THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 18

Case No. 10,121 — Case No. 10,847

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NEREUS—PAULINA

Case No. 10,121—Case No. 10,847

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FEDERAL CASES.

BOOK 18.

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

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

Case No. 10,121.

The NEREUS.

[3 Ben. 238.] [1]

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

COLLISION IN EAST RIVER—STEAMER AND SCHOONER—RUNNING OUT TACK.

1. Where a schooner was beating through the East river, and went about without observing the approach of a large propeller, and she might have gone farther on before going about, and, after running about four lengths on such new tack, she struck the side of the propeller, 32 feet from the stern, with her bowstrip, head on, her master having done nothing, after she went about, to avoid the blow, and the propeller, which was going 8 or 9 knots an hour, having neither slowed nor stopped nor sheered: *Held*, that the schooner was in fault in coming about without heeding the propeller, and when she could have kept on some distance farther.

2. She might have slacked up in the wind till the propeller got by, or have fallen off when on her new tack.

3. If the propeller had slowed or stopped, she would probably have struck the schooner, and that she had not time to sheer, and was not in fault.

[Cited in The Iron Chief, 53 Fed. 511.]

In admiralty.

Piper & Foster, for libellants.
R. D. Benedict, for claimants.

BLATCHFORD, District Judge. This is a libel for a collision which occurred about 11 o'clock, a. m., on the 24th of November, 1865, between the schooner Connecticut and the steam propeller Nereus, in the East river, off Twentieth street in the city of New York. The schooner was bound from Elizabethport, New Jersey, to Bridgeport, Connecticut, and was beating up the East river, against a strong breeze from the north northeast, the tide being strong flood. The Nereus was a large steam propeller, bound in the same direction with the schooner. The schooner, while on her starboard tack, approached near the New York shore, and came about to her port tack, and her sails filled, and she gathered way on her port tack, and had proceeded a distance of from two to four of her lengths on that tack, when her bowsprit struck the port side of the Nereus at a point 32 feet forward of the stern-post of the latter. The effect of the collision was to break the bowsprit of the schooner, and start her foremast and bring down her mainmast, and do other damage. The Nereus had not, before the collision, slackened her speed, or stopped, or changed her course. The defence on the part of the Nereus is, that the schooner came about to her port tack prematurely and negligently, and before she had run out her starboard tack as far as, in view of the approach of the Nereus, she should have done, and that, if she had held her starboard tack but a very short time longer, or, even if, after getting under way on her port tack, she had, on the approach of the Nereus, luffed up into the wind and held her jib away, the Nereus would have passed without colliding; and the fact that the Nereus was going at a speed of from 8 to 9 knots an hour, and would have passed over the 32 feet necessary to clear the schooner in less than 2 seconds, is urged to show that, under the circumstances, the schooner is wholly responsible for the collision. I think this defence is made out. Hays, the master of the schooner, who was at her wheel, testifies, that he did not see the Nereus until after he had got about upon his port tack, and that then he saw her under his boom, ahead of him. He had his foresail, mainsail and jib set. He says that he had gone not more than four lengths of his vessel on that tack before the collision took place. Turney, the mate of the schooner, who was forward on her deck, says that he did

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

not see the Nereus until she was from 20 to 25 rods off, but that he saw her before the schooner's helm was put up to go about, and before he let go the jib to go about, and that he saw her over the port side of the schooner. The schooner kept her course, on her new tack, without changing, up to the moment of collision, and made no attempt to luff or to pass under the steamer's stern. The master of the schooner attempts to excuse his not luffing, by saying that he had not way enough on his vessel. But, in any aspect, the schooner was in fault. It is clear that she went about without paying any heed to the Nereus, and, on the evidence, I am satisfied that she could have gone a sufficient distance further on her starboard tack to have enabled the Nereus to pass through the 32 feet in question, and that it was negligence in her not to do so. If she had sufficient steerage way on, upon her port tack, to either luff into the wind, or let her sheets go and fall off, it was her duty to have attempted to do so. If she had not sufficient steerage way to do so, as is claimed by her master, it was because she came about negligently, without paying any attention to the Nereus. On the testimony of Turney, her mate, there was no difficulty, after he discovered the Nereus, in letting the schooner shake in the wind, until the Nereus should have time to pass. I see no fault in the Nereus. If she had slackened her speed, or stopped her engine and reversed, when the schooner came about, she would undoubtedly have struck the schooner square on her starboard side, and probably have sunk her; and there was no time for her to sheer in either direction with any chance of advantage, with the strong flood tide that was running.

There must be a decree dismissing the libel, with costs.

NESBIT (HOWE v.). See Case No. 6,770.

Case No. 10,122.

N. E. SCREW CO. v. SLOAN.

[See Case No. 10,158.]

Case No. 10,123.

NESMITH et al. v. CALVERT et al.

[1 Woodb. & M. 34; 2 Robb, Pat. Cas. 311; 17 Hunt Mer. Mag. 508.] [1]

Circuit Court, D Massachusetts. Oct. Term, 1845.

JURISDICTION—CITIZENSHIP OF POSSIBLE AND NECESSARY DEFENDANTS—SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY A PATENT—"SUIT UNDER THE LAWS OF THE UNITED STATES"—INJUNCTION—EVIDENCE.

1. Where a bill in equity alleged, that one of several defendants contracted to transfer a patent (not then obtained) for a machine, and that after it was obtained he refused so to do; and that the other defendants, knowing these facts, bought machines of him; *held*, that as the suit could be maintained against him alone, the fact that some of the other defendants were citizens of the same state with the plaintiffs, was not fatal to the jurisdiction.

[Cited in Vail v. Hammond, 60 Conn. 384, 22 Atl. 957.]

2. A bill in equity to enforce a specific performance of a contract to convey a patent, is not "a case arising under the laws of the United States" as to patents, so as alone to give jurisdiction to its courts.

[Cited in Fuller & Johnson Manuf'g Co. v. Bartlett, 68 Wis. 79, 31 N. W. 749.]

3. But an objection on that account, or on account of the residence of the parties, should be taken before the pleadings are closed, and the evidence published. Semble.

4. If the bill prays for an injunction against the use of a patent, the question as to the issuing of that may come within the above laws of the United States.

5. A contract may be made to convey a future invention, as well as a past one, and for any improvement, or maturing of a past one. Allegations in bills need not set out all the facts, in detail, which are to be proved; but if they do not, they must contain general statements, under which the details proved are pertinent.

[Cited in Fuller & Johnson Manuf'g Co. v. Bartlett, 68 Wis. 80, 31 N. W. 749; Somerby v. Buntin, 118 Mass. 287; Vail v. Hammond, 60 Conn. 384, 22 Atl. 957.]

6. A deed, or other documentary exhibit, may be put in after the evidence is published.

[7. Cited in Groton Sav. Bank v. Batty, 30 N. J. Eq. 126, to the point that in a bill seeking to set aside a deed for fraud a general charge or statement of the matter of fact is sufficient, and that it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge, for these are properly matters of evidence, which need not be charged in order to let them in as proof.]

This was a bill in equity, complaining that, about the 15th of February, 1841, Francis A. Calvert had invented a machine for picking and cleaning wool and cotton, and was then contemplating to make improvements thereon, and was preparing to take out letters patent for the machine and improvements. That the plaintiffs [John Nesmith and others], with Royal Southwick and William W. Calvert, being engaged in the woolen manufacture, and knowing the facts aforesaid, and the skill and ingenuity of said Francis, agreed with him that he should go on and mature and perfect his invention and improvements, and take out letters patent therefor, and assign and transfer the same to them, so far as they related to the subject of cleaning or burring wool. That about the 15th of February aforesaid, Francis A. Calvert proceeded to execute a deed to them, which was recorded in the patent office of the United States on the 25th of that month, selling and assigning to them the exclusive right of using said machine and improvements for the purpose last mentioned, and covenanted that he would use due diligence in maturing said invention and taking out letters patent therefor, and would assign the same, when

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq. 17 Hunt. Mer. Mag. 77, contains only a partial report.]

procured, to them, so far as regards wool, and would assign them to no other persons. That William W. Calvert in the same year conveyed his interest in the subject-matter to the complainants, and said Southwick his interest to William C. Appleton, who in September, 1843, transferred it to the complainants; that they thus became entitled to the exclusive use of F. A. Calvert's inventions, so far as respects the cleaning of wool; and that F. A. Calvert then proceeded to mature his improvement, and about 25th November, 1841, applied for letters patent; and they were then given to him in due form. The bill then avers, that about the third day of June, 1843, F. A. Calvert obtained other letters patent [No. 3,120], for additional improvements in cleaning cotton and wool; that the improvements, described in the two letters patent, are those contemplated and referred to in F. A. Calvert's deed to the complainants, and are embraced in its grants and covenants, and the complainants are entitled to transfers of them, so far as they relate to the latter subject; that the complainants hoped said Francis would assign them; but on the contrary, he has combined with the defendants and others, and utterly rejects and refuses to comply with his agreements, covenants and grants, and to transfer to them so much of them as concern wool, and has used, and allowed others to use them, and sold the same to the other defendants, and has derived great advantage therefrom. The bill then proceeds to pray for answers to certain interrogatories, and that F. A. Calvert may be required to perform specifically his agreements, and to transfer to them the patents aforesaid, so far as they relate to the cleaning of wool. And that an account may be taken of the machines made by him and the other defendants; and that they be restrained from the further use of said patents for the purposes before named.

The joint and several answer of the defendants admits, on the part of F. A. Calvert, his inventions, and an agreement for the conveyance of the right to use the first one for cleaning wool, to the persons named in the bill, and to mature the same; but denies that the agreement extended to the improvement contained in the second patent, or that the last improvement was contemplated in that agreement. He further denies any use of the machine invented in 1841, by himself, or others under him, for cleaning wool, except by way of experiment. The answer further avers, that after maturing his first patent, February 15, 1841, he did, on the 14th of October, 1841, convey to the complainants his said invention, and the letters patent about to be obtained for it; and received $1000 instead of the one fourth part of the income reserved in the former deed, and said F. A. Calvert is now, and always has been ready to make any other deed desired, of said first-named patent; but the same has never been requested as to either patent. The answer moreover, throughout, denies any connection between the two patents, or any contemplation of the second one when the agreement was made and the first patent taken out, or any profit from either beyond an indemnity for expense, or any right in the complainants to any interest whatever in the last patent. The interrogatories are answered at length, and the other defendants profess to be either ignorant of the matters concerned generally, or admit or deny to the extent to which F. A. Calvert does. They, however, deny that they have made, or are making for F. A. Calvert, several of the machines included in the last patent. Some minor matters are stated in the answer, which need not be detailed here, but will be referred to, so far as material, in the opinion of the court, as also will be the evidence offered that has a bearing on the essential points in the case.

Warren & Rand, for complainants.
Giles & Dexter, for respondents.

WOODBURY, Circuit Justice. There is a preliminary objection to the jurisdiction of this court in the present case, which must first be considered. It was not made till the argument, after the pleadings to the merits, and after the evidence was taken and published. The ground of it is, that the matter in dispute does not arise out of or under the patent law itself, but under a contract to transfer a patent. I am inclined to think this objection is well founded in respect to the subject-matter, as our jurisdiction is extended in this class of cases so far as regards the subject-matter only to "all actions, suits, controversies, and cases, arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries," &c. Act July 4, 1836, § 17 (5 Stat. 124). The present action or controversy arises rather under a contract concerning a patent afterwards to be obtained, than under the patent law itself. But the objection, if good against the jurisdiction of this court, merely on account of the subject-matter, does not impair it over Francis A. Calvert personally, as he belongs to a different state from the complainants; and his interests are several, and capable of being severed from those of the other respondents. The bill then, as against him, both on principle and precedent, gives the court jurisdiction by his residence, even if it does not by its subject. Ward v. Arredondo [Case No. 17,148]. See Shute v. Davies [Id. 12,828]; Cameron v. McRoberts, 3 Wheat. [16 U. S.] 591; Strawbridge v. Curtiss, 3 Cranch [7 U. S.] 267. The same reasoning authorizes it to be sustained as against Gay, who belongs to New Hampshire. But the objection is probably made too late to operate in favor of any of the respondents, as it was not stated till after answers were put in to the merits, replications filed, and the evidence published.

See D'Wolf v. Rabaud, 1 Pet. [26 U. S.] 476 498; Wood v. Mann [Case No. 17,952]; Harrison v. Urann [Id. 6,146]; Briggs v. French [Id. 1,871]; Skillern's Ex'rs v. May's Ex'rs, 6 Cranch [10 U. S.] 267. There seems, also, so far as regards the prayer for an injunction against the use of the patents, to be one ground of jurisdiction given over all the respondents on account of the subject-matter. Under these considerations, the preliminary objection to our jurisdiction must be overruled.

The next inquiry is, whether the complainants have made out a case justifying an interference to compel a specific performance, or an account, or to issue an injunction such as is prayed for. This depends upon the true intent of the original contract between the parties. The chief inquiry is, was that intended to include any thing not actually embraced in the first patent? This is resolved into two subordinate inquiries, ramifications of that. One is, did that contract by its terms, in their proper extent and meaning, look beyond the first patent, and thus mean to include more? And the next is, if not so, did it include more than was in the patent in consequence of some further improvement being known and contemplated at the time of the first patent, which was not inserted in it, though covered by the contract; being withheld as not matured and being suppressed, and afterwards introduced into the second patent? In either of those events, the complainants are entitled to the benefit of the improvement, and it ought, under the contract, to be conveyed to them; but not otherwise. The clauses in the original agreement, relied on to sustain the view, that all improvements, then or afterwards to be made by F. A. Calvert, in machines for burring wool, were to be conveyed to the complainants and no other persons, are these. He sells to them the exclusive right to clean wool, &c. "upon the machines invented or improved by" him, and "for which improvements I am now preparing to obtain letters patent of the United States." He then covenants to "use all due diligence and effort to mature my said inventions and improvements for cleaning wool, as soon as possible," and to take out letters patent therefor, and assign the same for cleaning wool to the complainants and to no other persons.

To bear on the construction of this instrument, it is further proved or admitted, that the complainants were manufacturers of woolens, and anxious to obtain possession and control of all the inventions for cleaning wool; that the said F. A. Calvert was an ingenious mechanic, and supposed to be making and able to make great improvements in the machinery for that purpose; that by an agreement made at the same time with that referred to, he was to receive one fourth of the profits from the use of all said improvements by the complainants; and that afterwards, on the 14th of October, 1841, he transferred that one fourth to them for the gross sum of $1000, using language still stronger than in the first deed, and illustrative of it. In this last conveyance, after describing it as transferring his right under the original agreement, he adds, "Also my right to a certain improvement in burring wool," "to have and to hold" the same, as "described in his specification and caveat, and all my right and claim of whatever nature, under or by virtue of said agreement, and all my improvements in machines for burring wool, and all my right to any letters patent which may be obtained for the same." But the respondent, F. A. Calvert, denies, that either by the first or second deed any intention existed to convey any improvements he might make, except those then contemplated, and afterwards patented in November, 1841. The natural import of the language in the first deed certainly accords with this, rather than a more extended engagement, such as the complainants infer more particularly from the last deed, looking to all improvements on this subject made by him in all future time. The attendant circumstances of the parties and the subject-matter, so far as bearing on the construction of the agreement in the first deed, would not necessarily enlarge the construction to this extent. They are all consistent with the idea that improvements then thought of or started were the only subject-matter then contemplated to be transferred. Had the parties contemplated more, and wished to cover all improvements ever made at any future time by F. A. Calvert, explicit language to that effect would be likely to have been selected, as it would have been equally easy and more natural. Iggulden v. May, 7 East, 237, 241. But in the second deed by F. A. Calvert to the plaintiff, it is equally true there are some expressions that will bear a wider meaning, and they may have been introduced to cover what was doubtful in the first deed, and in consequence of a change in the consideration paid to F. A. Calvert, being, perhaps, deemed more advantageous to him; as it was a gross sum at once, instead of a share in remote and uncertain profits. Hence, after referring to the first improvements and the agreement in relation to them, he adds, as a part of the subject-matter conveyed in the second deed, what is susceptible of a construction much broader, viz.: "All my improvements in machines for burring wool, and all my right to any letters patent which may be obtained for the same." This language might, without any very strained interpretation, be extended to future improvements, as well as those already made, or to a second as well as first patent for them; and especially when it is recollected, that the complainants were desiring to purchase from F. A. Calvert and others all the machines, which might be useful in relation to this subject-matter: that F. A. Calvert was in embarrassed circumstances, and the complainants relieved him by the advances made

in October, when the second deed was executed; and that such engagements for the real benefit of inventors as well as the public, ought to be viewed literally when they tend to enable the inventors to continue their efforts, and eventually contribute to the public means and instruments for advancing useful industry and the arts.

But it is not necessary to form a decisive opinion on this point of the case, as I am satisfied on the other point that the balance of the testimony is in favor of the fact, that F. A. Calvert, before maturing his improvements and taking out his patent in 1841, had in contemplation, and had considered the further improvement patented in 1843. It would seem, however, that either, because he feared infringing Crane's rights, or had not time to finish the improvement in 1841, or entertained doubts of its superiority, or wished to reserve it for himself, he took out the patent of 1841, without including the same in it. It is not averred, nor is it necessary to infer, that he did this fraudulently. But that the principle of it had occurred to him in 1841, and had been in some degree tested, is quite clear, notwithstanding his denial, if we credit the testimony of William W. Calvert his brother, and of Mr. Crane. It is true, that William W. Calvert, though a brother, was a rival, and once had interests and feelings opposed to Francis A. Calvert. But he has no such interests at this time. So Crane was once interested in the patent. But neither of them seem now to be incompetent; and their manner of testifying is distinct and credible. Indeed, besides Crane's denial of any interest in it himself, the complainants offer now to show by a deed, that he had parted with all he possessed before giving his deposition, and put that in now as a documentary exhibit, though the evidence has been published. 2 Daniell, Ch. Prac. (Perk. Ed.) 1025. These witnesses testify to facts, which show distinctly, that the differences between the first patent, in November, 1841, and the second one in June, 1843, consisted chiefly in this—that the first had the angular tooth guard; and the latter dispensed with it, by using a receiver beneath, and bringing the saw cylinder nearer to the fine-toothed comb cylinder. Crane swears, that as early as the spring of 1841, Francis A. Calvert said the machine "could work without it," that is, without the angular tooth guard. And whenever he said that, a caution was given to him that he might then encroach on Crane's and William W. Calvert's patent, which seemed to deter him from then maturing such a change. Again, as to the angular tooth guard, Crane says, "I don't recollect that he said what he should use as a substitute, but he said he could do without it." The idea then had occurred to him, and the matter had been discussed, before his contracts with the complainants. William W. Calvert testifies, that the angular tooth guard could be dispensed with by bringing the cylinders nearer together and using a receiver, and such was the course of experiments tried in April, 1842, by his brother and himself. This was the second step in relation to the subject,—a series of experiments testing what he had thought of and talked of previous to his conveyances. He seems to have been deterred from resorting to this change in the spring of 1841, for some reason or other, and probably in part from threats of Crane that it would encroach on his rights; but that it was contemplated can hardly admit of doubt on examining the evidence. When he afterwards, in 1842, proceeded to develope this idea in a machine, he seems to have been conscious that it did not differ materially in principle from what he had patented in 1841, and should have been included in that; and hence he proposed to the complainants to buy back from them the patent of that year. The change was rather a further progress in the same machine, than inventing a new one; was maturing its form without introducing any new principle—was merely withdrawing the angular tooth, and substituting for it the receiver, and a nearer position of the saw cylinder to the fine-tooth comb cylinder. He told Crane that the machine would work without the angular teeth, before he obtained his first patent; and his brother came to that same conclusion with him; but the precise substitute, if any, or the change throughout, which he had in his mind, was not developed to them in detail, if it was matured, till 1842. But it being admitted, that in the winter of 1841 he had not matured any part of his invention—that his plans were but partially explained to any one—that the plaintiffs then, in advance of their completion and a patent, bought and he conveyed all of his improvements, such as they would be when matured—it was a natural form and design of the contract to reach every thing then in embryo in his mind on this subject; and after such a contract, it is equitable and just that it should pass the perfection or progress at any future day of any improvement in these machines, which he had thought of in 1841, and should at some future day complete. Under these circumstances, as the improvement in 1842 of what was patented in 1841, is proved in point of fact to have been only a further development of ideas entertained in 1841 on the same subject, we see no just reason why it should not be considered as assigned and granted to the complainants as was stipulated to be done in February as well as October, 1841, in terms covering at least all improvements he had then contrived.

It is hardly necessary to go much into various other points pressed by the counsel on the one side or the other. The bill distinctly avers that the improvements patented in 1843 were contemplated by said Francis A. Calvert in 1841, and hence the proof on this point is admissible, and the probata thus correspond, as they should, with the allegata. Story, Eq. Pl. § 264; The Chusan [Case No.

2,717]; 18 Ves. 312. I do not by this remark mean to be understood as expressing an opinion, that no evidence can be put in which is not alleged or specifically described in the bill; but there must be in the bill allegations broad enough to cover any evidence offered, before it becomes admissible. After that, confessions, or declarations, or documents, or cumulative facts are admissible to support any general allegations to which they apply; and such general allegations are alone often sufficient to render the introduction of such evidence proper. Smith v. Burnham [Case No. 13,018]; Jenkins v. Eldredge [Id. 7,266]. Nor is it necessary to examine in detail another question which the counsel have discussed,—whether a demand should be made for a conveyance of the patent of 1841 or 1843, before Francis A. Calvert is bound to convey them. For in all views of the deed and the testimony, he must be considered as having covenanted unconditionally to transfer them when obtained. He has long since received the consideration for doing it, and he now refuses absolutely to assign or grant the use of the last patent of 1843, which is a neglect of duty and violation of his contract sufficient to sustain the bill. Believing, for the reasons assigned, that he is bound to do it, so far as regards its use for cleaning wool, I think the prayers in the bill against F. A. Calvert ought to be granted; and the use of both patents for that purpose be assigned to the complainants,—conferring on them an exclusive license to use both in that way, and an injunction issue also to all the respondents, as all have interfered in making, or using, or vending these machines, to do so no more, for cleaning wool; and that they render an account of whatever has hitherto been received for the same beyond the expenses incurred. Decree for plaintiffs.

Case No. 10,124.

NESMITH et al. v. DYEING, BLEACHING, & CALENDERING CO.

[1 Curt. 130;[1] 1 Am. Law Reg. 82.]

Circuit Court, D. Rhode Island. June Term, 1852.

FACTORS—ACCEPTANCE OF BILL DRAWN AGAINST PARTICULAR GOODS—EFFECT.

1. A factor who accepts a bill, drawn against a particular consignment of merchandise, which has been so far executed as to be placed in the hands of a third person, to be delivered to him, acquires thereby a property in the goods, which will enable him to maintain replevin against an attaching creditor of the consignor, to whom the officer making the attachment had delivered the goods.

[Cited in Keene v. Wheatley, Case No. 7,644. Cited in brief in Halliday v. Hamilton, 11 Wall. (78 U. S.) 564.]

[Cited in First Nat. Bank v. McAndrews, 5 Mont. 325, 5 Pac. 881.]

2. No bill of lading, or other formal document, is necessary to create the title in such case, nor is it necessary that the depositary should have been originally employed by the consignee, nor that he should know the particulars of the consignee's title.

This was an action of replevin, for a quantity of cotton cloth. It appeared that Daggett & Co., manufacturers, at Attleborough, in the state of Massachusetts, who had been in the habit of employing the plaintiffs [John P. Nesmith and others] as their factors in the city of New York, wrote to them on the 4th of February, 1852, that they had that day delivered 500 pieces of cloth to the defendants, to be colored into cambrics, and had directed them to insure the goods, and send the plaintiffs a policy, with a receipt for the goods, and requesting the plaintiffs to accept a bill which they had drawn on them at six months date. They also desired the plaintiffs to order the colors of the cloths. On the same day, Daggett & Co. wrote to the defendants, at Providence, R. I., advising them of the despatch to them, by railroad, of 300 pieces of cloth, to be made by the defendants into cambrics for the plaintiffs, and to be forwarded to the plaintiffs when finished. They added, that they should send 200 pieces more on that day, and desired the defendants to send to the plaintiffs that afternoon a receipt for 500 pieces, together with evidence that they were insured for the plaintiffs' account; and they informed the defendants that the plaintiffs would order the colors. On the 5th of February the defendants wrote to the plaintiffs that they had received 500 pieces of cloth from Daggett & Co. to color, &c., for cambrics, and had, at their request, effected insurance thereon, payable, in case of loss, to the plaintiffs; and they applied for and obtained this insurance "for and on account of the plaintiffs, loss, if any, to be paid to them." On the 6th of February, the plaintiffs wrote to Daggett & Co., acknowledging the receipt of their letter of the 4th of February, and saying, they suppose the cloths are of the same quality as others they have sold, and if so, they will accept the draft; and on the same day they wrote to the defendants, acknowledging the receipt of their letter of the 5th of February, and ordering the colors and mode of packing the cambrics. On the 13th of February, the bill was presented to the plaintiffs for acceptance, and was by them accepted, it having been previously negotiated by Daggett & Co. On the 10th of March, Daggett & Co. having failed in business, the defendants caused these goods to be attached, as security for a debt which Daggett & Co. owed them; the goods were not then completely finished, and the attaching officer delivered them to the defendants. It was agreed that upon these facts the court should determine whether the plaintiffs can maintain their action.

Mr. Cozens, for plaintiff.

Carpenter & Hoppin, for defendants.

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

CURTIS, Circuit Justice. The question is whether the plaintiffs, at the time the attachment was made, had a property in these goods, which would enable them to maintain replevin, against one holding them under an attachment as the property of Daggett & Co. The facts show that the parties intended to vest in the plaintiffs an interest in these goods, as security for the reimbursement of the money, which, by their acceptance they engaged to pay for Daggett & Co. Independently of any particular expressions occurring in the correspondence, such an intention is fairly inferable from the very nature of the transaction. A request made by a principal to a factor to accept a bill, because the principal has placed merchandise in the hands of a third person, to be insured for the benefit of the factor, and forwarded to him for sale, carries with it an implication that the parties intend that the factor, if he accepts, may look to the goods for his reimbursement; and if this implication is not controlled, it is sufficient, so far as the mere intention of the parties can govern, to confer on the factor a corresponding interest in the goods. In the case at bar, this intent, derivable from the nature of the transaction, is not controlled, but is much strengthened by the language of the correspondence. When Daggett & Co. sent the cloths to the defendants, they informed them that they were to be made into cambrics for the plaintiffs, and forwarded to them; that they were to be insured for the plaintiffs' account, and they requested the defendants to send to the plaintiffs evidence that the goods had been thus received and insured. This was accordingly done, and the bill was accepted because it was done. Now, although it is clear that a mere intent of a consignor to vest a special property in his factor, to secure him for an advance on account of a particular consignment, even if the advance is made on the faith of it, will not create any legal property in the factor, yet it is otherwise when the particular goods have been set apart, in the hands of a third person, who has undertaken to deliver them to the consignee, and the latter has advanced, or accepted, upon the faith of such an arrangement. The decisions of the supreme court of the United States in Gibson v. Stevens, 8 How. [49 U. S.] 384, and Grove v. Gilmor, Id. 429, and of the court of exchequer in Bryans v. Nix, 4 Mees. & W. 775, and of the supreme court of New York in Holbrook v. Wight, 24 Wend. 169, and Grosvenor v. Phillips, 2 Hill, 147, fully support this position, as does also Sumner v. Hamlet, 12 Pick. 76.

It was attempted to distinguish some of these cases from the one now under consideration, because the parties had both agreed that the depositary should act as the plaintiffs' agent; but I consider that in this case, although Daggett & Co. originally employed the defendants, and were to pay them for finishing the goods, yet when the plaintiffs were apprised that the defendants held the goods for them and assented thereto, and when the defendants were informed that the goods were to be finished for and sent to the plaintiffs, and by accepting the goods for these purposes gave their assent to execute them, all parties, including the defendants, agreed that the defendants should act as the plaintiffs' agents so far as respected the custody for, and delivery to, the plaintiffs of these goods. It is true the defendants did not know why the goods were to be delivered to the plaintiffs. The information given to them by Daggett & Co., when the goods were sent, that they were to be finished for and sent to the plaintiffs, and insured for their account, would rather indicate that the plaintiffs were the absolute purchasers. But this is not material. It is not necessary that they should know the inducement which led to the arrangement, or the particulars of the plaintiffs' title. They knew what they had themselves agreed to do, which was in effect to hold the goods for the plaintiffs, and this was sufficient. I know of no principle, or decision, which requires more; and in none of the cases referred to above, except the one in 12 Pickering, was notice to the depositary of the nature of the title of the creditor, an element in the decision. If the depositary undertakes to act for a third person, and receives the property under such an undertaking, he must execute it, unless prevented by process of law founded on a superior title, and it is not for him to say he did not know that the person for whom he held the goods had a good title. This would be otherwise, if notice to the depositary were a necessary element in the title of the consignee; but it is not. That title rests upon the intent of the parties to create and vest a property in the goods, upon the valuable consideration parted with by the factor on the faith of that property, and upon the execution of that intent by setting apart the particular goods in the hands of a third person, to hold for the factor, thus placing them out of the control of the general owner, and within the control of the factor, so that he can exercise and have the benefit of his ownership. And, therefore, I am of opinion that the cases in which it has been held that a delivery to a carrier under a bill of lading, consigning the goods to a factor who has accepted on account of them, vests a property in the factor, are all authorities in favor of the plaintiffs; for they do not depend upon any particular efficacy of a bill of lading, any further than that document manifests the intent of the parties to have the carrier hold the property for and deliver it to the factor. Gibson v. Stevens, and Grove v. Gilmor [supra]; Haille v. Smith, 1 Bos. & P. 564; Anderson v. Clark, 2 Bing. 20; Desha v. Pope, 6 Ala. 690. That the right of a factor to a lien cannot rest on a bill of lading alone, is clear, from Patten v. Thompson, 5 Maule & S. 350; and in Bryans v. Nix, 4 Mees. & W. 791, Mr.

Baron Parke declares, in terms, what that case required, that there is no difference as respects this question, between a bill of lading and any other competent evidence of the purpose and acts of the parties. Gibson v. Stevens rests on the same ground.

Perhaps some confusion exists, from confounding the property acquired by such an arrangement as was made in this case, with the lien of a factor. It is correctly said, that actual possession by the factor is necessary to his lien; and when the goods have been placed in the hands of a depositary employed by the owner, to be delivered afterwards into the actual possession of the factor, it can hardly be said that the latter has actual possession of the goods, and so, it is argued, he cannot have a lien as factor. But the property acquired by depositing the goods in the hands of a third person, under an agreement that they shall be delivered to one who has advanced money or negotiable paper on account of them, and shall be by him sold, is something more than a lien. The legal title to the property may be considered as passing to him for the purposes indicated by the agreement. Such is the view taken by Eyre, C. J., in the leading case of Haille v. Smith, and I perceive no sound reason for doubting its correctness. It relieves transactions of this nature from all difficulty arising from the want of actual possession by the factor, and places them upon the same footing as absolute sales to bonâ fide purchasers, so far as respects the vesting of the title intended to be created. And in Gibson v. Stevens the court held that, as respects the legal title, there is no distinction between the person who has made advances and taken security on the goods, and the case of an actual purchaser. In my judgment, this result is in accordance with the interests of trade, and with the usages of commerce, and allows only a just and safe effect to the agreements of parties.

My opinion is, that the plaintiffs had a property in these goods on which the action of replevin may be sustained and the judgment must be in their favor. Judgment for plaintiffs.

Case No. 10,125.

NESSMITH et al. v. SHELDEN et al.

[4 McLean, 375.] [1]

Circuit Court, D. Michigan. June Term, 1848.

COURTS—FOLLOWING STATE PRACTICE—CONSTRUCTION OF STATUTES—CONSTITUTIONALITY—OBLIGATION OF PROHIBITED ACTS.

1. The courts of the United States will follow the established construction of a statute of a state, or the constitution of a state, if it do not impair the obligations of a contract, nor conflict with the constitution or any law of the United States.

2. It is important that there should be but one rule of property in a state.

3. This rule of construction is followed without regard to the correctness of the rulings of the state court.

4. Acts that are prohibited by law can impose no obligation on any one, nor will the law take cognizance of any matters between those who have united to violate the law.

Mr. Seaman, for plaintiffs.

Messrs. Romeyn, Harbough, Holbrook, and Hand, for defendants.

OPINION OF THE COURT. In the case of Falconer v. Campbell [Case No. 4,620], this court held that the act of the state of Michigan, "To organize and regulate banking associations," passed 15th of March, 1837 [Laws 1837, p. 76], and the amendatory act thereof, of the 10th of January, 1838, were valid and constitutional acts; and consequently that the corporation, the directors and stockholders organized under those laws, incurred all the responsibilities imposed by them. But the supreme court of the state of Michigan, have since decided that the legislature by a general law, had no constitutional power to pass any act of incorporation, and that consequently, the above acts were void.

This conflict of decision, as might have been expected, induced this court to re-examine their decision with all the legal scrutiny and ability they could exercise on the subject, and, after duly considering the lights thrown upon the question by the supreme court of Michigan, we feel ourselves bound to say, that in no one of the important points ruled in the decision of this court, is our confidence shaken. The opinion delivered by us was submitted to a most careful and rigid scrutiny by Mr. Justice Story, in his lifetime, than whom we know of no higher authority in this or any other country; and his entire concurrence in the opinion has increased our confidence in its legal accuracy. But the point now to be decided is, not whether the decision of this court, or of the supreme court of Michigan, be correct, but whether the federal court, to be consistent with its general course, must not conform to the state decision, depending upon the construction, of a law of the state.

This point has often been considered and decided by the supreme court. On all questions involving the construction of state laws, which do not conflict with the constitution or laws of the Union, the federal courts follow the adjudication of the supreme court of the state, as a rule of decision. This is necessary to prevent two rules of property in the state, which would be productive of great mischief. So far has this judicial policy been carried by the supreme court of the United States, as to reverse their own decision, made conformably to state decisions, when a new rule was established by the state court. Green v. Neal, 6 Pet. [31 U. S.] 291. Under such sanctions, this court can feel no hesitancy in following, in the present case, the state decision. And we have

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

only to remark, with the greatest respect for the high tribunal of the state, that we yield to the established policy of the supreme court, and not to our legal convictions.

The present being a bill to make responsible, under the general banking laws, the directors and stockholders of the Detroit City Bank, which has become insolvent, a question is made what effect the unconstitutionality of the banking laws, as ruled by the supreme court of the state, has upon the institutions organized under those laws. How does it affect the stockholders, directors, debtors, and creditors of those institutions? This is a question of momentous consequence to the parties concerned, as the amount involved is large. It is also of great importance as a practical question. In the case of Green v. Graves, 1 Doug. 351, the supreme court of Michigan held, "that so much of the act under which the Bank of Niles was organized, as purports to confer corporate rights upon the association organized under its provisions, is unconstitutional and void." The Bank of Niles was organized under the same general law as the Detroit City Bank, consequently the decision, in principle, applies equally to both. By the act to prohibit unauthorized banking (Rev. St. 1846) it is made penal to be concerned, or in any way interested, in a bank not authorized by law.

On the 12th of April, 1827, an act to restrain unincorporated banking associations was passed [Laws Mich. 1827, p. 504], which subjected to a penalty of one thousand dollars, any one who becomes interested in any association for banking purposes, unauthorized by law. That act was re-enacted in 1833, and still remains in force, if not repealed by the general banking law. Under this legislation against unauthorized banking and banks, the decision of the supreme court of the state, that the general banking law is unconstitutional, and the more recent decision, that under the general banking law, the organized companies are not corporations, it is difficult to find any principle on which the obligations on such associations can be enforced. They have no standing within the protection of the law, they having been established in defiance of its prohibitions. As between the individuals concerned, as particeps criminis, the law could give no aid. And it is not perceived how an individual can become indebted to the bank, or have a claim on it, without being involved in its illegality.

Upon the whole, we think the demurrer to the bill must be sustained.

[NOTE. This case was taken to the supreme court upon certificate of division of opinion. The case was there dismissed because of want of proper form in the certificate. 6 How. (47 U. S.) 41.]

NESMITH, The CAROLINE. See Case No. 2,423.

Case No. 10,126.

The NESTOR.

[1 Sumn. 73.][1]

Circuit Court, D. Maine. May Term, 1831.

JURISDICTION IN ADMIRALTY—SUPPLIES FOR FOREIGN VESSELS—SUITS IN REM—EFFECT OF CREDIT UPON LIEN—DEPARTURE OF VESSEL WITHOUT PAYMENT.

1. The admiralty has jurisdiction in rem for supplies furnished by material-men to foreign ships in our ports, to our ships in foreign ports, or in the ports of other states.

[Cited in Cole v. The Atlantic, Case No. 2,976; The Chusan, Id. 2,717; Leland v. The Medora, Id. 8,237; Macy v. De Wolf, Id. 8,933; The Alida, Id. 199; The Infanta, Id. 7,030; The Young Mechanic, Id. 18,180; The Lulu, Id. 8,604; The Grapeshot v. Wallerstein, 9 Wall. (76 U. S.) 136; The Maggie Hammond v. Morland, Id. 450; The Avon, Case No. 680; Rodd v. Heartt, 21 Wall. (88 U. S.) 597; The Albany, Case No. 131; The General Burnside, 3 Fed. 231; The Richard Busteed, Case No. 11,764; The Canada, 7 Fed. 121; Stephenson v. The Francis, 21 Fed. 717.]

[Cited in Brookman v. Hamill, 43 N. Y. 562.]

See Davis v. A New Brig [Case No. 3,643]; Harper v. A New Brig [Id. 6,090]; Read v. The Hull of a New Brig [Id. 11,609]; The Marion [Id. 9,087].

2. The giving credit for a fixed time for the supplies does not extinguish the lien for the supplies; nor the allowing the ship to depart from the port on her voyage without payment.

[Cited in Cole v. The Atlantic, Case No. 2,976; The Chusan, Id. 2,717; Packard v. The Louisa, Id. 10,652; Leland v. The Medora, Id. 8,237; Macy v. De Wolf, Id. 8,933; Burke v. The M. P. Rich, Id. 2,161; The James Guy, Id. 7,195; Griswold v. The Nevada, Id. 5,839; The Napoleon, Id. 10,011.]

3. The fact that the master and owners are personally liable for the supplies does not destroy the lien; for the party may trust to the credit of the ship, the master, and the owner.

[Cited in Phelps v. The Camilla, Case No. 11,073; The Chusan, Id. 2,717; Packard v. The Louisa, Id. 10,652; Leland v. The Medora, Id. 8,237; Hill v. The Golden Gate, Id. 6,492; Thomas v. Osborn, 19 How. (60 U. S.) 28; Harris v. The Kensington, Case No. 6,122; McAllister v. The Sam Kirkman, Id. 8,658; Cole v. The Atlantic, Id. 2,976; The Washington Irving, Id. 17,244; Hazlehurst v. The Lulu, 10 Wall. (77 U. S.) 202; The Sarah J. Weed, Case No. 12,350; Harney v. The Sydney L. Wright, Id. 6,082a; The Graf Klot Trautvetter, 8 Fed. 837; The City of Salem, Id. 837; The Ellen Holgate, 30 Fed. 127; The Scotia, 35 Fed. 909; The D. B. Steelman, 48 Fed. 581; The Stroma, 53 Fed. 283, 3 C. C. A. 530.]

[Cited in Harned v. Churchman, 4 La. Ann. 310; Young v. The Orpheus, 119 Mass. 184.]

See The Chusan [Case No. 2,717], where this case is affirmed.

[4. Cited in the Johns Walls, Jr., Case No. 7,432, to the point that where a credit is given no libel can be maintained until the expiration of the term of credit.]

[5. Cited in The Medora, Case No. 9,391, to the point that the master is a competent witness to prove the necessity for the supplies furnished.]

[6. Followed in The Chusan, Case No. 2,716, and cited in The Ann C. Pratt, Id. 409, to the point that the lien created by the maritime law

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

may be and is waived by the creditor by any act which is inconsistent with an intention to receive or retain that lien, such as the taking of a negotiable note given by the owner of the ship on time.]

[7. Cited in Todd v. The Euphrates, Case No. 14,074, and Bailey v. Sundberg, 43 Fed. 84, to the point that, in availing themselves of liens, creditors must exercise due diligence as to the proper time and circumstances.]

This was the case of a libel in rem brought by a material man for certain supplies, and especially for a cable furnished to the brig Nestor [Thomas Merrill, claimant]. The articles, amounting to the value of $168.46, were furnished at Alexandria in the District of Columbia, by the libellant, Lincoln Chamberlain, a resident merchant there, at the request of the master of the brig, then lying in that port, but belonging to the port of Portland in the state of Maine, and bound on a voyage from thence to other ports. In the district court there was a decree in favor of the libellant, charging the vessel with the value of the cable, and rejecting the claim for the other supplies. From that decree the respondent appealed to this court; and the question here was of course narrowed down to the point, whether the cable was necessary; and, if so, whether under all the circumstances the proceeding in rem could be maintained. At the argument, the necessity of the cable seemed not susceptible of doubt; and the controversy turned almost entirely on the other point.

William Pitt Fessenden, for libellant.
Mr. Daveis, for claimant.

STORY, Circuit Justice. In respect to the right, in point of jurisdiction, of maintaining this suit in rem in favor of material-men, it does not appear to me that there is any well-founded objection. The admiralty has, as I conceive, a clear jurisdiction to maintain such suits, whenever the supplies have been furnished to the vessel in a foreign port; and every port is foreign to her, which is not in the same state to which she belongs. So the doctrine was laid down in the case of The General Smith, 4 Wheat. [17 U. S.] 438, and it has never, to my knowledge, been in the slightest degree departed from. See also, the case of The St. Jago de Cuba, 11 Wheat. [24 U. S.] 409, 415–417. Abb. Shipp. pt. 2, c. 3, § 15, note 1 (Am. Ed. pp. 115, 116.) See also, 1 Bell, Comm. 525–527; 2 Bell, Comm. 39. Upon principle it appears to me equally clear. If ever an occasion should require it, I should not shrink from the duty of vindicating this doctrine in its full extent. But until the supreme court has justified me in sustaining a doubt, I shall content myself in following the doctrine, which it has deliberately avowed, as a duty most appropriate for one, who is called upon to administer the law under its guidance.

The only real question in this cause, is whether there are any circumstances, which show, that the general right to provide in rem has been displaced or waived. It is, in the first place, said, that here a personal credit was given to the master, excluding any credit to the owner or to the ship. Now I agree, that if the libellant has given an exclusive personal credit to the master, he cannot afterwards, upon any change of circumstances or opinion, resort to the ship, or shift the responsibility over upon the owner. But prima facie the supplies of material-men to a foreign ship, that is, to a ship belonging, or represented to belong, to owners resident in another state or country, are to be deemed to be furnished on the credit of the ship and the owners, until the contrary is proved. This appears to me the result of the authorities, many of which are referred to in Lord Tenterden's treatise on Shipping, and in the notes of the American editor. Abb. Shipp. pt. 1, c. 1, § 11; pp. 18, 19, note 1; Id. pt. 1, c. 3, § 8, note 1, p. 76; Id. pt. 2, c. 22, §§ 1, 2, note 1, p. 100; Id. pt. 2, c. 3, § 15, note 1, p. 116; Id. § 16, and note. There is certainly a total absence of all proof, that any exclusive credit was given, or intended to be given, to the master. It is not sufficient to show, that the master himself may be personally liable; for he is in all cases so liable for supplies and necessaries furnished for the ship, unless the credit be exclusively confined to the owners. The owners may be liable, notwithstanding the master is also liable for such supplies and necessaries. Abb. Shipp. pt. 2, c. 3, §§ 1-4; Id. pt. 1, c. 3, § 8, note; Id. § 15, note.

But the case does not rest upon the mere want of any evidence to establish an exclusive credit given to the master; for, if the master's testimony is competent, there is the most positive proof to the contrary. He swears in direct terms, that he purchased the cable "on a credit of ninety days on account of the brig Nestor and owners." An objection, however, is taken to his competency; and it is argued, that he cannot be a witness, where the verdict would establish any thing in his favor or against him; or where it might be simply given in evidence to establish any thing for him or against him. Considered merely in the light of master, it is difficult to perceive any solid ground against his competency. He is but an agent; and the case resolves itself into the common case of an agent offered to prove the acts done under his agency. An objection of that sort has been so many times overruled, that it is not now open to controversy.

But it is said, that he was also charterer of the brig for the voyage, under a written agreement in the case. Let us see, then, what is the nature of that agreement. It purports to be between the owners and the master, whereby they let the brig Nestor to him, "for a voyage from Portland to Eastport and St. Andrews, on the British lines, for a cargo of plaster, and from thence to one or more ports in the United States, and

from thence to any permitted port or ports on the globe, if he can obtain a fair, good freight, and back to the United States and to Portland; the owners to pay all necessary repairs on said brig, for sails and rigging." And the master agreed "to pay to the owners one half of all the gross freights and passage-money made during the voyage and voyages aforesaid;" and further, "to pay from his half of his earnings all wages, provisions, port-charges, &c., during the said voyage; and to deliver the said brig Nestor up to them or their order when called for, together with all her appendages received, wear and tear excepted." This is the substance of the agreement, there being only one other clause, providing for the reduction of tonnage, and custom-house fees, and pilotage, from the gross freight and primage, if the brig should obtain a freight from the southward to a foreign port. Now, it is argued, that this agreement constituted the master owner of the brig for the voyage, and made him primarily and exclusively liable as owner for the cable. But assuming the effect of this agreement to be to constitute the master owner for the voyage for some purposes, (on which, however, no opinion is intended to be given), yet it is plain, from the terms of the instrument, that the repairs for sails and rigging were to be at the expense of the owners. A cable is plainly a part of the rigging of a vessel; and so the parties understood the language of the agreement; for when, in a prior part of the voyage at Eastport, a cable and anchor were lost, the latter (an anchor) was supplied by the owners, and the brig worked her way to Alexandria with a poor hemp cable then on board. Indeed, the owners do not now set up any defence against their original liability to pay some person for the cable; but insist, that it has been already allowed for in their settlement with the master.

If, then, the owners were by their agreement bound to pay for the repairs and rigging, in what manner is their general liability affected by that agreement? There is no pretence to say, that the contents of the agreement were ever communicated to the libellant; and if they had been, it would be difficult to conjecture, how that circumstance would prove, that the libellant waived all remedy against them, and trusted exclusively to the credit of the master. They admit their liability for repairs, on that instrument; and therefore the master acted as their agent in procuring them. It might have been very different, if the master had been under a known engagement to make all repairs during the voyage. Take the case either way, then, it furnishes no ground for a presumption, which can exonerate the owners. If the agreement was not communicated, the libellant must be presumed to have trusted to the general credit of the owners, in the absence of all counteracting circumstances. If it was communicated, then the implied obligation to provide for repairs in the given case, notwithstanding the letting of the brig for the voyage, is explicitly retained by the owners. The master, then, is not, as charterer for the voyage, an incompetent witness; for, in regard to the purchase of the cable, he acted merely as agent for the owners. He was not liable therefore in his character as charterer; but, if at all, only in his character as master. The posture of the case is not, then, in the slightest degree varied by the introduction of the agreement.

But I wish to guard against any inference, that, if the master had been charterer and owner for the voyage for all purposes, he would not have been entitled to hypothecate the ship for any necessary supplies or repairs. I know of no principle, which disables a master by being charterer from exercising the common right of hypothecation, either express or implied, under the maritime law. The owners by trusting him, or any other charterers, with the management and navigation of the ship during the voyage, trust him and them with the usual powers in cases of necessary repairs and supplies. A material-man, who furnishes supplies in a foreign port, or to a foreign ship, relies on the ship itself as his security. He may, if he pleases, insist upon a bottomry bond with maritime interest, as the security for his advances; in which case, he gives credit exclusively to the ship, and must take upon himself the risk of a successful accomplishment of the voyage. But if he is content with receiving the amount of his advances and common interest, he may rely on that tacit lien or claim, which the maritime law gives him upon the ship itself, in addition to the personal security of the owners. Wherever a lien or claim is given upon the thing by the maritime law, the admiralty will enforce it by a proceeding in rem; and, indeed, it is the only court competent to enforce it.

The general maritime law, giving this lien or claim upon the ship for supplies, makes no distinction between the cases of domestic and of foreign ships, or between supplies in the home port and abroad. 2 Bell, Comm. 525–527. The rule was doubtless drawn originally from that common fountain of jurisprudence, the civil law, to which the common law, as well as the law of continental Europe, is so largely indebted. The civil law declared, "Qui in navem extruendam vel instruendam credidit, vel etiam emendam, privilegium habet," (Dig. lib. 42, 5, 26); and again, "Quod quis navis fabricandae, vel emendae, vel armandae, vel instruendae causa, vel quoquo modo crediderit, vel ob navem venditam petat, habet privilegium post fiscum," (Dig. lib. 42, 5, 34.) Pothier, Pand. lib. 42, tit. 5, § 33; Id. lib. 20, tit. 4, per tot. This doctrine was easily transferred into the early codes of maritime nations, from its general convenience, and the sound policy of multiplying the resources of credit of the masters and owners of ships in cases of necessity;

and we find it accordingly soon recognised as a principle pervading the maritime law, and giving confidence to the intercourse of different nations by navigation. See Roccus de Nav. et Naul. notes 91–93; Domat, Civ. Law, bk. 3, tit. 1, § 5; Consolato del Mare, c. 32; Emérig. Mar. Loans, c. 12, §§ 1–4; 2 Brown, Civ. & Adm. Law, 142; 1 Valin, Comm. lib. 1, tit. 14, art. 16; Abb. Shipp, pt. 2, c. 3, § 10; 2 Bell, Comm. 525–527. For a long period the same doctrine was fully recognised and acted upon by the admiralty courts of England without interruption. And though it can no longer be deemed in force, in regard to materials supplied to domestic ships in their domestic ports; yet, as a part of the maritime law, it is still applied to foreign ships in our ports. And the lien acquired in other states under that law, for supplies to our own ships while abroad, are recognised and enforced in our admiralty courts, upon the general principles of that comity, which pervades the maritime courts of all countries. But it is said, that, here, a credit of ninety days was allowed upon the purchase of the cable, and that such a credit is wholly inconsistent with the existence of any lien on the ship. This objection is founded upon a notion, that the liens given by the maritime law are governed exactly by the same principles, which regulate common-law liens. It is certainly true, that by the common law a lien imports, that the party, who claims it, is in possession of the thing, and his lien is neither more nor less than a right to detain it, until his claim is satisfied. So that, where there is no possession, actual or constructive, there can be no lien. Lord Tenterden (Abb. Shipp. pt. 3, c. 1, § 7; Id. pt. 2, c. 3, §§ 10, 15, 16) lays down this doctrine in very broad terms, and in a general sense it is well founded. For instance, if a shipwright has repaired a ship, while it is in his possession he has a lien on it for the amount of the repairs; but, if he once parts with the possession, his lien is gone. And if he never has had possession of the ship, he never has acquired any lien whatever. So, if the nature of his contract excludes the implication, that the parties intended any lien, the same result follows; for it is competent for parties to waive a benefit of this sort. If, therefore, he undertakes to repair a ship, and receives possession, and he is to give credit for the amount of the repairs for a certain period; the giving of such credit is sufficient to repel the presumption of a right of lien; for it cannot be supposed, that the parties intended, that the shipwright should retain the possession of the ship, and prevent her employment by the owner during the whole time of the credit. The giving of credit under such circumstances is inconsistent with the lien, because it supposes, that the credit is for the benefit of the owner; which it cannot be, if he is to be excluded from the possession and use of his ship. The law, therefore, in such cases interprets the contract between the parties upon rational principles; and deems the lien waived by consent. Abb. Shipp. pt. 2, c. 3, § 15, and note.

It is obvious upon the slighest consideration, that this qualification of the doctrine of lien, founded on and accompanying the possession of the thing, cannot be applicable to claims, which neither presuppose, nor originate in possession. Indeed, such claims are not, in a strict sense, liens, though that term is commonly used in our law to express, by way of analogy, the nature of such claims. Language is in this way perpetually deflected from its original meaning, and applied to things, which have a strong similitude, but not a perfect identity. Some obscurity too is thrown over the subject by the use of language borrowed from the civil and foreign law, and applied in a sense not exactly correspondent with the sense, in which it is found in that law. In the civil law the term pignus (pawn) was in an accurate sense applied to cases, where there was a pledge of the thing, and possession was actually delivered to the person, for whose benefit the pledge was made; and hypotheca (hypothecation), where the possession of it was retained by the owner. And pignus was especially used in such cases, where the thing was a moveable. The Institutes of Justinian notice this distinction. "Nam pignoris appellatione eam proprie rem contineri dicimus, quae simul etiam traditur creditori, maxime si mobilis sit. At eam, quae sine traditione, nudâ conventione tenetur, proprie hypothecae appellatione contineri dicimus." Inst. lib. 4, tit. 6, § 7; Dig. lib. 13, tit 7, l. 35; Halifax, Anal. Civ. Law, 63; Vinnius ad Inst. lib. 4, tit. 6, § 7, p. 800, etc. And this distinction, though not always strictly adhered to in the language of the commentators, was a leading use. But in each case, the same remedies belonged to the pawnee, whether it was a pignus or hypotheca, for in each case he had a right to the hypothecary action. "Inter pignus autem et hypothecam, quantum ad actionem attinet, nihil interest." Inst. lib. 4, tit. 6, § 7; Dig. lib. 20, tit. 1, l. 5, 1. See, also, 1 Bell, Comm. 25, 26. By the civil law, there might also be a pignus and hypotheca as well of moveables, as of immoveables; that is, there might be an hypothecation or pledge of personal property without possession or delivery of the thing; and this right travelled with the thing into whosever possession it might come. A pledge then in the Roman law answered exactly to a pledge of moveables in our law, where possession is indispensable. An hypothecation answered to a mortgage of real estate in our law, where the title to the thing may be acquired without possession. In the French law, however, from the inconvenience growing out of the transfers of personal property, subject to such prior titles by hypothecation, the doctrine has been constantly held, that moveables cannot be hypothecated, that is, transferred by way of pledge without possession; but that

hypothecation is confined to immoveables. Hence the maxim, that moveables have no sequel by a mortgage. Domat. bk. 3, tit. 1, § 1; 1 Valin, Comm. lib. 1, tit. 14, art. 1. When, therefore, we find the term hypothecation used in the French law, we are generally to understand it as used in this restrictive sense, though it is sometimes used in a broader and looser sense, as we sometimes call a mortgage a pledge, and a pledge a mortgage. Emérigon, in the passages cited at the bar, is to be understood as using hypothecation in its strict sense, unless where he qualifies it by some accompanying explanation. Emérig. Contrats à la Grosse, c. 12, § 1-5; 1 Bell, Comm. 25, 26, 39.

Now a lien by the martime law is not strictly a Roman hypothecation, though it resembles it, and is often called a tacit hypothecation. 1 Domat. bk. 3, tit. 1, § 5. It also somewhat resembles what is called a privilege in that law, that is, a right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors. 2 Browne, Civ. & Adm. Law, 142; Dig. lib. 42, tit. 5; Abb. Shipp. pt. 2. c. 3, § 10. Emérigon says, that this privilege was strictly personal, and gave only a preference against simple contract creditors, and had no effect against those, who were secured by express hypothecations; and that this personal privilege given by the Roman law is unknown in the French jurisprudence; for by the law of France every privilege carries with it a tacit and privileged hypothecation, at least as to the thing which is the subject of it. Emérig. Contrats à la Grosse, c. 12, §§ 1, 2. See, also, 2 Browne, Civ. & Adm. Law, 142. See, also, Merlin, Répertoire, Privilége de Créance, § 1. Lord Tenterden has remarked, that a contract of hypothecation made by the master does not transfer the property of the ship; but only gives the creditor a privilege or claim upon it, to be carried into effect by legal process. Abb. Shipp. pt. 2, c. 3, § 23. See, also, 1 Bell, Comm. 39, 94. And this is equally true, whether the hypothecation be express or tacit.

A maritime lien does not include, or require, any possession of the thing. It exists altogether independently of such possession. Nobody has supposed, that the lien on bottomry bonds, as for seamen's wages, is connected with any actual or constructive possession by the parties, seeking to enforce it in rem. This distinction between maritime liens, and strict possessory liens at the common law, goes very far to dispose of the objection now under consideration. There is no inconsistency in giving credit for supplies, and at the same time retaining the lien on the ship for the value of those supplies. In fact, it would be utterly inconsistent with the professed object of all such supplies, to retain the possession. That object is, to procure necessary repairs and supplies for the purpose of completing the voyage. But how is the voyage to be completed, if the material-man is to hold possession of the vessel, in order to secure his lien for the necessary repairs and supplies? The truth is, that the maritime law presupposes a credit given, a delay of payment, an intentional postponement of the right to enforce the claim in rem, at the same time that it creates the lien. How absurd would it be to declare, that the material-man should have a lien on the ship for his supplies, whenever, in case of necessity, the master, not having funds, is compellable, in order to proceed on his voyage, to obtain such supplies; and yet at the same time to declare, that if the ship left the port without payment of his demand, the lien should be extinguished; when the very case supposed is, that the master has no immediate means of payment. How is he to pay without funds? And if he has funds, what use is there in the enhanced expense of a credit? If he has funds, he will pay at once, and have the work done, or supplies furnished at cash prices. It is only when his funds fail, that he will ask a credit for the owners upon the security of the ship. The effect of denying the lien in such cases would be, to compel the master to break up the voyage, or to resort to the extraordinary expedient of a bottomry bond upon onerous interest, to the serious injury of the owner. The maritime law, in cases of material-men, as in other cases, where it gives a tacit hypothecation or lien, proceeds upon a different principle. It gives the lien upon the ship as an auxiliary to the personal security of the owner. It does not require the lien to be enforced before the voyage is completed. It allows the party to give credit, because it is for the general benefit of navigation and trade. It is not necessary to say, that the lien is indelible; or that it may not be lost by gross neglect and delay to enforce it, at least where the rights of other persons have intervened. But, as in cases of seamen's wages and bottomry bonds, it requires only reasonable diligence in enforcing the claim at a proper time, and under proper circumstances. The admiralty will not in cases of this sort sit for the purpose of enforcing stale claims, any more than in other cases, where its jurisdiction is sought. But, where the claim is recent, and the proceedings are had within a reasonable time, and in good faith; where there has been a clear case of necessity, and a credit given to the ship, the maritime law will not suffer the lien to be defeated by the mere departure of the ship from the port with or without the consent of the material-man. His giving credit to the ship for the voyage, or for a definite period, is not inconsistent with a positive intention to hold the ship bound for the payment by a tacit hypothecation or lien. It is not an election to rely exclusively upon the personal credit of the master or owner. His right, not growing out of possession, is not affected by the removal of the ship from the place, where possession may be enforced, or may be suspended.

A suggestion has been thrown out, that

there is a difference between giving credit indefinitely, and for a time certain; for that in the latter case the remedy in rem is necessarily suspended during the fixed period of the credit. So is the remedy in personam during the same period. But this circumstance does not defeat the security in rem, any more than in personam, as soon as the credit has expired. There is no difficulty in supposing the existence of a lien for a debt solvendum in futuro. If a bottomry bond were payable in thirty days after the safe arrival of the vessel, the additional period of credit would not defeat the hypothecation. If seamen's wages were by the contract not payable until ten days after the voyage was completed, it would not disturb the lien on the ship for those wages. The lien has in all such cases an inchoate existence from the moment of the contract, and attaches sub modo on the ship. The lien for seamen's wages attaches ordinarily on the ship during the voyage, although no wages are strictly due until the end of the voyage. A sale of the ship, pending the voyage, would not defeat this inchoate lien; and when the voyage was completed, the lien would have relation back to the commencement of the voyage.

There are analogous cases of liens even at the common law, where there is no possession, and where credit is given for a fixed period. Such is the lien of a vendor of real estate for the purchase money. Possession is not necessary to maintain that lien; neither does a long fixed credit annihilate, or suspend it. Yet the argument would apply at least as forcibly in such a case, as it does to the case now in judgment. The case of Ramsay v. Allegre 12 Wheat. [25 U. S.] 611, does not in the slightest degree impugn the foregoing reasoning. That case (in the judgment of which I concurred) was founded upon a very different principle. There, the material-man had received a negotiable promissory note, payable at four months, for the amount of his debt, as conditional payment. The note had not been paid; but it was still outstanding, and had never been surrendered; and it did not appear, that it had not in fact been negotiated. Under such circumstances the supreme court held, that a libel by the material-man could not be maintained. Now, there are two considerations proper to be noticed with reference to this case. The first is, that the taking of such a note is prima facie a presumptive extinguishment sub modo of the debt; and if it had been actually negotiated, whether paid or not, the creditor could have had no right to recover his debt, as the debtor would still be responsible to the holder of the note; and he ought not to be twice liable for the same debt. The second is, that the receiving of such a note is direct proof, that credit is given to the personal responsibility of the owner, and presumptive proof, that no credit is given to the ship; or, in other words, that there is a waiver of any lien on the ship. It cannot be ordinarily presumed, that a ship-owner, giving a negotiable note for supplies, intends at the same time, that a lien shall exist on the ship itself for the debt; for then the lien might be in the hands of one person, and the negotiable security in the hands of another. To bring the present case within the reach of that decision, it should be shown, that a promissory negotiable note of the master or owner had been taken by the libellant. I have the most confident reasons to know, that the decision of the court in Ramsay v. Allegre was not intended to shake any part of the doctrine in the case of The General Smith [supra]. There is a case decided by Lord Stowell, upon a principle analogous to that in Ramsay v. Allegre. A seaman elected to take a bill of exchange on the ship-owners for the amount of his wages; and the bill being afterwards dishonored, and the owners having become bankrupts, he sought a remedy in rem against the ship, for his wages. But Lord Stowell dismissed the libel. The William Money, 2 Hagg. 136.

Without going more at large into the argument, my judgment is, that the libel is well founded in point of jurisdiction; and that there has been no waiver of the lien implied by the maritime law for these supplies. Indeed, the moment the testimony of the master is admitted, it is impossible to raise any presumption of a waiver from any of the circumstances; for he positively swears to facts, which establish, that credit was given to the ship, thus displacing, by an express understanding, all mere argumentative inferences. The decree of the district court is, therefore, affirmed, with costs.

NETCHER (UNITED STATES v.). See Case No. 15,866.

NETNAGLE (GRAIGHLE v.). See Case No. 5,679.

NETTLETON v. The FANNY FOSDICK. See Case No. 4,641.

Case No. 10,127.

NETTLETON v. MORRISON.

[5 Dill. 503;[1] 23 Int. Rev. Rec. 187; 1 Month. Jur. 155; 16 Alb. Law J. 62; 1 N. W. Rep. (O. S.) 22.]

Circuit Court, D. Minnesota. 1877.

CONVEYANCE OF REALTY BY MINOR—DISAFFIRMANCE BY SUBSEQUENT CONVEYANCE.

A conveyance of land by a minor is voidable, not void, and where he disaffirms such act after coming of age, by conveying to a third person, the grantee in such subsequent conveyance, though taking the same with notice of the prior deed, is entitled to a decree quieting the title in himself without restoring the consideration paid for the voidable conveyance.

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

This is an action to quiet title. The complainant [Edward C. Nettleton] purchased a tract of land from Norbert Grignon, and received a conveyance of the same January 27th, 1876, which was properly recorded. The defendant [Dorilus Morrison] claims under a prior deed executed June 8th, 1874, by Peter Zanzius, in the name of Norbert Grignon, by virtue of a power of attorney dated May 30th, 1874, properly executed to him by the latter. It is admitted that Grignon represented himself in the power of attorney as of lawful age, but was a minor when he executed it, and that he received the proceeds of this sale of the property; also, that he executed the deed to the complainant January 27th, 1876, just one year after he arrived at majority, and has never restored the money received from the defendant. [The question was, could this action be maintained without a tender back of the money paid by defendant?] [2]

S. L. Pierce, for plaintiff.
Bradley & Morrison, for defendant.

NELSON, District Judge. The minor having received the consideration for the property at the time of the conveyance under the power of attorney, made the deed his own act, and it was voidable, not void. When the previous deed to the defendant was revoked, the parties thereto were left to their legal rights and remedies. The defendant could recover from the minor the money paid, on account of failure of consideration, and, perhaps, under the circumstances, might subject him to a criminal prosecution [25 Wend. 401, and cases cited; but see 1 Johns. Cas. 127]; [3] but he cannot insist in this suit that the complainant must restore to him the money paid out, as a condition of the relief asked. Although the complainant had notice of the previous transfer by the record of the deed and the power of attorney, it is evident he also knew that Grignon was not bound by it, and could avoid it. Decree as prayed.

Case No. 10,128.

NETTLETON v. ST. LOUIS LIFE INS. CO.

[7 Biss. 293; [1] 6 Ins. Law J. 426.]

Circuit Court, D. Indiana. Oct., 1876.

CONFLICT BETWEEN DIFFERENT CLAUSES IN LIFE INSURANCE POLICY.

1. Two clauses in such a policy, one "that no failure to pay any premium after the first should work a forfeiture of the entire policy, but the whole sum should be reduced in ratio to the number of premiums paid," and the other, that on failure to pay interest on unpaid policy notes, the policy should cease and determine, are not in conflict.

2. Semble—That equity might relieve.

Action on a policy of insurance issued by the St. Louis Mutual Life Insurance Company, on the 28th of July, 1866, on the life of Thomas A. Nettleton for the benefit of his wife [Louisa A. Nettleton], the plaintiff. Subsequently the St. Louis Mutual Life Insurance Company was merged into and consolidated with the defendant company, which latter company assumed all the debts and liabilities of the former, and succeeded to all its rights and franchises. The sum insured was $5,000. The first premium of $283.90 was paid when the policy issued, and that was to be followed by nine more annual premiums of a like sum. The policy was on the commutation or non-forfeiting, ten year plan, and provided for the absolute payment of the ratio of the full amount insured, upon payment annually of the premium due, and that no failure to pay any premium after the first should work a forfeiture of the entire policy, but the whole sum should be reduced in ratio to the number of premiums paid. The policy contemplated the half cash and half note system of paying premiums, and gave the company a lien on the amount due the assured for all unpaid notes taken on account of premiums. The policy also contained the following clause: "In case the said assured shall fail to pay annually in advance the interest or any unpaid notes on loans, which may be owing by said insured to said company on account of any of the above mentioned annual premiums, or any part thereof, then, and in such case the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine." On the 31st day of July, 1872, the assured owed the company $737.81, on account of premiums, for which sum he gave his note at twelve months. A clause was inserted in this note pledging and hypothecating the policy for its payment. This note, upon which nothing was ever paid, continued the policy in force until the 31st day of July, 1873. The assured died on the 14th day of May, 1875. To the complaint containing a statement of these facts the company answered, setting up the non-payment of advance interest due on the note on the 31st day of July, 1873, and the 31st day of July, 1874. The plaintiff demurred to the answer.

Hovey & Menzies, for plaintiff.
Denby & Kumler, for defendant.

GRESHAM, District Judge. It was insisted by the plaintiff's counsel that the interest was a mere incident to the note, and a part of it, that the parties could not have intended that the failure to pay interest on the note should forfeit the policy when neglect to pay the principal was not to have that effect; and that the interest forfeiting clause was in conflict with the provision which declared that the policy should be commuted, and not forfeited for failure to pay premiums or the principal of premium notes.

[2] [From 16 Alb. Law J. 62.]

[3] [From 23 Int. Rev. Rec. 187.]

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

I see no conflict in the provisions of this policy. The assured expressly agreed that he would pay interest annually on all notes given on account of premiums, and that a failure so to pay interest should forfeit his policy. In the face of that clear and explicit agreement it will not do to say that the interest was a mere incident to the note and a part of it, and that by the terms of the policy, a failure to pay premiums or premium notes was not to work a forfeiture. To read this policy as if the interest forfeiting clause were not in it, would be to make a new and substantially different contract for the parties, which courts are not at liberty to do. This company did business on the mutual plan. Premiums were paid, half in cash and half in notes, and it was, of course, indispensable to provide a fund out of which losses arising from death might be promptly paid. To provide such a fund, the company's plan of business contemplated and required the investment of the cash half of its premiums and the prompt annual payment of the interest on these investments, as well as the prompt annual payment of the interest in advance on its premium notes. It is not difficult to see that the success of the company depended largely upon the annual collection of its interest. If one member might let his premium note run without paying the annual interest, all might. The company could not have long existed and paid its current death claims with this wide departure from the plan of its organization.

So far, then, from the interest forfeiting clause being in conflict with any other part of the policy, it was a wise and necessary provision. I have carefully read the opinion of the Kentucky court of appeals in the case of the St. Louis Mut. Life Ins. Co. v. Grigsby [73 Ky. 310], upon which counsel relied with apparent confidence. In that case it was held that the policy was hypothecated for the payment of the note and interest, and that the company was amply secured. Although this decision comes from a court of great respectability, for the reasons already given, I can not follow it.

In the case at bar, when the assured died, two years' interest was due and unpaid on the note given for $737.81. It does not appear from the pleadings that the policy was entitled to any dividend in the hands of the company. In the Grigsby case the dividends due the assured were equal to the interest due on the premium note, less $6.97. I do not say that a court of equity would not be justified in relieving a party from forfeiture under such circumstances.

To have forfeited the policy in that case, when the premium in the hands of the company due the assured was within $6.97 of being enough to pay the interest due on the note, would seem to have been against conscience, but the decision was based upon other grounds. Courts of equity sometimes "relieve against forfeiture when the amount is greatly disproportionate, and the forfeiture is designed as mere security so that full compensation can be made." Story, Eq. Jur. §§ 1314, 1316.

The demurrer is overruled.

NEUTRALITY LAWS. See Append. Fed. Cas.

Case No. 10,129.

The NEVADA.

[Cited in The Nellie Husted, Case No. 10,098. Nowhere reported; opinion not now accessible.]

Case No. 10,130.

The NEVADA.

[7 Ben. 386.][1]

District Court, E. D. New York. July, 1874.

OFF-SHORE PILOTAGE — TENDER AND REFUSAL — STATE LIMITS—EFFECT OF STATE STATUTE.

1. A British ship, bound to New York, was spoken by a pilot before coming in sight of Sandy Hook light, and his services tendered. The master offered to take the pilot on board, but refused to pay off-shore pilotage, and the pilot left. Afterwards the ship took another pilot, and paid in-shore pilotage. The first pilot filed a libel to recover pilotage, as on a refusal of his services: *Held*, that the first pilot was refused within the meaning of the pilotage act of the state of New York of April 3d, 1857;

2. It would defeat the purpose of the statute to make pilotage payable after tender and refusal only where the ship did not accept the service of any pilot. The words of the statute do not forbid recovery in this case;

3. The pilot laws of a state have sufficient effect beyond the boundary of the state to fix the compensation of pilots;

4. The libellant was entitled to a decree.

In admiralty.

Butler, Stillman & Hubbard, for libellant.
Beebe, Wilcox & Hobbs, for claimant.

BENEDICT, District Judge. The libel in this cause was filed by a New York pilot, to recover off-shore pilotage of the bark Nevada, upon the ground of an offer of services and a refusal thereof, which occurred on the 4th day of January, 1874. The admitted facts are as follows: The bark Nevada, a British vessel, owned by subjects of Great Britain, was on the high seas, bound for the port of New York, and distant 14 miles to the southward and eastward from Sandy Hook lighthouse, and at such a distance that said lighthouse could not be seen from the deck of a vessel in fair weather in the day time. While the vessel was in this position, the libellant, a New York pilot, spoke her and offered his services to pilot her into the port of New York. The master thereupon offered to take him on board, but said he would not pay

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

off-shore pilotage. Upon this notice, the libellant left the vessel, and the master subsequently took another pilot, to whom he duly paid in-shore pilotage for piloting the vessel into the port of New York. The libellant was the first pilot offering his services to the vessel.

Upon this state of facts, it is contended in defence, first, that the facts do not show a refusal of the pilot's services, upon which the right to recover is, by the statute of the state of New York, passed April 3d, 1857, made to depend. Upon this point my opinion is, that the facts stated show a refusal to take the libellant as the vessel's pilot, within the meaning of the statute referred to. It is, next, contended, that, under the words of the statute, pilotage becomes payable by reason of a tender and refusal of service only in the case of a failure to accept the services of any pilot, and that there can be no recovery in a case like this, when it appears that subsequent to the refusal to accept the services of the libellant, the services of another pilot were accepted and paid for.

But it is evident that such a construction would defeat the objects of the statute. The interests of commerce require, that pilots be induced to board ships far out at sea. In all pilot systems, therefore, a higher rate of pilotage is fixed by the law, when tender of services is made beyond a certain distance. Ships boarded beyond the line pay at a certain rate, without regard to the distance beyond this line, and must pay the pilot who first tenders services beyond this line. Such an effect must be given to the statute in question to secure the result intended by the act. By such a provision pilots are induced to go far out to sea in search of ships, while the ship pays only off-shore pilotage, no matter how far distant from port she may be when boarded. The words of the statute do not, therefore, forbid a recovery in this case. But see Gillespie v. Zittlosen [60 N. Y. 449], in which the contrary has since been decided.

It is next contended, that the pilotage law of the state of New York is of no effect beyond the territory of the state, and that inasmuch as the libellant bases his right to recover upon the statute of New York, and admits that the vessel was beyond the limits of the state at the time she was boarded, he cannot recover. But pilot laws have sufficient effect beyond the boundary of the state to fix the rate of compensation for services tendered. Similar provisions in the pilot laws of France have been held obligatory on French vessels when situated within the limits of British ports on the British channel. The compulsory pilot law of England has been held to be obligatory upon an American vessel outside the limits of British jurisdiction, when bound to a British port (Lushington). The statute of New York, now under consideration, has been considered by the court of appeals of the state of New York as effective upon seas neighboring to the port of New York, although beyond the territorial jurisdiction of the state. Cisco v. Robert, 36 N. Y. 292. My conclusion, therefore, is, that the libellant is entitled to recover the amount of his demand.

Case No. 10,131.

The NEVADA.

[17 Blatchf. 122.][1]

Circuit Court, S. D. New York. Aug. 28, 1879.[2]

COLLISION IN NARROW SLIP—OCEAN STEAMER LEAVING MOORINGS WITHOUT AID OF TUG—LOOKOUT.

1. A large ocean steamer has no right to leave her moorings in a narrow slip crowded with other craft, by the use of her own propeller, without taking the utmost care to prevent accidents by the disturbance of the water which necessarily follows.

2. She must maintain complete control of herself, and, if she cannot get out by the use of her own propeller, without doing damage to other vessels that are lawfully moored near her, she must employ a tug.

3. In leaving the slip, she must keep a lookout astern, and over her side, into the slip, if necessary.

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

This was a libel in rem, in admiralty, filed in the district court. After a decree in favor of the libellants, the claimants appealed to this court. The decision of the district court, (Blatchford, J.,) was as follows:

"The libel in this case is filed by Sergeant J. Quick, as master and owner of the canal boat Kate Green, for himself and for F. A. McKnight, against the steamship Nevada. The Kate Green and a cargo of corn on board of her were sunk in the slip between piers 46 and 47, North river, in the city of New York, on the 27th of September, 1871, by a collision between her and the Nevada. The cargo was insured by the Western Insurance Company of Buffalo, which paid the loss, and its interest is vested in McKnight. The Nevada, a screw steamer, was moored at the north side of pier 46, lengthwise of the pier, with her bow towards the river, and, about 3 p. m., in full daylight, she steamed from her berth and went out and down the river and out to sea. The Kate Green was in the slip, and was, by the suction caused by the revolution of the screw of the Nevada, drawn into contact with the blades of the screw, as it revolved, so that the blades made holes in the bottom of the Kate Green and let in water, which caused her to sink, with her cargo, in a very short time. No person on board of the Nevada knew of the occurrence until she reached Liverpool, which was her destination. The libel alleges, that the Kate Green was properly and securely moored and fastened, and that the collision occurred through the negli-

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

[2] [Affirmed in 106 U. S. 154.]

gence of those in charge of the Nevada, and not through any neglect on the part of the Kate Green, her master and crew. The libel claims for a total loss of the canal boat and her cargo. The answer alleges, that the Kate Green was made fast, by her bow only, to a floating grain elevator which lay alongside and to the south of a steamer which was lying at the south side of pier 47; that the stern of the Kate Green was not fastened to anything; that between the Kate Green and said steamer there were two canal boats and another elevator; that the Kate Green remained thus made fast until the hour arrived for the Nevada to sail; that her master was notified of the approaching departure of the Nevada, and was warned that the boat was not properly moored, and was exposed to danger from the departure of the Nevada; that, notwithstanding said warning, he neglected to take the steps necessary to secure the boat: that the Nevada, at the hour appointed, left her berth, and, moving slowly and carefully, proceeded out into the river; that, previous to and while so leaving her berth, the steam whistle was blown, the bells on deck were rung, and all usual and proper precautions were taken to announce said departure and to avoid collision with the several lighters and canal boats lying in the slip; that, as the natural and ordinary result of the movement of the Nevada through the water, and of the action of her screw, the water was sucked or drawn towards the Nevada, and the stern of the canal boat, so allowed to remain unfastened, was thereby drawn over to the side of the Nevada, and struck against the Nevada with a violent blow; also, that the collision was occasioned solely by the negligence of the master and crew of the Kate Green, and by reason of her said improper and insufficient mooring. The fair reading of the answer is, that the situation and insufficient mooring of the Kate Green were seen and known by those on board of the Nevada, that the Kate Green was warned in respect thereto, that she neglected to moor herself more securely; that, after such warning was given, those on the Nevada saw that the Kate Green did not moor herself more securely, and saw that she continued to be insufficiently moored; and that, nevertheless, the Nevada, with full knowledge that the natural and ordinary result of the action of her screw, as she would move ahead, would be to suck or draw the water, and with it the unfastened portion of the Kate Green, over to the Nevada, put her screw in motion, and kept it in motion, until the collision occurred, in consequence of such drawing over of the Kate Green until she struck the Nevada. A clearer case of negligence on the part of the Nevada could not well be set forth. Much evidence is given as to the mooring of the Kate Green; as to whether she was fastened at all by lines to anything; and as to how she was fastened, if she was fastened. I deem it unprofitable to discuss or determine those questions, and many other questions as to which evidence was given.

"The case is easy of solution on plain propositions. If the Kate Green was loose in the slip, and not fastened at all, her condition ought to have been seen by and known to those on the Nevada, and it was negligence in them to set the screw of the Nevada in motion, under such circumstances that the Kate Green could be drawn over against the Nevada by the suction of the screw of the Nevada. And this is true whether the Kate Green was warned or not, and whether, when warned, she was loose or was only insufficiently fastened. And it is true whether the warning came from the Nevada or from elsewhere. Indeed, an unheeded warning from the Nevada, given before the Nevada set her screw in motion, so far from relieving the Nevada from fault, only serves to make her fault in starting her screw more clear, as showing that she had her attention called to the perilous condition of the Kate Green, and yet set her screw in motion. If the Kate Green was fastened, she was so fastened that she was at such a distance from the Nevada, that, after she began to be drawn over by the suction of the moving screw of the Nevada, there was abundant time for the Nevada to have stopped her screw and avoided the collision, if there had been a proper lookout kept in the proper place on board of the Nevada. The fact, that no one on board of the Nevada knew or heard of the accident till she had crossed the ocean, tells the whole story. It is abundantly proved, that, as the Kate Green was being drawn over by the suction of the moving screw of the Nevada, the Nevada was hailed from the Kate Green to stop her screw, but no heed was paid to the hail, by the Nevada, because there was no person in a position on the Nevada to hear the hail. Whatever observation was made by those on the Nevada, of the position of the vessels in the slip, preparatory to the sailing of the Nevada, and whatever warning she gave by any hails to any boat in the slip, were made and given, on the evidence, at a time before the Kate Green had come into the slip. Indeed, the answer does not aver that any oral notice or hail or warning was given to the Kate Green by any one on board of the Nevada. As there was fault on the part of the Nevada, causing damage to the cargo of the Kate Green, and as the Nevada alone is sued in this suit for such damage, and as no fault, if any, of the Kate Green, can be imputed to the cargo, there would have to be a decree against the Nevada in respect to the cargo, even if the Kate Green also were found to be in fault for the collision. As to the boat herself, I do not find that she was in fault. If she was loose, not fastened, she was not in fault for remaining so, whether warned or not, because it was the duty of the Nevada to see her condition and not to put her screw in motion. If the Kate Green was fastened, she was fastened at a distance from the Ne-

vada which allowed abundant time, if her fastenings parted, for the Nevada, with a proper lookout, to stop her screw, after the Kate Green began to be drawn over. In either view, the Kate Green, in fact, hailed the Nevada, after the suction began to take effect, in season for the Nevada to have stopped her screw and saved the collision, if an officer of the Nevada had been stationed in a proper place, to observe the condition of the Kate Green and to hear the hail. There must be a decree for the libellant, as to both boat and cargo, with a reference to ascertain the damages." [Case unreported.]

This court found the following facts: "About three o'clock in the afternoon of September 27th, 1871, the steamship Nevada left her berth in the slip between piers 46 and 47, North river, New York, on a voyage to Liverpool. She was one of a line of ocean steamers plying regularly between New York and Liverpool, owned by an English corporation of which Williams & Guion were agents in New York, and, previous to her departure, lay on the north side of pier 46, with her bow toward the river, and her stern toward the bulkhead. The slip was two hundred and five feet wide, pier 46 six hundred and thirty feet long, and pier 47 six hundred and twenty-four. On the opposite of the slip, and on the south side of pier 47, lay the steamship Queen, also with her bow toward the river, and her stern toward the bulkhead. The bow of the Nevada was about thirteen feet back from the end of her pier, and that of the Queen fifty-two feet six inches from the end of hers. Two floating grain elevators lay alongside of, and moored to, the Queen; one named the Scotia, at one of the forward hatches, and the other, named the Metropolitan, at one of the after hatches. The canal boat Sarah and Madonna, lay alongside of the Metropolitan, with her stern toward the bulkhead, and was being unloaded into the Queen. At her stern lay the canal boat C. H. Hart, with her bow toward the bulkhead, and extending some distance beyond the Metropolitan. Her stern was made fast by a line to the Metropolitan, and her bow by another leading to the deck of the Queen. She was waiting her turn to be unloaded. One or more boats lay alongside the Scotia, and moored to her, and there were two lighters at the bulkhead, astern of the Nevada. The length of the Nevada was three hundred and fifty-five feet, and her beam forty-three feet, four inches. The length of the Queen was three hundred and eighty-one feet, and her beam forty-two feet four inches. The Metropolitan was about eighty-seven feet long, and her width twenty-four feet. The C. H. Hart was ninety-six feet long, and her width seventeen feet, four inches. Just as the Nevada was starting, the canal boat Kate Green, owned and commanded by the libellant Quick, came into the slip, in tow, on the port side, of the tug Jacob Sinex, and was placed alongside the C. H. Hart. Her master, Quick, made a line from her bow to the bow of the Hart, and her steersman another from her stern to the stern of the Hart. While this was being done, the tug let go and commenced backing out of the slip, but she had only time to get under the stern of the Kate Green, or a little beyond, when the Nevada started. Previous to the time the Kate Green came into the slip, full public notice had been given by those in charge of the Nevada, that she was about to depart, and particular notice was also given to all the boats then alongside the Queen, including the C. H. Hart. When the Hart came in she was sent up the slip, in order that she might keep out of the way. The Nevada had been advertised to sail at that hour. Her bells had been rung, and her whistles blown, several times. Signals, indicating that she was about to depart, were flying at her mast-head. She took out, on that voyage, a considerable number of cabin and steerage passengers, and there was about her decks and on her pier, all the bustle and noise which usually accompanies the sailing of a large ocean steamer. The Kate Green was not seen from the Nevada when she came in, and no special notice was given to her that the Nevada was about to leave. She had no time, after her arrival, to give particular attention to what was being done on board of the Nevada, or on the pier. All the bells were rung and whistles blown before she arrived, or while the attention of those on board was given to making her fast and getting away from the tug. Neither was there time for her master to examine particularly the fastenings of the Hart. The Nevada started almost simultaneously with her getting alongside the Hart, and the first actual notice she had that the Nevada was about to leave was when the propeller commenced moving. If she was, in fact, made fast at the time, it had only just been done. She lay about sixty feet from the Nevada. The tide was flood, and running up by the ends of the pier, pretty strong. When the Nevada started, the revolution of her propeller and her own motion caused a displacement of the water in the slip, and a suction, which drew the Hart and the Green away from where they were lying, and broke the bow fastenings of the Hart. As soon as this was done, the Green swung rapidly towards the Nevada. Her master, who was on deck, called loudly to the Nevada to stop the propeller, but he was not heard, or, if heard, not heeded. The Nevada kept on without stopping, and the revolving blades of her screw struck the Green under the water line, and a little aft of the port bow, inflicting such an injury as caused her, the Green, to sink soon after, with her cargo on board, and some articles of furniture, &c., belonging to her owner. No one on board of the Nevada knew of the parting of the Hart's lines, or of the swinging of the Green, or of the accident, until after she arrived in Liverpool.

If a man had looked from her deck over her side into the slip, he could not have failed to see what was going on all the time from the first movement of the propeller, and before, until she got out. There was an abundance of time, after the breaking of the fastenings of the Hart, and after the Green began to swing, and after the hail of her master, to have stopped the propeller, before the collision. The report of the commissioner as to the damages, is warranted by the evidence, and the libellant, McKnight, was the owner of the claim for damages when the libel was filed."

E. H. Lewis, for libellants.

Stephen P. Nash and George C. Holt, for claimant.

WAITE, Circuit Justice. There are many palpable errors in the testimony in this case, but the material facts, as found, are satisfactorily proven, and are sufficient, as I think, to charge the Nevada with fault. A large ocean steamer has no right to leave her moorings in a narrow slip crowded with other craft, by the use of her own propeller, without taking the utmost care to prevent accidents by the disturbance of the water which necessarily follows. The natural effect of the revolution of her propeller is to draw towards her stern all objects near by, movable in the water, and that, added to the displacement of the water, by the movement of the vessel herself, in such a slip, makes it the duty of the officers and men responsible for her navigation to be specially vigilant, and to keep the vessel completely under their control, until all danger is past. Other vessels have the right to come into the slip and moor themselves. She has an equal right to be there, and to start on her voyage when she is ready, but she cannot, with impunity, cause damage to other vessels lying near, by any neglect of her own navigation in going out. She must watch for, and, if necessary, give warning of danger.

Some witnesses have testified that the Kate Green was told, when she came in, that the Nevada was about to leave, and sent up into the slip to get out of the way, but, upon the whole evidence, it is manifest to my mind they were mistaken, and that they counfounded the Green with the Hart, which arrived a short time before, and which, undoubtedly, was warned. I do not entertain a doubt, that the Green got into the slip without being noticed from the Nevada, or by any one charged in any manner with her navigation. The entire attention of those on board the Nevada, officers as well as men, so far as I can discover, was directed towards her and to getting her away from her pier, and into the stream, without injury to herself. No notice whatever was taken of the other vessels in the slip, and no one was set to look out for danger on the other side of the vessel, or at the stern, when it ought to have been known that much damage might be done to the neighboring vessels by the screw, if from any cause they got loose from their moorings. This I cannot but consider, under the circumstances, a gross fault. With the large number of competent officers and men which the prudent and successful navigation of snch a vessel required on board, there was no difficulty in providing men for the performance of that duty, and, if they had been at their posts, the Green would have been seen, as she approached the slip, and stopped outside, or sent up into the slip with her tug, away from danger, to wait until the Nevada had gone. The fastenings of the Hart might have been strengthened, to meet the additional strain caused by the presence of the Green alongside, or, when the boats broke away, and the Green swung over, the propeller might have been stopped until she could have been got away. I know that, since the appeal, testimony has been taken to show that it would have been unsafe to stop the propeller after the steamer had started, because of the effect of the tide upon her bow when it got outside the end of the pier. If this was really so, of which I am by no means certain, it was a fault in the steamer to start without making provision to counteract the éffect of the tide, in case it became necessary to stop. The rule hardly admits of an exception, which requires a steamer moving by her own power, in a crowded and narrow slip, to maintain complete control of herself. She is not likely to be put in a situation, during her entire voyage, where other vessels will be exposed to so much danger from her movements as there, and, if she cannot get out by the use of her own propeller, without doing damage to other vessels that are lawfully moored near her, she must employ a tug.

An attempt has been made to prove that the steamer broke a hawser leading from her to her pier, as she went out, and that her stern swung away from the pier and out into the slip. The testimony on both these points is very conflicting, and it is not easy to say what the actual facts were; but, in the view I take of this case, they are unimportant. The real fault of the steamer was in not keeping a lookout astern, and over her side, into the slip. The office of a lookout is to watch for the approach of danger, and he should be stationed where he can best do what is required of him. At sea, danger is most to be looked for ahead, and the lookout takes his place at the bow; but, in a crowded slip, there is as much, and oftentimes more, use for him at the stern, or over the side, than at the bow. Under such circumstances, it is as important to keep men stationed there, as at sea it would be forward. Thus much for the Nevada.

At first, I was inclined to think the Kate

Green was also at fault, but, on further reflection, have reached a different conclusion. In The City of Paris [Case No. 2,767], a case like this in many of its features, I held a canal boat responsible equally with the steamer, and divided the damages, because the canal boat was insufficiently moored; but, there, the steamer was known to be about to sail long before she started, and the captain of the canal boat ought to have known that the boat alongside of which he was moored was not securely fastened. Besides this, he lay within twenty-five feet of the steamer, and a very little change of position would bring the vessels together. Here, however, the Kate Green had no actual notice that the steamer was about to leave, and I am by no means satisfied that she was securely made fast to the Hart before the propeller was set in motion. If there had been time enough, she might have seen, by the indications on the steamer or the pier, that the steamer was about to start, but, in passing into and along the slip, she was cut off from any view of what was going on. If she had had time, also, she might have seen that the Hart was not sufficiently fastened to hold the two boats; and it is possible, that, but for this, the rule acted upon in The City of Paris [supra], might, with propriety, be applied here. But, upon the case as it stands, I think the whole fault must be charged on the steamer. Had she kept her proper lookout, and given the necessary warning, all defects in the mooring of the canal boat could have been avoided.

The delay in filing the libel is sufficiently explained, and no change has taken place in the ownership of the Nevada since the loss. The suit, therefore, is not barred by lapse of time. While there may have been some difficulty in obtaining testimony, caused by the length of time which elapsed between the occurrence and the trial, the facts on which the case turns, if not admitted, are not seriously contested.

There is no complaint as to the amount of damages allowed by the commissioner, except in relation to the value of the canal boat, and in that I think the preponderance of evidence is in favor of the report.

A decree may be prepared in favor of the libellant Quick, for three thousand one hundred dollars, and interest at six per cent. from September 27th, 1871, and in favor of the libellant McKnight, for five thousand eight hundred and sixty $^{61}/_{100}$ dollars, with like interest from the same date, and for costs.

[On appeal to the supreme court, the decree of the circuit court was affirmed. 106 U. S. 154, 1 Sup. Ct. 234.]

NEVADA, The (GRISWOLD v.). See Case No. 5,839.

NEVADA, The (SHERMAN v.). See Case No. 5,839.

NEVERS (PRESCOTT v.). See Case No. 11,390.

Case No. 10,132.

The NEVERSINK.

[See Case No. 12,079.]

Case No. 10,133.

The NEVERSINK.

[5 Blatchf. 539.][1]

Circuit Court, S. D. New York. Nov. 22, 1867.[2]

MARITIME LIENS — SUPPLIES AT FOREIGN PORT — AGENT OF MATERIAL MAN WHO RESIDED AT HOME PORT—PROOF OF APPARENT NECESSITY—SUFFICIENCY.

1. In the cases of Thomas v. Osborn, 19 How. [60 U. S.] 22, and Pratt v. Reed, Id. 359, the rule which requires evidence of an apparent necessity, existing at the time, for supplying, on the credit of a vessel, supplies furnished to her at a foreign port, in order to create a lien on her in favor of a material man, was not extended beyond its ancient strictness, as to the degree of proof required.

[Cited in The Grapeshot, 9 Wall. (76 U. S.) 137; The Washington Irving, Case No. 17,244; The Eledona, Id. 4,340; The Maitland, Id. 8,979; Stephenson v. The Francis, 21 Fed. 720, 726.]

2. Where the master of a steamer had no funds to pay for coal, and her charterers, who owned her pro hac vice, resided in a foreign jurisdiction, and the coal was a necessary supply, and it was obtained by the master, and credit therefor was, in fact, given to the vessel and her charterers: *Held*, that a lien was created on the vessel therefor.

[Cited in The Eledona, Case No. 4,340; The Maitland, Id. 8,979; The Plymouth Rock, Id. 11,237; The India, 16 Fed. 263; Scull v. Raymond, 18 Fed. 550; The Charlotte Vanderbilt, 19 Fed. 219.]

3. The same thing was held in a case where the material man resided at the home port of the vessel and furnished the coal at the foreign port, through an agent there.

[Cited in The Maitland, Case No. 8,979.]

4. The sufficiency of the proof of an apparent necessity must, in every such case, rest in the sound judgment of the court.

5. General rules stated, for determining the existence of such apparent necessity.

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

This was a libel in rem, filed in the district court, against the steamboat Neversink, to recover the value of coal furnished to her at New Brunswick, New Jersey, between the 12th of March, 1866, and the latter part of April, 1866. She made daily trips between the city of New York and New Brunswick, and was under a charter party to one Thornal and one Hine, who were the owners pro hac vice, one White being the general owner. The vessel was registered in the city of New York, where the general owner and the charterers resided. Thornal, one of the charter-

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

[2] [Affirming Case No. 10,132.]

ers, was master of the vessel. The district court decreed in favor of the libellants [Case No. 10,132], and the claimants appealed to this court.

Joseph E. Welch, for libellants.
Dennis McMahon, for claimants.

NELSON, Circuit Justice. That the coal supplied was necessary to enable the vessel to perform her daily trips, and earn her freight and passenger money, and that the credit for the supplies, as a matter of fact, was given to her and her owners, cannot be doubted, upon the proofs. The main ground of controversy is, whether or not there is sufficient evidence of an apparent necessity, existing at the time, within the rule of the maritime law, which justified the furnishing of the coal on the credit of the vessel. It has been said, or intimated, by very respectable authority, that this rule has been extended beyond its ancient strictness, in the recent cases of Thomas v. Osborn, 19 How. [60 U. S.] 22, and Pratt v. Reed, Id. 359, and that a greater degree of proof of this necessity is now required, by these adjudications, than had been previously exacted in the administration of this branch of the rule. I may be permitted to say, having written one of the opinions, and fully concurred in the other, after extended arguments at the bar, and the very full discussions by the judges in their conferences, arising out of the differences of opinion among them, that no such purpose existed on the part of the court or of any one of the justices; and a reference to the cases will show, that the opinion delivered in each of them was placed, and intended to be placed, upon ancient and settled authority. Some prominence, it is true, was given to this branch of the rule, and the propriety of properly enforcing it, in both opinions, for the reason, that, in several cases that had come before us, it had been overlooked or disregarded, and the decisions had proceeded upon the ground that proof of an apparent necessity for the credit constituted no part of the maritime rule. That error it was intended to correct, by recalling to the notice of the profession the rule as established by both the ancient and the modern authorities. I do not intend to go over this subject again, as I regard the two cases above referred to as laying down the principles which govern it. Applying those principles to the case in hand, I am satisfied that the proofs show an apparent necessity for the credit in question. The master had no funds to meet the payment for the coal as delivered, and the owners, the charterers, were not present, but resided at a distance, and, in the sense of the maritime law, in a foreign jurisdiction. The master was one of the charterers, but this does not affect his authority as master. He had no means, either as master or owner, which makes the apparent necessity for the credit to the vessel the stronger. I lay out of view the general owner, because the master was not his agent, and could bind him by no act of his. He could bind only the vessel and the charterers.

As to the sufficiency of the proof of this apparent necessity, no fixed rule, from the great diversity of the cases that arise, can be laid down in advance. It must necessarily rest in the sound judgment of the tribunal before which the proofs are presented. Good faith and fair dealing, in every case, are exacted on the part of the person furnishing the supplies, in every case; and the absent owner should be guarded against collusion by the master with the material man or the furnisher of supplies, and against an unnecessary tacit incumbrance upon his vessel.

Decree affirmed.

NOTE. Another case against the same vessel was decided at the same time, the libellants in which resided in the city of New York, the home port of the vessel. The coal was furnished to the vessel at New Brunswick, New Jersey, by the agent of the libellants. In his opinion in the case, Nelson, J., said: "Where the business of furnishing supplies of coal or other stores to vessels touching at a foreign port is carried on through an agent there, there would seem to be, in good sense, no distinction, so far as regards transactions at that port, between cases where the principal resides at that port and cases where he does not reside there. The agent represents the principal at the place of business. The supplies are furnished not at the home port of the vessel, but at a foreign port, and the reason for the remedy against the vessel exists with the same force as if the principal resided at the foreign port."

NEVERSINK, The (ROSS v.). See Case No. 12,079.

Case No. 10,134.

NEVES et al. v. SCOTT et al.

[9 Law Rep. 67.]

Circuit Court, D. Georgia. June, 1846.[1]

ANTENUPTIAL CONTRACT — EXECUTORY — BILL BY STRANGER TO THE CONSIDERATION — EQUITY — RULE IN SHELLEY'S CASE — SPECIFIC PERFORMANCE.

1. Two parties, intending marriage, entered into articles of agreement between themselves, without the intervention of trustees, and without the concurrence of any other party, by which they agreed that all property which then was or should thereafter become their right, should remain in common between them during their natural lives, and was to continue the property of the survivor until death, and then to be divided among the heirs of one and the heirs of the other, share and share alike. The parties intermarried; each acquired property during the marriage; the wife survived the husband, kept possession of the property, and married again, and at her death, without issue, her second husband took possession of the whole estate. The first husband, before his death, had made a will, devising one half of his estate to another party. The brothers of the first husband brought a bill in equity, claiming one half of the estate as his heirs, under the original articles, alleging that the will could not control

[1] [Reversed in 9 How. (50 U. S.) 196, 13 How. (54 U. S.) 268.]

the articles, and praying for a division of the estate, and for an injunction against the devisee from setting up any right under the will. On general demurrer, it was *held* that the articles of agreement constituted an executory, and not an executed, agreement.

2. A volunteer, or one who is not within the influence of the consideration of an executory agreement, or who does not claim through one who is within it, cannot maintain a bill to enforce its performance.

3. The complainants, being brothers of the first husband, were not within the influence of the marriage consideration; and since they claimed the estate on the ground that the terms by which they were designated in the articles of agreement were words of purchase, and not words of limitation, they did not claim through a party who was within the influence of the consideration, and were therefore volunteers.

4. In equity, what ought to be done should be considered as having been done; that the estate must be considered as having become vested in the first husband, according to the rule in Shelley's Case; and the heirs could only claim through him, and not in their own right.

5. The consideration of marriage and a portion extends only to the husband, the wife, and their issue, unless the settlement is made through the instrumentality of a third party, whose concurrence is necesasry.

6. Where an action of law might be brought in the name of trustees, to recover damages for the non-performance of a covenant, it seems that equity would enforce the specific execution of the covenant.

7. Upon the foregoing considerations, the demurrer should be allowed.

This was a bill filed by the complainants [William Neves and James C. Neves] against the defendants [William F. Scott and Richard Rowell], to enforce the articles of agreement entered into by John Neves and Catharine Jewell, anterior to their intermarriage, dated February 17, 1810, by which it was agreed "that all the property, both real and personal, which there was or may thereafter become the right of the said John and Catharine should remain in common between them, the said husband and wife, during their natural lives; and, should the said Catharine become the longest liver, the property to continue hers so long as she shall live, and at her death to be divided between the heirs of her, the said Catharine, and the heirs of the said John, share and share alike, agreeably to the distribution laws of the state made and provided. And, on the other hand, should the said John become the longest liver, the property to remain in the manner and form as above."

The bill alleged that the said marriage took place; that, subsequently thereto, the said John purchased many slaves and other property, and that the said Catharine acquired, by a bequest from her sister, other property of value; that the said John died in 1828, never having had any children, leaving the complainant William Neves, and his brother, and the complainant James C. Neves, his nephew, his heirs at law, and leaving a large estate, real and personal; that, after the death of the said John, all of said property (except some she disposed of) remained in the possession of the said Catharine, his widow, until her subsequent intermarriage with the defendant, William F. Scott, in the year 1835; that the said Scott, after his marriage, exercised control over said property; that the said Catharine died in 1844, without ever having had issue and leaving the said William F. the sole heir at law of her half or share of said estate, and who possessed himself of the whole estate, and refused to account with the complainants for their half, &c. The bill then further alleged that John Neves, when on his death-bed, and when in extremis, made a will, under the coercion and fraudulent procurement of the other defendant, Richard Rowell, by which John devised and bequeathed one half of his estate to George Rowell, the son of Richard; but the complainants allege that the will could not affect their vested rights under the deed of marriage settlement, whether the will be valid or not; but that Richard Rowell, as executor of said fraudulently procured will, claims one half of said estate adversely to the complainants. The bill then further alleges that both the defendants are estopped from disputing the rights of the complainants as vested under and by virtue of the deed of marriage settlement, because it has been heretofore judicially and finally adjudicated in the superior court of Baldwin county, Georgia, that the marriage settlement was not affected or controlled by the will of said John Neves, which adjudication took place in a proceeding on the equity side of said superior court, wherein the said Catharine, then Catharine Neves, was complainant, setting up and insisting on the deed of marriage settlement as paramount to said will, and Richard Rowell was defendant; and afterwards Richard Rowell was complainant in a cross bill, and Catharine and William F. Scott were defendants; William F. having also been made a party to the original bill pendente lite; and it refers to said equity proceedings as exhibits to the complainants' bill. The prayer of the bill was for a division of the whole estate in the hands and control of the defendant Scott, between the complainants and the defendant Scott; and that the defendant Richard Rowell, be perpetually enjoined from setting up any right under the will, &c.; and for further relief. The bill, answers, cross bill, &c. between Catharine Neves and Richard Rowell (to which the defendant Scott was subsequently made a party) are very voluminous, but the only part necessary to set forth is the final decree of the special jury (who, in the state courts of Georgia, act as co-chancellors with the judge,) in said cause, which final decree was as follows: "We, the jury, find for the complainant a life estate in the property, agreeably to the provisions of the marriage contract, leaving all other persons to contest their rights at her death; and we further find that the complainants do pay to defendant the sum of nine hundred and two

dollars and seventy-five cents, which have been allowed by the special jury, at this term, upon an appeal from the court of ordinary, as expenses and cost, incurred by the defendant in proving the will of John Neves, deceased, and resisting the marriage contract between John Neves and Catharine Neves, his wife; and we further find for the complainant the costs of suit. S. Boykin, Foreman."

To this bill of complainants, general demurrers were filed by the defendants respectively, and the demurrers were argued upon paper, and submitted to the court. The ground relied on in support of the demurrers, was, that the complainants were volunteers, not within the scope of the marriage contract, which, it was alleged, was only an executory, and not an executed, contract; in other words, that it was only marriage articles, and not a marriage settlement; and that a court of equity would never lend its aid to a mere volunteer, to enforce an executory agreement.

Seaborn Jones and S. T. Bailey, for complainants.

Francis H. Cone, for defendant Rowell.

Kenan & Rockwell and Robert M. Charlton, for defendant Scott.

NICOLL, District Judge. The agreement which forms the subject of the bill in this case was entered into by John Neves and Catharine Jewell, on the eve of their marriage. They were the only parties to it, and it was founded exclusively on the consideration of marriage, and other considerations moving only between the parties themselves. The consideration of such an agreement extends only to the husband and wife and their issue. Osgood v. Strode, 2 P. Wms. 245; Ath. Mar. Sett. 125, 127–151; 2 Story, Eq. Jur. § 986; Sugd. Vend. (5th Ed.) 466, 467; Bradish v. Gibbs, 3 Johns. Ch. 550; 2 Kent, Comm. 172, 173. And it is admitted by the counsel for the plaintiffs that a volunteer, one who is not within the influence of the consideration of an executory agreement, or who does not claim through one who is, cannot seek the aid of a court of equity to enforce its performance. Coleman v. Sarrel, 1 Ves. Jr. 50; 3 Brown, Ch. 12; 1 Fonbl. 406; Story, Eq. Jur. §§ 433, 973, 986; Ath. Mar. Sett. 398, 399. That the instrument under which the plaintiffs ask the interposition of the court constitutes an executory, and not an executed, agreement, can scarcely admit of doubt. It is in terms an executory, and not an executed, agreement, and of the most informal character. It transfers no property, passes no estate, declares no trustees, and contains no word of direct and immediate conveyance, and nothing to indicate that it was a complete and actual settlement. It relates not merely to property in possession, but to that which might be acquired in future; and the greater part of that which is the subject matter of the plaintiffs' bill was subsequently acquired either by purchase or descent, and could not be the subject of an executed contract. The title of the plaintiffs therefore rests entirely in covenant. Coleman v. Sarrel, 1 Ves. Jr. 54; Ellison v. Ellison, 6 Ves. 656; Antrobus v. Smith, 12 Ves. 39–46; Ath. Mar. Sett. 186. It is an executory agreement, then, to enforce which the interference of a court of equity cannot be obtained at the instance of a volunteer.

Now the bill, in this case, seeks the aid of the court upon the ground, that, by the stipulations of the marriage agreement, the plaintiffs were to have the absolute and entire property after the expiration of the life estate of Neves and his wife; that the precedent estate vested in Neves and wife; the first taken under the articles, was circumscribed to, and could not endure beyond, their lives; and that by the limitation over, the plaintiffs became entitled to the property, not by succession or descent, as coming in, in the estate of the first taker, but as taking originally in the capacity of purchasers in their own right; in other words, that the terms under which they claim title, and by which they are designated, are words of purchase, and not words designed to indicate the quantity of interest or magnitude of the estate which Neves and wife took; that consequently the interest of Neves and wife was limited to a life estate, the remainder did not become executed in possession in them, and that they and neither of them could by will, or otherwise, control or dispose of the property, after the termination of their respective lives, or bar the plaintiffs. Such is the aspect in which the claim of the plaintiffs is presented by their bill, and such was the construction given to the instrument by the bill, instituted by Mrs. Neves, in her lifetime, in Baldwin superior court. Since, then, the plaintiffs, who are the brothers of the husband Neves, are not within the influence of the marriage consideration, and since they claim to take, not derivatively or by transmission, from or through either or any of the parties, who came within the influence of that consideration, they are unquestionably volunteers, and are not entitled to the aid which they seek.

The view which I have taken is sustained by the authorities whose aid has been invoked by the counsel for the plaintiffs. The cases referred to by them may be resolved into three classes:

1. It is an established principle in equity, that what ought to be done shall be considered as done; "and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money; thus money articled to be laid out in land, shall be taken as land, and descend to the heir." Lechmere v. Earl Carlisle, 3 P. Wms. 215; Babington v. Greenwood, 1 P. Wms. 532. It is also a well-set-

tled rule of law, which equity must follow (Butler, note 249, subd. 14, to Co. Litt.); that if by one and the same instrument, a life estate is given to a person, with a limitation in remainder to his heirs in fee, whether with or without the interposition of an intermediate estate, the remainder unites with the precedent life estate, and is immediately executed in possession in the person who takes the life estate, who thus becomes seised of an immediate estate in fee. The word "heirs" is in such a case a word of limitation of the estate, and the heirs of the first taker take not by purchase, in their own right, but as standing in the place of the first taker, and embraced in the extent and measure of the estate of which he was seised. The heir takes not originally in his own right, but through the first taker. Shelley's Case, 1 Coke, 93. When, then, it is agreed by marriage articles, that money shall be laid out in lands, to be settled, for example, on the husband for life, with remainder to the sons of the marriage in tail male, remainder to the daughters, remainder to the heirs of the husband, forever, and the husband dies without issue, as a court of equity will, upon the application of one who has a right to pray that the agreement be executed, consider the money as land, and treat the investment as actually made in the lifetime of the husband, it regards him as seised, in his lifetime, of an estate in fee, which of course, upon his death, devolves by descent or transmission upon his heir, who succeeds through the husband to the estate thus vested in the latter, and does not become entitled to it by purchase, that is, originally in his own right. To this class may be referred Kettleby v. Atwood, 1 Vern. 298, 471; Lancy v. Fairechild, Id. 101; Knights v. Atkyns, Id. 20; Edwards v. Countess of Warwick, 2 P. Wms. 171; 4 Brown, Parl. Cas. 494; 3 Atk. 447; Lechmere v. Earl Carlisle, 3 P. Wms. 211; Cas. t. Talb. 80; Ath. Mar. Sett. 126, 127, 398; 2 Pow. Cont. 104.

Indeed, the only inquiry in these cases was, whether the property was to be considered land or money; in other words, whether the heir or personal representative was entitled to it; for if it were to be regarded as land, there could be no doubt that it would go to the heir. If the land had been purchased and settled in the lifetime of the husband, in the case which I have supposed, as in the cases to which reference has been made, it could not be questioned that it would have descended to the heir, whether he were a collateral or not; he would have been entitled to it as standing in the place of his ancestor and coming within the limitation of his estate. And the ground expressly assumed by counsel, and acted upon by the court, in some of the cases, was, that the estate of the husband, upon whom the land was to be settled for life, and that of his heir, constituted one and the same estate; that the remainder in fee united with the life estate, and became executed in the husband, who thus became seised of the fee; and that, as a specific performance of the agreement would have been enforced at the instance of the husband if in life, it would in like manner be enforced on the prayer of the heir, who was embraced in the husband, and succeeded to his estate. See, also, Co. Litt. 226.

2. Although the consideration of marriage and a portion extends only to the husband, wife and their issue, yet where the settlement is made through the instrumentality of a party whose concurrence is necessary to the validity of the settlement, and who insists upon a provision in favor of a person, for instance, a younger child, a collateral relation of the husband, who would not come within the consideration of marriage, such person is held not to be a mere volunteer, but as falling within the range of the consideration of the agreement. Such are the cases of Osgood v. Strode, 2 P. Wms. 245; Goring v. Nash, 3 Atk. 186; to which may be added Roe v. Mitton, 2 Wils. 356. But these cases themselves establish that the marriage consideration alone will not support the limitation to a brother or sister, and are therefore adverse to the claim of the present plaintiffs. In Osgood v. Strode, the father and son each "having an interest in the premises, so that one without the other could not make a settlement thereof," on the treaty of marriage of the son, in consideration of the marriage and of a portion paid to the son, covenanted with trustees, inter alia, that the premises should be settled on the son for life, remainder to the sons of the marriage in strict settlement, remainder to the plaintiff, a grandson of the father and nephew of the son, and his heirs male, remainder to the right heirs of the father. The father died, and afterwards, the son and his wife, without any issue. Lord Macclesfield, in delivering his decision, said: "The marriage and marriage portion support only the limitations to the husband and wife, and their issue; this is all that is presumed to have been stipulated for by the wife and her friends. But," he proceeds, "each of them, Lawrence Head (the father) and Edward Head (the son,) having an interest in the premises, so that one without the other could not make a settlement thereof, here is now a proper person for old Lawrence Head, the father, to stipulate with his son Edward, and it may be well intended that old Lawrence Head did stipulate with his son Edward, that he (Lawrence) would come into these articles, and join therein, on terms that the estate should, in case of Edward's dying without issue male of the marriage, &c., then go to the plaintiff Osgood; and this was probably part of the marriage agreement, and of the terms on which it was made; though the leaving out the sons of Edward by any other marriage might be a mistake. But since this might be, and probably was, nay, appears to have been, the terms of this marriage

agreement, and the inducement to old Lawrence Head to join therein, equity ought to decree the performance of it; but I will give no costs." The ground, therefore, on which that case was decided, was, that the provision for the plaintiff came within the consideration of the agreement, which was a valuable one, the parting with an estate by a party, other than the husband and wife, whose concurrence in the agreement was essential to its validity; while the case also establishes that the plaintiffs here are mere volunteers, the limitations to whom are not supported by the consideration of the agreement between Neves and his wife.

In Goring v. Nash, 3 Atk. 186, a father seised in fee had an only son and four daughters. On the marriage of his son, he entered into articles, by which he agreed to settle the estate to the uses of the marriage, with remainder, to the use of Lady Goring, one of the daughters, in tail male, remainder over. The son died without issue. The father then died; and the legal fee descended upon Lady Goring and her three sisters. No settlement having been made in pursuance of the articles, Lady G. brought her bill against her three sisters, to have the articles carried into effect. One of the grounds upon which Lord Hardwicke rested his decree, was, that it was a provision by a father for his daughter (page 189), that it was a provision for younger children, which is always favored in a court of equity, and carried into execution. That such children are considered purchasers by reason of the natural obligation of parents to provide for their children (page 191), and the court has always decreed the provision made by a parent for a child to be as extensive as the parent intended it, when it does not introduce a hardship, or leave the other children in distress (page 192). And so far from his judgment importing that a specific performance would be decreed at the instance of collaterals, the reverse is implied. The import of his remark is, that such a decree will not be made at the instance of a collateral, but if such decree be made at the instance of a younger child, the articles will, according to the course of chancery, be carried into effect in whole, and not in part only, and thus will be executed in favor of collaterals. He says (page 189) all the decrees for specific performance of marriage articles on limitations for younger children, are authorities in favor of the plaintiff, and where such articles have been decreed at all, they have been carried into execution even as to collaterals, and not carried into execution in part only (page 190). There is no instance of decreeing a partial performance of articles; the court must decree all or none; and where some parts have appeared unreasonable, the court has said, "We will not do that, and therefore, as we must decree all or none, the bill has been dismissed. * * * Nobody can tell what it is the parties who are dead have laid the greatest weight upon in coming to agreements, and therefore it would be attended with bad consequences, if agreements were to be split, and one part decreed but not another." 2 Kent, Comm. 172, 173. The case of Roe v. Mitton, 2 Wils. 356, where a mother interested in the estate united in a settlement, making a provision for a younger son, rests upon the same principle, and is also an authority in support of the proposition that the marriage consideration alone will not sustain a limitation to brothers. See, also, Stephens v. Trueman, 1 Ves. Sr. 74.

3. One of the grounds on which Lord Hardwicke placed his decision, in the case of Goring v. Nash, was, that an action of law might have been brought, in the name of the trustees, for the recovery of damages, for the non-performance of the covenant, and, therefore, to avoid the circuity of bringing such an action, and afterwards of applying to equity to have the damages invested in land, and settled according to the terms of the articles, and also, because a court of law has no means of apportioning the damages according to the respective rights of the parties, equity would enforce the specific execution of the covenant. And it is upon this ground that Lord King principally rested his decree in the case of Vernon v. Vernon, 2 P. Wms. 594. See, also, 3 Atk. 190; Stephens v. Trueman, 1 Ves. Sr. 74; Williamson v. Codrington, Id. 513, arguendo. But such a ground is treated as forming an exception to the general rule (1 Ves. Sr. 74), and leaves this, and other cases where the same ground does not exist, subject to the operation of the rule. There are other circumstances which contributed to influence the decision in the case of Vernon v. Vernon. The eldest brother of the family had bequeathed a large personal estate to the husband, with a limitation over to the plaintiffs, his other brothers, upon a contingent event, which, making the limitation void, vested the husband with the absolute and entire interest; and Lord King thought that the husband might be induced to enter into the covenant, to make to the plaintiffs some recompense or satisfaction for what was intended them by the bequest. The father, also, was a party to the articles, and, it appears from the report in 4 Brown, Parl. Cas. 31, "insisted upon the provision for the plaintiffs, and afterwards declared that it should never have been a match if the wife and her friends, as well as the husband, had not agreed to make the settlement in that manner;" thus assimilating it to the second class of cases which I have enumerated. But to whichever of these grounds the decision in Vernon v. Vernon may be referred, it must be obvious that that case can be considered as an authority only in cases similarly circumstanced.

Within no one of these classes does the case under consideration fall. There exists nothing, therefore, to relieve it from the operation of the general rule, that the per-

formance of a contract will not be enforced at the instance of a volunteer. And since the consideration of a marriage, or a portion, or other consideration, moving only between husband and wife, (and no other consideration exists here,) will not extend beyond the husband and wife, and their issue,—and collaterals and all other persons are mere volunteers,—the plaintiffs in this case, who are such collaterals, are not entitled to the aid which they pray.

The demurrer is therefore allowed.

[On appeal to the supreme court, the decree of this court was reversed. 9 How. (50 U. S.) 196. It being suggested that, at the time the case was decided, Richard Rowell, the principal defendant, was dead, the judgment was stricken out, and the cause argued again. At the reargument, the decree of the circuit court was again reversed. 13 How. (54 U. S.) 268.]

Case No. 10,135.

NEVETT v. BERRY.

[5 Cranch, C. C. 291.] [1]

District Court, District of Columbia. March Term, 1837.

TROVER FOR THE CONVERSION OF SLAVES—DAMAGES—EVIDENCE—NEW CONTRACT.

1. In an action of trover for negroes, the plaintiff may give evidence of, and recover, damages beyond the value of the property converted.

2. If the vendor states, under his seal, that he has bargained, sold, and delivered the property to the vendee, the vendor in an action of trover by the vendee for the property, is estopped to deny the delivery; and such an instrument is evidence of property in the vendee at the time of the conversion.

[Cited in Kaiger v. Brandenburg, 4 Ind. App. 500, 31 N. E. 212; Harvey v. Harvey, 13 R. I. 600.]

3. If, after the conversion, the parties enter into a new contract respecting a part of the property, which is thereupon delivered to the vendee, such new contract and delivery are not evidence of the performance of the first contract on the part of the vendor; nor of relinquishment of damages for such conversion; unless the vendee received such portion of the property as a compliance with the original contract, and intended by so receiving it to relinquish his claim for damages for the previous conversion.

Trover for forty-nine slaves, sold by the defendant to the plaintiff, by the following bill of sale: "For and in consideration of one dollar to me in hand paid, the receipt of which I hereby acknowledge, and the further sum of eighteen thousand seven hundred and seventy-four dollars to be to me well and truly paid on or before the first day of November next, I have bargained, sold, and delivered to John B. Nevett of Mississippi, (planter,) the following negro slaves, to wit, Jo, Winson, Shedrack," (&c. &c., naming forty-nine slaves,) "and all their children under three years and six months of age, they being, in part, all the negroes now residing on my estate, formerly owned by the late Rinaldo Johnson; which said negroes I warrant sound in body and mind, and slaves for life, with the exception of Rachel, whom I only warrant a slave for ten years from this date. I further agree to deduct out of the moneys to be paid me on the first of November as above, the price of any of said negro or negroes which may die before that time. In witness, I have put my hand and seal this twenty-fourth day of June, in the year of our Lord 1835. Washington Berry. (Seal.)"

On the trial, R. S. Coxe, for plaintiff, offered to give evidence of damage incurred by the plaintiff upon the faith of the sale such as the charter of a vessel to carry the negroes to the South, demurrage, &c.

Mr. Brent, for defendant, objected that such damages cannot be given in evidence in trover.

THE COURT, however (THRUSTON, Circuit Judge, contra), permitted the evidence to be given.

Mr. Brent then objected that the contract was executory, and did not pass the title; and that the negroes had never been delivered to the plaintiff, and that it appears by the contract that they were not to be delivered until November; so that neither the title nor the right of possession was ever in the plaintiff. Jackson v. Clark, 3 Johns. 424.

Mr. Coxe, contra. The defendant, by the bill of sale, under his seal, has solemnly acknowledged that he had "bargained, sold and delivered," the negroes, and he cannot now deny it. The money was to be paid on the first of November, but the sale and delivery were complete on the 24th of June.

THE COURT (nem. con.) was of opinion that the defendant could not deny the delivery, having solemnly acknowledged it by his deed; that the payment was a matter of mutual, but not dependent, covenant; that the sale was complete, and the property and possession vested in the plaintiff.

Mr. Brent, for the defendant, prayed the court to instruct the jury that, if they believe from the evidence, that the defendant contracted to sell and did sell to the plaintiff sundry negroes, and afterwards refused to comply with his said contract, and that while the negroes were yet in the possession of the defendant, he applied to the plaintiff to withdraw from the said sale several of the said negroes, at the prices to be paid for the same by the terms of the original contract, that the plaintiff did agree to the said proposition, and that the defendant did deliver to the plaintiff, and the plaintiff did accept the residue of the said negroes, and pay for the same according to the terms of the said original contract, that the said original contract has been performed so far as the plaintiff has not agreed to rescind the same, and the plaintiff is not entitled to recover in this action.

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

But THE COURT (nem. con.) refused to give the instruction.

Mr. Coxe, for plaintiff, then prayed the court to instruct the jury, that the contract executed by the defendant under date of the 24th of June, 1835, given in evidence by the plaintiff, in law amounted to an actual sale of the negroes therein mentioned, and they became the property of the plaintiff. And if the jury should believe, from the aforesaid evidence, that the plaintiff did on or about the 5th of November, 1835, demand the delivery of the said negroes, which the defendant refused to deliver, but retained possession of the same against the will and assent of the plaintiff, such refusal to comply with such demand is sufficient evidence from which the jury may and ought to find the defendant guilty of the conversion charged in the declaration; and the evidence of the subsequent delivery, by the defendant, of the said negroes, or some of them, can only operate to mitigate the damages which the plaintiff is entitled to recover; and that if the jury shall believe from the said evidence that the plaintiff did not accept the said delivery as a compliance with the said original contract, and intend thereby to relinquish his claim for damages sustained by such illegal detention by the defendant, the acceptance, if proved, does not amount to a release of said damages. Which instruction THE COURT gave (nem. con.).

Mr. Brent then prayed the court to instruct the jury that the plaintiff could not in law recover in damages more than the value of the negroes at the time of the conversion.

But THE COURT (nem. con.) refused.

Verdict for the plaintiff, $750.

NEVILLE (WELLS v.). See Case No. 17,403.

Case No. 10,136.

NEVINS v. JOHNSON et al.

[3 Blatchf. 80.][1]

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

JURISDICTION IN EQUITY—PATENTS—BILL FOR ACCOUNTING BUT NOT FOR INJUNCTION—PATENT ACT OF JULY 4, 1836.

1. The 17th section of the patent act of July 4th, 1836 (5 Stat. 124), confers jurisdiction in equity upon the circuit courts, irrespective of the right to the plaintiff to an injunction or of his demand for one.

[Cited in Hoffheins v. Brandt, Case No. 6,575; Vaughan v. East Tennessee, V. & G. R. Co., Id. 16,898; Gordon v. Anthony, Id. 5,605; Atwood v. Portland Co., 10 Fed. 285; Root v. Lake Shore & M. S. R. Co., 105 U. S. 206.]

2. Accordingly, where the plaintiff's patent had expired, and a bill in equity filed by him alleged an infringement of the patent, and prayed for a discovery and an account, but not for an injunction: *Held*, on a demurrer to the bill, that this court had jurisdiction of the case.

[Cited in Perry v. Corning, Case No. 11,003; Vaughan v. East Tennessee, V. & G. R. Co., Id. 16,898; Same v. Central Pac. R. Co., Id. 16,897.]

The bill in this case was founded upon letters patent [No. 3,917] granted to the plaintiff [William R. Nevins] on the 2d of March, 1836, for an improvement in a machine for rolling dough and cutting crackers and biscuit. On the 9th of May, 1848, the patent was surrendered, and a new one was taken out, on an amended specification. The bill, which was filed in December, 1851, charged an infringement of the re-issued patent by the defendants, from the 9th of May, 1848, to the 2d of March, 1850, and that they had realized great profits therefrom; and prayed a discovery of the particulars and extent of the use of the improvement, and that an account might be taken of the profits. The defendants [James Johnson and Francis C. Treadwell] demurred to the bill for want of equity, and assigned, as grounds of demurrer, that there was a complete and adequate remedy at law in the case, and that a court of equity had no jurisdiction of it, because the term of the patent had expired before the suit was commenced, and no injunction was prayed for or could be granted.

Edwin W. Stoughton, for plaintiff.

George Gifford, for defendants.

BETTS, District Judge. The point upon which the objection to the bill is placed is, that the case made by it is not within the jurisdiction of the court. To support this position, we are referred to the cases of Baily v. Taylor, 1 Russ. & M. 73; Jesus College v. Bloom, 3 Atk. 262; and Parrott v. Palmer, 3 Mylne & K. 632; and it is urged that those cases settle the doctrine, that chancery cannot take cognizance of a bill in support of a patent or a copyright, unless it appears, upon the face of the bill, that the plaintiff seeks an injunction, or at least that the court has competent power to award one.

We refrain from discussing the extent of equity jurisdiction, in the English courts, in copyright and patent cases, although our impression, on looking into the cases cited, is, that they do not import the absolute doctrine ascribed to them. In Crossley v. Derby Gaslight Co., 1 Russ. & M. 166, note, the court awarded an injunction after the patent right of the plaintiff had expired. But, whatever may be the rule in England in this respect, we think that the act of congress (5 Stat. 124, § 17), confers jurisdiction in equity upon this court, irrespective of the right of the patentee to an injunction, or of his demand for one; and that it must rest upon the case made by the defendant on the merits, for the court afterwards to determine whether the jurisdiction will be exercised in equity, or only by suit at law.

The terms of the statute are, that "all ac-

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

tions, suits, controversies and cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable as well in equity as at law, by the circuit courts of the United States," "which courts shall have power, upon bill in equity filed by any party aggrieved in any such case, to grant injunctions according to the course and principles of courts of equity, to prevent the violation, &c." These provisions in no manner import that the foundation of the jurisdiction of the court rests on its authority to grant an injunction. On the contrary, the language employed would seem to indicate, that congress, for greater caution, made the power to grant injunctions explicit and positive, perhaps to avoid an inference, that the process of injunction, being merely a mode of relief in equity, could only issue in cases which, under the general practice of courts of equity, were brought up specifically by injunction bills. It was held in this court, in 1811, by Mr. Justice Livingston, that the writ of injunction could not be issued except in suits prosecuted under the provisions of the 11th section of the judiciary act of 1789 [1 Stat. 78]. Livingston v. Van Ingen [Case No. 8,420]. And the stringent directions in the act of 1836, copied from that of February 15th, 1819 (3 Stat. 481), may have been designed to remove doubts as to the authority of the courts of the United States to employ that process in patent cases to the same extent it is used in courts of general jurisdiction.

We see no reason for regarding the power to issue injunctions as the primary and substantive authority of courts of equity, under this statute. They have plenary jurisdiction over all actions, suits, controversies, and cases, in equity and at law, arising under the patent laws. A suit demanding a discovery of the extent of an infringement of a patent right, and an account of the profits realized from such infringement, is manifestly a case arising under the patent law; and the natural interpretation of the language of the act would seem to be, that congress has bestowed upon this court a common jurisdiction, both on its law and equity sides, over all cases of that class, and that no suit of that character can be maintained at law, which may not also be prosecuted in equity. Indeed, the arrangement of the provisions of the 17th section may fairly be referred to, as implying that the power to award injunctions was introduced by congress rather as ancillary to the general equity jurisdiction imparted, than as the substantive and primary purpose of the enactment. It bears more the aspect of an incident to the jurisdiction before conferred, than a condition of the jurisdiction itself.

The manifest purpose of congress to give to the circuit courts in equity every power requisite to the entire protection of patent rights, would be thwarted by limiting that power, through construction, to a control only over interests existing at the time the court is appealed to, or to accrue subsequently. This would be to construe the jurisdiction of the court as conservatory and prospective only, and as possessing the faculty simply of maintaining the patentee's rights from present disturbance or after violation. It is, nevertheless, scarcely less important to a perfect protection and relief, that he be entitled to the aid of the court in a retroactive and compensating character, in bringing to light the extent of injury inflicted upon him, and measuring and adjudging the recompense he shall receive.

We do not think that the act justifies the restrictive interpretation of the powers of the court in equity that is set up by the defence; and, as the demurrer is an admission in law that the defendants violated the plaintiff's patent during its period of existence, and realized to themselves large profits from that wrong, he is, in our opinion, entitled to call upon them for a discovery and an account of those particulars, by a suit in equity, notwithstanding the period of his grant has expired, and he may thus be disabled from obtaining an injunction in respect to their subsequent acts.

The decree must, accordingly, be in favor of the plaintiff, upon the demurrer, with costs; and will be final, unless the defendants, within twenty days after notice of the decree, file their answer to the bill, and pay the costs created by the demurrer.

NEVINS (LYMAN v.). See Case No. 8,629a.

Case No. 10,137.

NEVITT v. CLARK.

[Nowhere reported; opinion not now accessible.]

Case No. 10,138.

NEVITT v. CLARKE et al.

[Olc. 316.] [1]

District Court, S. D. New York. April, 1846.

SEAMEN'S WAGES—SENT TO HOSPITAL IN FOREIGN PORT—ABSENCE—DEPARTURE OF VESSEL—RIGHT TO BE CURED — AMENDMENTS TO PLEADINGS.

1. If a sick seaman be sent from a ship to a hospital in a foreign port, and the ship leaves the port without his rejoining her, he is not to be regarded absent without leave, so as to stop the running of his wages. A contract of hiring for a voyage to different ports in the Pacific and back to the United States, or for a period of eighteen months, is not fulfilled as to the ship-owners by lapse of the term, or by the seaman remaining behind in a hospital abroad, unless opportunity, means and time are afforded him to return to his home port.

[Cited in Heynsohn v. Merriman, 1 Fed. 729; Highland v. The Harriet C. Kerlin, 41 Fed. 224.]

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[1] [Reported by Edward R. Olcott, Esq.]

2. A ship having left a seaman at Valparaiso and immediately thereafter proceeded to Callao, where she was sold to foreigners, and taken into their employ on a different voyage, he was not bound to rejoin her, or offer to do so if within his power. In such case the owners are liable to the seaman in damages for the breach of the shipping contract on their part. These damages are not made vindictive on the footing of a wilful tort, but are usually measured by the actual loss to the seaman.

[Cited in The Ben Flint, Case No. 1,299; Worth v. The Lioness No. 2, 3 Fed. 925.]

3. Quere, whether, if demanded in the libel, the extra wages given by the act of congress of February 28, 1803 [2 Stat. 203], can be recovered in addition to wages and expenses?

4. Ship-owners will not be held liable for the value of a seaman's wearing apparel and effects, upon proof that he left the ship to be placed in a hospital, without other evidence showing they were detained on board.

5. The privilege of seamen to be maintained by the ship, and cured at her expense of a disease or disability incurred in the service of the ship, continues no longer than their right to wages under their contract in the particular case.

[Cited in The City of Alexandria, 17 Fed. 394; The J. F. Card, 43 Fed. 94; The Tammerlane, 47 Fed. 825.]

6. The case of Reed v. Canfield [Case No. 11,-641], considered and doubted. When objections are made at the hearing, to the want of proper form in the pleadings or proceedings, apparent upon their face, the court will permit an amendment to be made therein instanter.

7. It can, also, at discretion, allow amendments to the merits in the pleadings at any stage of the cause prior to a final decree.

8. When a party proceeded against is named in the body of the libel, a decree secundum allegata et probata may be rendered against him, although he is not named in the prayer for relief.

9. If a party to an action dies pending a suit in this court, and the cause of action survives, no disadvantage accrues therefrom to either party. A suggestion of the fact apud acta, removes the technical difficulty.

This action was commenced in personam against the respondents [William Clarke and others], as late owners of the bark Mescino, and seeks the recovery of eight hundred and eighty-five dollars, with interest thereon. Six hundred dollars are claimed as wages due the libellant [John Nevitt] for his services as seaman on board the vessel; the further sum of one hundred and ninety-seven dollars for board in the city of New-York, during the continuance of a sickness contracted on board the vessel on her voyage, and seventy-five dollars for his clothes, &c., alleged by him to have been kept by the master of the bark on board the vessel, and never restored to the libellant. The facts established on the trial of the cause were, that the libellant shipped in New-York for a voyage in the vessel to various ports in the Pacific, and back to the United States, or for the period of eighteen months, at twelve dollars per month. The vessel left this port in February, 1840, and arrived at Valparaiso in May thereafter. The libellant then left her and was taken to the hospital, and continued there until July following, when he was shipped by the American consul, on board the ship Rachel for the United States, and arrived at this port October 31, 1840. The bark was sold by the captain at Callao, in July, 1840, in pursuance of a previous contract, and duly transferred to the purchasers, but the same master remained in command of her after the sale. On the passage of the vessel out to Valparaiso, some turpentine casks stowed below, as part of her cargo, were burst in heavy weather, and most of the ship's company were sickened by exhalations from it. The libellant, particularly, was seriously affected in his loins and kidneys, voiding blood with his water, and was greatly debilitated in strength, and unable to perform duty because of such sickness, and for that cause left the vessel at Valparaiso. He never after had an opportunity to rejoin her. On his return home, he continued feeble, but did such duty during the voyage as his strength permitted. Since his return he has made one voyage to the West Indies, but his general health has continued greatly impaired, and he has been most of the time for that cause out of employ, and at board. He has also been attended by a physician at times, since his return from the Pacific.

Burr & Benedict, for libellant.

F. B. Cutting, for respondents.

BETTS, District Judge. The first point to be considered is the period for which the libellant, under the facts, is entitled to wages. He claims their continuance to the commencement of this suit, because the vessel had not then returned to the United States, and completed the voyage for which he agreed. The respondents insist that the contract was terminated by the libellant's leaving the vessel in Valparaiso, as he never afterwards sought to rejoin her; or with her sale at Valparaiso, in July, 1840, or at the furthest, on his arrival at this port, October 31, 1840.

The contract of hiring being for a voyage out and home or for a term of eighteen months, was not fulfilled on the part of the ship, either by lapse of the term or the absence of the libellant, unless the respondents prove the failure was owing to the fault of the libellant. He is entitled to compensation conformably to the principle which prevails where the voyage is broken up abroad by the owners, or the seamen is intentionally left in a foreign port.

I think upon the proofs, there was sufficient reason shown for the libellant's absence from the vessel at Valparaiso; and as he was taken immediately from the ship to the hospital, it is to be presumed he left with the assent or under the direction of the master. No evidence is given that the master offered him provisions or medicines on board the ship, or afterwards reclaimed him from the hospital or gave him an opportunity to return to the vessel; and as it appears that the ship was sold at Callao in July, immediately after and

about the time the libellant was discharged from the hospital at Valparaiso, and was transferred to foreigners, and went directly into their employ, he was not bound, if within his power, to join her or continue in her service. Such sale by the owners terminated the contract on the part of the crew, and they were placed by it, at their option, in the same condition as to their rights and remedies as if they had been discharged from the vessel or her voyage had been wholly abandoned. Hindman v. Shaw [Case No. 6,514]; Emerson v. Howland [Id. 4,441]; Moran v. Baudin [Id. 9,785]; The Cambridge, 2 Hagg. Adm. 243.

The cases cited recognize the rule of the maritime law, that seamen in case of abandonment abroad or the sale of the vessel, are entitled to compensation by damages; and various methods are indicated for ascertaining and fixing the amount of such damages. The act of congress of February 28, 1803, c. 62 [2 Story's Laws, 883; 2 Stat. 203, c. 9], may perhaps be regarded as prescribing the rule of damages when the voyage is broken up in a foreign port by the sale of the vessel, but it would not necessarily include the case of a seaman left in a foreign port by the vessel previous to her sale. His rights would be fixed by that abandonment of him by the master, and not by the after sale of the ship. Although compensation by way of damages against the master or owners for such departures from the contract imputes it to be wrongful in respect to the sailor, yet the common occurrences of commercial business naturally leads all parties to contemplate changes of that character as incident to navigation and trade; and the courts, accordingly, rarely if ever countenance a demand of vindictive damages therefor as cases of wanton and unjustifiable tort. Wolf v. Oder [Case No. 18,027]; The Elizabeth, 2 Dod. 407, 411.

The courts seek rather a fair indemnification of the seamen than the infliction of punishment on the master or owners of the ship. But indemnity will ordinarily be found in continuing the wages of the seamen to the termination of the voyage, and his return to his home port, or for a time reasonably sufficient for such return, together with repayment of the expenses of his passage, when any have been incurred. On the other hand, he is to be considered compensated pro tanto towards those allowances, by wages earned by him in the interim. 2 Dod. 411; Ex parte Giddings [Case No. 5,404]; 3 C. Rob. Adm. 92; Hoyt v. Wildfire, 3 Johns. 518; Ward v. Ames, 9 Johns. 138; 11 Johns. 66; Pitman v. Hooper [Case No. 11,185]. And such earnings will be credited the owner and deducted from the total amount of wages.

In this case I think the libellant is entitled to wages up to his arrival in this port, and as to him the voyage is to be regarded terminated at that time. The libel does not demand the three months extra wages provided by the act of February, 1803, because of the sale of the ship, and it is not, therefore, necessary to inquire whether the payment can be enforced when the sale is after the actual connection of the seaman with the vessel is ended. There is no foundation in the reason of the case, nor do I find any in the authorities for considering the voyage continuing, in respect to time, until the actual return of the ship to the United States. Had he been brought home by the vessel as soon as he could return from Valparaiso, the contract of the ship would have been ended at her option, although he was in full health and desired to continue with her the full period of time stipulated in the shipping articles; and all he could equitably require of the ship or owners, in his enfeebled condition, was to replace him in his home port without charge, and with the continuance of wages to the time of his return. There is no fact in proof from which it can be implied that the libellant incurred any expense for his passage home, and no allowance, therefore, can be awarded him other than his wages. He has given no proof in support of his allegation that the master detained his wearing apparel on board the ship when he left her for the hospital at Valparaiso; and, in the absence of testimony, the presumption is, that he took it ashore with him. The inference that a sailor's wearing apparel is detained by the ship could never be raised, except in case of his desertion, or being forcibly put ashore, or wrongfully abandoned by the master when ashore.

The remaining inquiry upon the merits is, whether the libellant is entitled to be maintained at his home port during the continuance of the malady contracted on the voyage, and cured at the expense of the ship or owners. The doctrine of the maritime law, declared in the ordinances, edicts and decisions of commercial nations is, that a mariner falling sick during a voyage, or hurt in the performance of his duty on ship-board, is to be cured at the expense of the ship. Abb. Shipp. p. 146, note 1; 2 Browne, Civ. and Adm. Law, 182; Curt. Merch. Seam. 106–110, and the authorities there cited; 3 Kent, Comm. 184, 185.

The libellant insists that both public policy and the plain text of the laws of the sea give him a fixed right to be treated and maintained at the charge of the respondents whilst his disability remains. A like position was taken in the first circuit in the case of Reed v. Canfield [Case No. 11,641]. Judge Story felt the force of the interrogatory which naturally arises from this rule. Is the obligation imposed a positive one to cure the seaman? And does it stand in force so long as the illness or the wound incurred on ship board is unhealed? And in my humble judgment his decision in the cause fails to supply a clear and satisfactory explication of the difficulty. His answer is, that the law embodies in its very formula the limit of the liability. The seaman is to

be cured at the expense of the ship of the sickness or injury sustained in the ship's service; and when the cure is completed, at least so far as ordinary medical means extend, the owners are freed from all other liability. Reed v. Canfield [supra]. This statement indicates no limitation to the obligation of the owner short of a complete cure, unless it may be implied that he does not become responsible for inefficient efforts to cure, when ordinary medical means are used, and fail to accomplish it. But it would seem to result from the terms in which the doctrine is stated, that the owner remains chargeable with the expenses sustained by a seaman in employing medical means to effect a cure, so long as the necessity for such expenses abides. Certainly the court in that case points out no restriction or qualification to such absolute obligation. The doctrine is supposed to be founded in the laws of Oleron (articles 6 and 7), and to be incorporated into the maritime codes of most commercial nations. Pardessus' Collection of Maritime Laws, vols. 1, 2, 3; Cleirac, Us et Coutumes, 5 Poth. p. 376, arts. 188, 189; 2 Browne, Civ. & Adm. Law, 182. The French Ordinance of Marine and Code du Commerce adopt the rule in the same general language; the seaman is paid his wages, and tendered and nursed at the expense of the ship when he falls sick during the voyage. Ord. Mar. art. 11; Code de Comm. liv. 2, tit. 5, art. 262. It is manifest that a construction of this law, which should charge owners of vessels with the support of sick crews without limitation of time, would be most oppressive in its consequences, if it did not also tend to impair to a serious degree the maintenance and prosperity of a merchant marine, and thus become a public evil. The ship and owner would be rendered liable for the support of sick seamen out of each successive crew and voyage, who would be made pensioners upon the owner so long as their infirmities remain uncured. This rule does not embody in itself any restriction or limitation of liability short of the consummation of a cure, and the case of Reed v. Canfield [supra], in reposing upon the formula of the law as the measure of the owner's responsibility, would seem to sanction and adopt it according to its natural bearing. All from which the owner is exempted by that doctrine is a liability of sailors for consequential damages to them resulting from their sicknesses or bodily wounds; but its apparent tenor is to demonstrate that an uncured malady or wound is not of that character, and the inference accordingly is that the owner, after the voyage has been completed, is yet subject to charges for its treatment until a full cure is effected. It is not necessary to discuss the application of the rule to special classes of cases nor to impugn the justice of the decision in Reed v. Canfield upon the circumstances of that case. But I cannot subscribe to the position that seamen can exact any remuneration from owners of a ship after a voyage is completed, and their connection with the vessel has ceased, in satisfaction of expenses for their support or medical treatment incurred subsequent to that time.

The privilege of seamen, in distinction from the rights of others hired for services (Poth. Cont. Louage de Matelots, art. 189), is to have wages so long as they are bound to the ship, although disabled from performing any services, and a continuance of their right to maintenance and cure is justly concurrent with that privilege, and in principle ought not to extend beyond it. Pothier vindicates the allowance of these extraordinary privileges upon the policy of encouraging men to embrace that profession, and also because having to run the risk of losing all wages in case of the loss of the vessel and freight by shipwreck, it is just, in recompense of such risk, that their pay should continue during periods they may be prevented rendering services by reason of sickness or disabilities incurred on board, being a vis major in that respect. 5 Poth. p. 377, art. 189. And it is to be remarked that this learned jurist suggests no direct limitation to the provision for sickness, and that his language might be taken to imply that the duration of wages is to be coeval with the continuance of the disability. His words are: "L'ordonnance conserve aux matelots leur loyers pendant le temps de leur maladie, lorsqu'é tant au service du navire ils sont tombés malades pendant le cours du voyage." In my opinion, however, this position imports that the treatment for sickness stands on the like footing, and is recoverable by the seamen for the same period as wages, it being a part of their necessary nourishment during the term of their hiring.

The terms of the ordinance of Louis XIV. art. 11, unite the provision for wages and sickness, and apply the recompense alike to both: "Le matelot qui tombera malade pendant le voyage, sera payé de ses loyers et pansé aux depens du navire." Valin, in his commentary on the article, reasons theoretically that it would be just that seamen wounded in combating for the defence of the vessel or cargo, if maimed or disabled for life, should be supported during life at the expense of the ship and cargo; but he says a burthen of the kind would check commerce, and besides, that pensions or recompenses of that character should not be thrown on individuals, but be bestowed by governments. 1 Valin, 722. This sentiment had relation to military services, and no way favors the doctrine that seamen in commercial employment alone acquire a right against individual ship-owners to any support or cure after the term of their employment is ended. Cleirac plainly limits the privilege in stating that seamen sent ashore to the hospital are to be maintained there at the expense of the ship, whilst the voyage

endures. Cleirac, Us et Cout. 17, e. Thus, by implication at least, recognising the liability in respect to the case of sick seamen, to be no further in extent of time than payment of wages. Boulay-Paty cites an arêt of the court of cassation, giving to the provision in the Code, that the sick seaman shall be treated and cured at the expense of the ship (Code du Commerce, art. 262), the qualification, "whilst he is on the ship, or employed in its service." 1 Boulay-Paty, 202. This, in my opinion, is the sensible limitation of the rule, and enforced to that extent, it affords a liberal and just encouragement to seamen, without imposing an indefinite burthen on ship-owners. To give to the provision the full effect of the terms in which it is expressed, would be to cast upon ship-owners the charge of all seamen, for their lives, who fell sick, or were injured at any time in the employment of their vessel. A liability so hazardous would be oppressive and disastrous to navigation and trade.

I hold that the right of the libellant to wages, and his right to support or medical treatment at the expense of the respondents, supposing his cure not then completed, ended on his arrival in New-York, October 31, 1840, and that his demand for further compensation in that behalf must be denied.

Several formal objections were taken by the respondents to the correctness and sufficiency of the pleadings and proceedings on the part of the libellant. They do not appear to the court of a character to affect the merits or the form of the decree asked for. It is objected, that no order is prayed against Swasey, one of the respondents, and that accordingly he cannot be charged, in any respect, as the decree must be in correspondence with the allegations and prayer of the libel. The name of this respondent is written in the body of the libel but is not repeated in the prayer. The libellant, however, asks for a decree conformably to the case made by him, and it was no way essential that he should pray it specifically against each of the respondents by name. At most the error is merely formal, and can be rectified by the court at hearing, if important to give consistency to the minutes, or to render the ultimate act of the court formally correct. Dunl. Adm. Prac. 283; Id. 211; Betts, Adm. 57, 59; Jud. Act Sept. 24, 1789, § 24 [1 Stat. 85]. If the objection was in any way important to the interests of the defence, and had been made by special exception before issue upon the merits, and the court had exacted in the structure of the pleading all the provisions required by courts of common law, or in England by the ecclesiastical courts, the act of congress authorizing amendments and the practice of this court, would enable the party committing the error to have it rectified instanter at any time before final decree rendered and the close of the term. The death of one of the respondents since the suit was commenced cannot affect the proceedings. It would be irregular at law to raise the objection on proof at the hearing, and in this court no advantage could be taken of it by any mode of pleading, when the cause of action survives. Cir. Ct. Rules 56-59. All that the practice of the court would require would be the suggestion of the fact on the proceedings, or apud acta, and that ordinarily must be made by the parties with whom the death has occurred, and not by the opposite ones. There is accordingly no deficiency shown in the pleadings which can prevent or delay judgment for the libellant.

I think the libellant is entitled to recover full wages up to the time of his arrival at this port, and interest upon the sum which shall be reported due him from the time his suit was commenced. He had made no previous demand on the respondents, and remained here from 1840 without notice to them of his existence, or that he had any claim against the ship or them for wages. His excuse, that he was waiting the return of the ship, ought not to avail him to impose interest on the respondents, without proof that they knew of his services, and that wages were in arrear to him. If his action was defended under the expectation that he could subject them to the expense of his support, so long as he remained unable to do duty and maintain himself, that hope of enhancing the amount of his recovery affords no reason for charging them with interest on a concealed demand, and one not shown by the proofs that the respondents had any means of ascertaining otherwise than by evidence in the libellant's possession.

The decree will be that the libellant recover his wages, according to his contract, from the time he entered on board the vessel until his return to New-York, with interest since the commencement of this suit, deducting all payments and advances. He will also recover his costs to be taxed.

The usual reference will be taken to ascertain and report the balance of wages due according to those directions.

Case No. 10,139.

NEVITT v. MADDOX.

[4 Cranch, C. C. 107.][1]

Circuit Court, District of Columbia. Dec. Term, 1830.

SUIT BY INSOLVENT DEBTOR AFTER DISCHARGE.

An insolvent debtor discharged under the insolvent act of the District of Columbia [2 Stat. 237] cannot maintain a suit in his own name, for a cause of action which accrued before his discharge, nor can his administrator.

Assumpsit, by the administrators of Charles L. Nevitt, who had been discharged under the

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

"Act for the relief of insolvent debtors within the District of Columbia," after the cause of action accrued and before the bringing of this suit.

At the trial, Mr. Coxe, for defendant [William R. Maddox], objected to evidence of any cause of action which accrued before the discharge of the plaintiff's intestate; as all his choses in action existing at the time of his discharge had passed to Mr. Dawson, the trustee appointed under the act; and this among the rest.

Tabbs & Key, for plaintiffs, contended that the action may be now entered for the use of Mr. Dawson, the trustee, and maintained in the name of the administrators.

But THE COURT (THRUSTON, Circuit Judge, absent,) was of opinion that the action could not be brought and sustained in the name of the insolvent after his discharge upon a cause of action existing at the time of his discharge. Non-pros.

NEW ALBANY (PUTNAM v.). See Case No. 11,481.

NEW ALBANY, ETC., RY. CO. (BILL v.). See Case No. 1,407.

NEW ALBANY, ETC., R. CO. (WILLIAMSON v.). See Case No. 17,753.

Case No. 10,140.

In re NEW AMSTERDAM FIRE INS. CO.

[6 Ben. 368.] [1]

Circuit Court, S. D. New York. Feb., 1873.

ACT OF BANKRUPTCY—CORPORATION DISSOLVED BY STATE COURT—JURISDICTION.

1. A district court has jurisdiction to declare bankrupt a corporation which has been dissolved by a state court, but the proceeding must be commenced within six months after the corporation has been dissolved.

2. A corporation was dissolved by a state court and a receiver appointed. More than six months after, the receiver collected a claim of the corporation from a debtor by legal process: *Held*, that such collection was not a taking of the property of the corporation on legal process, in the sense of the bankruptcy act [of 1867 (14 Stat. 517)].

In bankruptcy.

BLATCHFORD, District Judge. The company, which was a New York corporation, was dissolved by an order of the supreme court of New York, on the 14th of December, 1871, and a receiver of all its property was at the same time appointed by that court, in proceedings instituted by the attorney-general of the state. The petition in bankruptcy in this matter alleges that the corporation has carried on business in this district for a period of six months next preceding the date of filing the petition. The act of bankruptcy alleged is, that the corporation, on the 17th of October, 1872, being insolvent, suffered the sum of $205.23, being money due to the corporation from the estate of one George Schenck, a bankrupt, to be taken on legal process by said receiver, with intent thereby to give a preference to one or more of its creditors, and with intent to delay and defeat the operation of the bankruptcy act.

The 39th section requires, that the petition shall be brought within six months after the act of bankruptcy shall have been committed. The latest act of bankruptcy which the corporation can have committed was committed by it on the 14th of December, 1871, by its suffering the receiver to be appointed, and its property to be taken by him on legal process. He took all of its property then, under the legal process by which he was appointed. That was more than six months before this petition was filed, this petition being filed February 19th, 1873. The receiver has not taken any of the property of the corporation, on legal process, since the 14th of December, 1871, nor has any property of the corporation been taken by any one else since that time, on legal process, in the sense of the act. He, at that time, took, on legal process, the claim of the corporation against the estate of Schenck, in so far as such claim has ever been taken by him on legal process. His collection of that claim from the estate of Schenck, on the 17th of October, 1872, is not a taking of the property of the corporation, on legal process, in the sense of the act. The petition should have been brought within six months after the 14th of December, 1871. While a district court has jurisdiction to adjudge a corporation bankrupt, although the corporation has been dissolved by a state court (In re Independent Ins. Co. [Case No. 7,018]; Platt v. Archer [Id. 11,213]; In re Merchants' Ins. Co. [Id. 9,441]), yet the proceeding must be commenced within six months after the corporation has been dissolved. It was so commenced in the three cases above cited. The views adopted by the district court in Louisiana, in Thornhill v. Bank of Louisiana [Id. 13,990], and by the circuit court for that district in the same case [Id. 13,992], have not been adopted in this district, and I am not prepared to adopt them, until they are approved by the circuit court for this district.

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

Case No. 10,141.

The NEWARK.

[1 Blatchf. 203.] [1]

Circuit Court, S. D. New York. Oct. Term, 1846. [2]

SHIPPING—DAMAGE TO CARGO—PERIL OF THE SEA—BAD STOWAGE—LARD AND TOBACCO.

1. The ship N. sailed from New-Orleans for New-York, on the 20th of June, with a cargo of

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

[2] [Reversing Case No. 4,602.]

tobacco in hogsheads and lard in barrels; when seventeen days out, without having met any very rough weather, lard was pumped from her; the tobacco was damaged by the lard running into it. *Held*, that the damage was occasioned by some cause other than the perils of the sea, such as bad stowage or cooperage, and that the ship was responsible for it.

2. If, under such circumstances, a peril of the sea, subsequent to the first pumping of the lard, and wholly unconnected with the fault of the carrier in the defective stowage or cooperage of the lard, is set up as the cause of the damage, the evidence should be clear and undoubted in order to exonerate the carrier from liability.

3. In this case, the court being satisfied that the barrels of lard were badly stowed and coopered, charged the damage to the carrier.

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

Faber & Bierwith filed a libel in rem, in the district court, against the ship Newark, to recover damages for injury caused to tobacco in hogsheads, shipped by them in that vessel from New-Orleans to New-York. The damage was caused by the leakage of grease or lard which ran into the tobacco in the hold of the ship. The bill of lading excepted "the dangers of the seas." The district court pronounced against the libellants, on the ground that the barrels of lard were properly coopered and stowed when put on board, and that the injury to the tobacco was not occasioned by the leaking of the lard directly upon the tobacco, but by stress of weather which caused the ship to leak. The libellants appealed to this court.

Francis B. Cutting, for libellants.
Erastus C. Benedict, for claimants.

NELSON, Circuit Justice. I cannot agree, upon the evidence, that the loss in this case was occasioned by the perils of the sea. The ship left New-Orleans for New-York on the 20th of June, loaded chiefly with lard and tobacco, having nearly seven hundred barrels of the former; and on the 7th of July, when she was seventeen days out, without having encountered any remarkably rough weather, indeed none, except occasionally a heavy swell of the sea, lard was pumped from her, showing, at this time, a very considerable leakage of that article from the casks. The tobacco was damaged by the leakage of the lard. It is quite obvious that, previous to this time, the leakage must have been such as to occasion a good deal of damage; and further, that such was the condition of the cargo, from some cause or causes other than the perils of the sea, either from bad stowage or cooperage, or both, that there was a leakage of the lard which would or might have occasioned all the loss complained of. This fact, I think, is undeniable, and is controlling in the case. For it is vain to urge the subsequent rough weather as affording evidence that the loss was occasioned by the perils of the sea, when it distinctly appears that the operating cause was developed previous to the alleged peril, in a manner sufficient to account for all that happened to the cargo, without attributing any part of the damage to the rough weather which the ship afterwards encountered.

It may be that if a subsequent peril of the sea had clearly occasioned a loss of the tobacco, wholly unconnected with the defective stowage or cooperage of the barrels of lard, the loss should not be borne by the carrier. But the facts present no such case. The loss by the subsequent peril of the sea unconnected with the fault of the carrier must be clear and undoubted, in order to exonerate him from liability.

It is not to be denied, that the shipping of lard with tobacco from New-Orleans in the warm season, exposes the latter to great danger from the leakage of the former, and requires the utmost care in the stowage, and attention to the cooperage of the casks of lard. Some of the witnesses say that lard is a dangerous cargo to ship with other goods like tobacco, and that, without the greatest caution, damage will ensue. Now, I am not satisfied, from the evidence, that sufficient attention was given to the stowage or cooperage of the cargo under the circumstances. Most of the damage occurred to the tobacco in the lowest part of the hold; the hogsheads in the forward and after parts of the ship escaped; and several of the witnesses express doubts and hesitation on the subject of the stowage. The barrels of lard, also, were leaking badly, and had leaked very much, when delivered on the dock for shipping, and before they were put on board. Such is the evidence of the mate, and I understand his logbook to state, under date of the 7th of June, that from a great number of them, one-fourth to one-half of their contents had leaked out when they were at the dock. It is true, he says, they were all well coopered before they were put on board. But the result, I think, is evidence that this could have been done but imperfectly; else, why such extensive leakage before the 7th of July, without any uncommon weather? For, I cannot admit that the swells of the sea, spoken of previously, are to be regarded as anything more than what must be usually expected to be encountered in the course of the voyage. The Reeside [Case No. 11,657], and cases there cited.

I am of opinion, therefore, that the decree of the court below should be reversed, with costs, and that there should be a reference to the clerk to ascertain the damages.

NEWARK, The (FABER v.). See Case No. 4,602.

NEWARK INDIA RUBBER MANUF'G CO. (DAY v.). See Case No. 3,685.

Case No. 10,142.

NEWARK SAVINGS INST. v. PANHORST et al.

[7 Biss. 99;[1] 8 Chi. Leg. News, 211.]

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

TOWN SUPERVISORS—REFUSAL TO PLACE JUDGMENT OF TAX LIST—MEASURE OF DAMAGES.

The highest damages which will be allowed in the United States courts, against the supervisors of a town for a refusal to put a judgment on the tax list, even though a mandamus shall have issued, will not exceed a counsel fee and costs.

[Cited in Branch v. Davis, 29 Fed. 894.]

At law.

John M. Palmer and John Mayo Palmer, for plaintiff.

Lyman Trumbull, John J. Rinaker, C. A. Walker, and W. R. Welch, for defendants.

DRUMMOND, Circuit Judge. This is an action on the case to recover damages for non-performance of a duty by the defendants, as supervisors of the county of Macoupin. The plaintiff recovered two judgments in this court against the county of Macoupin, amounting, altogether, to over $100,000, and writs of mandamus were issued, requiring the supervisors to levy a tax of one per cent. of the assessed value of the property in the county, to pay the judgments. The writs of mandamus were issued on the 24th of May, and the 28th of August, 1873, respectively. They were served upon the board of supervisors of the county, and the defendants all had notice of the fact that writs of mandamus had been issued, independent of the general obligation which the law imposed upon them to discharge the duty. The attention of the defendants was, therefore, in these writs, specially called to the duty incumbent upon them, to impose a tax to pay the judgments. They wilfully disregarded and disobeyed these orders of the court; in other words, violated a solemn obligation. For this disobedience to the order of the court, and for the non-performance of the duty required by the law, this action was brought, and the only question is, what is the amount of damages that can be recovered in the case.

It may, perhaps, be said, although it can hardly be considered as proved in the case, but still it has been argued somewhat upon that undisputed fact, that, for this disobedience to the orders of the court, the parties were fined, and the fine was paid. But it was not paid by themselves. They took the money of the county and paid the fine. And these fines were, it is understood, appropriated in part to the payment of costs.

A decision of the supreme court of the United States, not yet reported (Dow v. Humbert, 91 U. S. 294), has restricted us very much as to the quantum of damages which should be allowed in a case like this. That court has decided, in effect, that the measure of damages is not the amount of the claim. At the same time it is stated that if the plaintiff has sustained any special damages, they can be recovered.

Looking at the whole case, without going into the reasons which have influenced the conclusion, and regarding the decision above referred to as allowing nothing more than quasi nominal damages, we have determined that we will give the plaintiff some compensation for the trouble to which it has been put in consequence of the non-performance of a duty by the defendants, in the employment of counsel, and for the labor and expense, without defining it in any precise form or language.

In the case of Dow v. Humbert, supra, a demand was made on the officers of the town to place upon the tax-list the judgments then in question, which was necessary under the laws of Wisconsin, before the judgments could be paid. That was not done. The supreme court thereupon assumed that it might have been in consequence of ignorance, inadvertence, or mistake on the part of the officers, although it does not exactly appear how, or under what circumstances that inference was drawn.

There certainly can be no such assumption here. In that case there were allowed only nominal damages. Here the case is infinitely more aggravated. In fact it is as much so as it possibly can be. It is a case where the defendants have set at defiance the orders of the court—orders they were bound to obey—a case in which they were as guilty of violation of an imperative duty as men well can be. This court is a part of the institutions of their country, just as much as the circuit court of Macoupin county. They are just as much bound to obey its mandates as though it was a court of their own county. They have chosen deliberately to disregard them.

It is said, indeed, that we have punished them, and can punish them again. That is true, but this is an action brought for the violation of a public duty, which has resulted, it is claimed, in pecuniary loss to the plaintiff. So that it is a case where we think we may go further than the supreme court said they could go in the Wisconsin case. But at the same time we feel restricted, as I have said, by the rulings of the supreme court, and, while we give some damages, after all they will amount to not much more than nominal damages.

We will allow five hundred dollars to the plaintiff, and eighty-five dollars for the payment of the money for notices. The judgment of the court will be therefore for the plaintiff for the amount of $585 and costs. The parties who were not present at the meeting of the board of supervisors at which the

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

act of disobedience occurred, as well as those who voted for the imposition of the tax, as directed by the writs, are not, of course, included in this judgment.

I ought, perhaps, to add, that our view was, if we were left free by the decision of the supreme court, that the plaintiff would at least be entitled to the interest upon the money which would have been collected, if the defendants had performed their duty.

The presumption is, the plaintiff could have had the use of the money, and, in one sense, might have compounded the interest. But we think we are not at liberty, under the decisions of the supreme court, to allow it. That court seems to think that as the interest is still due and payable, and may be included with the principal, that is all which can be allowed.

We have also thought that there has not been, within the meaning of the supreme court, any substantial "impairment" of the responsibility of the county. It is true, that the assessed value of the property of Macoupin county was much less in 1875 than it was in 1873; but still it appears that the property is sufficient to enable the county to pay. At any rate, the fund out of which these judgments are to be made is sufficiently large to enable the plaintiff to avail itself of the laws to recover the amount.

It is also true, that under the decisions of the supreme court, these judgments against municipal corporations, where people do not choose to pay them, are not very potential. It has held that where the laws of a state declare that there can be no execution against the property of a municipal corporation the federal courts are without power to collect judgments by the imposition of taxes, although that may be the only resource. Rees v. Watertown, 19 Wall. [86 U. S.] 107.

And now it has been decided, substantially, that the officers of such corporations are not liable for more than nominal damages, if they refuse to perform the duty which the law imposes on them. The result is, judgments can be obtained in the courts against these municipalities, upon the bonds or coupons they have issued, and their obligations construed with the greatest rigor, but after judgments, and when it is attempted to make their property available to satisfy them, then arises the real difficulty of the case, in the effort to overcome which, the old legal maxim, that there is no wrong without a remedy, seems sometimes to be reversed.

NEW BEDFORD BRIDGE (UNITED STATES v.). See Case No. 15,867.

NEW BEDFORD COMMERCIAL INS. CO. (LAWRENCE v.). See Case No. 8,140.

NEW BEDFORD COPPER CO. (RICHMOND v.). See Case No. 11,800.

NEWBERRY (BARRON v.). See Case No. 1,056.

Case No. 10,143.

NEWBERRY v. The FASHION.

[1 Newb. 67.] [1]

District Court, D. Michigan. 1856.

SHIPPING—SALE OF VESSEL AND APPURTENANCES—WHAT PASSES.

Where one sells a steamboat with all appurtenances, &c., and prior to the sale, the owner had procured a new ash-pan for the boiler, which had been delivered to the owner, but was not placed on board the boat, *held*, that the ash-pan passed under the bill of sale as appurtenant to the boat.

In admiralty.

John S. Newberry, for libelant.
Levi Bishop, for respondent.

WILKINS, District Judge. This libel is brought to recover the value of an ash-pan, taken by the claimants from the dock of Oliver Newberry, and by them fixed in their steamboat. The libelant was the former owner of the Fashion, and during his ownership, in 1854, procured this new ash-pan, for her use, the old one being worn out, and rendering the navigation of his vessel unsafe. It is in testimony that this new ash-pan was delivered for the Fashion, at the dock of Oliver Newberry, and there remained during the winter of 1854-5, the navigation being closed, and the Fashion being in dock for the winter. It is in proof also that by measurement, the new ash-pan fitted the vessel for which it was made, and that the old one was unfit for service, and of no value but as old iron. On the 14th of February, 1855, the libelant sold the fashion to Oliver Newberry, the ash-pan in question being then on his dock; and by the bill of sale transferred his title in the boat with her engine, tackle, apparel, furniture and appurtenances, to the vendee, who, shortly after, by a similar bill of sale, sold the same to the respondents. After this sale, the engineer of the Fashion sent for the ash-pan, and on inquiry at the counting-room of Oliver Newberry, it was pointed out by one of the clerks, and the same was taken without dissent, and placed on the Fashion. The bill of sale controls the question, as to the intention of the parties. It is true that Oliver Newberry bought the vessel, without a knowledge of the fact, whether or not a new ash-pan was necessary, and had been procured; but his purchase embraced all that property appertained to the vessel, her tackle, her fixtures and her apparel; and such was clearly the intention of both vendor and vendee, when they executed the bill of sale. Had Oliver Newberry remained the owner, and fitted out the vessel in the spring, there can be no question but what he would have claimed the ash-pan as an appurtenance embraced in the bill of sale—and rightfully too—and his sale to the respondents passed all his rights. Decree dismissing libel, with costs.

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

NEWBERRY (WELLES v.). See Case No. 17,378.

NEW BRIG (DAVIS v.). See Case No. 3,643.

NEW BRIG (HARPER v.). See Case No. 6,090.

NEW BRUNSWICK CARPET CO. (WEBSTER v.). See Cases Nos. 17,337 and 17,338.

NEWBURY (MOORE v.). See Case No. 9,772.

Case No. 10,144.

NEWBY v. OREGON CENT. RY. CO. et al.

[Deady, 609;[1] Cox, Manual Trade-Mark Cas. 180.]

Circuit Court, D. Oregon. Aug. 3, 1869.

CORPORATIONS—NAME AS A TRADE-MARK—RIGHT TO SUCH NAME—JURISDICTION OF EQUITY TO ENJOIN ITS USE.

1. The corporate name of a corporation is a trade-mark from the necessity of the thing, and upon every consideration of private justice and public policy deserves the same consideration and protection from a court of equity.

[Cited in State v. McGrath (Mo. Sup.) 5 S. W. 30.]

2. A corporate name is a necessary element of a corporation's existence, and any act which produces uncertainty or confusion concerning such name, is well calculated to injuriously affect the identity and business of the corporation.

[Cited in Wells v. Oregon Ry. & Nav. Co., 15 Fed. 567.]

[Cited in State v. McGrath (Mo. Sup.) 5 S. W. 30.]

3. The right to a corporate name does not rest in parol, but is shown by the record and is triable by inspection thereof in any form of proceeding—therefore a court of equity will not refuse to enjoin the use of such name because the right to the same has not been established at law.

[Cited in American Order of Scottish Clans v. Merrill, 151 Mass. 562, 24 N. E. 919; Ft. Pitt Bldg. & Loan Ass'n v. Model Plan Bldg. & Loan Ass'n, 159 Pa. St. 311, 28 Atl. 215.]

4. The jurisdiction to enjoin the use of a corporate name does not depend upon the insolvency of the defendant.

5. The insolvency of a corporation, the legality of the subscription to its capital stock, and the validity of its organization generally, may be judicially investigated, whenever and wherever such investigation becomes material to the determination of the rights of third persons, who are parties to a judicial proceeding before the court.

[Cited in Re Oregon Bulletin Printing & Publishing Co., Case No. 10,560.]

6. Where a creditor of a corporation, as a bondholder, has a lien upon a grant of land or other property owned or claimed by such corporation, and another corporation is wrongfully using such corporation's name for the purpose of obtaining such grant of land, such creditor may maintain a suit in equity to enjoin such other corporation from such wrongful use of his corporation's name.

7. An agreement by a corporation to prefer its bondholder in the disposition of 50 per centum of the proceeds of its lands, which may be sold before such bond becomes due, does not give such bondholder a lien upon the corporation lands.

8. Quere, can a mere bondholder of a corporation maintain a suit to enjoin another corporation from doing unlawful acts which depreciate the conventional value of such bond in the market.

9. In a suit to enjoin the use of a corporate name, the corporation whose name is alleged to be wrongfully used must be a party plaintiff or defendant, but if such corporation refuse to bring such suit upon request, its bondholder or creditor may do so, and make such corporation a party defendant.

[10. Cited in Nebraska Loan & Trust Co. v. Nine, 27 Neb. 512, 43 N. W. 349, to the point that a geographical name cannot become the subject of property as a trade-name, unless coupled with words which qualify the general geographic term.]

[This was a bill in equity by James B. Newby against the Oregon Central Railway Company, George L. Woods, E. N. Cooke, J. H. Douthitt, J. R. Moores, Thomas M. F. Patton, John H. Moores, Jacob Courser, A. Laurence Lovejoy, F. A. Chenoweth, Stukeley Ellsworth, Stephen F. Chadwick, John E. Ross, J. H. D. Henderson, John F. Miller, Absalom F. Hedges, Samuel B. Parrish, and Green B. Smith.]

W. Lair Hill, for complainant.

Joseph N. Dolph, for defendants.

DEADY, District Judge. This suit is brought to enjoin the defendants from using the name "The Oregon Central Railway Co." and from issuing bonds bearing said name. It was commenced on February 9, 1869. The defendants on April 5, filed ten exceptions to the complainant for impertinence, which exceptions, after arguments by counsel, were disallowed on April 12th thereafter. On May 3, 1869, the defendant corporation demurred to the complaint, as did the other defendants, by a separate and similar demurrer. On May 15 and 22 the demurrer was argued by counsel and the cause submitted to the court for determination.

Substantially, the allegations of the complaint are as follows:

(1) That the complainant is a citizen of California and the defendants are all citizens of Oregon.

(2) That the corporation defendant was organized about April 22, 1867, under the laws of the state of Oregon, with its place of business at Salem, for the purpose, as expressed in its articles, of constructing and operating a railway for the transportation of passengers and freight from Portland in a southerly direction about three hundred miles, to the northern line of the state of California.

(3) That long prior to the incorporation of such defendant corporation, another corporation was duly incorporated under the laws of Oregon, under the name of "The Oregon Central Railway Co.," for the purpose as expressed in its articles of constructing and operating a railway from Portland, in a southerly direction, about three hundred miles, to the northern line of the state

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

of California, under the laws of Oregon and the act of congress, approved July 25, 1866 [14 Stat. 239], entitled "An act granting lands to aid in the construction of a railway and telegraph line from the Central Pacific Railway to Portland, Oregon," and the amendments thereto; and that about October 1, 1866, the articles of this corporation were published in full in sundry newspapers then published in Portland, Salem, Eugene, and elsewhere in Oregon, and that about October 11, 1866, the legislative assembly of Oregon, after hearing the articles of this corporation read before it, and upon the application of said corporation, did, by the passage of a joint resolution, namely, house joint resolution No. 13, designate and appoint this corporation to receive and manage so much of the land and franchises proposed to be granted by said act of congress, as should lie within the state of Oregon, which designation and appointment was in all respects regular and in accordance with said act of congress.

(4) That thereafter, and within the time prescribed by said act of congress, said last named corporation duly gave its assent to the terms proposed by said act, which assent was duly filed with the secretary of the interior of the United States; and such corporation is now proceeding to construct said railway as by said act required, in order to receive the benefits arising therefrom; and that said act of congress among other things provided, that the company complying with the conditions thereof and being designated therefor by the assembly aforesaid, should receive twenty sections of the public land within the state of Oregon for each mile of such railway, to aid in the construction thereof, together with the right of way, and other valuable privileges, in the public lands along the line of said railway.

(5) That by reason of the matters aforesaid, the last named corporation became possessed of valuable franchises and rights, in consideration of which its credit was established in the principal money markets of the world, so that its bonds and obligations became valuable and marketable commercial paper, by means whereof it was enabled to meet its obligations incurred in the construction of said railway; and that on June 25, 1868, said act of congress was amended so as to extend the time for the completion of the first and the subsequent sections of said railway; and that said corporation will be able to comply with said act of congress, and be entitled to receive the land and other franchises proposed to be granted thereby.

(6) That said last named corporation, for the purpose of raising money to construct said railway, issued bonds of the denomination of $1,000 each, payable in gold coin, to bearer, on January 1, 1869, with forty-one interest coupons attached to each of said bonds, which coupons were payable to bearer, and for the sum of $35 each, that being the amount of the semi-annual interest on each of said bonds at the rate of seven per centum per annum; and that such bonds were put in market and sold as all such other securities are sold, and that this complainant then and there became the purchaser and is now the holder and owner of two of said bonds; and that said bonds are secured by a first mortgage upon all the real and personal property of said corporation—excepting the subscriptions to the stock thereof—and upon all its rights under said act of congress, and fifty per centum of the proceeds of any land sold by said corporation before said bonds fall due, and that by reason thereof the complainant's bonds are the most valuable of said corporation's obligations, and would be of great market value but for the wrongful acts of the defendants, as hereinafter stated.

(7) That on about April 22, 1867, certain of the corporators of the last named corporation seceded therefrom and confederated and conspired with other persons for the purpose of defrauding and injuring said corporation, and in pursuance thereof said corporators and other persons, executed the articles of incorporation of the defendant corporation herein, and incorporated and proceeded to organize the same, by the corporate name of "The Oregon Central Railway Co."—that being the name of the corporation designated by said resolution No. 13, as aforesaid; and that the incorporators of said defendant corporation then and there well knew and were duly notified of the prior incorporation of the corporation designated by said resolution No. 13, under the name aforesaid, and of its rights and franchises aforesaid, and that the incorporation of another corporation under the same name would greatly injure the credit of said prior incorporation and depreciate its bonds in the money markets, by causing confusion and misunderstanding as to which corporation was entitled to the rights and benefits guaranteed to "The Oregon Central Railway Co." under said act of congress and resolution No. 13.

(8) That said defendant corporation has fraudulently issued a large number of bonds similar in appearance and purporting to be the bonds of "The Oregon Central Railway Co.," and to be secured by a first mortgage upon all the property of said company—except subscriptions to its capital stock—and upon its rights and franchises, and put the same upon the market as the bonds of said O. C. R. Co.; and that said last mentioned bonds were wrongfully issued for the purpose of depreciating and preventing the sale of the bonds of the corporation designated by said resolution No. 13, and destroying their character as marketable securities; and that by reason of the wrongful and fraudulent acts aforesaid, the market value of the complainant's bonds has been greatly reduced, and the same rendered unmarketable; and that said

acts have caused the public, particularly bankers and the like, to believe and suspect that the defendant corporation is the one designated by said resolution No. 13, and that said wrongfully issued bonds, and not the complainants, are secured by the mortgage by which the complainant's bonds are in fact secured; and that the putting of said wrongfully issued bonds upon the market as aforesaid, as the bonds of the O. C. R. Co. will cause further depreciation of your complainant's bonds, and cast confusion and suspicion upon and about the bonds of the corporation designated by said resolution No. 13.

(9) That said defendant corporation, by its officers, is threatening to issue, and unless restrained by the court, will issue a large amount more of its bonds, purporting to be the bonds of the O. C. R. Co., and to be secured as aforesaid, by which complainant's bonds will be further depreciated and their market value destroyed to his damage not less than $1,000.

(10) That the personal defendants above mentioned are all directors of the defendant corporation.

(11) That after the articles of incorporation of the defendant corporation were executed and filed, six of the corporators thereof subscribed $100, or one share each of the capital stock, and then passed a resolution that the president subscribe all the rest of the stock in the name of and for the corporation, there being then in fact no president, and thereupon, after George L. Woods, as president, had pretended to subscribe said stock as directed, said corporators proceeded to organize said corporation by the election of directors, and the pretended directors, so elected, then elected said Woods president, but that no other subscription to said capital stock has ever been made; and that said defendant corporation has no other property than the six shares of capital stock, subscribed as aforesaid, and is therefore wholly unable to respond to complainant in damages.

With prayer of special relief as follows: That the defendants be perpetually enjoined from the further use of the name, "The Oregon Central Railway Co.," and from issuing any more of such bonds, and such other and further relief, etc.

The causes of demurrer assigned in the demurrers of record substantially are: 1. That the bill is defective because it does not contain a prayer for process. 2. That the complainant has a plain and adequate remedy at law. 3. That it does not appear that the legal right of the last named corporation to the name—"The Oregon Central Railway Co."—has been established at law. 4. That complainant has not sufficient interest in the subject matter to maintain this suit or to the relief prayed for. 5. That the bill does not state facts sufficient to constitute a cause of suit. 6. That the complainant by his bill has not shown a case for relief in equity against the defendants. On the argument the following additional causes of demurrer were assigned ore tenus: 7. That it does not appear from the bill, that said last named corporation had refused to institute this suit, and therefore it should have been brought in the name of said corporation. 8. That this court has no jurisdiction of this suit because the subject matter in dispute does not exceed the value of $500.

By the law of Oregon any three or more persons may incorporate themselves for the purpose of engaging in any lawful enterprise or occupation. The primary step in the formation of this legal entity is the execution and filing of articles of incorporation, which articles, among other things, must specify—"The name assumed by the corporation and by which it shall be known." Code Or. 658, 659. By the execution and filing of these articles, the corporate name assumed thereby and specified therein, becomes exclusively appropriated. If afterwards any persons attempt to incorporate for any purpose by the same name, this would be an encroachment upon the rights of the first corporation, and therefore illegal. To prevent the continuance of such a wrong upon the rights of another equity will interfere at the suit of the injured party, by injunction. The case is analogous to if not stronger than that of a piracy upon an established trade mark. Bell v. Locke, 8 Paige, 75; Taylor v. Carpenter, 11 Paige, 292; Partridge v. Menck, 2 Barb. Ch. 102; Will. Eq. Jur. 402, 403. The corporate name of a corporation is a trade mark from the necessity of the thing, and upon every consideration of private justice and public policy deserves the same consideration and protection from a court of equity. Under the law, the corporate name is a necessary element of the corporation's existence. Without it, a corporation cannot exist. Any act which produces confusion or uncertainty concerning this name is well calculated to injuriously affect the identity and business of a corporation. And as a matter of fact, in some degree at least, the natural and necessary consequence of the wrongful appropriation of a corporate name, is to injure the business and rights of the corporation by destroying or confusing its identity. The motives of the persons attempting the wrongful appropriation are not material. They neither aggravate or extenuate the injury caused by such appropriation. The act is an illegal one and must, if necessary, be presumed to have been done with an intent to cause the results which naturally flow from it. Nor will a court of equity refuse to enjoin the wrongful appropriation of a corporate name until the right of the first corporation to the name has been established by the verdict of a jury in an action at law. Such right does not rest in parol but is shown by the record, if at all, and is determined by the court in any form of proceeding. Neither in such case, has the party injured an adequate and complete remedy at law. As in the case of patents for

inventions and copyrights, the remedy at law can only give redress for the past injury, and that often inadequately. But to protect the injured corporation from the mischief arising from continued violation of its rights and perpetual litigation concerning them, resort must be had to the equitable remedy by injunction. 2 Story, Eq. Jur. § 930.

Nor do I deem it material in this case to the jurisdiction in equity, that the defendant should be insolvent—unable to respond to the complainant in damages. The jurisdiction in this class of cases—trade marks, patents and copyrights—depends upon the fact that the matter is intrinsically of equitable cognizance—that the legal rights of the party can only be protected in equity, and not upon the uncertain and irrelevant test of the insolvency of the defendant. For this reason as well as the conclusion I have reached upon the rights of this complainant to maintain this suit, without the O. C. R. Co. being made a party thereto, it is not necessary to consider the question made in the complaint as to the insolvency of the defendant corporation upon the grounds of the alleged illegality of the subscription to its capital stock and the irregularity of its organization. It will not be out of place, however, to remark in passing, particularly after the argument of counsel for defendant upon that point that if any such question were to become material in this suit, for the purposes of this suit, it could be investigated and determined here as well as in any other proceeding. There is no divinity that doth hedge about the affairs of a corporation so as to preclude a judicial investigation of the facts concerning it, whenever and wherever such investigation becomes material to the determination of the rights of third persons. For instance, if it were necessary for the maintenance of this suit for the complainant to show that this defendant or any other corporation was insolvent, he would be allowed to do so, even if it were necessary in so doing to show that its capital stock was illegally subscribed or that its organization was invalid. The age or solvency of A B may become material questions in a suit to which he is not a party and in which he has no interest, but that does not preclude the parties interested and litigant from investigating the matter for the purposes of their controversy.

And this brings me to the consideration of the questions—has the complainant such an interest in the subject of this controversy as entitles him to maintain this suit; and if this question is answered in the affirmative, can he maintain the suit without making the O. C. R. Co. a party plaintiff or defendant. It being admitted by the demurrer that the complainant is a bondholder and a creditor of the O. C. R. Co., and that the corporation defendant has wrongfully appropriated the corporate name of said corporation, and is issuing bonds in said name, and is seeking by the wrongful use of such name to obtain the land granted to the O. C. R. Co., if it also appeared unqualifiedly that the bonds of the complainant were secured by a mortgage upon land granted by act of congress to the corporation designated by the resolution No. 13, I think he would have such a special interest in that property as would entitle him to maintain a suit to prevent another corporation from obtaining the same land by the wrongful use of the name of the corporation whose bonds he holds. Bradley v. Richardson [Case No. 1,786]. But upon this point the complaint is equivocal, or at least indistinct. It does not directly state that this land is mortgaged to secure the payment of the complainant's bonds. True, it is averred that the mortgage is upon all the property of the corporation; except subscriptions to its capital stock. What other property, if any, than these subscriptions and this land the corporation claims, is not shown. Now, as to the land, the complaint states specially that the mortgage is upon the rights of the corporation under the act of congress, and upon fifty per. centum of the proceeds of such of the lands thereby granted as may be sold before the bonds become due in 1889. Waiving the question of whether the corporation can mortgage these lands before the performance of the conditions on which the grant was made, and before they are selected and separated by the proper authority from the body of the public lands, this allegation rather indicates an agreement by the corporation in the disposition of the proceeds of this land sold before 1889, to prefer its bond creditors as to fifty per centum thereof, than a mortgage upon the land itself.

But counsel for complainant does not rest his right to relief upon this ground alone. He maintains that the complainant is something different from, and more than, a mere creditor of the O. C. R. Co., secured by a lien upon its property. That he is also the owner of its bonds—a species of obligation or security, which, in the progress of society and business, have acquired a conventional value, as property. That this conventional value depends upon the state of public opinion as to the resources and prospects of the corporation that issued these bonds, and thereby created this property; and that the issuing of similar bonds in large numbers, in the name of the O. C. R. Co. by the defendant corporation, works an injury to the complainant by diminishing the conventional or market value of his property. This argument is not without force and plausibility. No authority has been cited, however, in support of the conclusion, and I do not deem it necessary to express an opinion at this time upon the question made by it. For, admitting that the complainant is entitled against the defendants to the relief prayed for, either on the ground of his being the owner of the O. C. R. Co.'s bonds, or a creditor of such corporation with a lien upon its lands for security, yet I am satisfied that this suit

cannot be maintained without the O. C. R. Co. being made a party, plaintiff or defendant. Upon authority and principle, the corporation whose name is alleged to be wrongfully assumed and used, must be a party to the suit. If such corporation refuses to bring the suit after being requested to do so, the complainant may sue, and alleging the fact in his complaint, make the corporation a party defendant. Robinson v. Smith, 3 Paige, 232; Dodge v. Wolsey, 18 How. [59 U. S.] 331. The demurrer ore tenus, for want of proper parties is therefore allowed upon payment by the defendants of the costs of the demurrer on the record. 3 Paige, supra.

[NOTE. Afterwards the plaintiff amended his bill by leave. The defendants both demurred, and pleaded to the amended bill. The case was heard upon demurrer and pleas, and the bill dismissed. Case No. 10,145.]

Case No. 10,145.

NEWBY v. OREGON CENT. RY. CO.

[1 Sawy. 63;[1] 3 Am. Law T. Rep. U. S. Cts. 127.]

Circuit Court, D. Oregon. March 8, 1870.

EQUITY—NOTICE OF FILING PLEA OR DEMURRER—NATIONAL COURTS DO NOT DISCOURAGE SUITORS FROM SEEKING REDRESS IN THEIR TRIBUNALS—PLEAS IN EQUITY—NATURE—WHEN STOCKHOLDER OR CREDITOR OF CORPORATION CAN MAINTAIN SUIT FOR INJURY TO CORPORATE RIGHTS—INABILITY TO SUE NO TEST OF LIABILITY TO BE SUED IN NATIONAL COURTS — OWNER OF CORPORATION BONDS SAME RIGHT TO SUE AS STOCKHOLDER OF CORPORATION — CORPORATION NOT LIABLE TO ITS STOCKHOLDERS OR CREDITORS FOR ERROR OF JUDGMENT.

1. In equity a party does not take notice of the filing of a plea or demurrer, unless notice thereof be entered in the order book, as prescribed by equity rule 4.

2. There is no rule of law or public policy which requires the national courts to discourage suitors from seeking redress in those tribunals, and parties have a clear right to become the owners of property for the express purpose of maintaining a suit in such courts concerning the same.

[Cited in Blackburn v. Selma, M. & M. R. Co., Case No. 1,467; Collinson v. Jackson, 14 Fed. 310.]

3. Plea in equity, nature of in bar and abatement and where double allowed.

4. A stockholder or creditor of a corporation cannot maintain a suit for an injury to the corporate rights, unless it appears from the bill that the corporation refused to take proper measures to protect or redress the same.

5. The inability of a party to sue in the national courts, in a particular case, is no test of his liability to be sued in them under other circumstances.

6. The owner of corporation bonds secured by a lien upon lands claimed by the corporation, has the same right as a stockholder of such corporation to maintain a suit to prevent another corporation from obtaining such lands by the wrongful use of the name of his corporation.

[Cited in Byers v. Rollins, 13 Colo. 22, 21 Pac. 896.]

7. In choosing between remedies deemed equally effective, a corporation has a right to exercise its judgment, and for an error in this respect neither its stockholders nor creditors can call it to an account.

[This was a bill in equity by James B. Newby against the Oregon Central Railway Company, George L. Woods, E. N. Cooke, J. H. Douthitt, J. R. Moores, Thomas M. F. Patton, John H. Moores, Jacob Courser, A. Laurence Lovejoy, F. A. Chenoweth, Stukeley Ellsworth, Stephen F. Chadwick, John E. Ross, J. H. D. Henderson, John F. Miller, Absalom F. Hedges, Samuel B. Parrish, and Green B. Smith.]

Wm. Lair Hill, for complainant.
John H. Mitchell, for defendants.

DEADY, District Judge. This suit was brought to enjoin the defendants from using the name of the complainant's corporation—The Oregon Central Railway Company—and particularly from issuing bonds in the name of said corporation. It is alleged in the bill that the complainant is the owner and holder of two of said corporation's bonds, of the denomination of $1,000 each, and that for reasons stated in the bill, the use of such name by the defendants and the issuing of such bonds by them, do and will depreciate the market value of complainant's bonds to his damage not less than $1,000.

At the May term, 1869, the cause was heard on demurrer to the bill. On the argument a cause of demurrer was assigned ore tenus:—"That it does not appear from the bill that the complainant's corporation had refused to institute this suit, and therefore it should have been brought in the name of said corporation."

On August 3, 1869, the court sustained the demurrer as above assigned, and decided that the complainant's corporation must be made a party to the suit; and that if such corporation, after request by the complainant, refuses to bring such suit, the latter may allege such refusal in his bill, and make the corporation a party defendant. Newby v. Oregon Cent. R. Co. [Case No. 10,144].

Afterwards the complainant had leave to amend his bill, which he did, by making his corporation a party defendant thereto, and by alleging "that before commencing this suit your orator requested the said defendant corporation, whose bonds your orator holds and owns, as aforesaid, to bring this suit for his protection, and the said last named corporation refused so to do, and do still refuse to protect the rights of your orator aforesaid."

To the bill as amended, the natural persons named therein as defendants, demurred. The corporation charged with the wrongful use of the corporate name, filed two pleas to distinct portions of the bill and demurred to the remainder. The complainant's corporation made default.

On January 4, 1870, the defendants moved to dismiss the bill under equity rule 38, be-

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

cause the complainant had not replied to the pleas, or set down the same, or the demurrers, for argument. The motion was denied, because it did not appear that the complainant had notice of the filing of such pleas or demurrers, by entry in the order book, as prescribed in equity rule 4. Afterwards by consent of parties, the pleas and demurrers were set down for argument.

On the argument, the cause was submitted on the part of the complainant, with an admission as to the sufficiency of the second plea. The defendants filed a written brief in support of both pleas and demurrers. Both pleas are voluminous and full of details, and are pleaded as pleas in abatement. In effect, the first one alleges that the complainant is not the real owner of the two bonds mentioned in the bill, but that the same were merely transferred and delivered to him by a director of this corporation, for the sole purpose of enabling him to maintain this suit in this court, for the benefit of, or in behalf of such corporation.

If, notwithstanding the rhetorical exaggerations of this plea, it appears that the complainant has the legal title to, or interest in these bonds, then this plea is insufficient. They are payable to bearer and the title to them passes by delivery, unless the contrary is shown. The motive with which they were delivered to the complainant or he received them makes no difference in this respect. Parties have a clear right to become the owners of property real or personal, by purchase or gift, for the express purpose of maintaining a suit in this court concerning the same. In some of the earliest cases these are some dicta to the contrary of this, but their authority has not been recognized. Admitting all that can be claimed for the plea, and probably more than ought to be, it only amounts to an allegation that the father of the complainant delivered him these bonds as a gift, with the mutual understanding or expectation that the latter would commence and maintain this suit as the owner thereof. In all this there was nothing illegal or immoral or fraudulent. There is no rule of law or public policy which requires the national courts to discourage persons from seeking redress in those tribunals in every case where the constitution and laws fairly construed will permit it. This plea, I think, should be held insufficient.

The second plea alleges that it is not true that the complainant, before bringing this suit, requested his corporation to bring the same for his protection; and also, that prior to the commencement thereof, such corporation did commence a suit in the circuit court for the county of Marion, to enjoin the defendants herein from using such corporate name and issuing such bonds, and that such suit is still pending in said court, and being prosecuted therein in good faith, by said complainant's corporation.

Before disposing of this plea, I propose to call attention to the impropriety of pleading double in this case. A plea in equity is a special answer showing why the suit should be dismissed, delayed or barred, and that, therefore, the complainant ought not to have the answer of the defendant to the matters stated in the bill. It may consist of matter dehors the bill—new matter—then called a pure plea or of denials of some of the substantial matters set forth in the bill. Story, Eq. Pl. 649, 651. Two matters of defense cannot be stated in one plea, nor should a plea contain various facts, unless they are all conducive to a single point, which constitutes a single defense. Otherwise it is open to the charge of duplicity and multifariousness. Id. 653–656. Two pleas in a suit are never allowed, even in bar, except in a particular case, by leave of the court first obtained, where great inconvenience might otherwise be sustained. A plea is not the only mode of defense to a suit in equity. It is only allowed for the purpose of enabling a defendant to make a defense upon some single point or matter, and thereby avoid the expense, delay and inconvenience of answering the bill in detail. But if the defendant is allowed to plead several pleas to as many parts of the bill, and thereby put the whole or any great part of it in issue, nothing is gained in this respect, but rather the contrary. Id. 657; Didier v. Davidson, 10 Paige, 515; Saltus v. Tobias, 7 Johns. Ch. 215; Lamb v. Starr [Case No. 8,021].

Nor do I think the first plea is a plea in abatement. It is an allegation that the complainant has no property in the bonds, and is, therefore, without interest in the subject matter of the suit. Such a fact, or facts showing this conclusion, may be pleaded in bar of the suit. Story, Eq. Pl. 728. A plea of bankruptcy of the plaintiff, being in effect a plea that the plaintiff has no title, so far as he is concerned, is a plea in bar. Id. 726.

But as no steps have been taken to strike out these double pleas or compel the defendants to elect which one they will rely upon, and as the complainant on the argument practically admitted the sufficiency of the second plea, it will be assumed for the present, that the defendants in filing the second plea abandoned the first.

In accordance with the opinion expressed at the hearing on the original bill and demurrer thereto, this second plea is sufficient and constitutes a good defense to the suit. By it the defendants controvert the allegation of the amended bill, that the complainant's corporation had refused to bring this suit for the protection of his interests.

This is a plea to the person in the nature of a plea in abatement, and corresponds to the dilatory plea of the civil law. It does not dispute the validity of the rights which are made the subject of the suit, nor the plaintiff's interest therein, but objects to the complainant's present ability to maintain a suit concerning them. Story, Eq. Pl. 706, 707.

Since the decision of this court sustaining the demurrer ore tenus to the original bill, I have received the opinion (in sheets) of the supreme court in the case of City of Memphis v. Dean, 8 Wall. [75 U. S.] 64. In this respect the case is very similar to the one under consideration, and the court then held that a stockholder could only maintain a suit to protect his interest in the corporate property where the corporation refused to do so. The defense in that case was the same as in this—a denial of the allegation that the coporation had refused, but that, on the contrary, they were then maintaining a suit for that purpose. The complainant having signified his intention not to contest the plea upon the proof, it follows that the bill must be dismissed, because of the complainant's inability to sue.

In this view of the matter it is not necessary to pass upon the several demurrers of the defendants; but their counsel is urgent that the court shall decide the questions raised by these demurrers. Upon looking at the demurrer of the corporation, I find that all the qestions made by it were decided adversely to the defendants on the demurrer to the original bill, except the objection that the complainant's corporation is not a proper party defendant. The reason given in support of this objection is, that such corporation being a citizen of this state could not have maintained this suit against these defendants, who are also citizens of this state.

The facts are admitted, but the conclusion does not follow. The inability of a party to sue in this court is no test of his liability to be sued in it. While a suit cannot be maintained in this court by a citizen of the state against a citizen of the state, yet every such citizen is liable to be sued in this court by a citizen of another state. So, while it is true that the complainant's corporation cannot sue the defendant corporation in this court, because of their common citizenship, yet it is equally true, that the complainant being a citizen of California may sue either or both of these corporations in this court. The questions are different and have no sort of relation to or dependence upon one another. Woolsey v. Dodge, 18 How. [59 U. S.] 345, 346. In this case, and in City of Memphis v. Dean, supra, the complainant's corporation was a citizen of the same state with the other defendants and could not have maintained a suit in those courts against its co-defendants, yet in both cases such corporation was made a party defendant.

All the questions specially made by the demurrer of the other defendants have also been decided adversely to them. But, under the general allegation of this demurrer, "that the amended bill does not state facts sufficient to constitute a cause of suit," in the written argument of counsel for defendants it is specially maintained that the complainant has not a sufficient interest in the subject matter of the controversy to enable him to maintain this suit: and that the refusal of the complainant's corporation to bring this suit for this protection is not such a breach of trust or neglect of duty, as gives the complainant a right of suit.

The first of these objections—the want of interest in the subject matter—was considered by court in disposing of the demurrer to the original bill. It was then held, that the complainant, being the owner of the corporation bonds, was its creditor, and that if he had a lien upon the lands of the corporation, as a security for the payment of such bonds, he has as much interest in the subject matter as a mere stockholder, and might, for the same reasons, maintain this suit, "to prevent another corporation from obtaining the same land by the wrongful use of the name of the corporation whose bonds he holds," Bradley v. Richardson [Case No. 1,786]. As to whether it sufficiently appeared from the bill, that the complainant had such a lien, the court was not clear, and did not decide; and no reason is shown why there should be any other or different conclusion at this time.

The complainant also maintained his right to bring this suit to protect his interest in the bonds of the corporation, as a species of property, having a conventional market value depending upon the probable resources and prospects of the corporation that issued them. Upon this point, the court, on the demurrer to the original bill, expressed no opinion, and I do not deem it necessary to do so now.

As to the second of these objections—the refusal of the complainant's corporation to bring this suit. I think it is well taken. The allegation, is not sufficient to enable the complainant to sue. It was impossible for such corporation to have brought this suit —being a citizen of the same state with the defendants. But, admitting that complainant's corporation might have brought this suit, and refused, it does not follow that it refused to bring any suit—for instance, a suit in the state court. In choosing between remedies, which are presumed to be equally effective, the corporation has a right to exercise its judgment. For an error in judgment in this respect, neither stockholders, nor creditors can sue the corporation, or call it to account. Woolsey v. Dodge, 18 How. [59 U. S.] 341. But as has been said, the complainant's corporation could not have brought this suit. The law of the land did not permit or authorize it, and therefore its refusal to do so when requested by the complainant, was neither a neglect of duty nor breach of trust, which gave the complainant a right of suit. The allegation is insufficient, and the amended bill in this respect, is no better than the original one.

Both on the ground of the sufficiency of the second plea (the plaintiff not desiring to con-

test the matter upon the proof), and this cause of demurrer, the bill must be dismissed.

NEWBY (TALLAHASSEE v.). See Case No. 13,737.

Case No. 10,146.

The NEW CHAMPION.

[1 Abb. Adm. 202.] [1]

District Court. S. D. New York. April, 1848.

COLLISION—BETWEEN STEAM AND SAIL—DUTY OF SAILING VESSEL.

1. A sailing vessel is bound, when navigating in proximity to a steamboat, to take all reasonable precautions to protect herself, and to avoid injury to the steamboat, and she is not entitled to impose upon the steamer the duty to guarantee her against a collision.

[Cited in The Nacoochee, 22 Fed. 859.]

2. If injured by collision with a steamboat, the sailing vessel must discharge herself from fault, and show the adverse vessel guilty of culpable neglect, or want of due equipment or skill, which led to the collision.

This was a libel in rem, by John Hurley and William Murray, owners of the sloop Mary, against the steamboat New Champion, to recover damages for a collision.

The facts out of which the action arose were as follows: The steamboat arriving from Hartford in the night time, made her turn on the Brooklyn side of the East river, and was passing across the river to her berth at a wharf in New York. The sloop was at the same time running up with a free wind from the southwest, being close in upon the New York side. Those engaged in navigating her saw the lights of the steamer, and knew that she was on her turn towards the slip, and also what berth she was intending to take. At the time the steamer starboarded her helm and had commenced coming around, the river was clear in her proper course and direction to her berth. The sloop ran up across the line of the track she was turning into, unperceived on board the steamer, until the two vessels were nearly in collision. A quick order to luff was then given to the sloop by the master of the steamer, but it was not complied with in time, and the collision occurred. The pilot and master of the steamer testified upon the hearing, that at the time when the order to luff was given, the sloop could easily have been luffed enough to avoid the steamer; and their testimony was corroborated by proof of declarations subsequently made by the pilot of the sloop, to the effect that he gave the order to his helmsman to luff, but that the order was not obeyed. It was also proved that a good lookout was stationed and kept at the proper post on board the steamer; that her lights were exhibited conspicuously and shining brightly, and that strict precautions were employed on the steamer to avoid collision with other vessels whilst so gaining her berth; that she was coming into her usual and well-known place of landing, and that she pursued the customary method of doing it, as was notorious to vessels navigating the rivers near the docks in this port. It was furthermore proved that the sloop had sufficient time to have luffed and avoided the steamer, had she adopted that manoeuvre when the necessity of it was discovered by her.

George White, for libellants.

(1) The question to be considered is not whether the New Champion has been guilty of extraordinary neglect; but, did she, on the occasion on which this collision occurred, observe due care and exercise the proper precaution?

(2) Public safety requires that steamboats, particularly when navigating our crowded waters, should observe extraordinary care and unremitting vigilance. The smaller craft are comparatively helpless, but the steamboat possesses and exercises a power to which the winds and the tides are obedient. Her own momentum is unresistingly subject to her control; she is independent of external resistance; and in all cases, it may be positively asserted, wherever the smaller vessel is seen, a steamboat, unless her machinery is out of order, can avoid her.

(3) The New Champion did not observe ordinary care; no due precaution was taken to avert the collision, although she saw the sloop in ample time to avoid her. Nothing was done on board the New Champion but to hail the people on board the sloop, ordering her to luff. The testimony of the claimants' own witnesses shows this.

(4) The sloop Mary was comparatively helpless; while the New Champion had the full sweep of the river and the entire command of her machinery. The facts, uncontroverted and uncontradicted, are, that the sloop Mary, a very small vessel, was pursuing her course up the East river, near the New York side, to avoid a strong ebb tide; while the New Champion, a steamboat of a very large class, was crossing over from the Brooklyn side, the sloop and the New Champion came in collision with each other; that the New Champion saw the sloop when she was about one third or one half of a mile from her, and saw her distinctly, although the sloop had no lights.

Now, from the mere statement of these facts, the necessary conclusion must be, that the large and strong New Champion, with a propelling power to which the winds and tides are as implicitely obedient as is her own momentum, could, with a suitable effort, which she was bound to make, have avoided a collision with this little vessel, unless by some positive mismanagement the sloop placed herself in the way of the New Champion, so as to baffle any attempts of the latter to avoid her. Then, did the sloop place

1 [Reported by Abbott Brothers.]

herself in the way, unnecessarily, of the New Champion? So far from this being the case, she did every thing she could to avoid the steamboat. She was hemmed in while the steamboat had the full sweep of the river. Claimants' witnesses, indeed, state, that if the helm of the sloop had been put down, she could have avoided the New Champion. This was the very thing that was done; in short, they made every effort on board the sloop, while they on board the New Champion did nothing; whereas, if the sloop had made no effort, no blame could have been attached to her.

BETTS, District Judge. There is evidently a wide-spread misapprehension as to the relative liabilities and privileges of steamboats and sailing vessels, in cases of collision between them. In actions prosecuted against steamers, this court has repeatedly upheld the rule to be, that sailing vessels are bound to exculpate themselves from blame, and employ all reasonable precaution for their own protection, as well as to avoid injury to steamboats; and that they are in no way entitled to hold their own positions and courses under all circumstances, and rely upon steamers for a full guarantee when navigating in proximity to them. Tyler v. The South America [Case No. 14,311].

In the case of The William Young [Case No. 17,760], a collision occurred between a sloop and a steam vessel, running in opposite directions upon the North river, in consequence of an abrupt variation of the sloop's course. The court declared that it was not to be assumed that the fault was with the steamer; but the burden of proof was upon the libellant to show her in the wrong; that although a higher degree of responsibility was cast upon steamers, yet a sailing vessel could not be justified in an improper movement on her part, because of an apprehension of encountering an approaching steamer, unless the latter was crowding so much upon her track as to create an imminent danger of collision.

In the case of The New Jersey [Case No. 10,161], it was held that the laws of navigation imposed no peculiar general duties or liabilities on steamboats, in relation to collisions with sailing vessels; but the sailing vessel is bound to use, with reasonable promptitude and skill, all the means in her power to avoid a threatened collision; that it was only because the means at command by steam vessels are so much more efficacious and ready than those possessed by sailing vessels, and because the consequences of an omission to apply such means are so immediately destructive, that vessels propelled by steam are required to use the more watchful precautions; and the rule was there maintained, that the vessel under canvas must contribute to the common security so far as within her power; and that the owners of steamboats were by no means to be made insurers against the negligence, ignorance, or misconduct of persons in charge of sailing vessels.

In the case of The Neptune [Case No. 10,120], the declaration was reiterated, that steam vessels are not burdened with the sole risks and responsibilities of encounters with sailing vessels. It was stated that the rule is reciprocal, and places both classes of vessels under a common liability and privilege; that a sailing vessel under way was bound to exculpate herself from all negligence or misconduct leading to a collision, before she could claim damages against a steamboat for injuries received from her; and it is believed this is the spirit and policy of the marine law.

In each of these cases the proof was, that the collision was occasioned by an improper change of her course, on the part of the sailing vessel, unexpectedly to the steamer, bringing the former suddenly in the track of the latter. There is, however, no doctrine of the law which limits the duty and liability of the sailing vessel to cases of that description alone. It does not rest upon any specific kind of blame occurring in her management; but the general principles of law governing the navigation of vessels nearing each other have their full effect over her, with the exception that she has the privilege to hold her own course, unless it be palpable that she will endanger a collision with the steamer by so doing. Those principles are, that every vessel, however propelled, is bound to exert herself to avoid injury to others in the vicinity of which she is moving, and can found no claim to damages resulting solely from her own culpable want of care, or which are caused by her misconduct. To be entitled even to a contribution to her loss by collision, it must be made to appear there was at least a concurrent fault in the conduct of the other vessel, conducing to produce the collision. The qualification to these obligations is no more than that a steamer is not entitled, as against a vessel under sail, to keep a particular course, but must leave the latter to hold her own when it can be done with safety.

The libellant in this case must prove the steamer was in fault, and must show that his vessel was managed in a prudent and skilful manner, and interposed no needless impediments in the way of the steamer, and was not herself the cause of her own misfortune. Smith v. Condray, 1 How. [42 U. S.] 28; Waring v. Clark, 5 How. [46 U. S.] 501; The Ligo, 2 Hagg. Adm. 356; The Alexander Wise, 2 W. Rob. Adm. 66; The Woodrop-Sims, 2 Dod. 83.

The sloop, on the occasion, was running close in under the shadows of the city, in a dark night, without showing any lights, and took a course crossing the track of the steamer, at so small a distance that it must be palpable to her that if she were not seen from the steamer and avoided by her, a col-

lision would be extremely probable. She approached the steamer at the time the latter, as her lights would indicate, was working round to get into her slip. When a steamer is in the act of coming about, she cannot command her movements so promptly as under direct headway, and thus the reason for holding her to an extraordinary responsibility is, for the time being, in a measure suspended, as well as the privilege of a sailing vessel in respect to her own course, and this would be so especially in this instance, as the sloop was violating the duty imposed by law upon vessels in port, of showing lights in the night to steamboats coming in, &c. Her master must have been conscious that in so doing, the steamer was exposed to the hazard of coming upon her without warning of her position. 2 W. Rob. Adm. 1, 347. I think, upon the evidence, the collision was caused by the inattention and mismanagement of those on board the sloop, and not from any fault on the part of the steamer. The sloop was before the wind, running against a strong ebb tide; and the evidence is clear, that she might, with the greatest facility, have avoided the steamer, had she ported her helm, and that she had sufficient warning that she was in a situation where the steamer must inevitably come in conflict with her. She, however, needlessly and rashly passed into the narrow passage between the wharves and steamer, and thus placed herself within the range the Champion must take in swinging around to her berth. This was a gross act of remissness on the part of the sloop, and she has no right to charge the steamer with the consequences of it.

Libel dismissed with costs.

[See Case No. 6,919a.]

NEWCOMB (ADLER v.). See Case No. 83.

Case No. 10,147.

NEWCOMB v. MUTUAL LIFE INS. CO.

[9 Ins. Law J. 124.]

Circuit Court, D. Massachusetts. Dec. 12, 1879.

LIFE INSURANCE—SUIT BY ASSIGNEE—EQUITY—ASSIGNMENT BY MARRIED WOMAN—RIGHTS OF CHILDREN—CREDITORS.

1. R., a citizen of Massachusetts, insured his life for his own benefit in a New York company. R. subsequently assigned the policy to his wife, who in turn assigned it to plaintiff, as security for a loan to the husband. Upon the maturity of the policy, R. and his wife refused to allow plaintiff to recover. *Held*, that the assignee of an entire policy must usually sue at law, but where the rights of several parties are in issue, as here, a suit in equity may be maintained.

2. While the contract as between the original parties may be governed by the law of New York, the power of the wife to assign must be determined by the law of Massachusetts.

3. The court favors, without deciding, that St. Mass. 1864, c. 197, intends merely to guard the interest of the wife, and that she is absolute owner during life, with full power of disposal, and with only a contingent interest to children.

4. A married woman who is assignee of a policy in which her children are not mentioned has, at least, a life interest which she may assign.

5. The plaintiff is entitled to the amount due either out of the insurance money or out of the interest from the same until the debt is paid or the wife is dead. Demurrer overruled.

This bill in equity by John J. Newcomb, a citizen of Massachusetts, against the Mutual Life Insurance Company of New York, and J. Sanford Roberts and Sarah Thomas Roberts, citizens of Rhode Island, alleged that on March 13, 1866, the defendant company insured the life of the defendant, J. S. Roberts, then residing at New Bedford, in the state of Massachusetts, in the sum of $1,500, payable to said Roberts or his assigns, March 13, 1879, if he should then be living, or at his death before that time to his executors, administrators, or assigns; that the assured assigned the policy to his wife in 1869, and in February, 1874, the wife assigned the policy to the plaintiff as security for a loan of $1,000, then made to her husband, for which he gave his note; that the policy was handed to him by the husband and wife, who also verbally agreed that he should hold it as such security; that the company had notice of the assignment, and accepted and assented to the same; that there was now due the plaintiff the sum of $1,176.92 in respect of said loan; that the amount of the policy had become due by the lapse of time, but the company refused to pay the same or any part thereof to the plaintiff without the order of said Roberts and wife, and that the latter refused to consent to such payment and refused to join the plaintiff in such proceedings for its recovery, but asserted that the said transfers were void; that the plaintiff had a lien on the policy for the sum aforesaid, and prayed an account, and payment to himself of the sum due him, and to Roberts and wife whatever might be due them. The assignment by Roberts to his wife appeared to have been made in New Bedford; and that by the wife to the plaintiff, in Boston. The defendants demurred severally.

D. Foster and R. T. Lombard, for the respective defendants.

1. The remedy is at law. Walker v. Brooks, 125 Mass. 241.

2. The policy was inalienable. Eadie v. Slimmon, 26 N. Y. 9; Barry v. Equitable Life Assur. Soc., 59 N. Y. 587; Gen. St. Mass. c. 58, § 62; St. 1864, c. 197; Knickerbocker Ins. Co. v. Weitz, 99 Mass. 157.

A. A. Ranney, for plaintiffs.

1. There is a remedy in this court in equity, because the plaintiff is assignee of a chose in action, and because there are conflicting

interests of more than two different parties. Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398; Norwood v. Guerdon, 60 Ill. 253; Carr v. Silloway, 105 Mass. 549; Angell v. Stone, 110 Mass. 54; Story, Eq. Jur. § 1057a.

2. The New York decisions have not been followed in other states; all the cases elsewhere are in our favor. Connecticut Mut. Life Ins. Co. v. Burroughs, 34 Conn. 305; Emerick v. Coakley, 35 Md. 188; Kerman v. Howard, 23 Wis. 108; Baker v. Young, 47 Mo. 453.

LOWELL, Circuit Judge. The assignee of an entire policy of insurance must usually sue at law for the loss; upon this all the authorities are agreed, however they may differ in regard to other choses in action. Walker v. Brooks, 125 Mass. 241; Story, Eq. Jur. § 1057b. But in this case the defendants, Mr. and Mrs. Roberts, deny that there has been a valid assignment, and may also dispute the amount for which the policy is security, and may not choose to have the whole money collected by the plaintiff. That an action at law might be maintained by this plaintiff appears by the case of Burroughs v. State Assur. Co., 97 Mass. 359; but the court very justly remarked at the close of the judgment in that case, that another lawsuit will be necessary to decide the true ownership of the money; and it appears upon the face of this bill that there are questions of a similar character arising under this policy. In this state of facts, either of the three parties to this suit might maintain a bill to have the rights of all ascertained and adjusted.

Passing to the merits of the case, it is important to enquire whether the assignment is to be governed by the law of New York or by that of Massachusetts. Some late cases in this court have decided that the contract in such a policy, as between the original parties, is to be governed by the laws of New York; but the capacity of this married woman, then residing in Massachusetts, to assign this New York policy to another resident of Massachusetts for a loan made here, the insurers being mere stake holders in the matter must be ascertained, I think, by the law affecting married women in Massachusetts. See Milliken v. Pratt, 125 Mass. 374; Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 402. This seems taken for granted in Emerick v. Coakley, 35 Md. 188, and the other cases cited by the plaintiff. By the law of Massachusetts when this policy was or reports to have been transferred, the husband and wife, together, could convey all her separate property (unless a policy of life insurance is an exception) as security for his debts, or upon any other valuable and lawful consideration. Bartlett v. Bartlett, 4 Allen, 440; Willard v. Eastham, 15 Gray, 328; Heburn v. Warner, 112 Mass. 271. Later statutes have dispensed with the husband's consent.

Is a policy of life insurance an exception to the general rule—that the owner of property may convey it? Our statute of 1864 (chapter 197) enacts that a policy upon the life of any person, duly assigned, transferable or made payable to a married woman, or to any person in trust for her, shall enure to her separate use and benefit and that of her children, independently of her husband or his creditors, or of the person effecting or transferring the same, or his creditors, provided that if any premium is paid in fraud of creditors, an equal amount (of the insurance money) shall enure to the benefit of said creditors. A similar statute, in all which relates to the title of the married woman, has been in operation for a quarter of a century; but no decision of the supreme judicial court has been cited which construes it upon the point now in question. The statute itself does not define the relative rights of the mother and her children, and might be construed to give to her either a simple life interest with a vested remainder in her children; or, a life interest with an absolute power of disposal, leaving a contingent interest in the children if she should not assign the policy or collect the money during her life. It is sound law that if a policy is limited to children upon the death of the mother before the loss, she cannot divest their title by any conveyance of the policy while it is running; and if the statute means to say that in every policy acquired by a married woman there shall be interpolated a limitation over to children, it would seem to follow that the woman would have a life estate, without power to dispose of the remainder. Looking at the whole scope of the act, I am much inclined to think that its intent is merely to guard the interests of the wife against the husband and his creditors, and that she is to be the absolute owner during her life, with only a contingent interest in her children. If this be not so, the legislature have undertaken in a most arbitrary fashion to limit the right of a married woman to buy or receive the gift of a policy insurance, an injustice which I should not willingly impute to them. The courts of all the states which have passed upon this question under statutes more or less like ours, excepting the court of appeals of New York, have held that the married woman has the full domain over the policy, and may sell, assign or pledge it like her other separate policy. Emerick v. Coakley, 35 Md. 188; Baker v. Young, 47 Mo. 453; Archibald v. Mutual Life Ins. Co., 38 Wis. 542; Rison v. Wilkerson, 3 Sneed, 565; Bliss, Ins. (2d Ed.) 651; May, Ins. § 391.

The decisions in New York—Eadie v. Slimmon, 26 N. Y. 9, and Barry v. Equitable Life Assur. Soc., 59 N. Y. 587—are placed upon reasoning which does not apply to our statute; namely, that the statute deprives the husband's creditors of their rights, and must, therefore, be understood very strictly as giv-

ing a support to widows and orphans. Our law expressly provides against fraud upon creditors. I will not pursue the argument, as I do not intend to decide the point at this time.

It is clear to me that our statute gives a married woman who is the assignee of a policy in which her children are not mentioned a life interest, at least, in the policy; and there is no principle of equity better settled than that she can assign that interest. It is enough to refer in support of this elementary proposition to Hulme v. Tenant, and the notes thereon in 1 Lead. Cas. Eq. (4th Am. Ed.) 679, and to the cases first above cited from the Massachusetts Reports. There is not a word in our statute to restrict the alienation by the wife of whatever interest she has, and I see not the slightest ground to interpolate such a restriction, and therefore her assignee, the plaintiff, if the facts stated in the bill are true, will be entitled to a decree, either that the debt due him shall be paid out of the insurance money, or that the whole money shall be held in trust, and that he shall have the income thereof until his debt is paid or until the death of Mrs. Roberts, whichever event shall first occur.

Demurrer overruled.

Case No. 10,148.

In re NEWCOMER.

[18 N. B. R. 85;[1] 10 Chi. Leg. News, 347; 26 Pittsb. Leg. J. 3.]

District Court, N. D. Illinois. 1878.

BANKRUPTCY—PROVABLE DEBTS—SURRENDERED PREFERENCE.

The assignee recovered a judgment against a creditor for the value of goods taken by him, prior to the bankruptcy, in payment of his indebtedness. The creditor afterwards paid the amount of such judgment and costs, and proved his debt in the bankruptcy proceedings. On motion to expunge the claim, *held*, that such payment was a surrender of the preference, and that, in the absence of actual fraud, the creditor had right to prove his claim.

[Cited in Re Cadwell, 17 Fed. 694.]

[In the matter of Martin E. Newcomer, a bankrupt.] On motion to expunge claim.

F. C. Ingall, for assignees.

Baker & Dale, for creditors.

BLODGETT, District Judge. The assignees herein applied to the register, to whom the cause was referred, for an order for the reexamination of the claim of Field, Benedict & Co., of Chicago, filed herein. Upon testimony taken, and argument of counsel, the register expunged the claim, and objection being made by the creditors, the issue was certified to this court, pursuant to rule 35.

Newcomer was a merchant in Freeport, in this state, and was indebted to Field, Benedict & Co. for goods sold him in due course of trade, and, as agent of Field, Benedict & Co., took pay for the amount of their bill in goods. Newcomer was declared a bankrupt soon after, and his assignee in bankruptcy brought suit and recovered the value of the goods so taken. No actual fraud was proven. There was probably enough to create a belief that Newcomer was insolvent, or likely to be so. Since judgment was rendered against Field, Benedict & Co., in the above suit, they have fully paid the sum and costs, and proved their debt in bankruptcy. Section 5021 provides: "And if such person shall be adjudged bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned or transferred, contrary to this act: provided that if the person receiving such payment, etc., had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in case of actual fraud on his part, be allowed to prove for more than a moiety of his debt." Section 5084 provides that a person who has accepted a preference shall not prove his debt on account of which the preference is made or given, until he shall first surrender to the assignee all property, money, benefit, or advantage secured by him from said preference. The only question is whether, by payment of the judgment recovered against them for a preference, Field, Benedict & Co. have surrendered the preference received by them, within the spirit and meaning of section 5084. I think, there being no actual fraud, and the preference being only constructively fraudulent, these creditors have the right to prove their claim. The payment of the judgment is a surrender of the preference obtained. Motion to expunge overruled.

[1] [Reprinted from 18 N. B. R. 85, by permission.]

NEWCOMER (UNITED STATES v.). See Cases Nos. 15,868 and 15,869.

Case No. 10,149.

The NEW EAGLE.

[Blatchf. Pr. Cas. 196.][1]

District Court, S. D. New York. July 28, 1862.

PRIZE—ENEMY PROPERTY.

Vessel and cargo condemned as enemy property.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured by the United States mortar-boat Mathew Vassar, May 6, 1862, in the Gulf of Mexico. The sloop was taken to Ship Island, and appropriated to the use of the United States, and the cargo was transported to New York, and was here

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

arrested and condemned by default. The vessel was sailing under the confederate flag, and she and her cargo were owned in the seceded states, and were accordingly enemy property. Both, upon the legal proofs before the court, are lawful prize of war, and are condemned, as such, to forfeiture.

NEWELL (MASON v.). See Case No. 9,249.

NEWELL (NICHOLS v.). See Case No. 10,245.

NEWELL (SPEAR v.). See Case No. 13,224.

NEWELL (UNION PAPER-BAG MACHINE CO. v.). See Cases Nos. 14,389 and 14,390.

Case No. 10,150.

NEWELL et al. v. WEST et al.

[13 Blatchf. 114; 2 Ban. & A. 113; 8 O. G. 598; 9 O. G. 1110.][1]

Circuit Court, N. D. New York. Aug. 24, 1875.

PATENTS—ASSIGNMENT—VALIDITY—SPECIFIC PERFORMANCE OF AGREEMENT TO ASSIGN.

1. R., the patentee and owner of letters patent, agreed with M., shortly before the patent expired, that he would apply for its extension, and assign the extension, if obtained, to M., and M., in consideration, paid to R. $500, and agreed to pay him $1,500 more on receiving such assignment, and also the expenses paid by R. in procuring the extension. R. died without applying for the extension, and left a will appointing his wife his sole executrix, and making her and his daughter the sole beneficiaries. The will was probated in Massachusetts. Afterwards, a corporation, by assignment from M., acquired his rights under said agreement. Thereafter, the widow, as executrix, and acting in the interest of the corporation, applied for and obtained an extension of the patent, the corporation paid her the $1,500, and she executed to it an assignment of the extended term, which assignment was recorded. The assignment was not made under an order of the probate court, and the daughter did not assent to it. In the assignment the widow was described as administratrix, and conveyed her interest as administratrix. After the recording of the assignment, she resigned her trust as executrix, and one I. was appointed administrator with the will annexed, and he, as such, conveyed to the plaintiffs the title on which this suit was brought. *Held*, that the corporation became the equitable owner of the patent, and the plaintiffs had constructive notice of such equity, by the recording of the assignment from the widow, before they procured the assignment from I., and were not bona fide purchasers; that, as against the plaintiffs, the corporation was entitled to a specific performance of the agreement to assign; and that, therefore, it was not material whether the assignment from the widow was invalid, because made by her as administratrix and not as executrix.

[Cited in Prime v. Brandon Manuf'g Co., Case No. 11,421; New York Paper-Bag Mach. Co. v. Union Paper-Bag Mach. Co., 32 Fed. 786.]

2. The assignment from the widow was valid, although made by her as administratrix.

3. The sale was not invalid because made without an order of the probate court, although there was a statute of Massachusetts providing that, on application, the probate court might order a sale of personal estate, inasmuch as there was no provision precluding a sale without such order.

4. It was not necessary the daughter should have joined in the assignment, or assented to it.

[This was a suit by George L. Newell and others against George West and others in equity for an account and injunction to restrain the infringement of reissue of letters patent No. 17,184, originally granted to Benjamin F. Rice, April 28, 1857, for an "improvement in machines for making paper bags."]

Marcus P. Norton, for plaintiffs.
Horace Binney, for defendants.

WALLACE, District Judge. The complainants having filed their bill for a perpetual injunction, and for an accounting, alleging the infringement by the defendants of extended letters patent, in which the complainants own the exclusive right for the state of New York, the defendants plead thereto, that the Union Paper Bag Machine Company is the owner of the patent, in exclusion of the complainants. The complainants having taken issue by replication to the plea, the cause now comes on to be heard upon the pleadings and proofs.

The material facts, extricated from the mass of documentary and oral evidence contained in the proofs, a large portion of which seems utterly unimportant, are few and simple. The complainants claim title by an assignment from Ingalls, as administrator with the will annexed of Benjamin F. Rice, deceased, and the Union Paper Bag Machine Company claim by an assignment, prior in point of time, made by Roxanna Rice, while acting as executrix of the estate of Benjamin F. Rice. Benjamin F. Rice was the inventor of the improvement for which the patent was obtained. Shortly before the term of the patent expired, he entered into a written contract with one Morgan, who was a part owner of the patent, whereby Rice agreed to make application for an extension of the patent, and use all honorable means in his power to obtain it, and, when obtained, to set the same over to Morgan, and to execute an assignment thereof at any time, upon demand. Morgan, in consideration of the agreement on the part of Rice, paid Rice $500, and agreed to pay him $1,500 more upon the delivery of the assignment, and such sum in addition as Rice might expend in procuring the extension. Rice died without applying for the extension, the original term not having expired. He left a will, in which his wife Roxanna and his daughter were made the sole beneficiaries, and by which he appointed his wife sole executrix. Subsequently, the Union Paper Bag Machine Company became the benefi-

[1] [Reported by Hon. Samuel Blatchford, District Judge, reprinted in 2 Ban. & A. 113, and here republished by permission.]

cial party in interest in the agreement, in the place of Morgan, the latter having assigned his rights. Thereafter, Mrs. Rice, as the executrix of the inventor, and acting in the interests of the Union Paper Bag Machine Company, applied for and obtained the extension of the patent, and thereupon the latter paid her the $1,500 which Morgan had agreed to pay her husband, and she executed to the company an assignment of the extended letters patent. This assignment was duly recorded. It recited the obtaining of the original patent by Benjamin F. Rice, his death, the extension of the patent, and her appointment as his administratrix, and purported to convey her interest as administratrix in the patent as extended. After this assignment was recorded, she resigned her trust as executrix, and Ingalls was appointed administrator of the estate with the will annexed, and he, as such administrator, conveyed to the complainants the title upon which they now rely.

It is insisted, on behalf of the complainants, that the assignment to the Union Paper Bag Machine Company by Mrs. Rice, as administratrix, when she was in fact executrix of her husband's estate, did not pass her title as executrix. It is also insisted, that, if it would have passed such title, it was not valid, because her daughter, as a legatee under the will, did not assent to the transfer, and because the sale was not made upon the order of the probate court. If it should be conceded that the assignment to the Union Paper Bag Machine Company was wholly invalid, it does not follow that the complainants acquired any title by the assignment to them. They cannot be heard to set up their assignment against the Union Paper Bag Machine Company, because the latter was equitably entitled to a conveyance of the title, and the complainants had notice of such equity when they procured an assignment to themselves. If Rice had lived and obtained the extended letters patent, Morgan, upon tendering performance of the conditions in the agreement on his part, could have enforced specific performance of Rice's covenant to convey. The inchoate right of an inventor to an extension of his patent may be the subject of a contract of sale. Clum v. Brewer [Case No. 2,909]. And a contract to convey such a right will be enforced by a bill for specific performance. Nesmith v. Calvert [Id. 10,123]. Where an invention is assigned before it is patented, the assignor is estopped, upon obtaining the patent, from setting up any adverse title. Herbert v. Adams [Id. 6,394]. And the doctrine applies with equal force where he has agreed to assign, because, in such case, the purchaser, upon tender of the purchase price, becomes the equitable owner of the patent. Hartshorn v. Day, 19 How. [60 U. S.] 211. If Morgan could have required specific performance by Rice, the Union Paper Bag Machine Company, as the party in interest in the place of Morgan, could have required it of Mrs. Rice, as executrix. The patent, when obtained by her, devolved upon her, as the legal representative of the inventor, "on the same terms and conditions as the same might have been claimed or enjoyed by him in his lifetime." Act July 8, 1870, § 34 (16 Stat., 202). The obvious intent of the law is, to vest in the legal representatives of a patentee, upon his death, the same rights he would have enjoyed if he had lived. The executrix had no higher rights than Rice would have had; and, when she received the $1,500 which was to be paid upon the transfer of the extended letters patent, the Union Paper Bag Machine Company became the owner, in equity, of the patent. Its rights are the same as though that had been done which ought to have been done; and no one, except a bona fide purchaser, can now assert the contrary, in a court of equity.

The recorded assignment was constructive notice to the complainants of the rights of the Union Paper Bag Machine Company. It was notice that the latter claimed to be the assignee of the patent which had belonged to the estate of the testator. It sufficed to direct the attention of a purchaser to the claim of an adverse title in the patent, and to enable the purchaser, by inquiry, to ascertain the extent of the right. Inquiry, at proper sources, would have revealed that Mrs. Rice, though not the administratrix, was the legal representative of her husband's estate when she executed the instrument, and that the consideration was received by her in her representative capacity, thus indicating the right of the Union Paper Bag Machine Company to a reformation of the instrument by correcting the mistaken description of her representative character.

If these views are correct, it is immaterial whether the assignment made by Mrs. Rice to the Union Paper Bag Machine Company was valid to convey the title or not; but, in my judgment, it was valid to convey the title. It has been held, that an advertisement by an executor styling himself an administrator, is a legal advertisement of himself as executor, sufficient to permit him to set up the running of the statute of limitations (Finney v. Barnes, 97 Mass. 401); and an averment of one as an administrator, who is in fact an executor, does not constitute a variance in a pleading (Sheldon v. Smith, Id. 34). The instrument in question clearly indicates the intent of the assignor to convey as the legal representative of a person deceased. It recites the decease of the inventor, and that the patent was extended, and that she "was duly appointed his administratrix." The only effect which can be given to it is that of a transfer in her representative character; and, in view of the authorities which hold that, as descriptive terms, the words are practically synonymous, I have no hesitation in giving

force to the instrument as a transfer of her title as executrix.

The objection that she had no right to dispose of the estate of her husband without the order of the probate court, is based on a section of the General Statutes of Massachusetts, which enacts, that, on the application of an administrator, or executor, or of any person interested in the estate, the probate court may order any part or all of the personal estate to be sold at public auction or at private sale, and, in that event, the executor or administrator shall account therefor at the price for which it sells. No authority is cited to sustain the position that this section precludes a sale without such order; and, in the absence of a statutory limitation, it is to be assumed that executors in Massachusetts possess the same power that they do at common law. The reasonable construction is, that the section in question was intended for the protection of executors, and to afford the aid of the probate court to them and to others interested in the estate, when particular circumstances may require it.

I do not understand that it is claimed that the daughter should have joined in the instrument in order to render the assignment valid at law. If the theory is that she was a cestui que trust, whose equitable rights have been disregarded, the sufficient answer is, that she had none except in the proper application of the money paid, because the Union Paper Bag Machine Company were the equitable owners of the patent.

For these reasons I am of opinion that the defendants must prevail upon their plea. A decree is ordered dismissing the bill, with costs.

[For other cases involving this patent, see Union Paper Bag Mach. Co. v. Nixon, Cases Nos. 14,386, 14,391, and 105 U. S. 766.]

Case No. 10,151.

The NEW ENGLAND.

[3 Sumn. 495;[1] 2 Law Rep. 71.]

Circuit Court, D. New Hampshire. May Term, 1839.

PRACTICE IN ADMIRALTY—APPEAL—TO NEXT TERM—ENTRY—INTERLOCUTORY DECREE—WHAT IS FINAL DECREE IN SALVAGE CASES — REHEARING—ENROLLMENT OF DECREE.

1. No appeal lies from a decree of the district court in an admiralty cause, except to the next term of the circuit court.

2. The appeal, to be effectual, must be entered before the adjournment sine die, of the district court, unless a different time is specially allowed by the district court in the peculiar case, or is prescribed by the general rules of the court.

[Cited in Noe v. U. S., Case No. 10,286.]

[Cited in The Zephyr v. Brown, 2 Wash. T. 44, 3 Pac. 187.]

[See In re Dupee, Case No. 4,183.]

3. If in either case an appeal is entered within the prescribed term, it relates back to the time of the decree, although actually entered in vacation.

4. A party may appeal from an interlocutory decree, having the effect of a final decree; or he may, at his election, wait until the final decree is positively entered, and then may enter an appeal.

5. A decree awarding a certain rate of salvage of the proceeds, after deducting charges and expenses, and fees of court, is not a final decree; but at most is only an interlocutory decree, in the nature of a final decree.

6. To make a decree in a salvage case positively final, all the charges and expenses should be ascertained, and the salvage apportioned, and the rights of each salvor definitely fixed, so that he may appeal therefrom, if he chooses.

7. Quaere, whether a libel of review, in the nature of a bill of review in equity, will lie in a court of admiralty.

[Cited in U. S. v. The Glamorgan, Case No. 15,214; The Illinois, Id. 7,003; Jackson v. Munks, 58 Fed. 599.]

8. A rehearing in admiralty cannot be had after the term of the court has passed at which the decree was made.

[Cited in U. S. v. The Glamorgan, Case No. 15,214; Doggett v. Emerson, Id. 3,961; The Caithneshire, Id. 2,294; Sloman v. Wyssman, Id. 12,955a; The Illinois, Id. 7,003; Jackson v. Munks, 58 Fed. 599.]

[See The Avery, Case No. 672.]

9. All decrees in admiralty are deemed to be enrolled as of the term in which they are made.

[Cited in U. S. v. The Glamorgan, Case No. 15,214.]

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

This was a suit in rem for salvage brought [by the Kennebeck & Boston Steam Navigation Company] against the steamboat New England; upon which a decree for salvage was rendered by the district court at the September term, 1838. [Case unreported.] But it was ascertained, after the final adjournment of the court, that by a mistake of the time, nature, and operation of the decree, the benefit intended by it to the salvors was wholly defeated, and they were actually burthened with expenses beyond the salvage awarded to them. The morning after the final adjournment of the court the mistake was ascertained, and an application was made to the district judge, whose decree had been supposed to be perfectly satisfactory, to allow an appeal to be entered upon the records of the court, in order to have the error corrected in the circuit court. The minutes only of the decree had been stated by the court while in session, and the decree was not drawn out in form until the morning after the final adjournment. The district judge, doubting his authority to allow an appeal, except when applied for and allowed in open court, declined to allow the appeal. The libellants, notwithstanding, entered the cause, as upon an appeal to the circuit court, at the next term (October term, 1838); and at the same term, by motion, they made an application to the circuit court to direct the clerk of the district court to enter the appeal

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

upon the records of that court, and the allowance of it, due security having been offered to be filed. This motion stood over for argument and consideration until the present May term of the circuit court; and was now argued by Mr. Claggett for all the libellants, except John Hodgkins, and supported by affidavits.

In the intermediate time, viz., at the December term, 1838, of the district court, all proceedings under the original decree having been suspended, a petition in the nature of a libel for a rehearing, or of a libel of review, was filed by John Hodgkins in behalf of himself and the other libellants, before that court; and upon the hearing and argument by counsel, the district judge dismissed the petition upon the ground, that the court had no jurisdiction. [Case unreported.] From this decree of dismissal an appeal was taken to the circuit court.

Mr. Hale, Dist. Atty., for appellants.
Mr. Emery and E. Cutts, for appellees.

STORY, Circuit Justice. The present case presents some points, which have not been hitherto decided in this court, and have some novelty both in their principle and application. I have, therefore, taken time to consider the case with reference to the different forms, in which these points have been brought before the court. I have no doubt whatsoever, if the district court, in a case of admiralty and maritime jurisdiction refuses to entertain the cause, or to pronounce a decree, or to allow an appeal from a decree, when interposed according to the rules prescribed by the court, or justified by the general principles of the admiralty practice, recognised in the courts of the United States, that this court has a jurisdiction by mandamus to compel the district court to proceed in the cause, to enter a decree (not prescribing what that decree shall be), or to allow an appeal upon the proper requisitions of the law being complied with by the party. By the 14th section of the judiciary act of 1789, c. 20 [1 Stat. 73]; all the courts of the United States are clothed with "power to issue writs of scire facias, habeas corpus, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Now, the acts above specified may be essential to the proper exercise of the appellate jurisdiction of this court over the district courts, and a mandamus is the proper process to effect the objects, and is agreeable to the principles and usages of law, when they are to be attained. My Brother, Mr. Justice Thompson, held this doctrine in the case of Smith v. Jackson [Case No. 13,064], and I entirely subscribe to his opinion on this subject.

By the act of 1789 (chapter 20, § 21), an appeal is allowed from final decrees of the district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars (since that time altered to fifty dollars), exclusive of costs; but the appeal is allowed only to the next circuit court to be held in the district. In what mode and at what time the appeal is to be made, is not pointed out by the statute. By the civil law, and also by the general practice of the admiralty courts of England, the appeal may be made viva voce in open court, or in writing apud acta at the time of the pronouncing the decree, or within ten days afterwards in writing before a notary, who authenticates the instrument of appeal. 2 Browne, Civ. & Adm. Law, 435, 437; Norton v. Rich [Case No. 10,352]. In America, this practice has not to my knowledge ever been adopted. See Norton v. Rich [supra]; [Glass v. The Betsey] 3 Dall. [3 U. S.] 6, note. The uniform course, as far as I know, has been to interpose the appeal during the term or sitting of the district court, at which the decree passed, and before its final adjournment, or to interpose it within some stipulated period after the term or sitting, fixed by the general rules of the court, or specially prescribed and allowed by the court in the particular case, upon the motion of the party aggrieved. And, in each of these cases, if the appeal is taken within the prescribed period, it is entered upon the record of the proceedings, apud acta, by the clerk of the court; and when entered, it takes effect in the same manner by relation back, as if entered in open court upon the record, when the sentence was pronounced. If no appeal is taken in either of these ways within the proper period, and the district court is adjourned without day, then it is understood, that the party waives any appeal, and the court proceeds to execute its decree; and no appeal subsequently taken by the party, even if offered or entered before the next term of the circuit court, is understood to possess any validity; but it is treated as a mere nullity. Such, at least, has been the invariable practice in this circuit; and it was fully recognised and enforced in the case of Norton v. Rich [supra]. And it appears to me, that the practice is settled upon true principles; for, otherwise, the execution of the decree of the district court would be suspended until after the next circuit court, or the objects of the appeal might be in a great measure defeated by the total or partial execution of it. Be this as it may, I have no doubt whatsoever of the authority of the district court to prescribe by its rules the term, wherein appeals shall be entered, and that the parties would be bound by the limitations prescribed by those rules.

In the present case the motion for a mandamus to direct the clerk to enter the appeal, as allowed by the district judge, is founded upon a total mistake of the true state of the facts, and the remedial justice, to which the libellants would be entitled. There is no proof whatever, that the district judge al-

lowed the appeal on the morning after the final adjournment of the court, or at any time afterwards. He disclaims it in open court; and we have the fullest authority, that he never gave any directions to the clerk to enter or allow the appeal, and that he never approved any bond or security offered by the libellants for the purpose of obtaining an appeal. If the libellants were entitled to have the appeal allowed, and entered after the adjournment of court upon the application made the next morning, or at any time afterwards before the next term of the circuit court, and the district judge refused it, the proper application should have been by a petition to this court for a mandamus to be addressed to him (and not to the clerk), to allow the appeal. The whole proceeding, on the part of the libellants, has been in this respect as irregular and incorrect as it well could be.

But, waiving all minor considerations of this sort, the real and substantial question before the court is, whether the district judge had authority to allow the appeal after the final adjournment of the court, supposing the claim to have been made, while the court was in session, to have such an appeal entered, or a reasonable time allowed for perfecting it. As a general question, supposing the decree to have been drawn out at large, and fully enrolled or entered upon the records of the court, I have no doubt, upon the authority of Norton v. Rich, and upon the prinples above stated, that he had no such authority. And whatever might be the mistake of the libellants, as to the nature and operation of the decree, it would have been final and obligatory upon them in this form of seeking redress. There could be no appeal; and the mode of redress must have been, if any, by another proceeding, by a libel of review, in the nature of a bill of review, or in the nature of a rehearing, which I shall presently have occasion to consider.

But I understand it to be admitted on all sides at the argument, that the decree of the district judge was not, in fact, drawn out, or entered upon the records, before the final adjournment of the court; that he merely expressed the heads and grounds of his opinion; and that the decree was afterwards formally drawn up and entered upon the records as of the term, in conformity to his minutes and by his express sanction. It seems to me, that, until a formal decree was entered, the party was not bound to enter any appeal. He was not bound by the mere minutes; but was at liberty to apply to the district judge to vary his minutes and correct any errors, before the final entry of the formal decree. Nor can I entertain any doubt, that the district judge was, under such circumstances, at full liberty to rehear the cause, for the purpose of varying his minutes, and correcting any mistakes made by the parties in relation to the nature and operation of his decree. Indeed, by the general practice in this circuit, the decrees and decretal orders of the circuit court, if they contain anything more than a mere affirmance of the decree of the district court, or a formal dismissal of the suit, are always submitted to the court upon a written draft, and varied and corrected and amended by the court upon the suggestion of the parties, as well as upon its own mere motion, and in vacation, as well as in term. It is usual, I believe, in the district court of Massachusetts, after an opinion has been pronounced upon the case, to give time to the parties to draw up the final decree, and to add to and vary the original minutes, upon the suggestions of counsel, or upon the farther reflections of the court. And no appeal is ever entered, until after such a formal decree has been promulgated and entered on record. In this view of the actual posture of the case, it seems to me, that it was not competent for the district court to direct the formal decree to be entered in vacation, as of the preceding term, without at the same time giving notice to the parties, and submitting the decree to their examination, and allowing some opportunity to them, either to rehear the cause in the discretion of the court, or to enter an appeal. In this view of the matter it strikes me, that the district judge was at full liberty, when applied to on the morning after the adjournment, either to have reheard the cause, or to have allowed the appeal; since the decree had not been drawn out and entered on record during the term. He might have adopted either course; but he could not properly refuse both. He might have suspended all the proceedings and entry of the decree, and have reheard the cause at the next regular term of the district court, as unfinished business, or he might have allowed the appeal to the next circuit court. I am sure, that my learned brother (the district judge) would have eagerly embraced the opportunity of re-examining the case, or of allowing the appeal, if he had not felt extreme doubts as to his authority and jurisdiction so to act. Nor do I wonder at his doubts in a case of so much novelty, where there was no definite precedent to guide or to aid his judgment.

And this leads me to the consideration of the other question, arising upon the petition for a libel of review in the nature of a rehearing. That it is competent for a court of admiralty to rehear a cause after a decree has been pronounced, pending the term, and before the proceedings had been fully enrolled, or drawn up and entered on the record, I confess, I do not entertain the slightest doubt. It was well remarked by Lord Stowell, in the case of The Fortitudo, 2 Dod. 70, cited at the bar, that the court "might, perhaps, within the limits of that very extended equity which it is in the habit of exercising, deem it not improper in some cases to suffer a cause to be reopened. But it certainly would not do so, unless there existed very strong reasons to show the propriety of the measure." He added, what is very pertinent

in the present case, "that mere negligence or oversight would not be sufficient ground for such an extraordinary interposition of the authority of the court. A direct case of fraud, or something equivalent to it, must be made out" before such a step should be taken. His lordship was here speaking of a case, where all the proceedings had been voluntarily withdrawn and abandoned by the party before any decree; and perhaps the latter part of his language ought to be limited to such a case. I own, that I should have great difficulty in holding to this doctrine in the full extent of the language in which it is stated. If there has been a manifest mistake, going substantially to the merits, even with some slight ingredients of negligence on that side, and without any circumstances of fraud on the other side, I should be much inclined to direct a rehearing during the same term, while the proceedings are in paper, and the decree remains unexecuted. But I am not aware, that after the decree has been enrolled or entered on record, and the term has passed, that any court of admiralty, at least in this country, has ever entertained an application for a rehearing. In the high court of prize commissioners in England, it is said to be the practice never to rescind a decree after it has passed, or to open the subject anew. It has been suggested, that the court would not do it, even when a fraud had been practiced. But, at the same time, it was by implication admitted, that another mode of redress might be adopted, meaning, I suppose, that a libel, in the nature of a bill of review in equity, might be sustained, for the purpose of bringing the matter either before the appellate court, or before the court, in which the original decree was pronounced. I allude to the case of The Elizabeth and The Geheimirath, reported in 2 Act. 57, 58, note. But see The Flora, 1 Hagg. Adm. 298, 304, and The Elizabeth, 2 Act. 57, 58. See, also, Palmer's Practice of the House of Lords on Appeals and Writs of Error, Introduction, pp. 59–69. In the case of Hudson v. Guestier, 7 Cranch [11 U. S.] 1, the supreme court held, that a case could not be reheard after the term, in which it had been originally decided; and this rule has ever since been constantly adhered to. Whiting v. Bank of U. S., 13 Pet. [38 U. S.] 6, 13. But this is very different from saying, that there may not be a libel, in the nature of a bill of review. Commissions of review are sometimes granted in England to review the decrees of the appellate courts in ecclesiastical causes, and also in admiralty causes of civil and maritime jurisdiction, as contradistinguished from causes of prize. But such commissions are not matter of right, but are granted as matter of favor and discretion, or, as the phrase is, of the grace and benignity of the crown, upon the advice of the lord chancellor. This was so held in Mathews v. Warner, 4 Ves. 186, and Eagleton v. Kingston, 8 Ves. 439, 465, 469, 481. In such commissions of review, it does not seem beyond the proper functions of the court in granting them to allow new pleas and proofs; and so in fact Lord Eldon seems to have thought it in Eagleton v. Kingston, 8 Ves. 439, 463, 472. I am not aware, however, that any such prerogative right to issue a commission of review has ever been recognized in America. If the object is attainable at all, it must be (as it seems to me) by a libel in the nature of a bill of review in equity, addressed to the proper court having possession of the cause. If a libel, in the nature of a bill of review in equity, would lie after a final decree in the admiralty, it seems to me, that it ought properly to be governed by the same rules and principles which regulate that proceeding in courts of equity, as well from their intrinsic propriety and reasonableness, as from the consideration that the bill of review had its origin in the civil and common law, from which the court of admiralty derives its own practice and modes of proceeding. This is sufficiently apparent from what is stated by Lord Chief Baron Gilbert in his Forum Romanum, c. 10, pp. 182, 183, an extract from which will be found in Story, Eq. Pl. (2d Ed.) § 403, note 4. That extract is also important for another purpose; for it shows, that while interlocutory sentences are always alterable before a definite sentence is pronounced, the definite sentence must always be in writing, and signed by the judge; and after it is so signed, it cannot be altered; but it properly becomes a matter of appeal. It thus affords an indirect confirmation of what has been already stated, that the minutes of a decree before it is drawn out at large (for it is not always signed by the judge in our practice) are always open to alteration; but the decree so drawn out, after it is approved and enrolled, is not, after the term is passed, open to be reheard. For every decree is treated, after it has been approved, as enrolled of the term, at which it passed.

But to return. One of the settled rules in regard to a bill of review, and bills in the nature of review in equity, is, that they will lie only for errors of law, apparent on the face of the proceedings, or for newly discovered facts material to the rights of the party, of which he could not avail himself at the time of pronouncing the original decree. If the facts were known, and might have been used at the time of the decree, or if, though not known, they might have been known by the exercise of reasonable diligence on the part of the party applying for the review, the court will refuse it; for bills of review upon new discovered facts are not matters of right, but rest in the sound discretion of the court. See Story, Eq. Pl. §§ 412–419; also McGrath v. The Candalero [Case No. 8,810]. Now, it is unquestionably true, that, in the present case, the matters relied on for a review were well known to the libellants at the time of pro-

nouncing the original decree, and there was great negligence in not then bringing them before the court. Assuming, that there was definitive decree, which was not appealed from by the mistake and misunderstanding of the libellants of the extent and operation of that decree, I do not well see, how a libel of review would have helped the matter; since it would not fall within any of the ordinary rules applicable to bills of review. And if the district judge had entertained the petition, and decided against the relief prayed, and refused to review the original decree upon the merits, as the allowance or disallowance of it was a matter of discretion, and not of right, I do not well see, how an appeal would have lain from a decree dismissing the petition of this court. For in matters of discretion the judgment of the district judge would not be subject to the revising authority of this court in the exercise of its appellate jurisdiction. The difficulty is, that the district judge, instead of hearing the petition upon its merits, dismissed it for want of jurisdiction; and if he possessed jurisdiction, then it might become the proper duty of this court to reverse that decree of dismissal, and to remand the cause to the district court for further proceedings; since, if the district judge had jurisdiction, it is by no means certain, taking all the circumstances together, that he might not, in the exercise of his discretion, have varied his original decree; and then the respondents might have brought up the whole proceedings before this court by appeal. The question, therefore, whether the district court does possess any jurisdiction by a bill of review, or otherwise, after the term has passed, is directly presented for the consideration of this court. I have not been able wholly to satisfy my own mind upon this point. But upon the most careful reflection which I have been able to bestow upon it, the result to which I have brought my mind, is, that, if the district court has a right to entertain a libel of review in any case, it must be limited to very special cases, and either where no appeal by law lies, because the matter is less in value than is required by law to justify an appeal, or the proper time for any appeal is passed, and the decree remains unexecuted;—or where there is clear error in matter at law; or, if not, where the decree has been obtained by fraud; or where new facts, changing the entire merits, have been discovered since the decree was passed, and there has been not only the highest good faith (uberrima fides), but also the highest diligence and an entire absence of just imputations of negligence; and, finally, where the principles of justice and equity require such an interference to prevent a manifest wrong. Farther than this, I am not prepared to go; and I may say, that, with my present impressions, I should go thus far with some hesitation, and pause at every step.

But I am spared the necessity of positively deciding this point by the actual posture of the present case. It appears to me, that in no just sense can the original decree in this case be deemed a final or definitive decree. At most, it is but an interlocutory decree, partaking of the character of a final decree. I agree, that there are cases, in which either party may appeal from an interlocutory decree, having the effect of a final decree. Thus, for example, if upon a bill to foreclose a mortgage there is a decree for a sale of the mortgaged premises, although the decree is but interlocutory, and the sale is not perfected, yet, inasmuch as it has the effect of a final decree upon the rights of the mortgagor, he may appeal from it before such sale. So it was decided by the supreme court in Ray v. Law, 3 Cranch [7 U. S.] 179. But although a party, injured by such a decree, may appeal before the definitive decree is entered, and the whole proceedings are closed under it; yet it does not follow, that he is bound so to do, and may not lie by, and appeal after the definitive decree. On the contrary, as I understand the law, he has an election to pursue the one course or the other. Now, in the present case, it is impossible to consider the original decree as final between the parties, as to all the matters in controversy. It was interlocutory in its character for many purposes. It directed the charges and expenses of keeping and selling the property, and the fees and charges of the officers of the court, to be first deducted from the proceeds of the sale. Now, the exact amount of these charges, expenses and fees were not ascertained, and were necessarily open to further future inquiry, and might become matters of controversy between the parties, upon which they might have a right to take the opinion of the court. Indeed, it was indispensable, that this should be done, before it could be ascertained, what the moiety of the salvors would be in pecunia numerata. And then, again, the sums, belonging to the distributive shares of each salvor, remained to be ascertained, and awarded to him severally, in his own proper name; for, until that should be done, he could not know what his own particular share was, and whether he was aggrieved or not by the decree, not only as to the salvage in general, but as to his particular share thereof, so as to institute an appeal severally, and for his own interest. Thus, for example, until the share of each salvor was specifically ascertained, it would be impossible to say, whether the sum in controversy between him and any co-salvor, or the claimants, was enough to found the appellate jurisdiction of this court. It was indispensable, therefore, that the whole matter should have been referred to a master or auditor, to take an account, and ascertain the sums due to all parties according to the principles of the original decree; and for that purpose to hear all the parties, and make a report to the court. Such a report, when made, would be open to

contestation by any of the parties in interest; and until confirmed by the court, there would not be a sufficient basis on which to found a final decree, absolute in its nature, upon all the rights of all the parties.

It seems to me, therefore, that the district judge had a clear remaining jurisdiction in the premises for this purpose; that the original decree was not so final, as without an appeal to supersede the necessity of further proceedings; and consequently, that, as the original cause has never been wholly removed from his jurisdiction by any appeal, he is at liberty to rehear it, and to vary or modify that decree, and is bound to go on and perfect it by an absolute definitive decree. When such a decree shall be rendered by him, if unsatisfactory to any of the parties, it will of course be open to appeal under the usual circumstances.

My judgment, therefore, is, that the decree of the district court on the petition ought to be reversed; and, as all the proper materials are not now before this court to enable it to act definitely upon the whole rights of the parties, that the case ought to be remanded to the district court for further proceedings. If the parties, with a view to prevent further delay, shall agree, that the original cause shall be deemed to stand before this court, as if an appeal had been originally entered, and allowed in the district court, I shall have no difficulty in acting upon such an agreement, instead of remanding the cause. Otherwise a special mandate will be sent with the cause to the district court.

NEW ENGLAND, The, v. KENNEBEC & B. STEAM NAV. CO. See Case No. 10,151.

NEW ENGLAND, The (KRAMME v.). See Case No. 7,930.

Case No. 10,152.

NEW ENGLAND BANK v. BANK OF THE METROPOLIS.

[1 Hayw. & H. 203.] [1]

Circuit Court, District of Columbia. Sept. 14, 1844. [2]

BANKS AND BANKING — COLLECTIONS BETWEEN BANKS—RIGHT TO PROCEEDS.

1. Where banks acted as collecting agents for other banks, and in that capacity and in their settlements they mutually treated the notes and other paper sent as the property of the bank from which they received them, and without notice that they were not the property of said bank, the bank is entitled to retain the proceeds of said notes, and to retain the notes not collected and in their possession, until a settlement of the account between them, or tender is made of the balance found due.

2. Where notes and other paper were deposited with a bank for collection, and that bank transmitted them to another bank for the same purpose, after being endorsed by it in the usual manner, the owner of said paper is entitled to recover the amount collected by said bank, even if the said bank had, in its dealings with the endorsing bank, treated said paper as the property of said bank in the settlement of their balances.

This action was brought by the plaintiffs in 1841, on a balance of $2,900 for the amount of the proceeds of notes and bills sent to the defendants by the Commonwealth Bank of Boston, Massachusetts, for collection, the plaintiffs claiming the notes and bills as their property and subject to their order and control. The jury under the instructions of the court brought in a verdict for the plaintiffs for the whole amount of the proceeds of the notes and bills. [Case unreported.] At the trial a bill of exceptions was taken by the defendants and a writ of error was carried to the supreme court where the judgment was reversed and the cause remanded with direction to award a new trial. [1 How. (42 U. S.) 234.] On the receipt of the mandate of the supreme court a new trial was had on the original declaration and on the same issue.

Joseph H. Bradley, for plaintiffs.
Cox & Coxe, for defendants.

The following prayer was asked for by the counsel for the defendant, and THE COURT gave the instruction as prayed (THRUSTON, Circuit Judge, absent): "That if from the evidence they shall find that the course of dealing between the said Commonwealth Bank and the Bank of the Metropolis as stated in said evidence actually existed and had continued for several years prior to January, 1838; that their dealings had been mutual and extensive; that accounts current existed between them in which they were respectively credited with the proceeds of all notes, bills, drafts, &c., transmitted to the other for collection, when the same were received, and charged with all the expenses attending the same, as postage, cost of protest, &c., that from time to time such accounts were regularly transmitted from each to the other which accounts were mutually acquiesced in without objection, that the balances on the accounts current fluctuated from time to time according to the amount of money, bills, notes, &c., remitted; that upon the credit of such negotiable paper thus transmitted or expected to be sent, or upon the credit of such mutual dealings, each party was in the practice of drawing and accepting drafts and orders on or by the other; that said banks uniformly received the notes, bills, drafts, &c., transmitted by the other for collection and always regarded and treated them as the property of the other; that the notes, drafts and bills enumerated in the letter from C. Hood to G. Thomas, of the 13th January, 1838, were also received, regarded and treated; that the defendants had no notice or knowledge until the receipt of said letter, that said Commonwealth Bank was not the absolute and only

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[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

[2] [Reversed in 6 How. (47 U. S.) 212.]

owner of the same or that plaintiffs had any interest in or claim to the same; that said Commonwealth Bank became insolvent some days prior to said 13th January, 1838, at which time the Bank of the Metropolis, had in its possession and so held and received in the course of said mutual business, the notes, bills, &c., mentioned in said letter; that in the course of said mutual business it was the practice and usage of each of said banks to draw upon the other as its exigencies or convenience required even beyond the amount of the balances then due to it, on general account, which drafts it was also their usage and practice to accept and pay on the credit of anticipated remittances of negotiable paper, or funds, or on the credit of such mutual dealings and course of business and it was also the practice and usage of both said banks to suffer and permit ascertained balances to lie undrawn for on the same credit, that at the time the said Commonwealth Bank became insolvent and when said letter of January 13, 1838, was written and received, there was a balance of $2,900, or other sum due on said general account from said Commonwealth Bank to the Bank of the Metropolis, then the defendants were entitled to hold and retain the said notes, drafts, bills, &c., so in their possession, and the proceeds of the same when received until the payment or tender of such balance, and the plaintiffs are not entitled to recover in this action until they show to the satisfaction of the jury that before action brought such balance was paid or tendered to said defendants." Which was given by THE COURT (THRUSTON, Circuit Judge, absent).

And thereupon, and after the court had given the said instructions to the jury on the prayer of said defendants, the plaintiffs, by their counsel, prayed the court to instruct the jury: "That if from the evidence the jury shall find, that the notes mentioned in the said letter, dated the 13th day of January, 1838, from C. Hood, cashier of the Commonwealth Bank, to G. Thomas, cashier of the Bank of the Metropolis, were received by the said Commonwealth Bank, from the said plaintiffs, and were at the time of such receipt the property of the plaintiffs. That they were deposited by the plaintiffs with the said Commonwealth Bank, to be transmitted by it only for collection. That the said Commonwealth Bank, received the said notes only as the agent of the plaintiffs, and without giving any consideration for them or receiving any compensation as such agent to transmit them for collection, and never had any right, title or interest in or claim or lien upon the said notes, except as agent as aforesaid. That the said Commonwealth Bank, as agent as aforesaid, and not otherwise did in fact transmit the said notes to said defendants for collection only. That the said notes were endorsed by the cashier of the plaintiffs as cashier, and by the cashier of said Commonwealth Bank, as cashier in the mode and form commonly used by banks in the United States, in the transmission of negotiable paper deposited with and transmitted through such banks for collection. That the usage to deposit in one bank, such paper so endorsed to be transmitted, and for such deposit bank to endorse such paper in the manner aforesaid and to transmit the same so endorsed to another bank is a common usage throughout the United States, and that the custom so to endorse such negotiable paper is universal. That the Bank of the Metropolis, and the said Commonwealth Bank, were extensively engaged as the agents of other banks and with each other in the transmission for collection and in the collection of negotiable paper, belonging to third parties, in the year 1836 and 1837, in various and distant parts of the United States, and that the common form of endorsement used in the transmission of such negotiable paper by the said Commonwealth Bank and the Bank of the Metropolis was such as was used by the said Commonwealth Bank in the endorsement and transmission of said notes for the proceeds of which this suit is brought, and that neither of the said banks under the said usage and custom held the other liable upon such endorsement. That the said notes last mentioned were transmitted to the said Bank of the Metropolis in letters notifying the defendants that they were transmitted for collection, in the form commonly used by said banks in transmitting negotiable paper for collection and with no other intention as to who was the real owner of such negotiable paper. Then it is competent for the jury to infer from the facts aforesaid, that the defendants had notice that the said paper was transmitted by the said Commonwealth Bank as agent and not as owner thereof, and if the jury so find, then the plaintiffs are entitled to recover, notwithstanding the jury shall find that the said Commonwealth Bank and the Bank of the Metropolis treated each other as the true owners of the paper so remittted, and notwithstanding they shall further find that balances were from time to time suffered to remain in the hands of each other to be met by the proceeds of negotiable paper deposited or expected to be transmitted in the usual course of dealing between them, and notwithstanding the course of dealing stated in the instruction heretofore given at the instance of the defendants."

To the giving of which instruction as prayed, the counsel for the defendants objected, but THE COURT overruled such objection and instructed the jury as requested, to which the defendants, by their counsel, excepted. THRUSTON, Circuit Judge, absent.

Verdict for the plaintiff.

The defendants, by their counsel, moved for a new trial. Because the verdict was

against law, against the evidence and against the instructions of the court. Motion overruled and judgment on the verdict for $2,900.

[The case was carried by writ of error to the supreme court, where the judgment rendered in this court was reversed. 6 How. (47 U. S.) 212.]

NEW ENGLAND CAR CO. (DAY v.). See Case No. 3,686.

NEW ENGLAND CAR-SPRING CO. (DAY v.). See Cases Nos. 3,687 and 3,688.

Case No. 10,153.

NEW ENGLAND CAR-SPRING CO. et al. v. UNION INDIA RUBBER CO. et al.

[4 Blatchf. 1.][1]

Circuit Court, S. D. New York. March 30, 1857.

CORPORATIONS—PAYMENT TO TREASURER—NEGLECT OF DUTY BY AGENT AS A DEFENSE—NOTICE TO TREASURER—WAIVER—ESTOPPEL.

1. The treasurer of a corporation, who is held out to the world as the proper agent to whom a payment to the corporation is to be made, is the proper agent to whom notice is to be given as to the purpose for which the payment is made.

2. Circumstances stated, under which a corporation is not permitted to set up a neglect of duty by its agent, to show its want of knowledge of facts the knowledge of which was communicated to its agent.

3. Where a notice is required to be given to a corporation, it is sufficient to give such notice to its treasurer and managing agent, at its office; and it is not necessary to give it to the directors of the corporation, when assembled for the transaction of business.

4. A corporation can waive a right, and can be estopped from saying that it has not waived it.

5. The doctrine of estoppel considered, in reference to a corporation which receives, through its agent, a portion of the consideration money for the sale of property in which it is interested, and afterwards endeavors to prevent the full operation of such sale.

In equity. This was an application for a provisional injunction, to restrain the infringement of letters patent [No. 3,633] granted to Charles Goodyear, June 15th, 1844, for what is known as "vulcanized India rubber" [reissued December 25, 1849, No. 156]. The New England Car-Spring Company claimed the exclusive right to make car-springs under the patent, by license from Goodyear, and the bill alleged that the defendants were making car-springs of vulcanized India rubber without right. The defendants claimed a right to make such car-springs by license from Goodyear under the patent. On the 18th of July, 1844, Goodyear entered into an agreement with the Naugatuck India Rubber Company, by which he gave a license to that company, to use, with a few exceptions, the whole right granted by the patent, upon certain terms. By that agreement, Goodyear covenanted not to license any other person, reserving, however, to himself, provided he should deem it for his interest to sell the exclusive right for any particular subject of manufacture under the patent, the right so to do, for a sum in gross, provided, that, before any such sale for a sum in gross, the Naugatuck Company should have the right to become the purchasers, at such stipulated price or sum in gross; and such sale was not to be made to any other person, except on the refusal or neglect of the Naugatuck Company, for sixty days after the offer should have been made to them, to become the purchasers for such sum in gross, nor then, until one-fourth of the stipulated sum in gross should be first paid or secured to the company, to their satisfaction; and, upon such sale, the license to the company, to the extent of the exclusive right sold, was to cease. This agreement was recorded in the patent office. On the 29th day of October, 1847, Goodyear, for the consideration of $5,000, sold to Charles Ely and Edward Crane the exclusive right to use his patented invention in the making of car-springs. The transfer was in writing, and was recorded in the patent office January 10th, 1848. At the time of such transfer to Ely and Crane, the factory of the Naugatuck Company was at Naugatuck, in Connecticut, and all the directors, except Charles J. Gilbert, lived at Hartford, in that state. The company had an office for the transaction of business in the city of New York, where Charles J. Gilbert attended, he being the treasurer of the company. On the 26th of December, 1848, Ely and Crane assigned to the New England Car Company all the right which they acquired by the conveyance from Goodyear to them, of the 29th of October, 1847; and, on the 20th of November, 1851, the last-mentioned company assigned all such right to the plaintiffs, the New England Car-Spring Company. Both of these assignments were duly recorded in the patent office. On the 4th of November, 1848, the Naugatuck Company assigned all the right which they then had, by virtue of their contract with Goodyear, of the 18th of July, 1844, to the defendants, the Union India Rubber Company, they agreeing to perform all the covenants which the Naugatuck Company were bound to perform by virtue of their agreement with Goodyear of that date.

James T. Brady and Edward N. Dickerson, for plaintiffs.

William Curtis Noyes and George C. Goddard, for defendants.

INGERSOLL, District Judge. If the contract between Goodyear and Ely and Crane was a valid contract to convey what it purported to convey, then, from and after its date, the Naugatuck Company had no right to manufacture car-springs under the patent; and, consequently, no such right was conveyed by them to the defendants. If the contract between Goodyear and Ely and Crane did not convey what it purported to

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

convey, then the Naugatuck Company, subsequently to that contract, had the same right which they had before. And as, before such contract, they had a right to make car-springs under the patent, it would follow that the defendants would now have the same right to make such car-springs, as, on the 4th of November, 1848, they succeeded to the rights which the Naugatuck Company then had. The plaintiffs insist, that the contract between Goodyear and Ely and Crane was a valid contract, and that it conveyed the exclusive right to make car-springs of vulcanized rubber under the patent.

It is clear that Goodyear, after the contract with the Naugatuck Company, had no absolute unconditional right to convey to Ely and Crane what his contract with them purported to convey. The Naugatuck Company had rights, which were inconsistent with such absolute unconditional right. Their rights could not be affected at the mere will of Goodyear. Before their agreement with Goodyear, he could sell to whom he pleased, and for such sum as he pleased, the exclusive right to manufacture car-springs of vulcanized rubber. And, after such agreement, he could sell to any third person such exclusive right, upon any terms agreed upon, provided the Naugatuck Company assented to the same. Whatever restriction was imposed by the agreement, upon his right to sell, was so imposed for the benefit of the Naugatuck Company. They could, by their assent, remove the restriction, and, upon such assent being given, the right to sell existed, although the conditions mentioned in the agreement were not complied with. He had, also, a right to sell without the assent of the Naugatuck Company, provided that, upon an agreement to sell for a sum in gross, the company should either refuse or neglect, for sixty days after notice given to them to become the purchasers, to avail themselves of the privilege; and provided, also, that, upon such neglect or refusal, one-fourth of the stipulated sum or price in gross should be tendered to them. If the company assented to a sale, then these conditions need not be complied with. If these conditions were performed, then there was no necessity to obtain the assent of the company. In such a case, a sale would be valid, even if they should dissent. If, therefore, the Naugatuck Company assented to this sale of Goodyear to Ely and Crane, or if, before the sale, the conditions above set forth were performed, the Naugatuck Company would be divested of all right to manufacture car-springs under the patent, and the exclusive right to manufacture them would be vested in Ely and Crane. And, as the New England Car-Spring Company now have all the right which Ely and Crane derived from Goodyear, the exclusive right would be vested in them.

Two questions, therefore, are presented for determination: First, did the Naugatuck Company assent to the contract of sale, as made by Goodyear to Ely and Crane? and, second, were the conditions mentioned in the contract between them and Goodyear, and which were necessary to be performed, to give him a right to sell, complied with by him, before the contract of sale to Ely and Crane was executed? If either of these questions is answered in the affirmative, then the contract of sale to Ely and Crane was a valid one, and conveyed an exclusive right to them to manufacture car-springs under the patent; and, as a consequence, the right of the Naugatuck Company, under the license of Goodyear, to manufacture such springs, ceased.

The facts upon which the question of assent is to be determined, admit of little dispute. Five thousand dollars was paid by Ely and Crane for the transfer of the car-spring right to them. One thousand dollars of this sum was paid to a Mr. Dorr, as a commission for negotiating the purchase. On the 4th of November, 1847, Dorr delivered to Gilbert, the treasurer of the Naugatuck Company, for that company, $1,000, in a draft drawn by Charles Ely on Edward Crane, for that company's share of the purchase-money, according to that agreement of the 18th of July, 1844. The transaction was entered on the books of that company. The draft was discounted for the benefit of that company. It was paid at maturity. They received the money. It was appropriated to their use. They took advantage of the contract made between Goodyear and Ely and Crane. They received the consideration money paid by Ely and Crane to cancel the right which before then existed in them. They received the proceeds of the sale of their right, as made by Goodyear. They have kept those proceeds. They have never offered to return them. They never in any way repudiated the act of their treasurer, either in receiving the draft, or in procuring it to be discounted, or in applying the avails to their benefit. The money which Ely and Crane paid, $1,000 of which the Naugatuck Company received, was paid and received in consideration that the car-spring right should exclusively vest in Ely and Crane, and in consideration that the license to the Naugatuck Company to make car-springs should cease. The Naugatuck Company never attempted to make car-springs. The transaction in relation to this payment was entered on the books of that company, which books were at all times open to the inspection of its directors. The books show that the "patent account" was credited, and "bills receivable" debited, with the draft. On the 9th of February, 1848, "bills receivable" was credited, and "cash" debited, with the money received on the discount of the draft. It cannot be denied that Gilbert, the treasurer, knew for what purpose the draft was delivered to him, or that he received it for the purpose for which it was delivered.

But it is claimed by the defendants, that, although this $1,000 draft was delivered to

Gilbert, their treasurer, as the consideration that Ely and Crane should have the exclusive right to manufacture car-springs under the patent, and that the Naugatuck Company's right to manufacture such springs, under the license from Goodyear, should cease, and although Gilbert knew of the purpose for which the money was paid, and received it for the purpose for which it was paid, and applied it to the company's use, yet the corporation had no knowledge of the purpose for which the draft was delivered to the treasurer, and did not know that it was the consideration paid to enable Goodyear to transfer an exclusive right to manufacture car-springs, and no notice to that effect was given to it, and, therefore, it should not be presumed to have assented to such transfer.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. The only mode to give notice, or to communicate knowledge, to such artificial being, invisible and intangible, is to give such notice, and to communicate such knowledge, to some agent authorized to receive it. Corporations know nothing except through agents. They act by agents. They receive notice through agents. The neglect of agents is their neglect. The directors are no more the corporation than the treasurer is. They are merely the agents of the corporation, when assembled for the transaction of business. Gilbert was the proper agent of the corporation to receive funds paid to them. When the corporation appointed him treasurer, it held him out to the world as the proper agent for that purpose. As he was the proper agent to whom a payment should be made, it necessarily follows that he was the proper agent to whom knowledge should be communicated for what purpose such payment was made. Every agent authorized to receive money for his principal is the proper person to whom, when a payment is made, notice should be given for what purpose the payment is made. It is a principle of law, that, where a debtor owes two separate debts to the same creditor, and makes a partial payment, if he gives notice, at the time of payment, upon what debt the payment is to apply, it must be applied on such debt; and, if he gives no such notice, the creditor has a right to apply the payment on what debt he pleases. If an incorporated bank holds two notes against an individual, one of which is abundantly secured, and the debtor makes a partial payment, and, at the time of payment, notifies the cashier of the bank that the money is to apply on the note that is secured, it cannot be claimed that the bank has a right to apply the money on the note that is not secured, upon the ground that no notice was given to the corporation on what note the debtor wished the payment to apply.

It appears, on the books of the corporation, that a draft, drawn by Charles Ely on Edward Crane, for $1,000, was received, and that the "patent account" was credited with that draft. It is to be presumed that the directors did their duty. If they were attentive to their duty, the corporation, through its agents the directors, knew for what purpose the draft was received. Knowing this purpose, and not objecting to it, through any of its agents, but, through its agents, appropriating the money to its use, it ratified the receipt of the money for the purpose for which it was received, and assented to such purpose. The entry on the books fully apprised the corporation that the $1,000 draft was paid and received on the "patent account." It also apprised the directors. By inquiry, the directors could have ascertained for what particular reasons this $1,000 draft was credited to the "patent account." It was the duty of the corporation, through its agents, the directors, to make such inquiry. It is to be presumed that the directors performed this duty. It is to be presumed, therefore, that the corporation knew that the draft was received to enable Goodyear, by a transfer to Ely and Crane, to take from the company the right to manufacture car-springs. And, knowing the purpose for which the money was paid and received, the corporation, by not objecting, approved of it, and thereby assented that that purpose should be accomplished. If the directors, by a neglect of their duty, were ignorant of this entry on the books, and of the purpose for which the draft was received, the corporation cannot set up such neglect of duty in its agents, to show that it had no knowledge of the transaction as it actually was.

From these facts it is clear, that the Naugatuck Company assented to the contract of sale made by Goodyear to Ely and Crane. If they did not assent, they committed a fraud, not only on Goodyear, but also on Ely and Crane; and it is not to be presumed that they were guilty of any such fraud. He who does not dissent, when it is his duty so to do, if he ever intends to, thereby assents. If the owner of goods stands by, and knowingly sees a stranger sell his property, and does not dissent, he thereby assents to the transfer. He who receives the consideration money paid to have a particular act performed, thereby assents that such act shall be performed.

In July, 1847, Goodyear deemed it for his interest to sell, for the sum of $5,000, the right to manufacture car-springs under the patent. He had an opportunity so to do. Sometime during that month, he gave notice to Gilbert, the treasurer of the Naugatuck Company, and who had also the general management of its business, at a yearly salary of $2,000 of his wish and intention. That corporation, for more than sixty days after such notice to Gilbert, neglected to become the purchaser of such right to manufacture car-springs. The sixty days having elapsed, the draft of Ely on Crane for $1,000 was delivered to Gilbert, as treasurer of the company, for the company, on the 4th of November, 1847, for their share of the sum for which

Goodyear had agreed to sell the right, according to the agreement of July 18th, 1844, and Goodyear made the transfer to Ely and Crane, purporting to convey to them the whole of the car-spring right. In regard to these facts, there can be no serious doubt. But it is claimed by the defendants that they are not sufficient to show that the conditions in the contract of July 18th, 1844, to be performed by Goodyear, before he could sell and transfer the car-spring right, were complied with.

The notice which Goodyear sent to the Naugatuck Company was not in writing. There was no necessity that it should be in writing. The contract of July 18th, 1844, did not require that it should be in writing. The notice was to be given to the corporation. But a notice given to a proper agent of a corporation, is notice to the corporation. There is no way to give notice to a corporation, but to give it to a proper agent of the corporation. It can be given in no other mode. The defendants claim that the treasurer, who was also the managing agent, was not the proper agent to whom the notice should have been given, and that it should have been given to the directors, when assembled for the transaction of business. As has been already shown, the directors were not the corporation. They were only the agents of the corporation, when they were assembled for the transaction of business. And the records show that they had no regular place of meeting, or any regular time of meeting. They met in such place and at such time as was convenient to them. They had a meeting on the 30th of December, 1846. The next meeting was on the 19th of May, 1847; the next, on the 14th of July, 1847; the next, on the 16th of September, 1847; and the next, on the 28th of October, 1847. Their meetings were held sometimes at Hartford, sometimes at Naugatuck, and sometimes at New York. Goodyear had a right, by the contract of July 18th, 1844, to give, at any time, the notice required. That right of giving notice at any time, he could not exercise, if it were required of him to give notice to the directors when assembled for the transaction of business. He had no means of knowing when they assembled, or where they assembled. And, according to the claim made, if they should never assemble, or if they should keep the time and place of their assembling a secret, no notice could be given at all; and the consequence would be, that this right of sale, which Goodyear reserved, upon certain conditions to be performed, could never be exercised. There is a provision in the contract of July 18th, 1844, that if, for the period of one year, the Naugatuck Company shall neglect or refuse to stamp the goods manufactured, with the name of Goodyear, in disregard of his written remonstrance to the company, the license shall, at the expiration of the year, become void. According to the claim of the defendants, if such neglect should take place, and there should be no meeting of the directors, no such written remonstrance could be given. Such a construction would put it in the power of the corporation, through its agents, the directors, to abrogate all the rights which Goodyear reserved to himself in the contract.

The corporation had an office for the transaction of its business in the city of New York, established there by the vote of the company. The factory was at Naugatuck. Gilbert, the treasurer, attended, at the office in New York, to the business of the company, at a yearly salary of $2,000. There was no other agent of the corporation at that office. The directors had no particular office or place where they assembled to attend to the business of the corporation. Gilbert had the general superintendence of the business of the corporation. That appears on the records of the corporation, in a report made by him to the company, and accepted by them. The notice was given to him at the office of the company, where there was no other agent; and such notice to such agent was a notice to the corporation.

Upon such notice, it was not required that the corporation should do any act, either by vote or otherwise, to enable Goodyear to sell. All that was necessary was, that they should neglect to act—that they should neglect to make the purchase. When the sale was made by Goodyear to Ely and Crane, more than sixty days had elapsed from the time the notice was given. Five thousand dollars was the consideration of the sale. It was made on the 29th of October, 1847. One thousand dollars was allowed to Dorr, for a commission for negotiating the purchase. Of the remaining $4,000, $1,000 was paid to the Naugatuck Company, on the 4th of November, 1847, for their portion. They received it as their portion, and never made any objection to it. And, if in the latter two particulars, the conditions of the contract of July 18th, 1844, were not strictly complied with, it was because the company did not require a strict compliance. They waived such strict compliance. The conditions in the contract were for their benefit, and they could waive the right to insist upon a strict compliance with them. By the various acts which have already been enumerated, they did waive such right, and having so waived such right, such waiver must have the same effect as if the conditions had been strictly complied with.

The necessities of the case do not require a resort to the doctrine of estoppel, to come to a right determination. If they did, such resort would confirm the justness of the plaintiffs' claim. Corporations, as well as individuals, can be estopped from denying that they have done certain acts, when they had the corporate power to do such acts. They have the power to waive rights and conditions in their favor, to transfer rights and privileges, and to assent to such transfer by others;

and, therefore, they can be estopped from saying that they have not so done. Where one, by his words or actions, intentionally causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief, so as injuriously to affect his previous position, he is precluded from averring a different state of things, as existing at the time. Cowles v. Bacon, 21 Conn., 451; Brown v. Wheeler, 17 Conn. 345, 355; Roe v. Jerome, 18 Conn. 138, 153; Carpenter v. Stilwell, 12 Barb. 128. Where a party, negligently or wilfully, silently stands by, and allows another to contract, on the faith and understanding of a fact, which he can contradict, he cannot afterwards contradict that fact, as against the person who may be injured thereby. Gregg v. Wells, 10 Adol. & E. 90; Watson v. McLaren, 19 Wend. 557, 563; Dezell v. Odell, 3 Hill, 215; Reynolds v. Lounsbury, 6 Hill, 534, 536; Sanderson v. Collman, 4 Man. & G. 209; Welland Canal Co. v. Hathaway, 8 Wend. 480, 483; Bushnell v. Church, 15 Conn. 406, 419. If he stands by and sees his property sold, without objecting to it, he is estopped from saying that the party selling had no right to sell; and this even when he derives no benefit from the sale, and especially when he receives and keeps the consideration money derived from it. In such a case, it is his duty to speak and make known his rights to the purchaser, if he does not intend to be bound by the sale; and, if he is silent, when conscience requires him to speak, equity will debar him from speaking, when conscience requires him to be silent. Hall v. Fisher, 9 Barb. 17.

It is not necessary to examine many particular cases to sustain these rules. In the case of Zulueta v. Tyrie, 21 Eng. Law & Eq. 582, A., a merchant in Cuba, sold to B. part of a cargo shipped by him. C., (who was A.'s correspondent in England,) being informed thereof by B., made no claim until four months afterwards, when he insisted on a paramount right, over B., to the cargo. It was held, that, even assuming that he had originally such paramount right, his conduct had been such, that a court of equity would not allow him to enforce it against B. The case of Wing v. Harvey, 27 Eng. Law & Eq. 140, was an action on a policy of insurance issued by the Norwich Union Society for the Insurance of Lives, on the life of one Bennett. There was an express condition in the policy, that it should be forfeited and become void, in case the assured went, without the license of the directors, beyond the limits of Europe. He did, without such license, go to Canada, where he resided several years, and there died. After the forfeiture, premiums were paid, from time to time, to a local agent, who knew of the residence of the assured in Canada, upon the faith that the policy continued valid and effectual. These premiums were transmitted to the directors, who retained them without objection. It was held, that though the local agent might not have given notice to the directors, of the true state of the circumstances under which the premiums were paid, the directors became as much bound as if the premiums had been paid by the assured directly to them, with full knowledge of such circumstances; that the directors, by taking the money, were precluded and estopped from saying they received it otherwise than for the purpose for which it was paid to the agent; and that that for which the money was paid should be executed. He who takes the benefit of any contract or deed must bear the burthens of such contract or deed. If he knowingly accepts a part of the purchase money for a sale of property, he is estopped from denying the validity of the sale. Stroble v. Smith, 8 Watts, 280; Brewster v. Baker, 16 Barb. 613. If a person accepts a beneficial interest under a will, he thereby debars himself from setting up a claim which will prevent its full operation. Weeks v. Patten, 18 Me. 42; Hyde v. Baldwin, 17 Pick. 303; Thellusson v. Woodford, 13 Ves. 209. Apply this principle to the case now under consideration. The Naugatuck Company accepted and received a beneficial interest in the contract between Goodyear and Ely and Crane, to wit, $1000, a part of the consideration for the sale of the exclusive right to manufacture car-springs. They would be estopped, therefore, from setting up any claim to prevent the full operation of the sale of such exclusive right.

There are other considerations presented by the plaintiffs, to show that the exclusive right to manufacture car-springs was in the New England Car-Spring Company; as that, when the sale was made by the Naugatuck Company to the Union India Rubber Company, the agent of the latter company, who procured the purchase to be made, and, who on their part, executed the contract, had full knowledge that no right existed in the Naugatuck Company to manufacture car-springs, and that no such right was intended to be purchased by the Union Company; as that the defendants have, at all times, until within a few months past, acquiesced in the exclusive right of the New England Car-Spring Company; as that the Union Company applied to the New England Car-Spring Company for liberty to make car-springs for them, and, on condition that they might so manufacture, covenanted not to make springs for other parties in interference with the rights of the New England Car-Spring Company, as granted to said company by Charles Goodyear; as that the Union Company have never stamped the car-springs manufactured by them, with the words "Goodyear's Patent," and have never paid or offered to pay any tariff, which they were bound to do, if they were manufacturing by virtue of any right derived from the Naugatuck Company; and as that the exclusive right of the plaintiffs has been established in various trials at law. But it is not necessary to examine the force of any of these considerations. The

points considered show that the exclusive right claimed by the New England Car-Spring Company is clear, and that the violation of right on the part of the defendants is equally clear. An injunction must, therefore, issue, as prayed for.

[For other cases involving this patent, see Goodyear v. Central R. Co. of N. J., Case No. 5,563, and Goodyear v. Union India Rubber Co., Id. 5,586.]

NEW ENGLAND GLASS CO. (MAGOUN v.). See Case No. 8,960.

NEW ENGLAND INS. CO. (BAXTER v.). See Case No. 1,127.

Case No. 10,154.

NEW ENGLAND INS. CO. et al. v. DETROIT & C. STEAM NAV. CO.

[13 Int. Rev. Rec. 94; 10 Am. Law. Reg. (N. S.) 383.]

District Court, N. D. Ohio. 1871.

JURISDICTION OF FEDERAL COURTS IN ADMIRALTY CASES — RESIDENTS OF OTHER DISTRICTS — ATTACHMENT OF PROPERTY — SUPREME COURT RULES.

[1. A libel in personam to recover damages for a collision is a "civil suit," within the meaning of the judiciary act of 1789, § 11 (1 Stat. 78), and hence the court in which the suit is brought cannot obtain jurisdiction, as against an actual resident of another district, by an attachment of his property; nor has the act of 1789 been modified in this respect by the acts of 1792 and 1842, which only regulate the exercise of existing jurisdiction, and do not alter or enlarge the same. Distinguishing Manro v. Almeida, 10 Wheat. (23 U. S.) 473.]

[2. The acts of 1792 (1 Stat. 275) and 1842 (5 Stat. 510) conferred no power upon the supreme court to alter or enlarge, by its rules, the jurisdiction of the federal courts in respect to non-residents of the district in which the suit is brought.]

[This was a libel in personam by the New England Insurance Company and others against the Detroit & Cleveland Steam Navigation Company to recover damages occasioned by a collision. Heard upon a plea to the jurisdiction.]

SHERMAN, District Judge. The libel was filed in this case to recover the damages caused by the collision of the steamboat Morning Star and the bark Cortlandt, on Lake Erie, in the month of June, 1868. The usual process was issued from this court and returned by the marshal, that the respondents were not found; that he had attached one of its steamboats lying in the harbor of Cleveland. Under a stipulation entered into by the parties, both a plea to the jurisdiction and an answer to the merits were filed; but the answer was not to conclude the respondents from all advantages they might derive from the plea to the jurisdiction. The case was presented at this term upon the questions arising upon the plea. On the part of the respondents it is insisted that this court has no jurisdiction of the cause, because the respondent was not an inhabitant of the Northern district of Ohio, nor found therein; but was an inhabitant of the Eastern district of Michigan. The libellants claim that it is according to the long and well-established practice of courts of admiralty to proceed against a respondent by attachment of his goods, if he cannot be found within the jurisdiction of the court to be served with process; that when congress, by the act of 1789 [1 Stat. 93], established courts of admiralty, and gave them "cognizance of all civil causes of admiralty and maritime jurisdiction," and provided that the forms and modes of proceedings in causes of admiralty and maritime jurisdiction shall be according to the course of the civil law, they sanctioned the usual modes of obtaining jurisdiction for the recovery of a demand, which is in its nature cognizable in those courts; that this is confirmed by the act of congress passed May 8, 1792 [1 Stat. 275], and also by the act of August 23, 1842 [5 Stat. 516], and by the authority of these statutes the supreme court provided by rule No. 2 in admiralty for the issuing and service of mesne process in suits in personam, by virtue of which the process in this case was issued.

The case, therefore, presents the important question whether a court of admiralty can obtain jurisdiction against an inhabitant of another district, in a maritime cause, by an attachment of his property. The question is not affected by the fact that the respondents are a corporation. For the purposes of this case, a corporation must be deemed an inhabitant of the state in which it is created and doing business, and it is as clearly within the reason of the rule, regulating jurisdiction over inhabitants, as a natural person. I, therefore, treat the question precisely as I should if the respondent were a natural person, an inhabitant of the state of Michigan, sued in the Northern district of Ohio by attachment of his property, and not found, nor served with process. In addition to the statutes above-named, the libellants cite in support of their position the case of Manro v. Almeida, 10 Wheat. [23 U. S.] 473, and a number of other cases founded upon that decision. As that was the only case upon which the question appears to be raised and passed upon in the supreme court, and as the decision of that court is conclusive upon me, if applicable to this case, it is proper for me to examine it and ascertain the precise extent of the decision. The libel was filed in the district of Maryland against Almeida, charging him with having committed a tort on board of a certain vessel off the Capes of the Chesapeake, taking therefrom $5,000 in specie and converting it to his own use. It appears from the statement of the case that Almeida resided in the district of Maryland, but had absconded therefrom and fled beyond the jurisdiction of the court, and that the libellant had no means of redress except by process of attachment against his

goods within the district. The goods were attached by the marshal, and a copy of the monition was left at the late dwelling of Almeida. Upon demurrer to the libel the case came to the supreme court and was there decided. The decision establishes the general principle that in a suit in personam against a former inhabitant of the district who had absconded or concealed himself, the district court as a court of admiralty, had power to issue process of attachment to compel his appearance. Other cases cited by the libellants support and confirm this principle, and some of them extend it to cases against aliens not found in the district, but having property there, which can be attached. These cases all affirm the doctrine that courts of admiralty always possessed the power to issue process of attachment and still maintained and asserted it, as a means to compel absent respondents under certain circumstances to appear and answer. But these decisions are not applicable to the case before me. These respondents claim that, being in a legal sense, inhabitants of the state of Michigan, they could not be sued in the Northern district of Ohio by process of attachment and seizure of their property. That they were not alien, non-residents, nor were they ever inhabitants of this district, and had absconded or concealed themselves, and therefore not within the rules laid down in those cases.

The question then recurs upon the provisions of the acts of congress and the second rule in admiralty. The judiciary act of September, 1789 [1 Stat. 73], establishing the judicial tribunals, defines their location, distributes and limits their jurisdiction and the manner of its exercise. The first eight sections provide for the organization of the supreme, circuit, and district courts, the division of the country into circuits and districts, and appointments of clerks and other officers. The 9th section defines the jurisdiction of the district courts. First, of certain "crimes and offences;" next, they shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including seizure under laws of import as well as seizure on land and all suits for penalties and forfeitures under the laws of the United States, and shall have concurrent jurisdiction with the circuit courts, when an alien sues for a tort, and also suits against consuls, etc. The 11th section provides the jurisdiction of the circuit court, and provides that it shall have original cognizance of all suits of a civil nature in common law or equity, when the sum exceeds $500 and the United States or an alien is a party, or the suit is between citizens of different states, and concurrent jurisdiction with the district courts of all crimes and offences against the laws of the United States. Then follow in the same section these two provisions: "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he may be found at the time of the serving of the writ." It may be added that the constitution of the United States provides that the trial of all crimes shall be held in the state and district where the crime shall have been committed. The object of these provisions is clear. It is to prevent citizens of one state from being compelled to go to a distant state to defend themselves from criminal prosecutions, or against a civil suit. At the time of enactment of these provisions, congress was in the very act of framing a judicial system, providing for the organization of courts, to be held in each state, thus bringing the federal court within reach of every citizen. As these courts were acting, not under local authority, but derived their powers from a government embracing the whole country, it might well have been concluded that their powers were ample to send process and compel the appearance of defendants residing in any state, however remote. But, congress, by the provisions of the 11th section, prevented any such construction of their powers and thereby prohibited any of the federal courts to issue process and enforce the appearance of a citizen only in the district in which he is an inhabitant or in which he may be found at the time of the service of the writ. That in actions at common law or in equity, a party cannot proceed by attachment and so obtain jurisdiction of a person who is an inhabitant of another district, is well settled. It is also clear that the federal courts cannot send their process into another district in suits at common law or in equity, and thereby obtain jurisdiction of the person. I do not understand the libellant to controvert those propositions. They are settled by numerous authorities. Among them I cite Picquet v. Swan [Case No. 11,134]; Toland v. Sprague, 12 Pet. [37 U. S.] 300; Ex parte Graham [Case No. 5,657]; Day v. Newark India-Rubber Co. [Id. 3,685], which applies the principle to a corporation created by the laws of another state. If then this is a civil suit within the meaning of the 11th section of the judiciary act, there is an end of the question, and jurisdiction of the case cannot be acquired by attachment of property. In the 9th and 11th sections, conferring jurisdiction upon the circuit and district courts, congress had spoken of "crimes and offences," "civil causes of admiralty and maritime jurisdiction," "suits for penalties and forfeitures," "causes when an alien sues for a tort," "suits against 'consuls,'" "suits of a civil nature at common law and in equity," and declares that no "civil suit" shall be brought, etc.

A "civil cause of admiralty and maritime jurisdiction" is prosecuted by a suit. It is within the clause, as clearly as a "cause when an alien sues for a tort." It is not

necessary and not usual in a statute to recite in a restrictive clause again the several terms previously embraced in the same section. The suits that are recited are all civil in their nature. A cause in admiralty is so expressly described—it is called a "civil cause." The term "civil suit" was an apt and proper term, to describe all these actions and causes of actions. The constitution provided that all criminal prosecutions should be tried in the district where the crime was committed. Congress provided by this section that civil suits should be placed in the same position, and only be brought in the same district where the person sued was an inhabitant. The intention was, in using the term "civil suit," to distinguish it from a criminal cause, and to give as full and complete protection against suits brought against residents in distant districts in the one case as in the other. The restriction, therefore, made the judicial system and the jurisdiction of the courts consistent and complete. This construction does not deny the original and present powers of admiralty courts to issue the process of attachment when the respondent is an alien non-resident, nor, when an inhabitant, he absconds or conceals himself; but it restricts and prohibits such process to be issued when the respondent is an actual inhabitant of another district.

The libellants further claim that the acts of congress of 1792 and 1842, regulating the practice of the courts, are in such terms that they, and the second rule of the supreme court in admiralty, have modified the judiciary act of 1789, limiting jurisdiction in this respect. In answer to this, it is sufficient to say that the supreme court in Toland v. Sprague, 12 Pet. [37 U. S.] 300, expressly decided that these acts are not designed to alter or enlarge the jurisdiction of the courts, but only to regulate the exercise of jurisdiction where it exists. It may be added that if these acts are held to authorize the supreme court, by rule, to abrogate the restriction in the 11th section of the act of 1789, in any respect, it cannot be confined to the jurisdiction of courts of admiralty; for the act of 1842 gives the same power touching proceedings at common law and in equity, as in admiralty. If that construction is correct it enables the supreme court to repeal, by rule, all the restrictions contained in the act of 1789, on this subject, and to authorize common law actions against the inhabitants of any state, to be brought in any other district in the United States.

In support of these views the counsel for the respondents cite the written opinion of Judge McLean, given in Chicago in 1860, in the case of —— v. Western Transportation Company, and not reported. The facts were substantially the same in that case as in this, and he dismissed it for want of jurisdiction. His opinion, until reversed, is the law of this circuit and should be decisive of the question raised here. The opinion of Judge Woodruff, the circuit judge of the Second circuit, in the late case of Atkins v. Fiber Disintegrating Company [Case No. 602], decided in January, 1871, and reversing the judgment of Judge Benedict, as reported in [Id. 600], takes the same view of the question. The opinions of Judges McLean and Woodruff embody many of the views I have suggested, and very ably, I think, present the reasons and considerations pertinent to the subject, with the authorities. I am compelled to concur with the conclusions of those judges, and to hold that the jurisdiction of the defendants in this case was not acquired by this court by the attachment. The plea to the jurisdiction is sustained—the libel dismissed.

NEW ENGLAND INS. CO. (WILLIAMS v.). See Case No. 17,731.

NEW ENGLAND MARINE INS. CO. (HAZARD'S ADM'R v.). See Case No. 6,282.

NEW ENGLAND MARINE INS. CO. (MAGOUN v.). See Case No. 8,961.

NEW ENGLAND MUT. INS. CO. (DUNHAM v.). See Case No. 4,152.

NEW ENGLAND MUT. LIFE INS. CO. (ARTHUR v.). See Case No. 565.

NEW ENGLAND MUT. MARINE INS. CO. (DOLE v.). See Case No. 3,966.

Case No. 10,155.

NEW ENGLAND MUT. MARINE INS. CO. v. DUNHAM.

[3 Cliff. 332, 371.][1]

Circuit Court, D. Massachusetts. May Term, 1871.[2]

MARINE INSURANCE—DAMAGES FROM COLLISION—EFFECT OF PRIOR RECOVERY FROM OWNER OF COLLIDING VESSEL.

1. Where a vessel is insured, suffers loss and damage by collision with another vessel, and recovers from the owners thereof upon the ground that such vessel was in fault and the cause of the disaster, the amount so recovered is no bar to a further recovery from the underwriters, if it can be shown that the amount recovered in the collision suit is not equal to what it cost to repair the damages consequent upon the collision.

2. If the insured acts with diligence and in good faith he may pursue his remedy against the colliding vessel, and then, in his adjustment with his underwriters, he is obliged to account only for what he received from the owners of the vessel in fault.

3. The owners of the injured vessel may proceed and recover, and if they recover full satisfaction, or without suit accept satisfaction, such satisfaction is a discharge of all the parties liable.

4. In this case the underwriters are liable for the damage by contract, and the vessel causing the injury, for a marine tort, and the party injured may elect against which he will proceed.

5. The well-settled rule in collision cases is, in the federal courts, that the damages assessed

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

[2] [Affirming Case No. 4,152.]

against the respondent shall be sufficient to restore the insured vessel to the condition in which she was at the time the collision occurred, and that there shall not in insurance cases be any deduction for the new materials in place of the old.

6. While the district court has jurisdiction of marine insurance, it is not exclusive in consequence of section 9 of the judiciary act [1 Stat. 76].

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

On the 2d of March, 1863, the respondents contracted with the libellant [Thomas Dunham] as the owner of the barque, called the Albina, to insure the barque against the perils of the sea, mentioned in the policy of insurance in the sum of ten thousand dollars for the term of one year, which term was subsequently extended by an indorsement on the policy to the time of the arrival of the barque at her port of destination. Damage from perils of the sea was suffered by the barque on a voyage or passage from Cardiff to New York, but the barque put into the port of London, where she was fully repaired; and the case shows that the whole expense incurred for the repairs has been adjusted and paid by the underwriters. Thoroughly repaired, the barque, on the 7th of March, 1864, sailed on the voyage from London to New York, and on the 13th of the same month she came in collision with the ship Donald McKay, by which she was so much damaged that it became necessary for her to put back to London, where she was again repaired at the cost, as alleged, of £5,564 13s. 2d., and, having been so repaired, she sailed for her port of destination and arrived there in safety. Before leaving London, the master of the barque filed a libel in the admiralty court there against the ship, claiming damages for the injuries received by the collision, and a cross-suit was brought in behalf of the ship against the barque for the same purpose, alleging that the fault which occasioned the collision was committed by those in charge of the barque. Both causes were heard at the same time, and the court adjudged that the sole fault which occasioned the collision was committed by those in charge of the ship, and referred the cause to a registrar of the court to assess the damages. He allowed the sum of £4,634 7s. 5d., rejecting in whole or in part some of the expenses incurred for the repairs. His report was accepted by the court, and a decree was entered accordingly, and the amount allowed was paid to the libellant. After the barque arrived at her port of destination, the libellant caused an adjustment to be made, as of a partial loss, deducting from each item the sum allowed by the registrar, and, the respondents failing to pay the balance claimed, the libellant filed the libel in this case to recover the balance so found, together with fees and expenses of counsel and witnesses in that suit, with interest and exchange, as set forth in the adjustment. Appended to the agreed statement of facts was the stipulation that the cause should be sent to an assessor to ascertain the amount, if the court be of the opinion that the libellant was entitled to more than the amount allowed by the registrar. Hearing was had in the district court, and the court being of the opinion that a balance was due to the libellant beyond the sum allowed by the registrar, the parties appeared and modified their agreement that the cause should in that state of the case be sent to an assessor. Instead of that, each party filed an adjustment, and they agreed that each adjustment so filed should be treated and considered as an alternative report of an assessor, each party to be at liberty to object to the adjustment of the other, and the case to be subject to appeal by either party. For reasons not explained, it seems that the libellant recovered in the foreign court much less than the full amount of the repairs, and expenses made and incurred in consequence of the collision, and in the adjustment presented by the libellant he deducted the amount recovered and paid in the collision suit from the amount of the moneys expended in making the repairs and discharging the expenses incurred in consequence of the collision, which left a balance to be paid by the insurers. He admitted that in adjusting that balance so found, it was proper to make the computation by the rule applicable in insurance adjustments, that is, that one third new for old must be deducted, but he denied that that rule had any application in crediting the amount collected of the colliding vessel. On the contrary, he deducted the amount collected of the colliding vessel from the gross amount paid for the repairs, and the district court adopted his adjustment and entered a decree for the balance, amounting to $1,700.56 damages, and costs of suit. [Case No. 4,152.]

F. C. Loring, for libellant.

Hutchins & Wheeler, for respondents and appellants.

CLIFFORD, Circuit Justice. Amounts, it seems, were not in controversy, but the respondents differed widely from the libellant as to the correct rule of adjustment. They insisted that the partial loss should be first adjusted between them as the underwriters and the libellant, deducting one third new for old, and that the libellant could recover nothing of them in this case, as the loss, when so adjusted, did not exceed the amount paid by the colliding vessel or her owners. Suppose that to be the correct mode of adjusting the partial loss, then it is clear that the libel should have been dismissed, as the libellant was fully paid by the amount recovered in the collision case; but the district judge adopted the rule of adjustment

presented by the libellant, and entered a decree in his favor for the balance therein shown, and the respondents appealed to this court. Apart from the merits, when the cause came to be argued in this court, the respondents insisted that the district court had no jurisdiction of the cause of action set forth in the libel. Both parties were heard upon the question of jurisdiction as well as upon the merits, and the presiding justice entertaining doubts whether the district court, sitting in admiralty, had jurisdiction of the case, it was ordered that the question should be reargued, and the parties were heard a second time upon the question, the circuit judge sitting with the presiding justice. Difficulties attending the solution of the question and the opinions of the judges being opposed, the question was certified to the supreme court, where it was held that the contract of marine insurance is a maritime contract, and that libels of the kind exhibited in the record are properly cognizable in the district courts under the ninth section of the judiciary act, which provides that such courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. Insurance Co. v. Dunham, 11 Wall. [78 U. S.] 21.

Judge Story decided in the same way in De Lovio v. Boit [Case No. 3,776], and that decision had been followed once or twice in this circuit before the decision of the district court in this case. Hale v. Washington Ins. Co. [Id. 5,916]; Gloucester Ins. Co. v. Younger [Id. 5,487]. Jurisdiction in admiralty under the constitution and laws of congress must be determined, in a great measure, by a just reference to the laws of the states, and the usages of the courts prevailing in the states at the time when the constitution was adopted. Cunningham v. Hall [Id. 3,481]. Conclusive evidence was exhibited in argument by the libellant in this case that the admiralty courts existing in the states before the constitution was adopted did exercise jurisdiction over such controversies, and in view of that fact and of the further fact that the better opinion is that the contract of marine insurance is a maritime contract, the supreme court came to the conclusion that jurisdiction in this case was properly assumed by the district court. Such jurisdiction, of course, is not exclusive in the admiralty, as suitors, by virtue of the saving clause in the ninth section of the judiciary act, have the right of a common law remedy in all cases where the common law is competent to give it, and the common law is as competent as the admiralty to give a remedy in such a case, as the suit must be in personam against the underwriters named in the policy. The Belfast, 7 Wall. [74 U. S.] 642; Leon v. Galceran, 11 Wall. [78 U. S.] 190. Determined as the question of jurisdiction has been by the supreme court, nothing remains open here but the single question as to the proper mode of adjustment. Other questions on the merits might have been raised, but the record does not exhibit any exception as to the amount allowed save what appears in the objection of the respondents to the rule of adjustment adopted by the court. Undoubtedly in insurance adjustments where timbers or other materials are replaced by new, the vessel when repaired is, in general, considered to be better than she was before the repairs were made, and the rule of adjustment is that the assured must himself bear one third part of the expense of the labor and materials for the repairs, for the reason that new timbers and materials are substituted for the old, which are supposed to have been of less value. 1 Phil. Ins. (4th Ed.) 50; 2 Phil. Ins. 1431; Peele v. Merchants' Ins. Co. [Case No. 10,905]; Bradlie v. Insurance Co., 12 Pet. [37 U. S.] 399. Much discussion of that topic, however, is unnecessary, as the general rule is everywhere acknowledged in the federal courts; but it is equally well settled that the rule in collision cases is that the damages assessed against the respondent shall be sufficient to restore the insured vessel to the condition in which she was at the time the collision occurred; that there shall not in insurance cases be any deduction for the new materials furnished in the place of the old. The Baltimore, 8 Wall. [75 U. S.] 385; Williamson v. Barrett, 13 How. [54 U. S.] 110; Sedgw. Dam. (4th Ed.) 541. Attempt was made in the court below to set up the decree in the foreign court as rendered in the collision case, and the payment of the amount recovered as a bar to any further claim by the libellant upon the respondents for any damages, costs, or expenses occasioned by the collision; but that defence is not urged in this court, as it clearly could not be with any hope that it would be successful. Judgments and decrees bind parties and privies, but it is clear that the decree in the foreign court was res inter alios, and that it cannot have any effect here except as evidence to show the amount recovered by the libellant in that proceeding. Murray v. Lovejoy [Case No. 9,963]; Id., 3 Wall. [70 U. S.] 17. Where a party receives damage, and several are responsible for the injury, the plaintiff is entitled to but one satisfaction, and if he proceeds against one, and recovers judgment, and the same is fully satisfied, or if he without suit accepts satisfaction of one of those liable for the injury, no doubt is entertained that such satisfaction discharges all the other parties. Grant that, still it is clear that that rule has no application in the case before the court, as the respondents are liable in contract as set forth in the policy of insurance, and the owners of the colliding vessel were liable as wrong-doers for a marine tort. Randal v. Cockran, 1 Ves. Sr. 98; Yates v. Whyte, 4 Bing. N. C. 272; White v. Dobinson, 14 Sim. 273.

Full satisfaction, though received from a wrong-doer as in this case, would doubtless operate as a discharge of the claim upon the underwriters; but it is equally certain that nothing short of a full satisfaction would have that effect in the absence of fraud or proof of collusion or negligence. Atlantic Ins. Co. v. Storrow, 5 Paige, 285. Persons insured are at liberty in such a case to sue the wrong-doer first, or they may claim compensation from the underwriters, and leave them to their remedy against the wrong-doer, which must be prosecuted in the name of the injured party. When the underwriters pay the loss they are subrogated to all the rights of the insured, but until they do make satisfaction they have no claim on any such wrong-doers. They have a right to expect that the insured will act with due diligence and in good faith, but they cannot be regarded as subrogated to the rights of the insured until they have made such satisfaction. Prior to such satisfaction being made by the underwriters, the insured may, if he sees fit, pursue his remedy against the wrong-doer, and of the acts with due diligence and in good faith, he is only obliged to account in his adjustment with the underwriters for what he receives from the wrong-doer. Such is the settled law in cases of fire insurance, and the same rule, in the opinion of the court, must be applied in marine insurance in cases where the suit against the wrong-doers is prosecuted by the insured. Where property in the city of New York, which was insured, was destroyed by order of the mayor and aldermen to prevent the spreading of the fire, and the assured afterwards obtained an assessment of his damages for the destruction of his property, by a jury in conformity to the law of the state, it was held by the chancellor that such assessment was not evidence, as between the assured and the underwriters, of the amount of the loss, and that the assured was entitled to recover of the insurers the whole amount of his loss in consequence of the fire, after deducting therefrom the net proceeds of what had been recovered from the corporation of the city, provided such balance did not exceed the sum for which the insurers were liable under the policy. Pentz v. Aetna Fire Ins. Co., 9 Paige, 569.

Apply that rule to the case before the court, and it is clear that the decree of the district court was correct, and for the reasons assigned by the district judge. He adopted the adjustment presented by the libellant, by which it appears that the amount paid by the owners of the colliding vessel was deducted from the whole expenses of the repairs, and that two thirds of the balance, that is, deducting one third new for old, were claimed of the underwriters. Certain other topics are discussed in the brief of the respondents, but it is not necessary to enter that field of discussion, as there are no exceptions raising any such questions.

Decree affirmed with costs.

[NOTE. In the case of the Equitable Safety Insurance Company, respondents and appellants, against Thomas Dunham, libelant, the circuit court of the United States for the district of Massachusetts, at the May term, 1871, per Clifford, Circuit Justice, and Shepley, Circuit Judge, affirmed the decree of the district court, the following opinion (3 Cliff. 371) being delivered:]

CLIFFORD, Circuit Justice. Appeal in admiralty from a decree of the district court in a cause of contract. Like the case New England Mut. Mar. Ins. Co. v. Dunham [supra], the matters in controversy were submitted to the court upon an agreed statement of facts. Reference to the record will show that all the questions involved in the pleadings are the same as those just decided in the other case, and the evidence adduced is also the same, so that the decision in that case controls the rights of the parties in this case. Decree affirmed with costs.

NEW ENGLAND MUT. MARINE INS. CO. (HAWES v.). See Case No. 6,241.

NEW ENGLAND MUT. MARINE INS. CO. (HEARN v.). See Cases Nos. 6,301 and 6,-302.

Case No. 10,156.

NEW ENGLAND SCREW CO. v. BLIVEN et al.

[3 Blatchf. 240.] [1]

Circuit Court, S. D. New York. Nov., 1854.

REMOVAL OF CAUSES—EFFECT UPON ATTACHMENT ISSUED BY STATE COURT—ATTACHMENT BY ORIGINAL PROCESS—EFFECT OF STATE STATUTES

1. To an action brought by A., to recover for goods sold, B. pleaded that, before the bringing of the action, B. had sued A. in a state court of New York, to recover money, and, in that suit, had attached, under the state law, the debt sued for by A.; that A. had removed into this court the suit in the state court; that it was still pending; and that the attachment still held the debt: *Held*, on demurrer to the plea, that it was bad.

2. Where a suit in a state court is removed by a defendant into this court, under the 12th section of the act of September 24, 1789 (1 Stat. 79), no attachment of the property of the defendant by the state court can hold that property, after the removal of the suit into this court, unless such attachment was the original process in the suit in the state court.

[Cited in Rigg v. Parsons, 29 W. Va. 526, 2 S. E. 83.]

3. Where the suit in the state court is commenced by summons, and the attachment is subsequently issued by it, as a separate process, such attachment is not an attachment by original process, within said 12th section, so as to hold the property attached, after the removal of the suit into this court.

[Cited contra in Barney v. Globe Bank, Case No. 1,031.]

[See Act March 3, 1875 (18 Stat. 471, § 4).]

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[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

4. State statutes are rules of decision in the courts of the United States, when they prescribe a law governing the right or title in litigation, but are not allowed to interfere with the processes or modes of procedure of the tribunals of the United States.

This was an action of assumpsit, brought by the plaintiffs, a Rhode Island manufacturing corporation, to recover for goods sold to the defendants [Charles Bliven and Edward B. Mead] to the amount of $5,000. The defendants interposed a special plea to the declaration, averring that, at the time of the making of the several promises in the declaration mentioned, an act had been passed, and was in force, in the state of New York, which authorized a party bringing an action for the recovery of money against a foreign corporation, to attach the property of such corporation, as a security for the satisfaction of such judgment as the plaintiff might recover therein; and that, before this action was instituted, the defendants had brought an action, in the supreme court of New York, against the plaintiffs, for the recovery of $4,966 50, and, in that action, had caused the debt sued for by the plaintiffs by the present action in this court, to be attached by the sheriff of New York, pursuant to the laws of the state of New York, whereby all sums of money owing by the present defendants to the plaintiffs were attached and held as a security for the satisfaction of such judgment as the attaching suitors, these defendants, might recover against these plaintiffs. The plea further averred, that, thereafter, the plaintiffs caused the said action in the supreme court of New York, to be removed into this court for trial, and said supreme court caused an order to be made that such court would not proceed further in the said cause; that the suit so instituted in said supreme court was still pending in this court and undetermined; and that the attachment issued therein still held the debt so attached, to answer the final judgment therein. To this plea the plaintiffs demurred generally, and the defendants joined in demurrer.

[For prior litigation between the same parties, see Case No. 1,550.]

Edwin W. Stoughton, for plaintiffs.
George William Wright, for defendants.

BETTS, District Judge. It appears to us that there are some difficulties in the way of maintaining this plea as a bar to the action, either by way of abatement or in chief, which were not mentioned on the argument.

The act of the state of New York, under which the attachment pleaded was taken out, is one directed to the practice and proceedings of the local courts, and, in that character, in no way controls the action of a court of the United States. State statutes are rules of decision in the courts of the United States, when they prescribe a law governing the right or title in litigation, but are not allowed to interfere with the processes or modes of procedure of the tribunals of the United States. Duncan v. Darst, 1 How. [42 U. S.] 305, 306; Titus v. Hobart [Case No. 14,063]; Wayman v. Southard, 10 Wheat. [23 U. S.] 1; The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175, 184; Thompson v. Phillips [Case No. 13,974]. The argument of the plea, therefore, if well founded, that the process of attachment set up therein would operate, under the state law, as a withdrawal or extinguishment of the cause of action upon which the plaintiffs are prosecuting, would not avail to that purpose here.

The plea does not aver that an indebtedness of these plaintiffs to these defendants existed and was the subject of attachment under the state process, when the attachment issued and was served, nor that the attachment was part of the original process by which the suit in the state court was commenced. This court cannot judicially infer a summary jurisdiction of that character in a local magistrate, or take notice of any provisions of the state law conferring it, which are not set forth in the plea. A rehearsal in the plea, to the effect that the service of the attachment divested the corporation of the right to prosecute for the debt claimed in the declaration, cannot be received by this court as tantamount to an averment that the statute, in a case so circumstanced, gave to the defendants such title to the debt, or such power over it, or such lien upon it, as excluded or suspended the authority of the plaintiffs to seek its enforcement in their own name and right. It is not to be presumed that an enactment seemingly repugnant to general principles of right and equity in respect to private property, has been adopted by any legislature; and, if the defendants desire to avail themselves of an authority of that character over debts alleged to be owing by them, it devolves upon them to point out distinctly the appointment of law which confers it upon them.

We think these are substantive defects in the plea, whether it be regarded as in abatement or in bar. But the essential vice of the plea is, that it seeks to exclude the plaintiffs, in the maintenance of their rights, from the benefit of a cross action, and to restrict them to a defence to the suit instituted against them. We are referred to no case in which a defendant has been allowed to defeat an action at law against him by pleading the existence of a pending suit brought by himself against his adversary. The plea of a former action pending, in abatement or in bar, is given in the books, only in case the same party institutes double actions for the same subject matter in the same court. Bac. Abr. tit. "Pleas & Pleadings," M. If the attachment process was first in order of time, as between these

actions, then the present suit is no more than a cross action on the part of these plaintiffs. That another suit is pending for the same cause of action in a different court, cannot be pleaded in bar or in abatement (Bowne v. Joy, 9 Johns. 221), and it makes no difference whether both suits are in the same jurisdiction, or whether one is in a court of the United States and the other in a state court (Walsh v. Durkin, 12 Johns. 99). Even a plea of a former recovery cannot be supported, unless it be also averred that satisfaction has been had of the cause of action. Perkins v. Parker, 1 Mass. 117. A plea in bar or in abatement is bad, in either case, upon demurrer.

It is not unimportant to observe further, that the plaintiffs in this case, being a corporation of Rhode Island, sued in the supreme court of this state by citizens of this state, removed the cause into this court, under the 12th section of the judiciary act of September 24th, 1789. That section provides that, on the removal of a cause in that manner from a state court to a court of the United States, "any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment, in the same manner as, by the laws of such state, they would have been holden to answer final judgment, had it been rendered by the court in which the suit commenced." 1 Stat. 79, 80. The plea shows that the action against the corporation was commenced by summons, and that the warrant of attachment was a separate process, subsequently obtained, under the mandate of a judge of the supreme court, in the manner prescribed by the state statute. That statute is held by the state court to require an action against a foreign corporation to be actually pending, commenced by summons, before a court or a judge is authorized to issue a warrant of attachment. Fisher v. Curtis, 2 Sandf. 660. Therefore, the attachment cannot be the original process which is to carry with it a lien upon the estate attached, on the removal of the cause into this court; and the defendants can claim no advantage or priority under the attachment, in this tribunal, in this case, if it might, under any circumstances, abate or bar the cross action of the plaintiffs.

Judgment is, therefore, ordered for the plaintiffs upon the demurrer, with leave to the defendants to plead over upon the usual terms.

[NOTE. The defendants subsequently went to trial upon the general issue. There was judgment in favor of the plaintiffs. Case No. 10,157. This was affirmed upon appeal to the supreme court. 23 How. (64 U. S.) 433.]

NEW ENGLAND SCREW CO. (BLIVEN v.). See Case No. 1,550.

Case No. 10,157.

NEW ENGLAND SCREW CO. v. BLIVEN et al.

BLIVEN et al. v. NEW ENGLAND SCREW CO.

[4 Blatchf. 97;[1] 38 Hunt, Mer. Mag. 582.]

Circuit Court, S. D. New York. Sept. 23, 1857.[2]

SALE—USAGE OF TRADE—BREACH OF CONTRACT IN NOT FILLING ORDERS.

A customer, who has dealt with his vendor in conformity with a usage known to the customer, in regard to filling orders for goods, must, if he sues for a breach of contract by the vendor in not filling orders, establish a right superior to that arising out of such usage, or else he cannot recover, provided he has been treated fairly, in conformity with such usage.

The first of these suits [the New England Screw Company against Charles Bliven and Edward B. Mead] was an action to recover a balance due to the plaintiffs for screws delivered to the defendants. [See Case No. 10,156.] The second [Charles Bliven and Edward B. Mead against the New England Screw Company] was an action to recover damages for an alleged breach of contract in not filling orders for screws. On the trials, verdicts were taken for the plaintiffs severally, subject to the opinion of the court, upon cases to be made.

Edwin W. Stoughton, for the company.

George William Wright, for Bliven and Mead.

NELSON, Circuit Justice. On looking into the facts, I am satisfied that the plaintiffs in the first suit are entitled to a judgment for $1,990,01, with interest from September 27th, 1853.

The evidence in the second suit is full to show the usage of the company in filling the orders of their customers, and that it was known to these parties; and, also, that their dealings with the company from its commencement had been in conformity with it. The usage was, on receiving orders from their customers, to file them away and fill them up in turn, in proportion to other orders on hand at the same time to filled up. The company had from five to six hundred customers, with standing orders, to be filled as fast as practicable, or as the capacity to manufacture screws would permit. For some time, the gimlet or sharp-pointed screws, as they were called, were manufactured at no other establishment, and the demand for the article seems to have been very great. For aught that appears in the case, the parties here were dealt with upon the same footing as other customers of the company. Many of the orders were not filled in six months or a year, and some never in full. The course of the usage necessarily left the apportionment

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

[2] [Affirmed in 23 How. (64 U. S.) 420, 433.]

of the screws, as manufactured, upon the orders on hand, to the discretion of the company. But, if otherwise, it would be an endless undertaking to ascertain, with any degree of certainty, whether the apportionment had been pro rata, in the filling up of some five or six hundred orders; and, without such an inquiry, it would be impossible to ascertain whether injustice was done to these parties or not.

An effort has been made to take the order given on the 15th of October, 1852, out of the usage, on the ground that it was accepted absolutely, to be filled on the 15th of March, and the 15th of April following. But, on looking into the evidence on the subject, and the circumstances under which the order was given and accepted, I am satisfied that it forms no exception to the general usage, and was accepted subject to it.

These parties seem to have been fairly dealt with, the same as all other customers, and, unless they can establish some right superior to that arising out of the usage, in filling their orders, they have no well-founded ground of complaint. No such right has, in my judgment, been established, and I am, therefore, satisfied that judgment should be rendered in favor of the company, in the second suit.

This decision was affirmed by the supreme court on writ of error. 23 How. [64 U. S.] 420, 433.

Case No. 10,158.

NEW ENGLAND SCREW CO. v. SLOAN.

[1 MacA. Pat. Cas. 210.]

Circuit Court, District of Columbia. April, 1853.

PATENT INTERFERENCES — PRESUMPTIONS FROM FAILURE TO PRODUCE WITNESSES—REDUCTION TO PRACTICE—LACHES.

[1. Failure to produce as witnesses several workmen who were in the inventor's shop at a time (long previous to his application) when, it is claimed, a machine embodying the invention was put in actual use, should not raise an unfavorable presumption, since by publicity the inventor might have deprived himself of the benefits of the invention.]

[2. It is not necessary that the first inventor should have constructed and used a practical machine, even though a subsequent inventor has done so; and he need not show that he has reduced the invention to practice, otherwise than by filing his specifications and furnishing drawings and a model, as required by the statute.]

[3. One who made an invention in 1846, and did not file his application until 1851, but who in the meantime was making efforts to perfect his machine, *held* entitled to a patent, as against another who invented the same thing in 1849, and applied for a patent in 1852.]

[This was an appeal by the New England Screw Company, assignee of Cullen Whipple, from a decision of the commissioner of patents, in an interference proceeding, awarding priority to Thomas J. Sloan in respect to an invention of a machine for forming the point on screw blanks.]

Watson & Renwick, for appellant.
Chas. M. Keller, for appellee.

MORSELL, Circuit Judge. Cullen Whipple, after giving a description in his specification of the construction and operation of his improvement, and referring to the drawings as making a part of the specification, says: "What I claim as my invention, and desire to secure by letters-patent, is the mode of pointing the blank in the threading machine by a separate tool or cutter, thereby pointing the blank and cutting the thread with separate tools or cutters, and finishing a pointed screw from the blank at one operation, substantially as described." This application bears date the 20th of April, 1852. Thomas J. Sloan, in his specification, which describes his invention fully, says: "What I do claim as my invention is combining in an organized machine a cutter and its appendages, operated substantially as specified, for forming the point on screw-blanks, as specified, with the chaser or cutter, which cuts the thread over the blank and pointed part thereof down to the point, substantially as specified." This application appears to bear date on the 22d day of December, 1851 (afterwards patent No. 9688, April 26th, 1853).

From the descriptions and claims the specifications appear to be substantially for the same invention. On notice being given of the interference, the respective parties, under the rules of the patent office, had the depositions of their witnesses duly taken and sent to the commisioner of patents, who appointed the 17th day of June, 1852, for the trial of the issue between the said parties; and upon the hearing thereof, and on consideration of the testimony adduced, priority of invention was decided in favor of Thomas J. Sloan; from which decision said Cullen Whipple appealed, and filed his reasons of appeal: First. Because it appears from the testimony of Sloan's own witness that he never succeeded in making a practically useful machine, with a pointing and chasing or threading cutter combined. Second. Because it is not in proof that he ever succeeded in applying a pointing cutter, so as even to point a single screw-blank; or, in other words, he never succeeded in producing a machine which combined the functions of pointing and chasing or threading the blank. Third. Because the testimony was too vague and indefinite and contradictory to be received as evidence to prove said facts, while experts, who had a knowledge of the facts, might and ought to have been called upon to testify. Fourth. That as to the character and construction of the machines, the machines themselves are the best evidence, and ought to have been produced, or their absence satisfactorily accounted for, and that the parol evidence was inadmissible. I do not think this principle correct on the issue then trying between the parties. Fifth. Because there is

no legal evidence sufficient to prove that Sloan ever made the invention—the subject-matter in dispute. Sixth. Because the fact that Sloan patented, at various times between the years 1846 and 1852, the several improvements in screw machinery which he had so far perfected as to deem worthy of a patent, proves that he deemed the attempt to combine the pointer and chaser an abortion until after Whipple demonstrated its practicability. Seventh. Because it is proven that Whipple made the said invention in April, 1849; and as soon thereafter as time and opportunity would permit, viz., in December, 1851, he completed a machine embodying said invention, which worked successfully and satisfactorily in the opinion of the most competent experts, and has continued so to work, as those experts testify. Eighth. Because, although it is fully in proof that in December, 1851, Whipple had applied his invention and reduced it to practice, and put it in full operation, no machine has been produced on the part of Sloan of a date prior to December, 1851, effecting the same or similar result, nor has the deficiency been supplied by any oral proof that such ever did exist.

The report briefly states the substance of the evidence on the part of Sloan and Whipple. That which is stated in the deposition of Leggett, on the part of Sloan, seems to be principally relied on by the commissioner as the proof to sustain his decision in favor of Sloan as the first inventor, fixing his invention in the year 1846, whilst that of Whipple is not shown by his proofs to be earlier than the year 1849 (July). In his answer to the reasons of appeal the commissioner says: "The law does not regard him as the inventor who first constructs a machine and puts it into successful operation, but awards the invention to him who reasonably sets forth or exhibits his invention, even though it be not so shown or constructed as to be in operation." With respect to the evidence, he says that it does not show that Sloan did not put the invention into successful operation. On the contrary, it shows that he reduced the invention to practice in 1847, and at that time had in operation about thirteen machines, which were continued in use for about three months, &c. The objection on the part of Whipple that the invention did not belong to Sloan because he did not produce some other and stronger evidence than that which has been placed before the office, was not sufficient, because various circumstances may have operated against his doing so, which ought not to be assumed as reasons against his claim. It is in proof that his pecuniary condition was one of embarrassment, which is a very good reason why he did not continue his machines in operation. Then the machines, though successful, had certain difficulties in the way of feeding when both cutters were used; they also needed changes in the feeding part, &c. The commissioner further says, with respect to Sloan's not applying for and obtaining a patent upon this invention as early as 1846 or 1847, when he was obtaining patents upon other improvements in machines for making screws, that this should not be urged against him. Many reasons might have operated, such as pecuniary embarrassment, &c. The liberal construction applied to Whipple's circumstances by his counsel in his seventh reason of appeal, if extended to Sloan's circumstances, will greatly lessen the force of the arguments made against Sloan. In that seventh reason it is admitted that Whipple let his invention sleep from 1849 to 1851. Why should not Whipple, then, be obliged to show stronger testimony in his behalf on this point as well as Sloan? According to notice previously given of the time and place of hearing before me, the parties by their counsel appeared, and an examiner from the patent office, who laid before me all the original papers and evidence in the case, together with the grounds of the commissioner's decision, set forth in writing, touching the points involved by the reasons of appeal. The said parties were allowed to file their arguments in writing, according to the established rules. The argument for the appellee was not filed within the time limited, and was for that reason objected to. But upon being satisfied of the reasonableness of the excuse for failing to do so, the objection is overruled and the argument received. As before stated, the two inventions for which patents are claimed are the same substantially, and it is admitted that both are patentable inventions. The question to be decided is that of priority of invention, and that will depend upon the evidence. Cullen Whipple's witnesses prove that about July, 1849, the invention alluded to in his specification was described to Thomas P. Hunt and to Mr. Packard in March or April, 1849. It was shown upon a slate, and the machine itself was erected and perfected in December, 1851. The question is whether he or Thomas J. Sloan is the first inventor, as above mentioned.

(A resumé of the testimony follows.)

What effect, then, ought to be given to the aforegoing testimony? If Leggett is worthy of credit, it will be difficult to resist the conclusion that Sloan was the first inventor of the improvement which is the subject of controversy. He proves that in the year 1846 he had a knowledge thereof, derived from Sloan, which he states very clearly and distinctly as follows: He invented a machine for pointing and threading wood-screws, which he describes to be "a combination of the two functions of pointing and threading with the same machine." The blank was reduced to a point and the thread cut by separate cutters. The model marked "Exhibit A," shown to him, represents the said invention; and this was in the month of June or July, 1847. The machines worked successfully. The weight of this testimony is supposed to be destroyed, first, because the witness himself

declares that he had but little acquaintance with machinery, and that he could not go into technicalities, &c.; but he also says that at the time he received the communication from Sloan he had, then, three or four years' acquaintance with machinery. I suppose counsel means that the witness had acquired this information after he first went to live with Sloan, which was in the year 1843; and further, that as there were a number of workmen in the shop of Sloan at this time who were acquainted with machinery, and none of whom were called as witnesses, or any reason for not doing it furnished, the law would raise an unfavorable presumption against him. If this had happened in an ordinary case the argument, perhaps, might have been more correct; but this is a case where, by publicity, the party might have deprived himself of the benefit he was seeking as the first inventor; and though the witness was no expert, his knowledge and memory might be sufficient to enable him truly to relate the facts on the subject which he had heard and seen. Next, as to the contradictions and inconsistencies in the testimony, there are such apparently, it is true, but it does not appear that they proceeded from corrupt motives. The presumption is that a witness on oath testifies honestly, until the contrary is shown. These circumstances may lessen, but not entirely destroy, his testimony—the rule of law being that where a witness stands wholly unimpeached by any extrinsic circumstances, credit ought to be given to his testimony, unless it be so grossly improbable as to show that he is not to be trusted. His testimony, too, is corroborated in several material parts from other sources. As to the fact of Sloan being an inventor of the improvement, it appears from his specification filed in 1851; and as to the principles being practicable, this is clear from successful experiments which have been made with machines subsequently used, embodying in substance the same principle. The witness Parfitt also corroborates him in several material parts. As to the last ground of argument on the subject of reducing the principle of the invention to a practical or useful result, I think the rule as laid down by Judge Cranch may be considered as correct: "That where the invention is not of a mere philosophical speculation, abstraction, or theory, but of something corporeal—something to be manufactured—the applicant need not show that he has reduced his invention to practice otherwise than by filing his specification and furnishing drawings and a model, as required by the statute, where the nature of the case admits of drawings or of a representation by model." In this case Sloan appears to have been making efforts to perfect his machine, and as yet I do not think he can be said to have forfeited his right by laches.

I think, therefore, and do so decide, that Cullen Whipple is not the original first inventor of the said improvement, but that Thomas J. Sloan is, and that the decision of the commissioner of patents ought to be, and is hereby, approved.

NEW ENGLAND SCREW CO. (WARD v.). See Case No. 17,157.

NEW ENGLAND TRANSFER CO. (NEW YORK v.). See Case No. 10,197.

Case No. 10,159.

Ex parte NEWHALL.

[2 Story, 360;[1] 5 Law Rep. 306.]

Circuit Court, D. Massachusetts. May Term, 1842.

BANKRUPTCY—WHAT PASSES TO ASSIGNEE BY DECREE—EQUITIES OF THIRD PERSONS.

1. All the property and rights of property of the bankrupt, at the time of the decree of bankruptcy, pass to the assignee to be distributed amongst the creditors, with the other assets of the bankrupt.

[Cited in Beardslee v. Beaupre, 44 Minn. 4, 46 N. W. 137; Fisher v. Currier, 7 Metc. (48 Mass.) 427. Cited in brief in Tichenor v. Allen, 13 Grat. 28.]

2. Property, which comes to a person seeking the benefit of the bankrupt act, by descent, or as distributee, in the intermediate time between his filing his petition and his being declared a bankrupt, passes to the assignee as a part of the assets of the bankrupt.

3. The assignee takes the property and rights of property of the bankrupt, subject to all such rights and equities of third persons as are attached to it in the hands of the bankrupt.

[Cited in brief in Kelly v. Scott, 49 N. Y. 597. Cited in Kirk v. Roberts (Cal.) 31 Pac. 622; Rowe v. Page, 54 N. H. 195.]

4. Where the bankrupt, after filing his petition, and before a decree of bankruptcy, became entitled to certain property, as heir to his mother, to whom, when alive, he was indebted; it was *held*, that the assignee of the bankrupt was only entitled to the bankrupt's moiety or distributive share, after deducting therefrom his debt to the estate.

This case came before the district court upon a petition by the assignee of the bankrupt, setting forth, that Brown, the bankrupt, on the 2d February last, filed his petition to be decreed a bankrupt, and on the 3d May thereafter, was duly decreed a bankrupt. On the 20th February, Mary Brown, a widow, the mother of the bankrupt, died intestate, and Charles Brown was duly appointed administrator of her estate. That said Mary, at the time of her death, was seized and possessed of certain goods and estate to the value of about four thousand dollars, and the said Charles, and the bankrupt, were the sole heirs. Wherefore, the assignee prayed, that the bankrupt be directed to file a supplemental schedule to his petition in bankruptcy, and therein to enumerate and set forth one half of the net proceeds of his mother's estate, now in the hands of the said administrator; so that the same may be applied to the pay-

[1] [Reported by William W. Story, Esq.]

ment of his just debts, according to the statute of the United States, in that behalf made and provided. It appeared, upon an agreed statement of facts, that the matters of fact set forth in the petition, were true, and also, that the bankrupt was indebted to Mary Brown during her lifetime, to the amount of $1200. Upon these facts, the following points were raised by the respective parties, namely: (1) The administrator contended, that he must retain in his hands the amount due from the bankrupt to the intestate's estate, and that he ought not to pay either to the bankrupt, or to the assignee, any thing more than the balance of the bankrupt's share of the estate of Mary Brown. (2) The assignee contended, that the whole share of the bankrupt in the said estate, without deducting the sum due by him to said deceased, should be added to the assets of the petitioner set forth in his schedule B. (3) The bankrupt contended, that the whole of his share in the estate belonged to himself, and that the administrator could not retain, on account of the claim of the said Mary Brown, any more than the pro rata dividend, which might be hereafter declared out of his assets. Upon the hearing in the district court, it was ordered, that two questions be adjourned into this court: First, whether upon the accompanying statement of facts, the share in the property of Mary Brown, descended to the said George Brown, as one of her heirs at law, belongs to the said assignee, for the benefit of the creditors of the said bankrupt, or to said George, the bankrupt, for his own use and benefit? Second. Whether, if the said share belongs to the said assignee, the said administrator is entitled to set off against the claim of the assignee, the amount of the debt due from the bankrupt to the estate of the said Mary Brown?

John G. King, Jr., for assignee.
R. Rantoul and F. Dexter, for bankrupt.

STORY, Circuit Justice. There are two questions adjourned into this court for consideration. The first, in effect, is, whether property, which comes to a person seeking the benefit of the bankrupt act, by descent, or as distributee, in the intermediate time between his filing his petition and his being declared a bankrupt by the decree of the district court, passes to the assignee as a part of the assets of the bankrupt, or belongs to the bankrupt himself. My opinion is, that it passes to the assignee as a part of the assets of the bankrupt. The third section of the bankrupt act of 1841, c. 9 [5 Stat. 442], declares, that all property and rights of property of every bankrupt, who shall, by a decree of the proper court, be declared a bankrupt within the act, shall by mere operation of law, ipso facto, from the time of such decree, be deemed to be devested out of the bankrupt, and the same shall be vested by force of the same decree in such assignee, as from time to time shall be appointed by the proper court for this purpose. It seems to me that the natural, and even necessary interpretation of this clause is, that all the property and rights of property of the bankrupt, at the time of the decree, are intended to be passed to the assignee. It is true, that the decree will also by relation cover all the property, which he had at the time of filing the petition, and at all intermediate times, to effect the manifest purposes of the act. But this is rather a conclusion, deducible from the general provisions and objects of the whole act, than a positive provision. It results by necessary implication in order to effectuate the obvious purposes of the act, and to prevent what otherwise would or might be irremediable mischiefs. But the language of the third section speaks in direct terms of property and rights of property in the bankrupt, at the time of the decree, as being devested out of him by the decree, and vested in the assignee. In the present case, there can be no doubt, that, by Mrs. Brown's death, in February, 1842, the distributive share of the bankrupt in her estate, was property or rights of property vested in the bankrupt. It, therefore, falls directly under the category of the act. I take the plain distinction, running throughout the act, to be, that it is not intended to touch any property or rights of property, which may be acquired by a descent to him after the decree in bankruptcy, by which he has been decreed to be a bankrupt; but that it covers all his property, acquired by or descended to him, or belonging to him, before the decree. The English statutes of bankruptcy go further, and vest in the assignee all the property of the bankrupt, which comes to him by descent, distribution, or otherwise, before the discharge is granted. But this doctrine stands only upon the positive language of those statutes, and not upon any general principles of law, applicable to the subject.

The second question appears to me equally free from reasonable doubt. I take the clear rule in bankruptcy to be, that the assignee takes the property and rights of property of the bankrupt, subject to all the rights and equities of third persons, which are attached to it in the hands of the bankrupt. What is the distributive share of the bankrupt in his mother's estate? Plainly one moiety of all the assets of her estate. The debt due by the bankrupt to her estate, constitutes a part of her assets, and he cannot take his distributive share of the whole assets, without allowing and paying that debt out of it. Any other course would be a monstrous injustice, at war equally with law, and equity, and common justice. Suppose his debt were equal in amount to his whole distributive share in the other part of her assets, could it for a moment be imagined that his assignee would be entitled to take the whole of the distributive share in the other assets of the estate, and leave the debt to be proved against the

estate of the bankrupt? The present case may not be a case of mutual debts or mutual credits, in the sense of the 5th section of the bankrupt act of 1841, c. 9; and, therefore, to be set off. But if it is not, still, according to the rules of a court of equity, the assignee cannot now claim the distributive share of her assets, without making all equitable allowances attached to it; and this debt is clearly legally, as well as equitably, due to her estate. The rule of distribution should be the same, as if this very debt were now paid to her estate.

To make my opinion more clear, I will suppose the facts to be that the other assets of Mrs. Brown, in the hands of her administrator, amount to $4,000, and the debt due by the bankrupt to her estate is $1,200. The whole assets of Mrs. Brown are then $5,200; and the distributive share or moiety of the bankrupt of these assets is $2,600, from which should be deducted, as unpaid, the debt of $1,200, leaving his net distributive share, after the set-off or deduction of his debt, to be $1,400. I shall direct a certificate to be sent to the district court in conformity to this opinion.

Circuit Court of the United States, Boston, September 12, 1842. It is ordered by this court, that the following answers be certified to the district court, upon the questions adjourned into this court for a final determination. First, upon the first question. It is the opinion of this court, upon the statement of facts, that the assignee of the said George Brown is entitled, for the benefit of the creditors of the said George Brown, to his distributive share in the estate of Mary Brown deceased, as set forth in the said question, and that the said George Brown is not entitled to the same for his own use and benefit. Secondly, upon the second question. It is the opinion of this court, that the administrator of the estate of Mary Brown deceased, is entitled to set off or deduct the amount of the debt, due by the said bankrupt to the estate of the said Mary Brown, against the claim of the said assignee, for his distributive share of all her assets, including this debt. In other words, the debt is to be treated as a part of the assets of the estate of the said Mary Brown, to be distributed between her two heirs and distributees, and the debt of the said bankrupt is to be deducted from his moiety or distributive share, thus ascertained of the whole assets.

JOSEPH STORY,
One of the Justices of the Supreme Court of the United States.

NEWHALL v. The R. G. WINSLOW. See Case No. 11,736.

NEWHALL, The HARRIET. See Case No. 6,102.

NEWHALL, The SARAH M. See Case No. 12,351.

Case No. 10,160.

The NEW HAMPSHIRE.

[23 Int. Rev. Rec. 311; 2 Civ. Law Bul. 225.]

District Court, E. D. Michigan. April 30, 1877.

PRACTICE IN ADMIRALTY—CONFIRMATION OF SALE—POSSESSION—RESALE—LIBEL FOR SERVICES.

1. The practice of the court of admiralty requires that sales be confirmed by the court before the purchaser is entitled to the property.

2. Where the purchaser of a vessel at a judicial sale not confirmed by the court, obtained possession of her without authority, and expended labor upon her, and a resale was afterwards ordered, it was held that he was not entitled to maintain a libel for his services.

This was a libel for expenses incurred by the libellant in towing the schooner, pumping her out and taking care of her, pending proceedings in this court for a resale of the vessel. It appeared that on the 30th day of October, A. D. 1875, a writ of venditioni exponas was issued from this court, in the case of Hugh Mallon, an intervening libellant, requiring the marshal to make public sale of the schooner on the 18th day of November. In obedience thereto Mr. Blanchard, deputy marshal, offered her for sale at public auction, at the time and place named in the writ, and struck her off to the libellant for the sum of $650, he being the highest bidder, and that being the highest sum bidden therefor. Some days thereafter, several parties interested in the proceeds of the schooner, came into court and prayed that the sale be set aside and a resale ordered, offering to start the bids upon such a resale at $800. Pending this application, libellant came to the marshal's office and tendered to Mr. Blanchard the amount of his bid. Mr. Blanchard at first declined to accept the money, saying to him that the sale would probably be set aside, but finally consented to receive the money, nothing being said about surrendering the vessel. Libellant at once, and without the knowledge of the marshal, took possession of the schooner from one Beaubien, who had charge of her as well as of about a dozen other vessels, towed her to his wharf and bestowed upon her the labor for which this action is brought. On the 20th of December a resale was ordered to take place on the 5th of January, at which time the vessel was put up and struck off to another party for $975, and possession was surrendered to the purchaser. Libellant now sues for reimbursement for the labor and money expended upon her, as he claims in good faith.

Sylvester Larned, for libellant.

F. H. Canfield and John C. Donnelly, for claimants.

BROWN, District Judge. Had this been an ordinary sale at auction, it is quite likely that the striking of her off to libellant, and the subsequent receipt of the money by the auctioneer, would have vested a good

title in the purchaser, although it is evident that Mr. Blanchard, in receiving the money, did not thereby intend to vest title or surrender possession to libellant.

A different rule, however, obtains with regard to judicial sales. The practice in courts of chancery and admiralty requires that the sale be confirmed before the purchaser has a right to the property. Confirmation is said to be the judicial sanction of the court. Until then, the bargain is incomplete. When made, it relates back to the time of the sale, and supplies all defects except those founded in want of jurisdiction or in fraud. Until confirmed by the court the sale confers no right. Until then, it is a sale only in a popular and not in a judicial or legal sense. "The bidder," says the supreme court of Kentucky, "acquires by the mere acceptance of his bid no independent right, as in the case of a purchaser under an execution, to have his purchase completed," but is merely a preferred proposer, until the confirmation of the sale by the court, as agreed to by its ministerial agent. Ror. Jud. Sales, §§ 122, 124–126, 134. Although it is true if the deed be made and delivered and possession surrendered, lapse of time may operate to confirm the title of the purchaser, without formal confirmation by the court; yet, ordinarily speaking, until confirmation, the sale may at any time be set aside, and a resale ordered. The vesting of a title in a purchaser is obviously inconsistent with the power of ordering a resale. As the libellant expended his money and labor without authority, he is not entitled to recover, and his libel must be dismissed.

NEW HAVEN, The. See Case No. 280.

NEW HAVEN, The (The GEORGE M. DALLAS v.). See Case No. 5,338.

NEW HAVEN, The (REED v.). See Case No. 11,649.

NEW HAVEN CLOCK CO. (TERRY CLOCK CO. v.). See Cases Nos. 13,840 and 13,841.

NEW HAVEN, M. & W. R. CO. (LEE v.). See Case No. 8,197.

Case No. 10,161.

The NEW JERSEY.

[Olc. 415.] [1]

District Court, S. D. New York. July, 1846.

COLLISION—BETWEEN STEAM AND SAIL—DUTY OF EACH VESSEL—EVIDENCE.

1. Steamboats having greater facilities than vessels under canvas to avoid collisions when they are brought in proximity to each other, are bound to give way to sailing vessels when practicable, or take other proper precautions within their means for avoiding collisions.

2. But steamers are not bound to insure the safety of sailing vessels against their own negligence or misconduct. A sailing vessel is bound to exercise equal care, skill and prudence in passing a steamer as another sailing vessel; the only distinction being that in respect to a steamer, the vessel under sail is to adhere to her own course as far as practicable, and when so doing is not manifestly perilous to both or either.

[Cited in The New Champion, Case No. 10, 146.]

3. A sailing vessel, suing a steamer for damages from a collision, must prove that the injury was not produced by her own negligence or fault; particularly that she did not depart from her course when near the steamer, without a clear necessity for so doing.

4. Loose declarations or admissions extracted from or freely made by portions of a crew directly after a wreck from collision, will have but slight weight in invalidating their deliberate testimony to the facts.

5. A vessel wrongfully or carelessly interposed in the track of another so as to render a collision inevitable to the latter, is responsible therefor the same as if the blow was given by her movement directly against the one striking her.

[Cited in brief in Austin v. New Jersey Steamboat Co., 43 N. Y. 78.]

This was an action brought for the recovery of damages occasioned by a collision. The libellant, John H. Stebbins, alleges that he was the owner of the sloop Hamlet; that in the month of October last the said sloop sailed from the port of Bristol, on the Hudson river, on a voyage from thence to New York, with a cargo of flagging and other stones on board; that she was staunch and well built, and of about ninety tons burthen; that she was proceeding at the rate of about four or five miles per hour until she arrived at a point on the Hudson river called Blue Point; that the wind then failed, and the sloop then proceeded, with the force of the current and very little wind, about one or two miles an hour; that those on board of the sloop then observed the steamboat New Jersey coming up the river at the rate of about twelve or fifteen miles per hour, and nearer to the east shore of said river than the sloop; that the man at the helm was ordered to head the sloop more to the west shore of the river, which was done; that when the New Jersey arrived near the sloop, she changed her course to the westward and headed across the bows of the sloop, and attempted to pass to the westward of said sloop, by means of which she struck the end of the said sloop's bowsprit, and carried away about ten or twelve feet of it, and the stays attached thereto, and forcing her round by the blow, struck her on the larboard bow with such violence that she sunk her with her cargo. The libellant further alleges, that it was impossible for the Hamlet to get out of the way of the New Jersey, the sloop having little way on, and at the time at the westward of the steamer, and that there was room enough for the steamer to have passed to the eastward of the sloop; that by said collision the libellant has suffered damage to the amount of three thousand five hundred dollars. The answer of the claimant admits

[1] [Reported by Edward R. Olcott, Esq.]

the ownership, the voyage and loading of the sloop as alleged, but denies that she was well built and staunch; avers that she was not thoroughly manned, that the master was not on board, and no competent person in charge of said sloop. That the collision occurred about two o'clock in the morning, the steamboat, having a tow-boat of about two hundred tons burthen, was on the west side of the river, and westward of the course of the sloop; that the steamboat had had a fair tide until a little time before the collision; the wind was from the westward, and blowing a stiff breeze before and at the time of the collision; that the steamboat was slowed, and was stopped about the time of the collision; that she did not cross the bows of the sloop, nor the course the sloop was running at the time the sloop came in sight; and further avers, that the collision arose from the short luffing of the sloop through the fault of those in charge of her, which those in charge of the steamboat could not have foreseen or guarded against, whereby the sloop was run into the steamboat. He denies that the sloop was running as slow as alleged after the arrival at Blue Point, or that the steamboat was running at the rate of twelve or fifteen miles an hour, or that the steamboat was nearer the east shore than the sloop. He further avers, that as the steamboat was passing to the west of the sloop, and the sloop coming down was passing to the east of the steamboat, the course of the sloop was suddenly altered, and so directed to the westward, as to run into the steamboat. He further avers, that the collision happened within the body of the county of Ulster or of Dutchess, and not within the admiralty and maritime jurisdiction of this court; that this court has no jurisdiction of this cause of complaint.

Burr & Benedict, for libellant.
F. B. Cutting, for claimant.

BETTS, District Judge. The proofs show that the sloop Hamlet, owned by the libellant, on her passage to New York from Bristol, on the North river, came in collision with the steamboat New Jersey, owned by the claimant, and was immediately sunk. The occurrence took place in the night time. in October last, on the western side of the river, about half way between Blue Point and Sands' Dock, a mile or two below Poughkeepsie. The sloop was heavily laden with stone; she had a fair wind, but light and unsteady, and was running nearly directly down the river, about one-third its breadth off the west shore. The channel of the river at the place was half a mile wide, with flats each side of it extending a quarter of a mile, making the whole water surface about three-quarters of a mile in width. The early part of the night had been thick and dark, and the wind strong from the north. At the time of the collision, the wind had much subsided; sailing vessels were floating upon a slack tide at the rate of from two to four miles the hour, and could be seen at a distance of from a half to a mile off. The steamboat was proceeding, with one barge in tow attached to her larboard side, at a speed estimated on board to be six miles the hour, and by persons upon vessels she met and passed, at from ten to twelve miles. The endeavor of the libellant has been to show that the steamboat was negligently headed across the bows of the sloop, and crowded so near to her track as to come afoul of her, and cause her loss. The effort of the claimant has been to prove that the steamboat was properly conducted, and that the sloop carelessly, or from mismanagement, was turned off her true course, and run directly upon the steamboat.

The laws of navigation impose no general duties or liabilities on steamboats in relation to collisions with sailing vessels not common between themselves, and to that class of vessels also; each is bound, under all circumstances, to use, with reasonable promptitude and skill, all the means in their power to avoid a threatened collision. Abb. Shipp. (Perkins' Ed.) 238, 311, 312; Car. & P. 538; Lowry v. The Portland [Case No. 8,583]; 1 W. Rob. Adm. 157. It is only because the means at command by steam vessels are so much more efficacious and ready than those possessed by sailing vessels, and that the consequences of an omission to apply such means are so immediate and destructive, that vessels propelled by steam are required to use the more watchful precautions, and to avoid vessels under canvas whenever it is plainly within their power to do so, without waiting for any correspondent exertions on the part of the sailing vessel. The Perth, 3 Hagg. Adm. 414; The Shannon, 2 Hagg. Adm. 173. Yet the vessel under sail must contribute to the common security by holding steadily to her course, or take positive measures, if any are within her power, to prevent a collision, and avoid counteracting or embarrassing the steamer in the use of her powers to that end. The owners of steamboats are not to be made insurers against the negligence, ignorance or misconduct of persons in charge of sailing vessels. If a collision occurs through the inattention, want of skill or blameable conduct of the latter, which the steamer, in the use of reasonable endeavors, could not avoid, the consequences must fall upon the vessel in the wrong the same as if both vessels were of the same description. It thus becomes indispensable, in actions for damages by owners of sailing vessels against steamers, to prove ordinary care and skill on their part, and negligence or wilful fault on the part of the steamboat, though the latter may be liable to the implication of a delinquency when it might not, in like circumstances, be imputed to a sailing vessel which fails to avoid a collision.

The answer in this case sets up a state of facts which, if proved, would exonerate the steamer from responsibility for the injuries received by the sloop, because it in effect charges her with having departed from her proper course suddenly and run upon the steamer, or placed herself in the way of the latter. A sailing vessel meeting a steamer is entitled, in all ordinary circumstances, to keep her way; but the privilege involves a corresponding obligation to adhere to that course, and thus give the steamer the opportunity to employ its superior facilities to secure the safety of both. A change of direction by the sailing vessel, or manoeuvre indicating the intention to change it, may embarrass the steamer, or prevent the use, in time, of the power to vary or stop her own way; and a collision so produced must be laid to the fault of the vessel and not to that of the steamer. If, then, the allegation of the answer that the steamer was on a course which would have carried her clear of the sloop had not the latter abruptly luffed, and thus come unexpectedly across her track and into her, had been supported by the proofs, it is clear that she would not only have been acquitted on this libel, but would be entitled to prefer her own claim for damages so sustained.

I do not propose to spread out the testimony in detail; the result of it, in my opinion, is that the claimant's own witnesses contradict the answer in two particulars of considerable moment in a question of culpable inattention or misconduct; first, in proving that the steamer crossed the track of the sloop in full view, and less than a third of a mile from her bows; second, in proving that the steamer had not been previously on the west shore; and third, upon the whole evidence it is at least doubtful whether the steamer was not in the act of crossing the river from the east shore, steering westward, when the collision occurred. The testimony of the two men on board the sloop, strongly corroborated by those on board other sloops in the immediate vicinity, and who saw the position and course of the steamer and sloop, is positive that the steamer stood in a direction across the bows of the sloop in a course from the east to the west shore. It also very satisfactorily appears, from a comparison of the testimony of these witnesses, that the steamer did not, as is asserted in the answer, commence her course from the eastern shore to the western, at a point from one-half to three-quarters of a mile further down the river than the place of collision; because all the testimony is that her course was up the river, diagonally across, and the diagrams render it certain that the steamer could not have been on the western shore rounded to up the river, when the pilot observed the sloop luffing one-third of a mile off. The pilot of the Washington supposed the steamer had time, after she began crossing, to get to the westward of the sloop, and head up, before reaching the place of collision. He was, however, half a mile below; and after he fell into her wake, he pursued her course, and judged it would bring him over at about Blue Point, which is proved to be as far north of the place of collision as Sands' Dock is south of it. I am satisfied, that giving due weight to all the evidence, it is proved that the collision occurred whilst the steamer was going towards the west shore, and before she had passed the sloop, and got to the west of her. This necessarily places the steamer in a culpable position, attempting to cross the track of a sailing vessel and run under her bows, when she was entitled by law to hold her course, and it was the business of the steamer to leave it free to her.

The actual collision, as described by eye witnesses, and as far as it can be judged from concomitant circumstances, was not produced by any misconduct or want of care on the part of the sloop. The answer charges it to have been produced by the sudden change of the direction of the sloop from eastward down the river to westward towards and directly upon the steamboat. The pilot of the steamer is the only witness called to support the answer to this point. He describes two movements of the sloop into the wind, (or luffing,) which brought her upon the steamer. He says he first saw her a mile or more ahead, and laid his course to clear her; and if she had continued the course she was then pursuing, there would have been left him one-third the breadth of the river west free. The sloop was coming straight down the river, and when one-third of a mile from him, she changed her direction, luffed, and bore more for the steamer. He might have gone clear, notwithstanding, had she adhered to the new course; but fearing she would not leave him room, he slackened the speed of the steamer, and hailed her to keep away; then stopped the boat, and repeated the hail; the man at the tiller immediately shoved down the helm, which luffed the sloop directly into the wind; at the instant that movement was made, he rung the bell to back the steamer, and the sloop came, head on, hard into the steamer. This statement was not materially varied on cross-examination. He was still more emphatic that the sloop luffed twice, and added that he backed his boat twice, once at the instant of collision and again to keep clear of the sloop after the collision. The pilot is confirmed as to the working of the machinery by the engineer of the boat; and the declarations of the two men on the deck of the sloop, made on board the steamer that night and immediately after the sloop sunk, are proved, in which they represented that the sloop had luffed once, and the man at the helm said he had orders from the forward man to luff again, and at the same time to bear away. I do not regard these declarations of much moment if entirely credited; but the hasty assertions of men under such circum-

stances, in the confusion and fright of the moment, and in answer to the kind of questioning which most likely would take place, would weigh very slightly against their deliberate statements, when collected in mind and not appearing to testify under any bias or prejudice, and not discredited in character.

The intrinsic evidence, it appears to me, is very cogent against the representations of the pilot. The relative and actual speed of the two vessels is given as matter of conjecture, and no dependence can be placed on either for accuracy. The witnesses of the libellant estimate the speed of the steamer at ten to twelve knots; the engineer supposes she was not going over six or seven, and the pilot judges the speed of the sloop much greater than any person on board her, or sailing in her company. Assuming, however, a reasonable medium, and that the united speed with which the two vessels were approaching each other was ten miles the hour, they would strike in two minutes from the time the pilot saw the sloop luff. The engineer estimates that as the time occupied in giving two signal bells. No evidence is given that a sloop deeply laden, and scarcely more than floating with the current, could be brought, in two minutes, by any action of her helm, from a direction heading down the river and bearing eastwardly, to one westward and at right angles with a steamer running up the river. The inherent probabilities are forcibly against such supposition. But that statement does not present the full force of the presumption against the statement of the pilot; for he testifies, that after his boat was stopped, the helm of the sloop was shoved down, which luffed her, in his words, "directly round," and brought her into him nearly head on. The sloop must have been, at that moment, standing down the river in a direction opposite to his, and close beside him, to enable him to see so minute a manoeuvre in a dark night, and it would require great weight of evidence to convince the mind that she could have been brought instantaneously round under the circumstances, on her heel as it were, so as to be driven into the steamer. The men on board the sloop state, that when the steamer was observed stretching over from the east shore, and making for the sloop, she was luffed some to give way for the steamer to pass under her stern, and was then steadied, and was holding her course down the river as the steamer crossed her bows and struck the bowsprit. The pilot of the Eliza Wright, and captain and pilot of the Van Buren, both near the Hamlet, confirm this testimony. They all testify that the steamer was crossing the river west, and west northwest; she ran down to the Eliza Wright, and a light being shown from that vessel, she sheered more west, and attempted to run under the bows of the Hamlet, about half way between the Eliza Wright and the shore, and struck her bowsprit. This was within two minutes after passing the Eliza Wright. The Van Buren was a few rods in rear of the Hamlet, running in her wake, and the captain and pilot give the same statement of the course of the steamer, and say the Hamlet was steering directly down the river when the collision occurred. The captain of the Excelsior, the first sloop passed by the steamer after her direction distinctly made to the west, says she ran close to him, so near that he thought she was coming into him, and that he kept his eye on her till the collision, apprehending, from her course west and northwest amongst sloops in that part of the river, she would run foul of some one. He also testifies that she was bearing west at quick speed when he heard the crash.

The claimant contends that the manner the bowsprit of the sloop perforated the steamer demonstrates that the blow was given by the sloop, and at almost right angles, and outweighs the opinions and conclusions of all the witnesses as to the course of the steamer being across the river, and confirms the statement of her pilot that it was, on the contrary, up the river. I do not perceive how that consequence follows. The blow would be nearly perpendicular to the steamer on the hypothesis of their witness, as she was crossing the track of the Hamlet nearly at right angles, and must necessarily have the same effect in that position of the vessels as if reversed, and the steamer was heading up the river and the sloop across it. More force would probably be given the blow if the sloop held her way upon the wind and current than if driven against the steamer after being luffed round. Either mode of contact would account for the effect produced, and it cannot accordingly be assigned as exclusively necessary to either. Nor is the question of the responsibility of the steamer affected by the fact that she received the blow, and was not directly the impinging body. She wrongfully placed herself under the bows of the sloop in her track, and when the sloop could by no manoeuvre avoid a collision; and she is in law answerable for the consequences the same as if her motion had been immediately upon the sloop. Negligently or unskilfully interposing one vessel in the path of another, which the latter is entitled to hold, and under circumstances preventing her extricating herself, renders the collision and the injury consequent upon it the wrongful act of the vessel so interposed. It was the business of the latter to get out of the way of the former. 2 Dod. 83; Story, Bailm. § 611; Abb. Shipp. (Perkins' Ed.) 307. The sloop, in this instance, was sunk by the collision, and went down almost instantaneously. I think the proofs fasten the blame on the steamer, and she must accordingly be held responsible for the entire loss sustained by the libellant. The special fact ought not to be overlooked, that the steamer was running in a dark night, at her ordinary speed, amidst a thicket of vessels, without its being shown that any person on board her was on the lookout except the pilot at the wheel, or

that any other person was at the time on deck. This was a most culpable want of precaution in her navigation.

The decree must be entered condemning the steamboat in the damages inflicted by the collision, and it will be referred to a commissioner to ascertain and compute the amount.

[For the hearing on exceptions to the commissioner's report, which report was confirmed in part, see Case No. 10,162.]

Case No. 10,162.

The NEW JERSEY.

[Olc. 444.] [1]

District Court, S. D. New York. Oct., 1846.

COLLISION—MEASURE OF DAMAGES—IMPAIRMENT OF VALUE OF VESSEL INJURED—COSTS.

1. In the valuation of damages caused by a collision, the owner of the injured vessel is entitled to be recompensed to the amount of his entire loss.

2. When the value of the vessel injured is only impaired, the measure of damages will be the sum required to reinstate her to the condition she was in at the time of collision; if she is a total loss, her market price or value at the time will be the criterion.

[Cited in The Baltimore, 8 Wall. (75 U. S.) 386.]

3. The colliding vessel cannot diminish the allowance of her market value by proving her actual worth to be less, because of her age, imperfect build or the state of her timbers.

4. A common carrier by water is not liable for the loss of cargo by collision at sea; but if a commissioner reports damages for that cause, an exception will not lie to the report to try the legality of the decision, it being a question on the merits.

5. Relief must be had by motion to vacate the report as not within the scope of the order of reference, or for a rehearing before the court on the merits.

6. When seven exceptions are filed to a commissioner's report, and six are sustained by the court, costs will be allowed therefor, to be deducted from the amount decreed to the libellant.

A decree having been rendered in this cause that the libellant recover against the steamboat New Jersey the damages sustained by the sloop Hamlet, and the cargo on board, it was referred to a commissioner of the court to ascertain and compute the amount of such damages [Case No. 10,161], and having heard the evidence submitted and the arguments of counsel, he reported that he found the sloop at the time of the collision was worth three thousand dollars, and the cargo was worth five hundred and twenty-eight dollars. Upon the coming in of the report exceptions were filed to it by the claimants, on the following grounds: 1st. That the value of the sloop reported by the commissioner was above her real worth. 2d. That the commissioner had given undue weight to the opinions of witnesses as to such value, and had not determined it by the facts. 3d, 4th and 5th. That in appraising her value he had not made proper deductions, because of her age, unsoundness and other defects. 6th. The commissioner has allowed a greater amount than it would have cost to have raised the sloop, put her on the ways and repaired her. 7th. That the commissioner allowed the owner of the vessel $528.35 for the cargo on board, which did not belong to him; that the sum, also, was more than its value; that the amount of freight should have been deducted from the value of the cargo.

C. Van Santvord, for claimants.

E. Burr and E. C. Benedict, for libellant.

BETTS, District Judge. Twenty witnesses were examined before the commissioner in relation to the value of the Hamlet, and their testimony has been reported in full to the court. On examining it carefully, I am satisfied the commissioner has not over estimated the value of the vessel at the time of the collision. The owner is entitled to have the vessel estimated at its market value at the time of her destruction. His loss is the price it would produce on sale. The claimants cannot overcome that evidence by proving the vessel worth, intrinsically, less money, because of her insufficient build, her old age, or the actual state of her timbers. These considerations are of weight on an appraisement of a vessel, but they afford no certain criterion of her market price. The evidence of the claimants does not show she was apparently below the value of craft of her class and age.

There is no right of abandonment to the owner of a colliding vessel because of any injury, less than a total loss by collision. The damages arising from collisions are compensated at the amount of actual loss sustained by the injured vessel. The Amiable Nancy, 3 Wheat. [16 U. S.] 546. Accordingly, if the injured vessel is left in existence, and in possession of her owner, he must prove the amount of his loss over and above what remains to him. He is to be indemnified the expense of replacing her in the condition she was when the injury was received. Abb. Shipp. 300. The collision, in this case, occurred in October, 1845. The sloop lay under water at the place until June, 1846, when she was raised, at an expense of $500 to the owner, and could have been placed on the ways ready for repairs for $25 more. The cost of repairing her was then carefully estimated, and it is proved she could then have been repaired and placed in as good a condition as at the time of the collision, including new sails, for a sum not exceeding $1,350. To this would be added the expense of raising her, and placing her on the ways ready for repairs, $525, the whole being $1,875. Nothing was, however, done with her, and she was suffered to remain under water until September, when other ship-wrights, who examined her, proved her hull was not worth repairing; one valued it at $250, and t

[1] [Reported by Edward R. Olcott, Esq.]

testified that it would not pay the cost of breaking up for fire-wood. The first survey and examination of the sloop was careful and thorough, and affords more satisfactory evidence of her true condition than the opinions of those who subsequently looked at her cursorily only, and after she had been three months under water.

The libellant does not prove that he tendered the wreck to the steamboat, or demanded the means of repairing her, and accordingly it must be assumed that his claim of damages had relation to her condition at the time. The damages, then, which he can rightfully recover, must be limited to what would have restored her to the condition she was in when injured, adding a proper allowance for loss of her services during the time reasonably required for her reparation. No evidence was taken by the commissioner showing how long a time would have been necessary to repair her after she was raised, nor what would be a fair compensation for that loss of time. The allowance for loss of the services of the vessel should not commence prior to the efforts put on foot to raise her. No proof is given showing that the work could not have been done as well in November as May and June, and the owner ought not, therefore, to be allowed against the steamboat any time he voluntarily lost in regaining his vessel.

As the testimony stands, therefore, I am of opinion that the libellant is only entitled to recover $1,875 for the injury to the Hamlet. He may, however, upon proper application, obtain leave to go again before the commissioner to establish more distinctly this class of claims. I accordingly so far allow the six first exceptions to the commissioner's report as to deduct $925 from the value of the vessel reported, and order that the libellant recover therefor $1,875.

The seventh exception is to the allowance of $528.25 for the cargo on board; and the material question under that exception relates to the competency of the owner of the vessel to sue in his own name for that loss. The owner of a vessel is not liable for the loss of goods shipped on board his vessel, occasioned by a collision at sea, where no blame is imputable to him (Story, Bailm. § 512; Id. §§ 514, 518, and cases there collected), and when by the bill of lading the perils of the sea are excepted (Abb. Shipp. pp. 472, 473). It is held that such exemption is implied in all cases of carriage by water. Gould, J., 1 Conn. 487, and 12 Conn. 410; 1 Nott & McC. 170. And it would seem that usages of the particular place or business is made of important weight in determining the liability of water carriers. 3 Kent, Comm. 217. Without proof, then, that the libellant had paid for the cargo, or made himself liable for it, and thus become equitably assignee of the owner's right, this objection ought probably to have prevailed if made on the hearing upon the merits. But it is too late to raise the question on exceptions to the report of a commissioner. The authority of that officer extended no further than to consider and decide points of fact and evidence, and an exception to his report does not bring in review issues upon the merits. The remedy of the claimants would be by motion to reject the report, as not within the provision of the order of reference, or to allow a re-hearing on the merits. This exception is accordingly overruled. The claimants may be protected against the hazard of an after suit by the owner of the cargo, on application to the court to stay this portion of the recovery in court until the release of the claimants is filed by the owner of the cargo.

The libellant will recover $2,403.35, with his costs to be taxed, deducting therefrom the taxed costs of the claimants upon the six first exceptions to the commissioner's report, which are decided in his favor.

Case No. 10,163.

NEW JERSEY et al. v. BABCOCK.

[4 Wash. C. C. 344.] [1]

Circuit Court, D. New Jersey. April Term, 1823.

JURISDICTION—SUITS IN WHICH STATE IS A PARTY.

The circuit courts of the United States have not jurisdiction of a cause in which a state is a party; and if a state be a party, and the cause be removed from the state court to the circuit court, the latter court will remand it, even after it has been docketed.

[Cited in Field v. Lownsdale, Case No. 4,769; Fields v. Lamb, Id. 4,775; Texas v. Lewis, 12 Fed. 3, 14 Fed. 66; State v. Columbus & Xenia R. Co., 48 Fed. 628.]

THE COURT having directed this cause to be docketed at the last term, a motion was now made by the counsel for the plaintiff to remand it to the supreme court of this state, from which it had been removed under the twelfth section of the judiciary act of 1789, c. 20. The ground of the motion was, that the state of New Jersey being a party to the suit, this court cannot entertain jurisdiction of the cause as to her, and has no power to remand the cause in part, and to retain it for trial here in respect to the title of Gale, the other lessor of the plaintiff. This motion was opposed upon the following grounds: 1. That the objection to the jurisdiction is prematurely made, and if well founded, ought to be reserved until the trial of the cause. But that, at all events, the motion was inadmissible, after the cause had been docketed by order of the court. 2. That the two counts, one upon the demise of the state, and the other upon that of an individual, are inconsistent with each other, and that Gale, the only real plaintiff, should be put to his election upon which count he means to rely. 3. That

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

the act of assembly of this state, passed at the session of 1822, authorizing the governor to institute suits for asserting the rights of the state in certain cases, does not apply to the subject of this suit, and consequently the state is improperly made a party in this cause, for the sole purpose of defeating the remedy provided by the act of congress for the defendant, for removing the cause into this court.

[See Case No. 5,188.]

WASHINGTON, Circuit Justice. The motion to remand this cause to the supreme court of the state in which it was commenced, presents but one question for our consideration, and that is, whether it was properly removed into this court under the provisions of the twelfth section of the judiciary act, which declares that "if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought, against a citizen of another state, and the matter in dispute exceeds the sum or value of $500, exclusive of costs, &c., it shall be the duty of the state court to proceed no further in the cause." The section then provides for the trial of the cause in the circuit court, to which it is removed. If the cause be not one which is removable from the state to the United States court under the above section, it ought not to be placed upon the docket of the latter court; and if it should be improvidently placed on that docket, either by the order of that court, or without it, it can never be too late, before the trial at least, to remand it to the court from which it was improperly removed. The suit, not having originated in the circuit court, it is impossible that that court can take cognizance of it, unless it was legally removed into it from the court in which it originated. Upon what justifiable ground can the cause be retained here, when the court perceives, from the face of the record, that every step which can be taken in it is coram non judice, and that it must be finally dismissed for want of jurisdiction? By the declaration filed in this case, it appears, that the state of New Jersey is substantially a party plaintiff in the cause; and this is a fact which cannot be controverted at the trial. But this court cannot hold jurisdiction of a cause wherein a state is a party, because it is not bestowed upon it by any act of congress. A suit in which a state is plaintiff, cannot, for another reason, be removed from a state into a United States court, under the above section of the act of congress, since it cannot, without a manifest absurdity, be affirmed, "that the plaintiff is a citizen of the state in which the suit is brought." The only difficulty which this court felt at the last session, upon the motion to docket the cause, arose from considering the insertion of the count upon the demise of the state, as having been made for the purpose of preventing the cause from being removed from the state court, and intended to commit a fraud upon the jurisdiction of this court. But we are satisfied, upon further reflection, that, although it is in the power of a plaintiff to practice a trick of this sort, for the purpose which has been mentioned, still it must rest with congress to provide a remedy for such a case: it is not in the power of this court to do it. All that we can know of the cause is exhibited by the record of it as removed from the state court; and by this, it appears, that the state is a party to the cause, and claims title to the land in controversy. The suit was instituted in a court which had complete jurisdiction of it; and whether it was properly brought or not, either on account of a defect of power in the governor to bring the suit in her name, or of the alleged incompatibility of the two demises in the declaration, are questions which may be fit to be investigated in the state court, but are improperly brought to the view of this court, where a well grounded objection is made, in limine, to its jurisdiction of the cause.

What then can this court do? We cannot retain the whole cause, and give judgment in it for or against the state, because, as to the state, we have no jurisdiction. We should, consequently, be compelled to dismiss the cause as to her from this tribunal; and thus she would be baffled in her efforts to assert her right to the land in controversy; in her own way, either in the state court, or in this. The power of removal, if it exists, would prevent a trial in the former, and the want of jurisdiction would turn her out of the latter. This doctrine can never be maintained. It is quite impossible for this court to sever the cause, and remand that part of it which involves the right of the state, and retain the residue of it. The truth is, that unless the circuit court has jurisdiction of the whole of the cause, the case is not embraced by the above section of the act of congress, which speaks of a suit commenced by a citizen of the state in which it is brought: and provides that the state court shall proceed no further in the cause. The whole cause or suit then must be removed, or no part of it can. The inconvenience, if it be one, to which the defendant is subjected of trying his cause in the state court, instead of a court of the United States; is not greater than is experienced in many other cases where there are more parties than one, plaintiffs or defendants; as to some of whom, the court has jurisdiction, but not so as to the others. In such cases, if all the parties must join, the jurisdiction of the federal courts is excluded. 1 Wheat. [14 U. S.] 91, 3 Cranch [7 U. S.] 267. The cause remanded.

NEW JERSEY, The (GARDNER v.). See Case No. 5,233.

Case No. 10,164.

NEW JERSEY v. NOYES.

[35 Leg. Int. 341; 11 Chi. Leg. News, 9; 17 Abb. Law J. 407; 3 Cin. Law Bul. 680; 12 Am. Law Rev. 819; 24 Int. Rev. Rec. 174, 334.] [1]

District Court, D. New Jersey. May 14, 1878.

INTERSTATE EXTRADITION—LEGALITY OF ARREST.

A fugitive from justice extradited from one state of the Union to another, may be detained by the authorities of the state for prosecution, notwithstanding it may appear that his arrest under the rendition proceedings was without legal authority.

[This was an action at law by the commonwealth of New Jersey, ex rel. the warden of the Essex county jail, against Noyes.]

NIXON, District Judge. I am quite clear that the facts presented by the return and testimony in this case, preclude the court from discharging the prisoner on these proceedings. Whatever may be the opinion of the court in regard to the methods adopted by the agents of the state to obtain the possession of the body of the petitioner,—and I should be sorry to say or do anything which might be construed into disapproval of such methods and proceedings,—it, nevertheless, appears affirmatively that the prisoner is detained by the legal authority of the state to answer certain alleged violations of the criminal laws of New Jersey. The case falls within the provisions of section 753 of the Revised Statutes of the United States, which restricts the writ of habeas corpus to a case, where a prisoner in jail is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the constitution or a law or treaty of the United States * * * or unless it is necessary to bring the prisoner into court to testify.

It appears in the petition, return and evidence that the prisoner was brought into the state of New Jersey from the District of Columbia, by persons claiming to act under the constitution and laws of the United States in regard to the extradition of fugitives from justice. The second section of article 4 of the constitution, provides that a person charged in any state with treason, felony, or any other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state whence he fled, be delivered up to be removed to the state having jurisdiction of the crime. The act of congress of February 12, 1793 [1 Stat. 302],—section 5278, Rev. St. U. S.,—was passed to provide the machinery to carry into effect this provision, and it is therein made the duty of the executive of the state or territory, to which a person charged with crime, generally designated in the constitution, has fled, upon lawful demand, to cause the fugitive to be arrested and surrendered up. The alleged fugitive in the present case being in the District of Columbia, the demand was made upon the chief justice of the supreme court, under section 843 of the Revised Statutes relating to the District of Columbia, wherein that officer is directed to deliver up fugitives from justice in the same manner as the executive authorities of the several states are required to do under the extradition act. The demand of Governor McClellan upon Chief Justice Carter, was dated March 11, 1878, and was based upon the allegation that the prisoner stood charged with the crime of perjury, committed in the county of Essex, state of New Jersey; that he had fled from the justice of said state, and had taken refuge within the District of Columbia. It was requested that the petitioner be delivered up to Robert Lang and Andrew J. McManus, who were authorized to receive and convey him to the state of New Jersey, there to be dealt with according to law.

The grounds alleged in the petition for the discharge of the petitioner were, that he was a citizen of Connecticut, residing at New Haven, in said state; and in the latter part of February last he left his home for the purpose of attending to certain business in the city of Washington in relation to the legislation pending before the congress of the United States, and under consideration by a committee of the senate; that he passed openly in the daytime through the state of New Jersey, took rooms at a hotel in the city of Washington, where he remained from day to day in the open and public pursuit of the business objects for which his presence was required at the capital, and attended from time to time before the senate committee, and held conferences with different members of congress, concerning business which he had in hand; that he was thus engaged on the 11th day of March last, and in the evening of that day had retired to his bed as usual, when, at about midnight, he was awakened and disturbed by the entrance of three men into his room, who informed him that they had authority to arrest him and take him to the state of New Jersey, which they did. * * * That the indictments which formed the basis of such extradition proceedings do not charge any crime under any statute or at common law, and that therefore the arrest in the manner aforesaid was illegal, and a violation of the rights of the petitioner as a citizen of the United States. If the return had been made to the writ of habeas corpus in this case that the warden annexed to the writ, issued for the prisoner on his application to the supreme court of the state to be admitted to bail, to wit, that he was held in custody only by virtue of the

1 [Reprinted from 35 Leg. Int. 341, by permission. 12 Am. Law Rev. 819, and 3 Cin. Law Bul. 680, contain only partial reports.]

commitment issued by the governor to the keeper of the jail of the county of Essex, the sole question presented would be, whether it was competent for this court to inquire into the sufficiency of the evidence upon which the governor of New Jersey and the chief justice of the District of Columbia acted, in making the requisition by the one and the order for the rendition by the other. But the return, as amended, set forth the existence of new facts, which had arisen since the writ was allowed. It not only averred that the prisoner had been delivered into his custody by virtue of the writ of commitment, issued by Governor McClellan, of New Jersey, but also that he was held (1) by writs of capias from the court of oyer and terminer in and for the county of Essex, for the term of April, 1877, and the term of April, 1878; (2) by virtue of orders of said court remanding him to his custody for trial upon the indictments to which he had hitherto pleaded, the tenors of which were annexed, and which were the cause of his detention.

The writ of habeas corpus was tested and allowed April 16th, 1878. It appears by the copies of the papers annexed to the return, that on the 19th day of April the court of oyer and terminer of the county of Essex, caused the prisoner to be placed at the bar to be charged on the indictments for perjury, upon which the requisition had been made, and, on his plea of not guilty, the court had remanded him to the custody of the warden of the jail for trial upon the 8th of May upon the indictments to which he had before pleaded guilty; that on the 26th of April he was again sent to the bar of the court to be charged upon another indictment for conspiracy, and, upon his plea of not guilty, the court had again remanded him to the same custody and control, to be held for trial. The traverse to the return substantially admits the truth of these allegations, but it seeks to break their force by claiming that if the arrest of the petitioner, by means of which he was brought within the jurisdiction of this state, was unlawful, he is entitled to his discharge from custody, and return to his home, notwithstanding he was charged upon other indictments, and has been ordered to be held for trial since the service of the writ of habeas corpus.

We are thus brought to the consideration of the naked questions: (1) Whether a fugitive from justice extradited from one state of the Union to another, on the charge of the commission of a specific crime, can be held by the courts of the state to which he is sent for trial, for another and different crime? And (2) whether such persons may be detained by the authorities of the state for prosecution, notwithstanding it may appear that his arrest under the rendition proceedings was without legal authority? If these inquiries are answered in the affirmative; if the state court, without regard to the lawfulness or unlawfulness of the methods adopted to obtain the custody of the body of the prisoner, may not detain him for trial upon the same or other indictments charging him with offences against the criminal laws of the state, he has no claim upon this court for a discharge on the ground that his rights as a citizen were violated by parties who secured his person in a foreign jurisdiction other than by due process of law.

Questions were discussed in the argument which may properly arise between governments, as to the construction of the extradition treaties, or between individuals, as to responsibility for the invasion of personal rights, but which, in my judgment, are not involved in the present inquiry. It may be true that where a treaty exists between two independent nations in regard to the surrender of fugitives, or a criminal is given up on the allegation that he had committed a specified crime, good faith between the governments requires that he should not be tried for other offences. It may be true that when a citizen has been placed under restraint without lawful cause, and without due process of law, he can hold every one who caused or contributed to his imprisonment to a strict accountability in a civil action. In the one case the right of asylum is sacred, except so far as it has been yielded by the terms of the international compact, and any abuse or perversion by one government of the privileges of arrest granted by the treaty, is a just cause of complaint on the part of the other. In the other case, so jealous is the law in regard to the invasion of the individual liberty of the citizen, that all unauthorized restraint of his person is followed by damages against the offending party. But here, a court of competent jurisdiction has the custody of a person who is charged with the commission of certain offences against the laws of the state. The answer to the charge is, that some other person has done a wrong to the prisoner, by violating the laws of another state, in arresting him without proper authority. In a criminal case this can hardly be reckoned a pertinent response. A person arraigned for the commission of a felony cannot plead in bar that he ought to be excused from answering the charge because other parties trespassed upon his personal rights. It is confounding of matters which are essentially separate and distinct. It is a claim on the part of the accused that his criminal violations of the law are to be condoned by his personal injuries. It is asking a court to suspend its most responsible duties, to wit, the trial of alleged offenders against the Penal Code of the state, while the persons charged with the crime are instituting preliminary investigations into the methods adopted to bring them within its jurisdiction. Such a course, for obvious reasons, is allowable in a civil suit between private litigants, but, for like obvious reasons, cannot be and

never has been allowed in criminal proceedings, where the object of the prosecution is to punish an offender against the public. On a claim of this sort the court says to the prisoner, "You are going too fast. We will consider one thing at a time, and everything in its regular order. The precise matter which now concerns you and the court is, whether you are guilty of the crime charged against you. As you happen to be found within our jurisdiction, we will first settle that question, and afterwards, if needs be, will inquire into the circumstances attending your rendition for trial, or will leave the respective governments to discuss them, or will remit you to the recovery of such damages as you may be able to obtain in the civil courts for the violation of your rights of person."

All the authorities of Great Britain and the United States, when carefully distinguished and interpreted by their circumstances, support this view of the law. The earliest cases in England to which the attention of the court has been called, are Rex v. Marks, 3 East, 157, before the king's bench, in 1802, and Ex parte Krans, 1 Barn. & C., 258, in the same court in 1823, in both of which it was held that when a party was liable to be detained on a criminal charge, the court would not inquire on habeas corpus into the manner in which the capture had been effected. The Case of Scott, 9 Barn. & C. 446, before the king's bench, in 1829, was thus: A rule nisi had been obtained for a habeas corpus to bring the body of the prisoner in the custody of the marshal, in order that she might be discharged, on the ground that she had been improperly apprehended in a foreign country. It appeared on the return that an indictment for perjury had been found against her in London; that a warrant for her arrest to appear and plead had been granted; that the police officer having the warrants went beyond his jurisdiction, and followed her to Brussels and then arrested her, conveyed her to Ostend against her will, and thence back to England. Chief Justice Tenderden, on discharging the rule, said: "The question is thus, whether if a person charged with a crime is found in this country it is the duty of the court to take care that such a party shall be answerable to justice, or whether we have to consider the circumstances under which she was brought here. I thought, and will continue to think, that we cannot inquire into them." The courts of South Carolina, in the same year, were considering the same question, as appears in the case of State v. Smith, reported in 1 Bailey, 283. In the case of State v. Brewster, 7 Vt. 118, before the supreme court of Vermont, in 1835, an attempt had been made in the court below to have the proceedings in an indictment against the defendant dismissed, on the ground that he was forcibly and against his will, and without the assent of the authorities of Canada, brought from that province. The court held that the matter set up could not avail the prisoner. Dows' Case, reported in 18 Pa. St. 37, is in many of its features quite similar to the one under consideration, but the illegality of the capture could not be set up by the fugitive. The case of State v. Ross, 21 Iowa, 467, was cited also, and no reference was made to the cases of U. S. v. Caldwell [Case No. 14,707], because they had been fully discussed in the argument, and were not considered pertinent in the present instance. They all turn upon the construction of the treaty between the United States and Great Britain, in regard to the extradition of fugitives from justice, and involve the authority of the courts to hold a surrendered fugitive for trial for any other than extraditable offences. It may, however, be remarked, in reference to this question, that by the second clause of article 6 of the constitution of the United States, treaties are declared to be the supreme law of the land, and by the second section of article 3 they are brought as directly within the judicial power as cases in law and equity arising under the constitution and laws of the United States; unless, therefore, there was something in the treaty with Great Britain which required the aid of legislative provisions to give it effect (see [Foster v. Neilson] 2 Pet. [27 U. S.] 253), it is somewhat difficult to understand or endorse the reasoning of the learned judge who decided the case of U. S. v. Caldwell [Case No. 14,707], and especially where he asserts that complaints of the abuses of the extradition proceedings do not form a proper subject of investigation in the courts of the United States.

It is the conclusion of the court, upon principle and authority, that the state court has the right to hold the prisoner for trial for the offence charged against him, without reference to the circumstances under which his arrest was made in a foreign jurisdiction. It necessarily follows that there is no authority here to discharge him on the habeas corpus. Neither the constitution of the United States, nor section 753 of the Revised Statutes, makes any provision for the writ in such a case, and the prisoner must be remanded.

Case No. 10,165.

NEW JERSEY MUT. INS. CO. v. BAKER.
[See 94 U. S. 610.]

NEW JERSEY MUT. LIFE INS. CO. (DE CAMP v.). See Case No. 3,719.

NEW JERSEY R. CO. (MILNOR v.). See Case No. 9,620.

Case No. 10,166.

NEW JERSEY STEAMBOAT CO. v. PLEASONTON.

[8 Blatchf. 259.][1]

Circuit Court, S. D. New York. Feb. 18, 1871.[2]

INTERNAL REVENUE—GROSS RECEIPTS STEAMBOAT COMPANY FOR CARRIAGE OF PASSENGERS—ACT JUNE 30, 1864, AS AMENDED JULY 13, 1866.

1. Section 103 of the internal revenue act of June 30, 1864 (13 Stat. 275), as amended by section 9 of the act of July 13, 1866 (14 Stat. 135), is to have full operation, according to its plain terms.

2. Under that section, the "gross receipts" of a steamboat company from passengers carried by it in its steamboats, includes receipts not only for the carriage of passengers, but for the use of berths and staterooms.

[This was an action by the New Jersey Steamboat Company against Alfred Pleasonton, collector of internal revenue, to recover the amount of a tax alleged to have been unlawfully exacted.]

William P. Prentice, for plaintiffs.

Henry E. Davies, Jr., Asst. Dist. Atty., for defendant.

WOODRUFF, Circuit Judge. (1) I am of opinion, that when, by the act of July 13th, 1866, (14 Stat. 98,) in section 9 thereof, (page 135,) congress struck out of the internal revenue law the former section 103, and re-enacted it, with such modifications as were deemed proper, and, in the same act, by section 70, (page 173,) declared, in express terms, that "all provisions of any former act, inconsistent with the provisions of this act, are hereby repealed," they left to us no alternative but to say, that section 103, as then re-enacted, with the modifications then made, is to have full operation, according to its plain terms.

(2) I am also of opinion, that the plaintiffs' attempt to withdraw from the designation of "gross receipts from passengers," a portion thereof, because they discriminate, in their charge to passengers, assigning a portion to the mere right of passage and a portion to the use of the berth or the stateroom in which the passenger necessarily passes a portion of the period of carriage, is not warranted by the law or by the sensible meaning of the language, "gross receipts from passengers." Those receipts are what the passenger pays for carriage, with its usual and necessary incidents. As well, in my opinion, might railroad companies, who are included in the same section, make discriminating charges, one for the mere carriage of the passenger, and another for a seat, and then claim the deduction of the latter from their gross receipts, as not taxable.

The defendant must have judgment, with costs.

[This cause was carried by writ of error to the supreme court, where the judgment of this court was affirmed. 18 Wall. (85 U. S.) 478.]

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

[2] [Affirmed in 18 Wall. (85 U. S.) 478.]

NEW JERSEY STEAM NAV. CO. (CLARKE v.). See Case No. 2,859.

Case No. 10,167.

NEW JERSEY ZINC CO. v. TROTTER et al.

[23 Int. Rev. Rec. 410; 17 Am. Law Reg. (N. S.) 376.]

Circuit Court, D. New Jersey. 1877.

REMOVAL OF CAUSES—CITIZENSHIP—REPEAL OF STATUTES—LOCAL PREJUDICE.

[1. The second and third subdivisions of Rev. St. § 639, relating to removals by one of several defendants, and to removals on the ground of prejudice and local influence, are not in conflict with the provisions of the act of 1875 [18 Stat. 470] so as to be repealed by the latter act.]

[2. Where one defendant is a citizen of a different state from plaintiff, and others are citizens of the same state, and the latter, by answer in the state court, disclaim all interest in the controversy, this does not bring the cause within that clause of the act of 1875 which authorizes removal by a single defendant when the controversy is wholly between citizens of different states, and can be wholly determined as between them; for the matter must be determined upon the case made in the complaint, and not by the answers.]

[3. In such case the cause is not removable on the ground of local prejudice under the third subdivision of Rev. St. § 639; for under this section all defendants must join in the petition, and they must all be nonresidents of the state.

Thomas N. McCarter, for petitioner.

John E. Parsons, for respondent.

NIXON, District Judge. This is a motion to remand to the state court the controversy pending between the New Jersey Zinc Company, a corporation created by the laws of New Jersey, and Charles W. Trotter, a citizen of the state of New York. The complainant filed its bill in the court of chancery of New Jersey, on the 22d of January, 1877, against Trotter and one William Dixson and Daniel P. Mapes, for an injunction to restrain them from digging, mining and carrying away or using any of the zinc ores, or other ores, found upon certain described premises, on Mine Hill, in the county of Sussex, New Jersey, except franklinite and iron ores, when they exist separate from zinc ore, and to account for all the ores which had already come into their hands. The bill alleges that Dixson and Trotter were engaged in business as partners, and that the other defendant, Mapes, acting or claiming to act under the authority of the firm, had entered upon a portion of the premises and excavated and removed therefrom a considerable quantity of the ores. Answers were severally filed by the defendants: the said Dixson

acknowledging that he was the partner of Trotter in other matters, but disclaiming all interest in the pending controversy, and denying that he ever authorized Mapes to mine, or remove any of said ores, or that he now claims or ever claimed any right, property or interest therein: the said Mapes setting up, that in entering upon the premises and mining the ores, he was simply acting by the command and under the authority of his employer, Trotter, disclaiming all pretence of right to perform such acts, except as the agent and servant of Trotter; and the said Trotter, replying upon the merits, claiming that he was solely interested in the premises, as the lessee of one James L. Curtis, the surviving trustee of the Franklinite Mining Company; that he employed Mapes to enter, mine and carry away the ores, as he had the right and authority to do, under the provisions of a certain lease for said premises, from the trustee, duly executed March 6, 1877. Upon the filing of the bill the state court granted a preliminary order, restraining the defendants from carrying away, or otherwise disposing of, any of the ores then mined or thereafter to be mined, upon the premises, except franklinite and iron ores, when they exist separate from the zinc ore. In this state of the pleadings, the defendant, Trotter, on the 31st of August, 1877, filed in the state court a petition, praying for the removal of the cause to this court. He set forth in the petition, that complainant was a citizen of the state of New Jersey, and the petitioner a citizen of New York, and that the whole controversy in the suit was wholly between citizens of different states; that although Mapes & Dixson were joined in the bill of complaint, as defendants with the petitioner, yet, in fact, neither of them had any interest in said controversy; that the same was between the complainant and petitioner and could be fully determined between them, without the presence of the other defendants; and further, that he had annexed thereto and filed therewith, an affidavit, that he had reason to believe, and did believe, that from prejudice and local influence, he would not be able to obtain justice in the state court. Not, as was explained upon the argument, from any lack of confidence in the integrity or ability of the chancellor, but because he would feel obliged to follow the decision of the court of errors and appeals of New Jersey, in the case of New Jersey Zinc Co. v. Boston Franklinite Co. [2 Beas. 322], which was supposed to be against the claims of the defendant in this case.

The counsel for respondent insists that the case should be remanded, because the act of March 3, 1875 (18 Stat. 470), has repealed all antecedent legislation in regard to the removal of causes, and because the present controversy does not fall within the provisions of the said act. The counsel for the petitioner claims that only such portions of the acts of 1866 [14 Stat. 306] and 1867 [Id. 558] as are in conflict with the law of 1875, are repealed by it; that the second and third subdivisions of section 639 of the Revised Statutes are still in force, and that the pending suit comes within both of these subdivisions; or, if he is mistaken with regard to the existence of that law, he is, nevertheless, entitled to the removal under the second and third sections of the act of March 3, 1875.

In order to understand the present state of the law in the matter of the removal of causes from the state to the national courts, it may be proper to advert briefly to the previous legislation upon the subject. Whilst the judicial power of the United States is vested, by the provisions of the third article of the constitution of the United States in one supreme court, and in inferior courts, it is left to congress to say, from time to time, what inferior courts shall be ordained and established. When the congress acts, and clothes these subordinate tribunals with jurisdiction, the extent of the jurisdiction—within the range of the constitutional authority to act, as limited by the second section of the third article—is wholly determined by the congressional will. Until within a few years, all the general legislation upon the subject is found in the twelfth section of the judiciary act [1 Stat. 79]. It is here that the class of cases is defined in which the power of removal exists, and the circumstances are found under which such removal may be effected. The amount in dispute must be $500; the suit must be commenced in the state court against an alien, or by the citizen of the state in which the suit is brought, against the citizen of another state; and the petition for removal must come from the defendant or defendants, and be filed in the state court at the time of entering an appearance to the action. Under these provisions, it was early decided, that the right of removal existed only with the defendant; that where there was more than one, all must join in the petition, and to authorize the removal, that all the plaintiffs must be citizens of the state in which the suit was brought, and all the defendants citizens of some other state or states.

The right to remove was enlarged by the act of July 27, 1866. It was therein provided, that if it appeared to the satisfaction of the court, that there was an alien defendant and a citizen of the state wherein the suit was brought, or that the suit was against a citizen of the same, and the citizen of another state, and was for the purpose of enjoining or restraining him or was one in which there could be a final determination of the controversy, so far as it concerned him, without the presence of the other defendants, as parties in the cause; in every such case the alien defendant, or the non-resident citizen, might petition the state court for its removal, as against him, at any time before the trial or final hearing. But such removal did not take away the right to proceed at the same time in the state court against the other defendants, if the plaintiff desired so to do.

This act was amended, and the jurisdiction still further enlarged by the act of March 2, 1867. Under its provisions, when there was a suit between a citizen of the state in which it was brought, and a citizen of another state, such non-resident citizen, whether he was plaintiff or defendant, might remove the cause into this court, by filing a petition in the state court at any time before trial or final hearing, upon filing an affidavit in the state court, alleging that he had reason to believe, and did believe, that from prejudice or local influence he would not be able to obtain justice in the state court. These three acts embrace the general legislation of congress, on the subject of the removal of suits, previous to the act of March 3, 1875, to which reference will be made hereafter; and their various provisions are grouped under the first, second and third subdivisions of section 639 of the Revised Statutes of the United States, where the confused phraseology of the act of July 27 1866, has been corrected and made intelligible. The subsequent legislation occurs in the act of March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from state courts and for other purposes." 18 Stat. 470. Omitting from the second and third sections everything that does not concern the present inquiry, they provide, in substance, that any civil suit at law or in equity, pending or hereafter brought in any state court, * * * in which there shall be a controversy between citizens of different states, may be removed by either party into the circuit court of the United States for the proper district, upon filing a petition in the state court before or at the term at which the said cause could be first tried and before the trial thereof. And when, in any such suit, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit. It was clearly the general design of this act to enlarge the jurisdiction of the court in the matter of the removal of suits as well as in other matters. Whether such a result has beeen secured will depend upon the operation of the tenth section, which provides that all acts and parts of acts in conflict with the provisions of that act are repealed.

At the hearing the arguments of counsel turned principally upon the question as to how far the previous legislation conflicted with, and had beeen superseded by, the act of 1875. It seemed to be conceded on both sides that the first subdivision of section 639 of the Revised Statutes was covered by the more comprehensive provisions of this last act, and the chief controversy was in regard to the second and third subdivisions. Each of these provides for the removal of causes under a state of circumstances which are not provided for in the act of 1875, and unless they are in conflict with the provisions of the later act they are not repealed by it; for instance, the second subdivision authorizes the splitting of a cause under certain circumstances, leaving some of the parties to go on with the suit, as to them, in the state court and allowing the removal as to other parties to this court, whenever there could be a final determination of the controversy, so far as they were concerned, without the presence of the other parties. The last clause of the second section of the act of 1875 has retained some of these provisions in permitting one or more of either the plaintiffs or defendants to remove the suit when there is a controversy therein wholly between citizens of different states and which can be fully determined as between them. But it does not allow the splitting of the cause; and although one of the plaintiffs or defendants may petition for the removal under the conditions named, such petition takes the suit and all the parties to it, and not, as under the other act, merely a controversy wholly determinable between some of the parties, leaving the other matters involved therein between other parties for the action and adjudication of the state courts. And likewise the third subdivision provides for the removal of the cause by either a non-resident plaintiff or a non-resident defendant, upon filing an affidavit of prejudice or local influence, and this provision is altogether omitted in the act of 1875. Unless these differences existing between the old and new legislation create a conflict both must stand, because only contrary or repugnant acts or parts of acts are repealed. And wherein is the conflict? Because the act of 1875 authorizes the removal of the whole suit under the existence of certain facts, does it necessarily repeal those features of the act of 1866, transferred to the revision, which permit a suit to be split and to be removed in part upon the existence of other and varying facts? When it is apparent that it was the intention of congress to amplify the jurisdiction of the court, must such a construction be placed upon their act that the jurisdiction will be restricted? And yet such would be the result, if it be held, that either the provisions of the act of 1866, authorizing a defendant to remove a cause, as to him, or the provisions of the act of 1867 in regard to prejudice or local influence, were superseded by the more recent legislation. Holding, then, that the second and third subdivisions of section 639 are still in force, the question reverts, whether the present suit is removable either in whole or in part under any existing law? The complainant is a corporation, resident of the state wherein the action is brought. Two of the defendants live in the same state and one in the state of New York. The petition for removal has been filed in the state court by the non-resident defendant alone. If the two other defendants had united in the petition, the

whole suit could have been removed into this court, under the provisions of the act of 1875. They have not joined with the petitioning defendant, but have answered in the state court, disclaiming all interest in the controversy. Will such disclaimer bring the case within the last clause of the second section of that act, which authorizes a single plaintiff or defendant to petition for the removal, when the controversy is wholly between citizens of different states and can be fully determined between them? We think not. We must decide upon the case made by the bill of complainant, and not by the disclaimer of the defendants. It is, doubtless, true that if immaterial parties have been added, merely to give jurisdiction, or to hinder a removal, the court would and ought to disregard their presence. Wood v. Davis, 18 How. [59 U. S.] 467. But neither Mapes nor Dixon is a nominal party, if the allegations of the bill, as to their acts or interests, are true. Their presence is necessary to the complete maintenance and vindication of the rights of the complainant; for the whole controversy—embracing indemnity for the past and security and protection for the future—cannot be determined without them. Nor is the suit removable under the third subdivision of section 639. All the defendants have not joined in the petition; nor are they all non-residents of the state; and both of these facts must exist to bring the case within the provisions of that clause of the section. Bixby v. Couse [Case No. 1,451]; Sewing Machine Co., 18 Wall. [85 U. S.] 587. In the latter case the supreme court say: "Either the non-resident plaintiff or non-resident defendant may remove the cause under the last named act (act of March 2, 1867), provided all the plaintiffs or all the defendants join in the petition, and all the party petitioning are non-residents, as required under the judiciary act; but it is a great mistake to suppose that any such right is conferred by that act, where one or more of the plaintiffs or one or more of the petitioning defendants are citizens of the state in which the suit is pending, as the act is destitute of any language which can be properly construed to confer any such right, unless all the plaintiffs or all the defendants are non-residents and join in the petition."

The only remaining inquiry is, whether the suit is removable in part under the second subdivision of section 639. If it be conceded that that clause of the section is in force, there is no reasonable doubt but that the case under consideration is within it. This is a suit brought, so far as it relates to the petitioning defendant, to restrain and enjoin him; and it is also one in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants, as parties to the cause. It answers to all the requirements of that clause of the section which allows a severance of the defendants; the non-resident petitioner coming here for the determination of his rights, and the other resident defendants remaining in the state court, in which the controversy, as to them, may be still carried on by the complainant.

The motion to remand must be refused and the cause will proceed in this court against the petitioning non-resident defendant alone.[1]

[NOTE. There was also another bill subsequently filed by the New Jersey Zinc & Iron Co. against Charles W. Trotter, James L. Curtis, and the Franklinite Steel & Zinc Company, to obtain the reformation of certain deeds. The cause was heard on a motion to remand to the state court. The motion was granted. 18 Fed. 337.

[An action of trespass had been instituted by Trotter to recover damages of the New Jersey Zinc Company for entering on his lands and digging up and carrying away a quantity of ore. Judgment was rendered in favor of Trotter for $3,320 damages and costs. Case unreported. Defendants then removed the case, by writ of error, to the supreme court. A motion made by Trotter to dismiss, because the value of the matter in dispute did not exceed $5,000, was granted. 108 U. S. 564.]

NEW JERSEY ZINC CO. (WETHERILL v.). See Cases Nos. 17,463 and 17,464.

Case No. 10,168.

In re NEW LAMP CHIMNEY CO.

District Court, S. D. New York.

BANKRUPTCY—COUNSEL FEES—DISBURSEMENTS.

[A memorandum in 2 Alb. Law J. (Oct. 29, 1870) 343, states that BLATCHFORD, District Judge, refused to allow $250 out of the assets of the bankrupt estate as counsel fees to the bankrupt's attorney, on the ground that no such allowance was authorized in the bankruptcy act or in analogous practice; and referred a question of allowing the attorney $90 for disbursements to the register for proofs and opinion.]

J. W. Martin, for bankrupt.

S. B. Hingenbotam, for assignees and creditors.

[Nowhere reported. Opinion of BLATCHFORD, J., and report of referee not now accessible.]

Case No. 10,169.

In re NEWLAND.

[Affirming Case No. 10,171. Nowhere reported; opinion not now accessible.]

Case No. 10,170.

In re NEWLAND.

[6 Ben. 342;[2] 7 N. B. R. 477.]

District Court, S. D. New York. Feb. 7, 1873.

SECURITY FOR DEBT—INSURANCE ON BANKRUPT'S LIFE—PRESENT VALUE OF POLICY.

N., having borrowed money of his mother-in-law, gave her his notes for it, and, as security

[1] See the opinion of BALLARD, J., to the same effect, in Cooke v. Ford [Case No. 3,173].

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

for them, procured a policy of insurance on his life to the amount of $4,000, for her benefit, and paid the premiums on it up to the date of his bankruptcy. On a surrender of the policy, she would be entitled, in its stead, to a paid up policy for $158. The cash value of the policy, at the date of the bankruptcy, if surrendered, was $13.13. The mother-in-law proved her debt, to the amount of $3,450, setting forth the security: *Held*, that, in order to ascertain the amount on which she was entitled to dividends from the estate, the cash value of the policy, if surrendered, viz., $13.13, should be deducted from the amount of the debt, as proved.

[Cited in Re McKinney, 15 Fed. 539.]

[In the matter of Frank F. Newland, a bankrupt.]

James Clark, for creditor.

David Thornton, for assignee.

BLATCHFORD, District Judge. The petition in this case, a voluntary one, was filed on the 16th of April, 1872. Mrs. Van Antwerp, the mother-in-law of the bankrupt, has proved a debt against his estate, on promissory notes made by him, and held by her, for $4,000, the consideration for which was money loaned by her to him, the amount of the debt proved being $3,450, there having been $550 paid on account of the $4,000. On the 16th of April, 1870, the bankrupt took out a policy of insurance on his own life, in a life insurance company, for $4,000, for the benefit of Mrs. Van Antwerp, payable to her, as collateral security for said debt, and paid the quarter-yearly premiums, $19.84 each, up to the date of his bankruptcy. On the surrender of this policy, the company would, by its terms, issue, in its stead, a paid up policy for $158. At the present age of the bankrupt, it would require the payment now of a single premium of $49.99, to purchase a paid up policy in the company for $158. The cash value of the $4,000 policy, on a surrender of it to the company, is $13.13. The proof of debt sets forth the security.

Two questions are certified by the register as arising on the foregoing facts: (1) Whether the assignee in bankruptcy can require Mrs. Van Antwerp either to surrender the policy to him and take a dividend on all her claim, or to retain the policy and withdraw her proof of debt. (2) If such election on her part cannot be required, what shall be taken as the value of the collateral security to be deducted from the debt, so as to arrive at the amount on which Mrs. Van Antwerp is to receive a dividend from the estate?

It is contended, on the part of the assignee, that, as the bankrupt took out the policy, and for two years paid the premiums, the assignee has a claim to whatever surplus of the amount insured there may be, after paying the debt due Mrs. Van Antwerp, and that she could not retain such surplus, as against the assignee; that the payment of the amount insured will pay her debt; that dividends to her must cease when the amount insured is paid; and that, if she shall receive dividends on the $3,450, or on that amount less the $13.13, or less the $158, and then the amount insured shall be paid, she will have received the dividends, and the $3,450 in addition. Hence, the assignee insists, that Mrs. Van Antwerp ought to surrender to the assignee her interest in the policy, and prove her claim for the $3,450, as a debt unsecured, or else look to the policy as full security, and relinquish all claim on the assets of the estate.

For the creditor, Mrs. Van Antwerp, it is contended, that this policy, the bankrupt being alive, has now no fixed, definite value, other than its present cash surrender value of $13.13; that, outside of that, everything is contingent, as well the continued payment of the premiums, as the duration of the life insured, and the continued solvency of the company; that, if the future payments of premiums shall be made by the creditor, she will be giving to the policy all its value; that the future payments of the premiums may be made by the bankrupt, out of after acquired property, if he does not thereby contravene any provision of the bankruptcy act; that it would not be equitable to require the creditor to deduct from her claim more than the present cash surrender value of the policy; that such value is the entire present value produced by the payments of premiums by the bankrupt; that the entire security which the bankrupt has furnished to the creditor, by making such payments, is the present cash surrender value of the policy; that the contingencies before mentioned make it impossible to consider the present value of the policy as being $4,000; that the $158, as the amount of a paid up policy which would now be issued for the premiums already paid, ought not to be taken as the present value of the $4,000 policy, because of the contingencies as to the duration of the life insured and as to the continued solvency of the company; and that, consequently, the only certain present value is the $13.13 cash surrender value.

The questions involved are ones as to which no direct authorities are to be found, either in England or in the United States. It is well settled, that where a debtor, at his own expense, effects an insurance on his life, as security to a creditor, the representative of the debtor is entitled to the surplus after the debt is paid. So, too, if such a debtor, in his lifetime, pays the debt, he is entitled to have the policy delivered up to him. Lea v. Hinton, 5 De Gex, M. & G. 823; Drysdale v. Piggott, 22 Beav. 238; Courtenay v. Wright, 2 Giff. 337; Morland v. Isaac, 20 Beav. 389.

The policy of insurance, as a security, is not, within the language of section 19 of the bankruptcy act, "a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt" owing to the creditor from the bankrupt; but, nevertheless, the creditor must, in some proper way, credit on the debt the present value of the security. It seems to me impossible to say that the present value of the policy is more than its cash surrender

value. But for its having such cash surrender value, it could not be said to have any appreciable value. Parker v. Marquis of Anglesey, 20 Wkly. Rep. 162, 25 Law T. (N. S.) 482. It is true, that the bankrupt paid the premiums for two years, but that has given no present appreciable value to the policy other than its cash surrender value. It is true, that, if the policy were now due, the creditor could not hold, as against the assignee, the surplus beyond her debt. But, it may require the payment of the premiums for many years, before the death of the person insured will make the policy due; and those premiums, with the accumulating interest on the debt, may, with the debt, amount to a sum much larger than the amount of the policy. It would not be proper, even if the creditor should so desire, to compel the assignee to assume the payment of the premiums on the policy for the future. In fifty years, and the assured may live that length of time, the premiums, not calculating interest on them, would amount to about $4,000. Besides, the estate could not be kept unsettled, to carry this policy; and, if the assignee took it now, it would now be worth to him, to dispose of, in its present shape, no larger sum than its cash surrender value. That amount he is entitled to have allowed at once on the debt, the balance of it being proved. It is not proper to require the creditor to prove for nothing and look to the policy alone, because the policy is now worth only the $13.13.

In every view, the first question must be answered in the negative, and the value of the policy, to be deducted from the debt, must be taken at $13.13.

[NOTE. The policy was kept alive by the payment by the defendant's mother-in-law, Mrs. Van Antwerp, of the premiums afterwards due upon it. She received a dividend on the debt due her from the bankrupt estate. Subsequently the bankrupt died. The case was then before the court upon the question of the apportionment of the amount received upon the policy from the insurance company, between the assignee and Mrs. Van Antwerp. Case No. 10,171.]

Case No. 10,171.

In re NEWLAND.

[7 Ban. 63;[1] 9 N. B. R. 62; 2 Ins. Law J. 860, 895; 4 Bigelow, Ins. Cas. 283.]

District Court, S. D. New York. Nov. 21, 1873.[2]

INSURANCE ON BANKRUPT'S LIFE—RIGHT OF CREDITOR WHO KEPT POLICY ALIVE — SECURITY FOR DEBT.

1. An insurance policy on the life of a bankrupt was set forth in his list of debts, as security for a debt. The debt was originally $4,000. The policy was for $4,000. Before the bankruptcy, $550 had been paid on the debt. The debt was proved at $3,450. The surrender value of the policy at the time was credited on the debt by order of the court, at $13.13; and a dividend of $641.64 from the bankrupt's estate was paid on the debt. The holder of the policy kept it alive by paying the premiums, instead of surrendering it, and, before another dividend was paid by the estate, the bankrupt died, and the insurance policy became due. *Held*, that the holder of the policy was not entitled to receive and keep all the insurance money;

2. The debt must be charged at its original amount, without deducting the surrender value, with interest, the payments of $550 and $641.64 must be credited on it, with interest, and the amount received on the policy must be applied to extinguish the balance due on the debt, the creditor having credit for all premiums paid by him after the petition in bankruptcy was filed, and out of the balance, if any, the assignee must be refunded the $550 and the $641.64, with interest.

[In the matter of Frank F. Newland, a bankrupt.]

Charles M. Earle, for assignee.
John L. Hill, for creditor.

BLATCHFORD, District Judge. On the 16th of April, 1872, the bankrupt filed his voluntary petition in bankruptcy, and was, on the 23d of April, 1872, adjudged a bankrupt thereon. Among the debts proved against his estate was one by Mrs. Lucy Van Antwerp, his mother-in-law, on two promissory notes made by him, without interest, for money loaned to him by her at the dates of the notes, neither of which notes was due. The notes amounted to $4,000. The proof was for $3,450, the bankrupt having paid $550 upon the debt before his bankruptcy. On the 16th of April, 1870, the bankrupt took out a policy of life insurance, on his life, for $4,000, payable to Mrs. Van Antwerp, as collateral security for such debt. He paid the premiums on such policy quarter-yearly to the time of filing his petition. Afterwards, and to and including the premium for the quarter year during which the surrender value of the policy was fixed, as between Mrs. Van Antwerp and the assignee in bankruptcy, as hereafter mentioned, the premiums on the policy were paid with moneys furnished for the purpose by Mrs. Van Antwerp. In the schedules to the bankrupt's petition, and in the proof of debt by Mrs. Van Antwerp, the fact that the policy was a collateral security for the debt was set forth. Prior to the making of any dividend of the assets of the estate, the assignee and Mrs. Van Antwerp, by agreement, submitted to this court, for decision, the following questions: (1) Whether the assignee can require Mrs. Van Antwerp either to surrender the policy to him and take a dividend on all her claim, or to retain the policy and withdraw her proof of debt; (2) if such election on her part cannot be required, what shall be taken as the value of the collateral security, to be deducted from the debt, so as to arrive at the amount on which Mrs. Van Antwerp is to receive a dividend from the estate? The court answered the first question in the negative, and decided that the value of the

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

[2] [Affirmed by circuit court. Case unreported.]

policy, to be deducted from the debt, must be taken at $13.13, which was the then cash value of the policy, on a surrender of it to the life insurance company. Newland's Case [Case No. 10,170]. The $13.13 was credited on the debt. After making such credit, the debt, less a rebate of interest, stood, for a dividend, at $3,208.20. On this sum a dividend of 20 per cent. was declared, and the amount of such dividend, $641.64 was paid to Mrs. Van Antwerp, March 18th, 1873. Mrs. Van Antwerp retained the policy and kept it alive by paying the premiums which afterwards became due on it. After the dividend was paid, and during the life of the policy, the bankrupt died. Prior to the declaring of a second dividend, the following questions have been certified for decision: (1) After crediting the $13.13 upon Mrs. Van Antwerp's debt, had the assignee any further estate, right, or interest in the policy, or has he now in the proceeds? If yea, to what extent? (2) In case he has any such rights, is Mrs. Van Antwerp to be allowed for any, and, if yea, which, of the following items: (a) Rebate of interest, or proportion thereof, since her notes became due; (b) premiums furnished by her before the valuation and credit of the $13.13; (c) premiums paid by her after that? (3) Can she, in either case, retain the past and participate in future dividends, or can the assignee require her to withdraw from participation in further dividends? (4) If she is entitled to the whole $4,000 in the first instance, can she be required to return, or in any way give the assignee the benefit of, what has been already credited upon the original debt, viz. (a) the $550; (b) the $641.64 received by her as dividend?

It is contended, for the creditor, that the policy is her absolute property, subject to no equity of redemption by any person; that the value of the policy was fixed and deducted from the debt; that thereby the policy became her property, with liberty to her, if she chose, intead of surrendering it, and receiving its surrender value, to keep it alive, by paying premiums, and receive to herself its fruits; that the right of the assignee in the policy ceased, on its being so valued, and could not be revived by the fact that she chose to continue to pay premiums, when it never could have been revived if she had chosen to surrender it and receive the $13.13; that the policy would have been worthless, at the death of the bankrupt, had Mrs. Van Antwerp not paid the premiums; that she took the risk and is entitled to the profit of the investment; and that the question of the value of the policy, as against the assignee, is res adjudicata, and cannot be opened.

For the assignee, it is urged that the equity of the case is with him; that, if the creditor shall receive the $4,000, and shall retain the $550 and the $641.64, and shall receive further dividends from the estate, she will be more than paid her debt in full, while the other creditors will not be paid in full; that, if she shall repay the $550 and the $641.64, and be debarred from further dividends, she will still be paid in full, while the other creditors will not; that, therefore, by receiving the amount of her policy, she is paid more than her debt, and ceases to be a creditor; and that, consequently, the assignee should be declared to be entitled to an interest in the policy, as an asset of the estate, to the extent of the surplus remaining after paying the debt, and no further dividend should be paid on the debt. In support of these views, and in answer to those maintained by the creditor, it is insisted, that the former decision was only a direction made under circumstances then existing, to guide the assignee in respect to a dividend; and that Mrs. Van Antwerp took nothing but the right to keep the policy alive, and to be paid in full out of its proceeds, coupled with the obligation to pay to the assignee the surplus of the proceeds over the amount of her debt.

I am of opinion that the position taken by the creditor is not sound. The court, in fixing the $13.13 as the value of the policy, fixed it in reference to its value as it then stood, as a security created and upheld by the payment of the bankrupt's money, and one to which he had given all the value it then had. The determination of the relations between the estate and the creditor proceeded on the further basis, that the policy was to be surrendered and was to cease. Since that, the creditor has kept the policy alive; but she has done so as a security for her debt. It was only as a creditor that she had such an interest in the life of the bankrupt as to make it possible for her to have an insurable interest under the policy. The policy was taken out as such security, and has been continued as such security. It is not, however, now, and was not, when the bankrupt died, the same security which the court fixed the value of and applied on the debt at $13.13. That value was merely the then value of the investment of the bankrupt's money. The policy now is substantially a new security. It stands as if Mrs. Van Antwerp had never had any security under a policy until she began paying the premium herself after the $13.13 was credited. Suppose another creditor of the bankrupt's had, after his bankruptcy and before any dividend was made, taken out a policy on his life as security for the debt, and the bankrupt had died before any dividend was made, would it not have been necessary and proper to charge such creditor with the net amount realized on such security? Mrs. Van Antwerp has substantially taken out a new policy, since the bankruptcy and before a second dividend is made, and ought to credit on the debt what she realizes on the policy, besides crediting all other payments on the debt, and, when her debt is

thus paid, she ceases to be a creditor. The twenty-second section of the bankruptcy act provides that a proof of debt must set forth whether any and what securities are held for the debt and must state that the claimant has not, nor has any other person, for his use, received any security whatever other than that set forth; and the same section, and general order No. 34, provide for the re-examination of all claims and proofs of debt at any time. This policy was, in the hands of Mrs. Van Antwerp, as much a security for this debt after, instead of surrendering it, she went on keeping it alive, as it was before.

As the credit of the $13.13 was based on the surrender of the policy, that sum ought not to be credited, the policy not having been surrendered. The debt should be charged at its proper original amount, with proper interest. Then there should be credited on it the $550, with proper interest, and the $641.64, with proper interest. The amount of the policy, so far as necessary, should be applied to extinguish the balance due on the debt, Mrs. Van Antwerp having credit for, and being refunded, with interest, the amounts paid by her for premiums after the petition was filed, either through the bankrupt or directly. Out of the balance, if any, then left of the policy money, the assignee must be refunded the $550, with interest, and the $641.64, with interest. It is referred to the register to state an account on this basis and report it to the court.

[This decision was affirmed by the circuit court on review. Case unreported.]

Case No. 10,172.

NEWLIN v. GARWOOD.

DEBTOR AND CREDITOR.

Where one, all of whose property at a certain time amounted in value to about $4,500, entered into mercantile speculations to the extent of some $60,000, and made purchases on credit for that purpose, and about that time purchased real estate to the value of $2,500, which sum he withdrew from the $4,500, and in a few months afterwards conveyed the real estate in trust for his wife and children, after which he continued in business for several years, and then became a bankrupt, having never been free from debt at any time subsequent to the purchase of the real estate, *held*, that the assignee in bankruptcy was entitled to the real estate.

[Before KANE, District Judge. Cited in 1 Whart. Dig. 572, to the point as stated above. Nowhere reported; opinion not now accessible.]

Case No. 10,173.

Ex parte NEWMAN.

[3 App. Com'r Pat. 226.]

Circuit Court, District of Columbia. Oct. 14, 1859.

PATENTABLE INVENTION — DOUBLE USE — HOOP SKIRTS.

[The use of strands of twisted cord to sustain the hoops of hoop skirts *held* a patentable invention, where the result was a better and cheaper article, although a similar use of such cords for supporting the rounds of rope ladders, the slats of window blinds, etc., was old and well known.]

Appeal from the decision of the commissioner of patents, refusing to grant Cearsar Newman a patent for a new and useful improvement in fabricating hoop-skirts.

MORSELL, Circuit Judge. The appellant states his claim thus: "My improvement consists in cheapening the construction of skirts known as 'skeleton skirts' by the employment of strands of cord so twisted as to retain the hoops of spring-steel or other material forming the spring hoops in their places, by which great facility and cheapness of construction is attained; materially reducing the cost of manufacture as heretofore practiced. To effect this desirable result I take the ordinary spring-hoops used in skeleton skirts, however constructed, and, first twisting two or more strands hard, I place one of the hoops in the bight and by the back-twist of the strands form a cord over the spring and thus fasten it. Cords formed as thus described are placed at equal distances all around the hoop sufficiently far apart for the purposes of properly sustaining the hoop for strength and durability as shown in the drawing; and the formation of each of the cords extends to the length of the distance the hoops are to be placed apart, when a second hoop is introduced, and a new section of cord is laid over it. This process is continued until the whole skirt is completed. This mode of connecting the spring hoops of a skirt, it is obvious, admits of great rapidity of construction. The twisted cord has heretofore been employed in rope-ladders and some other constructions, and is consequently not new. I therefore do not make any claim thereto as of my invention. But what I do claim as my invention, and desire to secure by letters patent, is combining a series of spring-hoops as herein set forth, by means of a series of twisted cords, and thus forming a skeleton skirt as above specified."

In stating particularly the nature of his plan he says: "The twisting of the strands D, D, D, Fig. II., being entirely effected by machinery, as well as the inserting of the hoops A, A, A, A, Fig. I., in the same manner." In the report adopted by the commissioner for his decision and reasons it is said: "The appellant in this case proposes to suspend the spring hoops of a hoop skirt by means of the bight afforded by the twisting together of two or more strands, the series of twisted strands forming the vertical ribs of the skeleton. He claims combining a series of spring hoops by means of a series of twisted cords and thus forming a skeleton skirt. It is alleged on the part of the office that this method of suspending horizontal cross pieces is familiar in rope-ladders, in window-blinds and in many varieties of bas-

ket and wicker-ware, and a patent is refused on the ground that, as it is not new to suspend supports in the strands of ropes and cords, the adaptation of this device to the hoops of skeleton skirts is but a colorable use, and not a patentable invention. On the other hand, the appellant contends that the point at issue does not involve the question of a double use. He maintains that he has produced a new combination; that his invention consists in manufacturing skirts by combining a series of spring-hoops by means of a series of twisted cords, whereby he has produced a manufacture that the examiner does not assume is old.

"Now, looking at some of the well and long known methods of making hoop-skirts, we find that the hoop for the horizontal and the cord for the vertical ribs are the common materials employed. The combination thus far therefore possesses no novelty, but the hoop and cord are the only elements of the combination, and we see at once that the appellant is driven from the ground he strives to occupy. The truth is that the only just interpretation which can be placed upon the claim before us—an interpretation which its language fully justifies—is that it refers alone to the method of connecting the hoops with the vertical cords, or the method of supporting the hoops. If it was anything more, or can bear any other construction, it is that it relates to the means of connection or support in combination with a hoop-skirt. Assuming this to be the correct view of the matter as understood by the appellant, and we are brought directly to the objection of the examiner that what is known in other connections becomes but a double use when applied to a new purpose. That the rounds of ladders, the slats of blinds, and the horizontal withes of wicker-baskets have been supported by twisted cords or twisted withes, cannot be denied notwithstanding a disposition is manifested to join issue as to the fact. The question occurs then, is there anything patentable in applying this well known method to the manufacture of hoop-skirts? If it perform any other function, or an old function in a better manner in its new manifestation than it does in its old, there can be no doubt that the appellant is entitled to his patent; if it does neither of these, there can be as little doubt that his claim should be refused. The office performed when this plan is adopted in a ladder is to support the rounds and keep them in place. So in window-blinds it is to support and keep in place the slats; and in baskets the lateral withes. If in skirts it performs any other office than to support and keep in place the hoops, we have failed to perceive it, and we are not assisted in the discovery by the revelations of the specification, or of the reasons of appeal. If it produce a different shaped skirt, a better or cheaper manufacture, then the thing would be patentable; but it does not alter the form, and there is no evidence that it leads to a better or cheaper fastening or support than is now manufactured in various ways. The application is an analogous use, and should, in our opinion, follow the law as interpreted by the best authorities."

This report was adopted by the commissioner as his decision May 26th, 1859.

To this decision there were two reasons of appeal filed,—the first denying the applicability of the references; the second, that there is no want of novelty in applicant's new mode for a hoop-skirt by combining the hoops with the twisted series of cord as practiced for the first time by Mr. Newman. Due notice having been previously given of the time and place of hearing this appeal, all the papers in the case, with the references, &c., were laid before me in writing, and submitted said case for consideration. In the report of the commissioner just stated, speaking of the hoop-skirt in question, he says: "If it perform any other function, or an old function in a better manner in its new manifestation than it does in its old, there can be no doubt that the appellant is entitled to his patent." If it produce a different shaped skirt, a better or a cheaper manufacture, then the thing would be patentable. At the stage of the enquiry in which the subject was at the time of the application made by the appellant to the commissioner for a patent, if all the previous requisites of the act of congress [5 Stat. 117] had been complied with, and the oath taken as directed thereby, together with the production of the specification, drawings, &c., prima facie evidence was thereby furnished, to be received by the commissioner in his further proceedings in said case, of the truth thereof. The specification, among other things, states that the nature of the invention consists in forming a skirt entirely by machinery, &c., and particularly describes how his invention may be used. It states: "The twisting of the strands D, D, D, (Fig. II.) being entirely effected by machinery, as well as the insertion of the hoops (A, A, A, A, Fig. I.) in the same manner." The cost is greatly reduced, and the skirt is rendered very durable, as the strands, being very tightly twisted, not only remain so, but retain the hoops firmly in their place. This machine (or the model), it is stated, was to be seen in the office, and this mode of constructing a hoop-skirt is supposed to be new, and that no other such was ever before made. The advantages over all others of the kind will at once suggest themselves to any one who is skilled in the manufacturing of this description of fabric. The exhibit of a specimen was before the commissioner, and by an examination and comparison with others of a different mode of construction it must have appeared that the time in which it can be constructed is much less, the number of hands and labour fewer and less, the material to construct with far less costly, that it is stronger and more durable, it is

much lighter, and less injurious to the other wearing apparel of ladies than any of the skirts where clasps or knotted fastenings are used. Thus that it unites cheapness, strength and durability. "The cord itself is formed of the strands employed for the purpose in the act of manufacturing the skirt, while in all the hoop-skirts by others, the suspending fabrics of whatever kind used are first made separately and complete, and the hoops are afterwards inserted therein. One hand only is necessary by this new mode, many more by the other methods. Newman, by this new mode, "is enabled to form at one and the same instant of time, the fabric that supports the hoops and insert the hoops without other guides than those employed to form the fabric. One operation forms the entire skirt complete, and with the rapidity that a cord can be made, &c.

Thus it seems to me all the conditions mentioned by the commissioner are fully asswered, and that the appellant has satisfactorily shown that he is entitled to a patent for his said invention.

MORSELL, Circuit Judge. I, James S. Morsell, assistant judge of the circuit court of the District of Columbia, do certify to the honorable commissioner of patents, that according to due notice previously caused to be given of the time and place appointed for the trial of the above described appeal, all the papers, references &c. in said case were laid before me by the commissioner, and the said appellant, by his attorney, appeared, and, having filed his argument in writing, submitted the said case; whereupon, after deliberate consideration thereof, I am of opinion, and I do so hereby adjudge and determine, that the decision aforesaid of said commissioner is erroneous, and it is hereby annulled and reversed, and it is ordered that a patent forthwith be issued to the said Newman for his invention aforesaid as prayed.

Case No. 10,174.

Ex parte NEWMAN.

[2 Gall. 11.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1813.

NATURALIZATION—DECLARATION OF INTENTION BY ALIEN ENEMY.

An alien enemy cannot be permitted to make the declaration required by law preparatory to the naturalization of aliens.

J. T. Austin, in behalf of Newman, who is an alien enemy, moved the court to permit him to file his declaration preparatory to naturalization, according to the act of 14th of April, 1802, c. 28 [2 Stat. 153].

Before STORY, Circuit Justice, and DAVIS, District Judge.

STORY, Circuit Justice. The petitioner is an alien enemy, and therefore has no legal standing in court to acquire even inchoate rights. We have so held on a former application. The act of congress of 30th of July, 1813 [4 Bior. & D. 585] c. 35 [2 Stat. 53, c. 36], on which this motion is founded, does not apply. That act enables persons, who before the war had made the preparatory declaration, to become citizens in the same manner as if war had not intervened. But it confers no privileges on other persons. The petitioner, therefore, cannot exempt himself from the general disability. Motion denied.

[1] [Reported by John Gallison, Esq.]

Case No. 10,175.

In re NEWMAN.

[3 Ben. 20; 2 N. B. R. 302 (Quarto, 99); 1 Chi. Leg. News, 123.] [1]

District Court, S. D. New York. Nov., 1868.

BANKRUPTCY—TRADESMAN—BOOKS OF ACCOUNT.

1. The question, what are proper books of account to be kept by a merchant or tradesman, is in each case a question of evidence.

2. Where a bankrupt, for a year before filing his petition, was engaged in the business of buying and selling furniture on his own account, having a shop where his goods were displayed and sold, *held*, that he was a merchant or tradesman, under the twenty-ninth section of the bankruptcy act [of 1867 (14 Stat. 517)].

3. Where a bankrupt kept no books but two memorandum books, from which he could not tell the amount of the business he had done, or the particulars and consideration of debts due to and by his principal debtors and creditors, *held*, that the bankrupt had not kept proper books of account under the twenty-ninth section, and a discharge must be refused.

[In the matter of Abraham Newman, a bankrupt.]

S. Hirsch, for bankrupt.

P. H. Vernon, for creditors.

BLATCHFORD, District Judge. The first specification filed in opposition to the discharge of the bankrupt sets forth that, during the whole of the year 1867, he was a merchant engaged in the purchase and sale of furniture on his own account, at No. 149 Bowery, in the city of New York, and yet, with the fraudulent intent of concealing from his creditors the true state of his affairs, he kept no books of account whatever during any of the said period. The twenty-ninth section of the bankruptcy act provides, that no discharge shall be granted, if the bankrupt, being a merchant or tradesman, has not, subsequently to the passage of the act, kept proper books of account. The act was passed March 2d, 1867. The provision in question does not qualify in any manner the effect of the non-keeping of the books. It does not say that the non-keeping must be with intent to defraud his creditors or to conceal anything from his creditors. In the same section, in the case of destroying or making false entries in books, or removing or transferring property, the intent and purpose of defrauding creditors, or of preferring a particular creditor, or of

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Chi. Leg. News, 123, contains only a partial report.]

preventing the property from being administered in bankruptcy, are made essential conditions. By the English bankruptcy statute, an intent on the part of the bankrupt to conceal the true state of his affairs must be coupled with a wilful omission to keep proper books of account, in order to warrant the refusal of a discharge. Undoubtedly, under the act of 1867, if the non-keeping of any book or books be shown to have had no effect in concealing from creditors the true state of the bankrupt's affairs, that circumstance must have weight in determining whether such books as were kept were proper books. But the intent of the non-keeping of books is of no importance. The mere omission is the thing plainly interdicted. Therefore, so much of the specification under consideration as attaches an intent to the omission may be properly rejected as surplusage; and the allegation that the bankrupt kept no books of account whatever during the period referred to, is equivalent to an allegation that he kept no such books of account as he was required by the statute to keep, that is, no proper books of account.

From the 1st of January, 1867, to the 1st of January, 1868, during which period many of the debts due by the bankrupt, as set forth in his schedule of debts, were contracted, he was engaged in business on his own account, buying and selling furniture, in the city of New York. He had a shop or store where his wares or merchandise were displayed and sold. He was, therefore, a merchant or tradesman, under the twenty-ninth section. His voluntary petition was filed on the 3d of February, 1868. On the 10th of September, 1868, the bankrupt testified, on his examination, that he did not keep any books of account at all while he was in the furniture business on his own account. The specifications in opposition to the discharge were filed on the 17th of September, 1868. The bankrupt was again examined thereafter, and, on the 12th of October, 1868, testified, that when, in his original examination, he stated that he did not keep books when he carried on business, he meant that he did not keep a regular set of books; that he cannot write and does not know how to keep books; that he can write his name only; that he can write a little German so far as to write his name, but not to keep books; that he kept a memorandum book, in which he made entries in German that he could understand, and that he relied upon that; that he did not keep a book-keeper because his business could not afford it; that he had lately found the memorandum book referred to; that at the time the petition and schedules were prepared that book was not shown to the counsel who prepared them, because it was then lost; that he told his counsel at that time that he did not keep any books of account, but only kept such memorandum book; that his schedules were made up from his memory of what people owed him, and the schedules of what he owed were made out from bills in his possession; and that the memorandum book was kept in German, with, it may be, a few entries in English by his daughter. On the 17th of October, 1868, the bankrupt produced two memorandum books as being the only books that were kept by him. He was then examined in regard to those books. Being asked what was the nature of the entries in the books, he stated that when a man bought goods of him he put it down there. He stated, that the entries were in the handwritings of himself, his son, his daughter, and strangers when they bought goods of him; that every thing of his affairs was in those books; that the names of all purchasers to whom goods were sold and delivered were there; that some of their residences were there, and some not; and that the books contained entries of very few of his purchases in the furniture business. The books have been submitted to the inspection of the court, but the question whether they were the proper books of account required to be kept by the bankrupt must depend upon the testimony. After the books were produced, the bankrupt was asked, on his examination, whether he could tell what amount of business he did during the year 1867. He replied that he did not know, but that, as near as he could tell, it might be from one to five thousand dollars. In his examination on the 10th of September, he stated that one Rosenberg, who appears in his inventory of assets as a debtor to him for $887.50, owed him that amount for money loaned and furniture bought, but he did not know how much was for money loaned, or how much was for furniture bought; that, in regard to a claim in his inventory against one Riddle for $476.-40, it was for furniture, but he could not tell the price of the furniture; and that, in regard to a claim in his inventory against one Jones for $2,280.76, it was for money lent at different times, but he could not tell the dates, and it might be a year and a half ago. All the items of assets in the inventory, nine in number, and amounting to $5,544.09, are put down merely as due by nine persons. In regard to Rosenberg, Riddle, Jones, and three others, the debts due by which six amount in the aggregate to $5,405.09, their present residences are stated in the inventory to be unknown. The creditors were entitled to know what amount of business the bankrupt did during the year 1867, after the passage of the bankruptcy act, nearer than a conjecture that it was from one to five thousand dollars. They were also entitled to know the particulars and consideration of the indebtedness due by Rosenberg, and the price of the furniture sold to Riddle, and the details of the money loaned to Jones. If the bankrupt had kept proper books of account, and if

these memorandum books were such proper books of account as he ought to have kept, he would have been able to give the information asked on the points referred to. The fact that, after these books were produced, he could not tell more nearly than he did the amount of his business during the year 1867, is conclusive evidence that the books he kept were not proper books. The question of what are proper books must be in each case a question of evidence. What would be proper and sufficient books in one case would be improper and insufficient in another. In the present case, on the evidence, the books were not such proper books of account as ought to have been kept. It may perhaps be shown that they were proper, and I am disposed to allow an opportunity to the bankrupt to do so, if he desires to introduce further evidence on the point. At present, I refuse the discharge on the first specification, without passing on any of the other three.

Case No. 10,176.

NEWMAN v. DAVIS.

[2 Cranch, C. C. 16.] [1]

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

ACTIONS—TRESPASS VI ET ARMIS FOR ASSAULTING PLAINTIFF'S SLAVE.

Trespass vi et armis will lie for assaulting and shooting the plaintiff's slave, without a per quod servitium amisit.

Trespass vi et armis for assaulting and shooting the plaintiff's slave. Motion in arrest of judgment, that trespass vi et armis does not lie. It ought to be a special action upon the case; the damages being consequential only.

But THE COURT (THRUSTON, Circuit Judge, doubting) overruled the motion.

NEWMAN (DUBOIS v.). See Case No. 4,-108.

Case No. 10,177.

NEWMAN v. KEFFER et al.

[1 Brun. Col. Cas. 502; [2] 33 Pa. St. 442, note.]

Circuit Court, E. D. Pennsylvania. Nov. 30, 1836.

ATTORNEYS' COMPENSATION — FEDERAL COURTS—EFFECT OF DECISIONS OF STATE COURTS—DEBTOR AND CREDITOR — PAYMENT — EXCHANGE — INTEREST RECOVERABLE ON ARREARS OF GROUND RENT—GROUND RENT—REMEDIES FOR RECOVERY —JOINT TENANT—RIGHT TO COLLECT RENT.

1. An attorney is entitled to recover a quantum meruit for his professional services.

2. Where the federal courts have jurisdiction of a suit between citizens of different states, affecting real property, they will adopt the decisions of the highest state courts as the local law of real property, whether under a statute or the unwritten law of the state.

3. Where a rent is reserved payable in a foreign coin, it is computed at so much of the coin made current by law, as at the rate of exchange will be equal in value to the foreign coin in the country where issued.

4. Arrears of ground rent will bear interest from the time they become payable.

5. For the recovery of arrears of ground rent, the plaintiff may proceed by distress, re-entry, ejectment, and action of covenant, and proceedings in one do not suspend the others; the remedies are cumulative. Such actions will lie as well against the administrator, after decease of the covenantor.

6. One joint tenant, his executor or trustee, may receive the whole rent or appoint a bailiff to collect it.

These were actions brought by the surviving trustee of the ground rents, belonging to the Hamilton family, issuing out of lots in the city of Lancaster, to recover the rents of many lots held by each of the defendants respectively. On each of these lots the annual rent was a certain number of shillings, sterling money of Great Britain. These rents were all in arrear for many years. By the terms of the deeds reserving them, they were made payable at Lancaster annually, forever, in shillings sterling, or their value in coin current, according to the rate of exchange between Pennsylvania and London, on the day on which the rent in each year fell due. The rents varied in amount from seven shillings to ninety shillings sterling per annum. The deeds reserving them were of various dates, the earliest having been made in 1740, and the latest in 1815. The plaintiff claimed the rent for each year, at the current rate of exchange, with interest from the day on which it became payable. In two of the cases, the first and last, defense to a part of the plaintiff's demand was taken upon special grounds, particularly noticed below in the charge of the court. Except upon these grounds, the defendants' counsel did not contend that they were not liable to pay the principle of the rents in arrear, at the par of exchange. They insisted, however, that the rents having been, in former settlements of arrears, computed upon the footing of an estimate of the pound sterling as equal to only four dollars and forty-four cents, they were not now liable, by reason of any difference in the rates of exchange proved at the trial, to pay on the footing of any higher estimate. They also insisted that no interest could be recovered on the arrears of rent, or that if any were recoverable it was not recoverable for any time previous to the commencement of these suits in February or March, 1836. At par, without interest, the arrears of rent due amounted in the five cases together to $2,862 74

To which the plaintiff claimed to add,

Difference of exchange 218 15

Interest 1,508 27

Making the plaintiff's demand in the five suits amount to $4,604 44

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

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

In the year 1818 the legal title to all the groundrents in Lancaster (including the rents in question) had been vested in James Lyle, since deceased, and the plaintiff, in trust, to recover and receive the rents as they should become due, and sell or otherwise dispose of the whole or any part of them, and hold the proceeds in trust for the parties who had the beneficial ownership of the rents, according to their respective interests, expressed in the deed of trust. It appeared that in the first eight or nine years of the existence of this trust, the practice had been for the acting trustee to send an agent to Lancaster once or twice, or oftener, in each year, for the purpose of receiving the ground rents. This agent generally remained there for some weeks. Concerning a power of attorney under which he acted, there arose a question which is noticed in the charge of the court. During the remaining period of the existence of the trust, from 1827 to the present day, the surviving trustee always had a resident agent in Lancaster, authorized by letter of attorney to receive the rents.

Mr. Cadwalader, for plaintiff.
Kittera & Read, for defendants.

BALDWIN, Circuit Justice (charging jury). The plaintiff sues to recover rent in arrear, alleged to be due to him in virtue of the covenants contained in the deeds, by which the defendants hold, or have held, certain lots in the town of Lancaster, and adjacent out-lots. It is admitted that the title under which he claims the rents is good, and that he has a right to receive what is due; it is also admitted by all the defendants, except the representatives of Mr. Hopkins, that they are liable for such arrears as have become due on the lots occupied by them, respectively, leaving no subject of controversy except the amount actually due. Mr. Keffer claims a credit for the rent due on one of the lots held by them, because the plaintiff had distrained his goods therefor previously to bringing this suit. In our opinion, this is no ground for allowing such credit. The law gives the plaintiff cumulative remedies for the recovery of his rent, a distress, an action of covenant, a right of re-entry, and an action of ejectment, each of which he may pursue till he obtains satisfaction. In these respects, the remedies of a landlord are on the same footing as in the case of a mortgage and bond, the maker and indorser of a note, or several promises or obligations for the same debt; where all parties liable are sued, and all remedies against them are pursued, the pendency of one does not suspend the proceedings on or against another. If costs have been vexatiously incurred, the law acts in relation to them as the justice of each case may require; but they cannot deprive a plaintiff of his right to recover in an action properly brought, whatever is justly due on the contract sued on, though there may be another proceeding depending, in which he claims the same thing. We therefore instruct you as matter of law that this credit cannot be allowed. It is objected on behalf of Mr. Hopkins' administrators, that they are liable only for the rent which became due during his lifetime, because the covenants in the deed by which he held the lots is not an express one, the obligation of which does not devolve on his personal representatives. We think this objection will not avail them, and instruct you that by the legal operation of the deeds Mr. Hopkins was personally bound and his administrators now liable. As these questions affect but a small amount of the sum claimed, we have not examined them as thoroughly as we otherwise should have done; they will be considered open to future argument should the counsel desire it. If we should be in error, it can be corrected by entering a remittitur for the amount of the rent due by Mr. Keffer, which has been distrained for, and what has accrued on Mr. Hopkins' lots since his death. As to the off-set claimed on behalf of Mr. Hopkins, for his professional services to the plaintiff, or the Hamilton estate, the law is now well settled, though it was once questioned; he is entitled by law to recover such compensation for his services as they were worth, though no agreement may have been had on the subject. You will ascertain from the evidence what services Mr. Hopkins had rendered, as well as what would be a fair and reasonable compensation; it seems that he received one hundred dollars, which Mr. Reigart thinks an ample sum for any services which may have been rendered in the cases referred to in the account presented by the administrators. On this subject you will do what you think is justice, and credit such sum as you may think Mr. Hopkins was entitled to for services actually performed, without deducting anything therefrom on account of his afterwards declining his professional connection with the Hamilton estate. A professional gentleman has also a right to claim a proper compensation, on being retained or required not to act or advise professionally, adversely to the person so retaining him, or he may be retained to act generally in all cases and matters in which the other is interested. From the letter of Mr. Hopkins to General Cadwalader, the retaining was of the latter description, and a positive engagement as the counsel of the Hamilton estate; and if you are satisfied that Mr. Hopkins declined acting as counsel of the estates, for no other reason than that stated by Mr. Reigart, and in consequence thereof that other counsel have been employed, no credit ought to be allowed on account of such engagement beyond what will compensate Mr. Hopkins for his actual services. This is a question of fact, which is submitted to you, to decide what services were performed, what is a reasonable compensation, and whether it has been received.

Before we bring to your attention the interesting grounds of controversy between the parties, we will notice some matters which have been the subject of remark in the course of the argument. Complaint has been made that the plaintiffs have resorted to this court for a remedy, instead of the courts of the state, but the right so to do has not and cannot be questioned. The reasons why he has done so are no part of the merits of the causes on trial, or a proper subject of your or our inquiry; for whether plaintiff's reasons for suing here are good or bad, is for him and his counsel alone to judge. It is well known that by the laws of this state a plaintiff must sue and have his cause tried in the county where the defendant is found; the venue or place of trial can be changed only by a special act of assembly. In this case the plaintiff may have been unwilling to try his causes before a local jury sitting in Lancaster, where there may be some excitement prevailing, on account of the general interest which is felt in the questions at issue between the parties. Suffice it to say, that the constitution of the United States and the judiciary act give to the citizens of other states the option of suing in this or a state court, on causes of action exceeding in amount five hundred dollars; the reasons for constituting a tribunal of a national character to decide controversies between citizens of different states, and our own citizens and foreigners, have ever been deemed wise and just, and impose on juries and courts the duty of so exercising our respective functions, as not to disappoint the just expectations of the plaintiff, or give to the defendant any just cause to regret that he has been brought within our jurisdiction. We must administer the jurisprudence of the state in this court, as it bears on the rights of the parties, and decide between them precisely as the courts of the state ought; in these causes no question arises on the constitution, laws, or treaties of the United States. We are, therefore, bound by the thirty-fourth section of the judiciary act [1 Stat. 92] to make the laws of the state the rule of our decision, so far as they apply, and to take the settled decisions of the supreme court of the state, on the construction of state laws, as a part of the laws themselves. Our decision ought to be the same, which in our opinion the learned and much respected judge who presides in the court at Lancaster would make on the causes now before us, without turning to cases referred to by counsel, not connected or having any bearing on the merits of those now on trial. Reference has been made to some part of the opinion of Judge Hayes, in Franciscus v. Reigart [4 Watts, 98], in relation to the facts in evidence in that cause, but though we cannot doubt the entire correctness of the judge's review of that evidence, it cannot be noticed as tending to prove any fact which has the least bearing in these cases. Adjudged cases in books of reports are referred to for the questions of law which have been decided, but are not to be taken as any evidence to the jury of the facts therein stated.

We now come to the matters in issue between the parties, which arise on the deeds under which they hold the property on which the rents claimed have accrued; as all the deeds are similar in substance, if not in words, the one from James Hamilton, the elder to Mary Dougherty, dated in 1740, is especially referred to. It is an indenture, which the law deems to be the act of both parties, speaking in the words of the indenture, which is to be taken and held most strongly against the grantor as to the estate conveyed and most strongly against the grantee as to the rent to be paid, so as to give the parties respectively the mutual benefits intended. It is a grant of a certain lot in fee, for and in consideration of the rents and services therein reserved, to be paid and performed by Mary Dougherty, her heirs and assigns; each party has an estate in fee, the grantor in the lot, the grantee in the rent; the rights of the parties depend on the deeds without any incidents of tenure which can affect the contract as a grant, with no other reservation than what is expressed on its face, which are rents and services. The rents are seven shillings sterling, etc., annually; the services are the erection by the grantee, at her cost, of a substantial dwelling-house of sixteen feet square, etc. The residue of the deed refers to the remedies of the grantor to enforce the payment of the rent, and the erection of the house. On the house being finished, the lot became discharged from all services, with no other charge or encumbrance upon it, except the payment of the rent, which is the only benefit that can accrue to or be received by the grantor, as the consideration or equivalent, in the nature of purchase-money, for the estate granted. It does not appear that the Hamilton estate was under any rents or services to the proprietary, nor is it alleged that the title by which it was granted was made subject to any reservations; no question, therefore, can arise as to the tenure by which the site of Lancaster was held, at the time of and before the present grant. James Hamilton, the unencumbered owner in fee, granted this lot subject to specified rents and services; the grantee performed the service for his own benefit as to engagement, but for the benefit of the grantor, merely as a security or pledge for the payment of the rent which was concomitant with the estate, so long as it continued. These kinds of grants have been common from a very early period after the first settlement of the province. The rents reserved upon them in proprietary grants have been called quit-rents; in other grants, ground-rents, as terms of common use, and rents charge, fee farm-rents, or rents service, as defined in the books of the law. But by whatever name they may be called, their

nature depends on the deeds reserving them, which define the remedy for their payment, and the case in which the estate granted reverts. Whether these rents were reserved by the proprietaries of the province, or those who held under them, they were considered as an estate in the land granted, which was subject to taxation as other property, from which even the proprietary was not exempt before the Revolution. After the state had taken to its own use the whole estate of the Penn family, except their manors and other private property, for the consideration of one hundred and thirty thousand pounds sterling, to be paid to the proprietaries, they were charged with seven thousand pounds currency, for the arrears of taxes due on their quit-rents, on lands granted by them before 1779, when their title had become vested in the state. 3 Dall. Laws, 475. The taxes due the state were exacted, though the rents were not paid, and continued to be assessed on their manor quit-rents, as a part of their private estate, as had been done before the Revolution. Vide Act 1755 (Miller's Laws, 53); Act 1757 (Miller's Laws, 73); Act 1758 (Miller's Laws, 92.) "All ground-rents" were made liable to taxation by the acts of 1779, as well as the proprietaries' proper estate. 1 Dall. Laws, 807. By the act of 1782, "houses, lots of ground, and ground-rents" are made taxable. 2 Dall. Laws, 8. So by the act of 1795, "the amount of the ground-rent, on account of the said houses, lands, and lots of ground respectively, or either or any of them, reserved, charged, and payable." 2 Dall. Laws, 746. So by the act of 1799. 4 Dall. Laws, 511. By the act of 1705, for the collection of the proprietary quit-rents, the persons who hold under them by deeds reserving a quit-rent are called freeholders. Miller's Laws, 31–33. So that it must be considered that the estate of the grantor in the rent reserved, and of the grantee in the land granted in fee, partakes of the attributes of other real estate, and has been so held for all purposes from the earliest time. 2 Yeates, 24; 2 Watts, 26. The rent was the purchase-money charged upon the land forever. When due, it was a debt which was recoverable by the grantor, his heirs, or assigns, as any other debt, it was for a sum certain in sterling money or wheat, payable or deliverable at a certain time and place, and could be apportioned on alienation. 2 Watts, 32, 33.

With this explanation of the nature of ground or quit-rents, we will now proceed to ascertain what is the rent reserved in the grant to Mary Dougherty; the words reserving it are these: "Yielding and paying therefor and thereout unto the said James Hamilton, his heirs and assigns, at the said town of Lancaster, on the first day of May, yearly, forever hereafter, the sum of seven shillings, sterling money of Great Britain, or the value thereof in coin current, according as the exchange shall then be between the said province of Pennsylvania and the city of London." The first question which has been raised on this clause of the deed is as to the payment of exchanges on the amount of the rent, which you observe is seven shillings sterling, and is all that can be required; but it must be paid in shillings sterling of Great Britain, that is, in current coin of that kingdom, which is worth seven shillings sterling there, unless the alternative pointed out in the deed is complied with, "or the value thereof in coin current," etc. This is the equivalent or substitute for the seven shillings sterling, which means, as much of the coin made current by law when the rent becomes due as according to the rate of exchange between Pennsylvania and London will be equal in value to seven shillings sterling in London. As an example, if payment is made in Spanish milled dollars, which is a coin current in Pennsylvania, at four shillings six pence sterling, but in London are worth only four shillings two pence sterling, as bullion there; four pence sterling must be added to each dollar to make the four shillings six pence in London; on the other hand, if the dollar is worth four shillings ten pence in London, it must be taken at that here. By the agreement of the parties the rent is payable in shillings sterling, or their value in other coin, which is a legal tender for debts in Pennsylvania (which is the legal meaning of current coin [U. S. v. Gardner] 10 Pet. [35 U. S.] 620), according to its value as regulated by the rate of exchange. This is what the deed defines as the equivalent for the stipulated rent. It is in effect the same as rent reserved of so many bushels of wheat, or its value, in any particular place; if the wheat is delivered at the time and place stipulated, the rent is extinguished; if not so delivered there, then so much money must be paid as will be equal to the value of the wheat at the place agreed on. In this deed the parties agreed that the standard of the value of the coin current in the province should be its worth in London in sterling currency—so that the quantum of rent should be the same as if paid in shillings sterling in Lancaster, or as much coin current as would purchase the same number of shillings in London. Such is the express contract of the parties, which is not prohibited by any law of the state or of the United States, and nothing has been given in evidence from which you can legally infer that the terms of the deed have been varied by the parties, or which will prevent the plaintiff from recovering either the amount in shillings sterling or the agreed equivalent. Though the persons who have been entitled to the rent have been willing to receive it in current coin at the par of exchange, when it is paid on the day or on demand, that cannot bar them from claiming according to the terms of the deed, when they are put to the vexation and ex-

pense of a course of litigation to recover it. From the state of the currency in Pennsylvania, stipulations of this kind were necessary; acts of assembly for "appointing the rate of the money or coin in the province, in 1700, and for the better ascertaining the rates of money in payments made upon contracts according to the former regulations," in 1705, were repealed in council. Miller's Laws, 9, 44, 45. Also one passed in 1709, "for ascertaining the rates of money for payment of debts," etc. Miller's Laws, 51. The reason for the repeal was that by the 6 Anne, c. 30 (4 Ruff. 324), the value of foreign coin was directed to be of a uniform value in all the colonies, which value was fixed by that statute. Hall & Sellers, Addendum, p. 2. In consequence whereof it became the common practice of reserving rents payable in sterling money, or so many bushels of wheat. The latter appears to have been reserved even on grants of city lots. 2 Dall. Laws, 397. No mode therefore remained of ascertaining the value of a shilling sterling by law as the rent became due, until it was done by act of congress, which would have been the rule for computing it in contracts, if a different one had not been made; it is now a rule, where sums of money are estimated in pounds sterling, on contracts to be performed within the United States, but it is otherwise when the debt is payable in England. In the Philadelphia Library Co. v. Ingham we find a rent reserved in 1747, of twenty-one pounds sterling, as it passes in the kingdom of England, on the first of March in every year for seven years; and afterwards for one hundred years for the rent of twenty-five pounds sterling money, as it shall pass in the kingdom of England on the first of March yearly, yet no objection was made to the validity of such a reservation of rent accruing after congress had regulated the value of the pound sterling in dollars. 1 Whart. 74, etc. Though the distress was made only for the twenty-five pounds sterling at its par value here, there could be no good reason why the parties could not as well stipulate for the payment of rent according to the value of the currency in England, as in English currency; or when they have so stipulated, why one part of the stipulation should not be as obligatory as the other. You will therefore consider the rent reserved by this deed as seven shillings sterling, or as much coin made current and a legal tender by the acts of congress, as is equal in value to seven shillings sterling in London, on the days it became due.

The next question is whether the plaintiff is entitled to interest on the arrears of rent, which must depend on the law of the state. The sum due is certain, if paid in shillings sterling, and is capable of being ascertained to a certainty, if paid in coin current by law; it is due by a covenant, and is payable at a particular time and place; it is also in effect the purchase-money of the lots, the only consideration which can be received, or in any event accrue to the grantor or his heirs. For the right of re-entry, and holding the lots as of his former estate, in case the rent is not paid, however binding at law, is in equity considered only as a penalty from which the grantee would be relieved on paying the arrears with interests, etc., unless his conduct had been such as to give him no standing in a court of equity, which would be only in a very strong and clear case for the grantor. On principle, then, the case of ground-rents comes within the rules long since settled by the supreme court of the state, that money due by bond, covenant, and bill, bears interest from the time of payment; so of the purchase-money of land, where the purchaser is in possession, and the money is due by the terms of the contract; so where there is an open account between parties, and the money has become due by their agreement, or according to a settled usage applicable to such accounts. 6 Bin. 162; 12 Serg. & R. 398; 17 Serg. & R. 391; 2 Watts, 201. Why should a debt for rent be an exception to a rule so general and just? As a matter of policy, landlords can afford to be indulgent when they can recover interest on their rents; but if their indulgence is a forfeiture of interest, they will be compelled to distrain, re-enter, bring ejectments, or sue on the covenant. When the landlord is made safe, and put on the same footing as other creditors, poor men can not only procure houses to live in, but purchase real estate, on payment of interest on the purchase-money, having a perpetual credit for the principal, while they are punctual in paying the rent and interest. You have seen that the effect of exempting so much of the tenant's property from distress, for rent, as not to leave sufficient as a security to the landlord, has been the passage of an act of assembly in 1825, compelling tenants to give security for the rent in certain cases, or surrender possession of the property. Sound policy and humanity to tenants, therefore, would require that interest should be recoverable on rents, if no law forbids it; it is the only way to avoid the expense and vexation of distress and replevin, ejectment, and bill in equity, actions of debt and covenant, the costs of which fall on the tenant, while the litigation diminishes the value of the rent to the landlord, and punctual tenants find it to their interest to become litigious. If a discrimination is made between interest on rents by leases for years, and ground-rents reserved on deeds in fee, it ought to be in favor of the latter, for the land does not revert; whereas the land comes back to the landlord after the end of the lease, and he derives all the benefit of its rise in value; besides, the ground-rent is the purchase-money of the fee simple, but the rent for a time is only the estimated value of the annual use of the land. Another and still stronger reason in

favor of the ground landlord arises from the laws subjecting ground-rents to taxation as a distinct estate in the land; while rents arising from leases for years are not assessed separately from the land itself, and ground-rents are assessed according to their value as reserved in the deeds. Whether the grantee pays them or not, the grantor is obliged to pay his annual quota on the whole rent reserved. If a vendor of land for a sum in gross was compelled to pay a tax on the annual interest falling due, it would be deemed a great hardship on him if the law would not permit him to recover the interest from the purchaser; so if the money was payable by installments, and a tax was assessed upon them. It has been urged in argument that the quit-rents of the proprietaries did not bear interest, and that ground-rents therefore do not; but no such principle is to be found in any act of assembly or decision of the supreme court of the state. That it was not the practice of the proprietaries to demand interest, may be very true; but it has nowhere been held that there were no cases in which they could not recover it; on the contrary, we find that whenever the court alludes to this practice of the proprietaries, an exception is made that when there has been unreasonable or vexatious delay in paying the rent, the least compensation is interest. 2 Yeates, 73; 4 Yeates, 265; 6 Bin. 162. By an act of assembly passed in 1705, for the more easy and effectual collecting of the proprietary quit-rents, on notice given by the receiver, the freeholders and others were obliged to pay their rents at a certain time and place; in case of neglect, the receiver was authorized to distrain, and if no distress could be found, to sue for and recover the rent by action of debt, as any other debt could be recovered by law. Where the quit-rents were due by non-residents, a special remedy was provided for their recovery, by suit in the county in which the land lay, judgment, execution, and sale in the same manner as other lands may be sold on execution. Miller's Laws, 31, 33; Hall & Sellers' Laws, 41, 43. It would seem to be the fair and obvious construction of the law, that when rent is directed to be recovered as other debts, by suit and sale of the land on which it is reserved, interest was recoverable by the same rule which applies to other debts. Another law was passed on the same subject in 1739, which was approved in council (Hall & Sellers, 192, 193); and so far from proprietaries' quit-rents ever being put on a footing less favorable than other ground-rents, they were especially excepted from assessment for the road tax, by the act of 1772. 1 Dall. Laws, 624. In 1760 a committee of the privy council recommended a repeal of an act of assembly unless, among other things, it was so altered and amended "that the payment by the tenants to the proprietaries of their rents shall be according to the terms of their respective grants, as if the act had never passed"; which was agreed to by Dr. Franklin and Mr. Charles, the agents of the province, who pledged the assembly thereto. Hall & Sellers, 278. By the act of 1779, for vesting the estates of the proprietaries in the commonwealth, the right, title, and estates of purchasers under them are confirmed according to the grants and conveyances thereof (section 7); and "the private estate of the proprietaries, their manors, together with the quit or other rents and arrearages of rents reserved thereon, are confirmed, ratified, and established forever," "as in and by the reservations, grants, and conveyances thereof are directed and appointed" (section 8). 1 Dall. Laws, 824. It must then be considered as a settled principle that even proprietary ground-rents were recoverable, according to the terms of the deeds of reservation, as other debts, and with the incident of a liquidated debt, interest as a compensation for the delay of payment. But even admitting that interest is not recoverable on proprietary quit-rents, we have the declaration of the late chief justice that the inference that other ground-rents did not bear interest, had been made "without sufficient consideration" (6 Bin. 162); and of Judge Yeates that "we are no longer in trammels on the score of proprietary quit-rents" (6 Bin. 166), since their abolition by the act of 1779, except those due on grants of their private estate, or parts of their manors, which still remain on the same footing as other ground-rents.

In Obermeyer v. Nichols [6 Bin. 159], the supreme court held that interest was payable on rent, on the same principle as on other liquidated demands, and was recoverable in an action of covenant, as matter of law, unless under special circumstances. As to ground-rents, they recognized the principle that when there was a clause of re-entry interest ought to be paid, because equity would relieve only on payment of the rent and interest, and consider them as on the same ground as other rents. Purchase-money, from the time it becomes due, bears interest though no demand is made (6 Bin. 435; 5 Rawle, 262, 263); so an action of covenant lies for a ground-rent as soon as it is due, without a demand. 3 Pen. 464, 465. On a recognizance in the orphan's court, for securing to a widow the interest on her third part of the money at which an estate is valued, the act of 1794 makes it recoverable as rent; the supreme court hold the widow's interest to be in the character of annuity, of interest on money, and a rent-charge, and that if the interest be not punctually paid, the widow shall recover interest on the interest from the time it became due. 2 Watts, 203. There cannot be a stronger case; for as a widow's annuity partakes of the character of a rent-charge, a rent-charge partakes of the character of the annuity, and it is so considered by the court, who put it on the same

footing as to bearing interest. The reason is the same in both cases; the annuity is in the nature of maintenance income, and bears interest if not paid punctually, because it is in lieu of the widow's share of the profits of the land, and all that is reserved to the widow; the rule is the same as to ground-rent, as it is of the same nature. But a court never inquires into the fact, whether the annuity or the rent is necessary for the support of the widow or the ground landlord; the rule is the same whether they are rich or poor, being founded in the nature of the debt, and the manifest justice of interest being paid as a compensation for withholding payment. 2 Watts, 203. On these principles which have been established by the supreme court, we give it to you as our decided opinion, that interest is recoverable on ground-rents as a part of the contract of grant, unless in cases where there are such circumstances as make an exception to the general rule. If it is an ordinary case, interest is payable as a matter of law. Circumstances which make exceptions are matters of fact. Courts do not direct interest to be allowed in the name of interest, but leave it to the jury to find it or not, where there is no usage to pay it, no time fixed for payment of the principal, no account rendered, or demand of payment made. 12 Serg. & R. 398. But where there is a usage, the time fixed or demand made, the jury are directed to find it. 17 Serg. & R. 391. Thus the jury were so directed, in case of the widow's interest, on the orphan's court recognizance (2 Watts, 201); on the other hand, where an annuity was given to a widow, charged on land, in lieu of her dower, and she had made no demand for several years, the court left it to the jury to allow interest or not on the arrears, as they should think that she had lived on the land or not (17 Serg. & R. 390). When the landlord resorts to the land for payment of rent, he shall not recover interest. 2 Bin. 153, 154; 17 Serg. & R. 391. When his conduct has been unfair, oppressive in exacting too much rent, when he has given reason to believe that he did not want his rent, and the tenant has been willing to do justice by paying what is due, the jury have a discretion to find interest or not. 6 Bin. 162; 17 Serg. & R. 391. But a demand of the rent on the premises puts the matter beyond a doubt, that interest must be paid; the mere not distraining is no evidence of an intention to relinquish the interest; and if the tenant knows that the landlord wants his money, and does not pay what is justly due, he is not excused from paying interest. This is the law of the state which you will apply to the evidence. It is not necessary for the plaintiff to prove a demand on the day the rent is due, or a specific demand of each year's rent; it is sufficient that he or his agent attends at a convenient time and place in Lancaster, and gives notice of his readiness to receive the rents; where the rents of the whole city are payable on the same day, to the same person, a reasonable demand or notice is all that is required. If you believe the witnesses, this has been sufficiently proved, in point of law, to come within the established rules of the supreme court; in point of fact, you will decide whether there has been such reasonable demand or notice, as the nature of the case requires. There is clear evidence on this subject, and the defendants have offered nothing to rebut or contradict it. If you find such demand or notice, the law is clear that if the rent is not then paid, the plaintiff has a right to recover interest from the time the rent became due, as a matter of contract and law; unless you shall find that there are some special circumstances, which make these cases an exception to the general rule. What these circumstances are, is for you to decide as matter of fact. Their sufficiency in law to make out an exception is for the court to decide; for instance, Tilghman, C. J., declares that the mere not distraining for rent when it is due, is no evidence that the landlord intended to relinquish interest, and that a demand of payment on the premises would put the matter beyond a doubt; there would, in such cases, be no fact to decide; so if the tenant knows the landlord wants his money, and is guilty of unreasonable or vexatious delay, the law compels him to pay interest. On the other hand, if the landlord has acted unfairly or oppressively by demanding too much, or otherwise, while the tenant has been willing to do justice by paying what is really due, in such cases, the question of interest is in the discretion of the jury; so if the landlord has given good reason for believing he did not mean to exact interest, provided the tenant was willing to pay the rent demanded or wanted. But the practice of the landlord or his agent not to demand exchange or interest from punctual tenants is not such a circumstance as to authorize a jury to apply it to those who have had no inclination to pay, but have put the landlord to the delay, vexation, and expense of litigation, and who have suffered arrears to accumulate till the interest nearly equals the principal. When interest and exchange are demanded by suit, from a tenant who offers to pay his rent at par, on notice, it will be the time to decide what law and justice require; no such case, however, is now before us; none of the defendants have shown an offer or willingness to pay anything; the evidence is full to the contrary. As an illustration of the effect of applying the same rule to punctual and delinquent litigant tenants, take the cases of Mr. Ross and Mr. Keffer, who occupy parts of the same lot. Mr. Ross has paid his rent punctually, Mr. Keffer has paid none for years; if he is not to pay interest, he will be largely the gainer by the delay and litigation. If the case is otherwise clear, such an effect ought to be avoided as a bad example in society.

In referring to the grounds of defense taken

in the argument, we find little, if anything, which contradicts the justice of the plaintiff's claim to all he demands. It has been objected that the power of attorney from Mr. Lyle to Mr. Ellis was defective, because he did not sign it as trustee, though he signed it as administrator and otherwise; but it is a well-settled rule of law, that if a man has competent power to do an act, and misrecite his power, the act is valid notwithstanding. The act will be referred to the authority which will make it legal and operative. It is also objected that Mr. Lyle was a joint trustee with Mr. Newman, and could not appoint an agent alone; the law is otherwise; one joint tenant, trustee, or executor may receive the whole rent, or appoint a bailiff to collect it. In this case, too, there is sufficient evidence to prove the assent of Mr. Newman to the agency of Mr. Ellis, and an authority by parol is sufficient. Unless, therefore, you shall find that there are such circumstances in these cases, or any of them, as come within the exceptions to the general rules in relation to interest, it is due to the plaintiff as matter of law; he is also entitled to recover the exchange by the plain and express terms of the contract, the obligation of which cannot be impaired. In conclusion, we will remark that when the rights of a landlord are clear, their enforcement according to the settled principles of law will insure comfort and protection to the tenant.

In each case the jury found a verdict in favor of the plaintiff. The verdicts, together, amounted to $4,604.44, the full sum claimed by the plaintiff, including difference of exchange and interest.

The defendants' counsel afterwards moved for a new trial and in arrest of judgment. On the 13th December, 1836, these motions were overruled without argument, and judgment was entered for the plaintiff on the verdicts.

NOTE. Interest is payable on arrears of ground rent from the time they become due. See Beaver Co. v. Armstrong, 44 Pa. St. 64, approving this doctrine as laid down in above case.

NEWMAN (TURNER v.). See Case No. 14,-262.

NEWMARK (UNITED STATES v.). See Case No. 15,870.

Case No. 10,178.

The NEW ORLEANS.

District Court, S. D. New York. May 25, 1877.

DEMURRAGE—INTEREST.

[Cited in Johanssen v. The Eloina, 4 Fed. 575, to the point that interest will not be allowed on demurrage. Nowhere reported. Decision on the merits reported sub nom. The New Orleans, Case No. 10,179. The decree filed May 25, 1877, merely disposed of certain of complainant's exceptions. The court records contain no opinion other than that reported in The New Orleans, supra. See Case No. 17,-354.]

Case No. 10,179.

The NEW ORLEANS.

[8 Ben. 101.] [1]

District Court, S. D. New York. May, 1875.[2]

COLLISION AT SEA — STEAMER AND SCHOONER — LOOKOUT—CHANGE IN EXTREMIS—BURDEN OF PROOF—PRESUMPTION OF NEGLIGENCE.

1. A steamer and a schooner came in collision on the morning of September 6th, 1874, at sea, off the coast of New Jersey. The schooner was sailing northeast by north, the wind being east-south-east, when the steamer, which was steering about south by west half west, was seen about two or three miles off and about two points and a half on the schooner's port bow. The schooner kept her course till the steamer was about three lengths, or about 800 feet, distant. The schooner's second mate then hailed the steamer, and, getting no answer, told the man at the schooner's wheel to let her luff half a point, and the man ported his wheel just before the vessels struck. Both vessels had their lights set and burning, and it was, moreover, so light that the vessels themselves could be seen at an ample distance. The lookout on the steamer had been sent from his post by the second mate, who had charge of the deck, to help wash the decks, the only lookout from that time being the quartermaster at the wheel, in the wheel-house, with the windows closed. The schooner was not seen till her hail was heard by the second mate, who then saw her over the steamer's starboard bow, about 850 feet distant. The steamer was running ten miles an hour. The second mate then went to the pilot-house and ordered the steamer's wheel put hard-a-port, and her engine was stopped by the captain, who had been asleep and was awaked by the second mate's order to the quartermaster. The porting of the steamer's helm changed the steamer's course but very little. She struck the schooner on her port bow, cutting half-way into her: *Held*, that the fact of a collision under the circumstances of this case was evidence of great negligence somewhere.

2. It being the duty of the steamer to avoid the schooner, the presumption of negligence was on the steamer, and it was for her to relieve herself from the burden.

3. The steamer was in fault in not having seen the schooner sooner.

[Cited in The Ancon, Case No. 348.]

4. That the porting of the schooner's helm was a movement in extremis, brought about by the fault of the steamer in approaching so near the schooner, and was not to be attributed as a fault to the schooner.

5. That the steamer was liable for the collision.

In admiralty.

Henry J. Scudder, for libellants.
John E. Parsons, for claimants.

BLATCHFORD, District Judge. This is a libel filed by the owners of the schooner Allie Bickmore to recover for the damages sustained by them through a collision which occurred between that vessel and the steamer New Orleans, on the morning of the 6th of September, 1874, at a little after five o'clock.

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

2 [Affirmed by circuit court. Case No. 17,-353a. Decree of circuit court affirmed by supreme court. 106 U. S. 13.]

The schooner was bound from Fernandina, Florida, to New York, with a cargo of lumber, and the steamer was bound from New York to New Orleans. The collision occurred in the Atlantic Ocean, off the coast of New Jersey. The libel alleges, that, prior to and at the time of the collision, the schooner had all her sails set, and was steering north-east by north, with light winds from the east south-east; that the steamer was seen at a distance of three miles, and, when within a mile of the schooner, the bell of the latter was rung and her crew shouted to the steamer to keep off; that the steamer paid no attention to such signals, but bore down on the schooner and struck her on the port bow, cutting half into her, and said schooner immediately filled with water, and would have sunk but for her cargo; and that the collision occurred through the negligence of the steamer and without fault on the part of the schooner.

The answer avers that the steamer was sailing on a course nearly opposite the course of the schooner, and was in charge of a competent master and with sufficient crew, who were attending to the discharge of their duties; that the schooner, when first seen, bore on the starboard bow of the steamer, and was heading in a direction opposite to that of the steamer, and such that, had the two vessels continued their respective courses, they would, by an ample distance, have cleared each other; that, when the two vessels had approached to within a few lengths of each other, the schooner ported her helm, so as to pass directly across the course of the steamer and in front of her bow; that, as soon as this movement was seen from the steamer, the steamer was slowed, her wheel ported, so as, if possible, to pass astern of the schooner, and her engines then stopped, but that it was impossible then to prevent the collision, and the steamer struck the schooner on her port bow, cutting a considerable distance into her side; that the steamer did all that was in her power to prevent the collision, and the same was caused by the improper navigation of the schooner, in changing her course across the steamer's bow; and that, when the schooner undertook to cross her bow, all that the steamer could do to prevent the collision was to stop and to port her helm, which was done, but that it was impossible then to prevent a collision.

The schooner had her lights set and burning, the weather was clear, there was already so much of daylight that the schooner herself could be seen, irrespective of her lights, at an ample distance, the wind was light, and the schooner was making but slow progress though the water. Under these circumstances the fact of a collision is evidence of great negligence somewhere. It being the duty of the steamer to avoid the schooner, the presumption of negligence is on the steamer, and it is for her to relieve herself from the burden. She has undertaken to show that she would have avoided the schooner but for the movement of the schooner by porting, which brought the schooner suddenly across the bow of the steamer, when otherwise the schooner would have passed safely on the starboard side of the steamer.

Great negligence is shown on the part of the steamer in not having discovered the schooner sooner than she did, and in not having had a lookout stationed at a proper position at the bow of the vessel, and vigilant in the discharge of his duty. At the approach of day the lookout who had previously been stationed forward was withdrawn, the officer of the watch and his men were engaged in washing the decks, they were none of them in a position to see ahead, and the duty of looking out for approaching vessels was confided to a quartermaster, who was alone in the pilot-house engaged in steering the vessel, and who had the glass windows in front of him closed. This quartermaster has been examined as a witness for the libellants. The pilot-house in which he was, was on the upper deck, on the forward house, just before the foremast. The quartermaster testifies that he saw nothing of the schooner until the second mate, who was the officer of the watch on deck, came into the pilot-house and directed him to put the helm hard-a-port; that the second mate assisted in porting the wheel; that the captain then came from his room and rang two bells and stopped the steamer; and that the steamer swung to starboard, by the porting, three-quarters of a point from south by west half west, before she struck the schooner, that having been her course for some time previously, so that, when she struck the schooner, she was heading south-west by south three-quarters south. It also appears from the testimony of the quartermaster, that, as soon as the second mate gave him the order to port, he looked up and saw the schooner over his starboard bow, heading across his bow. The vessels at that time were very near each other. The quartermaster says they were not more than three ship's lengths apart. In a statement given by him to the claimants' proctor, eleven days before, he had said that they were about five of the steamer's lengths apart.

The master of the steamer, also, was sworn as a witness for the libellants. He says he was aroused from sleep by the order of the second mate to the quartermaster to put the wheel hard-a-port; that he was sleeping in a berth in his room abaft the pilot-house, on the same deck, a door from the rear of the pilot-house opening into his room; that he sprang up, and, without waiting to put anything on, went into the pilot-house, and saw the schooner directly ahead or a little on the starboard bow, about three or four of the steamer's lengths off; and that he immediately pulled the bell to slow, and took hold of the wheel to help port it, and then pulled a bell to stop, and watched the schooner's red light, putting it in range with the window of the pilot-house, to see if the

steamer answered her helm, but saw very little change in the course of the steamer before the two vessels collided. He further says that the steamer was a vessel of between 1,400 and 1,500 tons burthen; that she was running, at the time, at the rate of about eleven and one-half miles an hour, which was full speed; and that, by ringing to slow, stop and back, she could not be stopped, from full speed, in a distance of less than a quarter of a mile, which is a little over six and one-third times her length.

The only other witness from the steamer who was examined was the second mate, who was examined for the claimants. He testifies, that, at twenty minutes before five o'clock, it being then daylight, he called the lookout away from the topgallant forecastle to help wash the decks, and told the quartermaster in the pilot-house to keep lookout. His attention was first called to the schooner by hearing some one call out "Steamer, ahoy!" This was a cry from the schooner. He ran to the starboard side of the steamer and looked over the rail, and saw the schooner a little on the starboard bow and three and a half of the steamer's lengths off, or about 850 feet. This was a space over which the steamer, at a speed of ten miles an hour, would pass in less than one minute, allowing nothing for any movement of the schooner towards the steamer.

Here, then, on the concurrent testimony of these three witnesses from the steamer, we find her rushing on at this speed, with no proper lookout, and, in full daylight, approaching within 850 feet of the schooner before discovering that there was a vessel in her way, and then notified of the proximity of the schooner by a cry from that vessel. This was negligence sufficient to cause the collision, and, presumptively, was the cause of it.

But it is claimed that the schooner ported her helm and threw herself into the path of the steamer.

The second mate of the steamer testifies, that, when he looked over the rail on the starboard side of the steamer and saw the schooner a little on his starboard bow he saw a light on the schooner, one light, and noticed that it was her green light; that he then went up the steps on the starboard side to go to the pilot-house; that, when he got up the steps, he looked at the schooner again, and saw that she bore about three-quarters of a point on his starboard bow, and that she had altered her course from the time he looked at her over the rail, and had shut in her green light, and was heading nearly across the bow of the steamer; that he noticed all this before he gave the order to hard-a-port; and that the steamer changed her course, by the porting, from a quarter to a half of a point, before the collision. On cross-examination he says, that, when he looked at the schooner, after getting up the steps, she was three of the steamer's lengths off. He makes the change in the schooner's course to have taken place when the schooner was between three and three and a half lengths of the steamer off—that is, between 735 feet and 858 feet. It is satisfactorily established, by the evidence, that the steamer's stem struck the schooner on the port bow of the schooner, and cut into her at an angle of about from eighteen to twenty degrees with the line of the keel of the schooner. As the steamer's course, at the blow, was south-west by south three-quarters south, and the direction of the blow was the same as such course, the course of the schooner at the time of the blow must have been, as nearly as possible, a course a point and three-quarters to the eastward of north-east by north three-quarters north—that is, northeast. The second mate of the steamer admits that, when he first saw the schooner, she was heading about half a point on to the steamer. He makes the course of the steamer at that time to have been, by the compass, south by west half west, and says that the course of the schooner at that time was north-east by north. If the course of the schooner was north-east by north, and the course of the steamer was south by west half west, the schooner was heading a point and a half on to the steamer, instead of half a point. If the course of the steamer was south by west half west, and the schooner was heading half a point on to the steamer, the course of the schooner was north north-east. In either case, the course of the schooner was a course drawing on to the course of the steamer and not drawing away or diverging from it. Under such circumstances, any porting of the helm of the schooner, resorted to at the distance off given by the second mate of the steamer, was a movement in extremis, brought about by the fault of the steamer in approaching so near to the schooner, and not to be attributed to the schooner as a fault. On the facts testified to by the second mate of the steamer, and with the speed of the steamer, and the positions and proximity of the two vessels, there would have been a collision, even it the schooner had not made such a change as the second mate of the steamer testifies to.

This view as to the time when the change by the schooner was made is confirmed by the testimony of the second mate of the schooner, who was the officer of the watch on her deck at the time. He testifies, that he was aft, when the man on the lookout reported a steamer; and that he then went forward and saw the steamer about two or three miles off, about two points and a half on the port bow of the schooner. He gives the course of the schooner as north-east by north, and this agrees with the testimony of the first mate of the schooner. The second mate of the schooner further says, that the steamer was coming for him, and that, when she was about three of her lengths off, he hailed her. This was the hail which attracted the attention of the second mate of

the steamer. He also says that he got no answer; that the steamer was then close to him; that he then told the man at the wheel of the schooner to let her luff half a point; and that then the vessels struck. It required a luff of only a point to bring the schooner so as to head north-east. She probably did, at the time, luff a point, and this accords with the testimony of the witnesses from the steamer.

In so far as there may be anything in the testimony of Oberg, the man at the wheel of the schooner, or of Potter, the steward of the schooner, which militates against the foregoing conclusions, such testimony is unreliable. The course of the schooner being north-east by north, or even, as Oberg puts it, north north-east half east, it is impossible to believe that the steamer was seen over the starboard bow of the schooner, at any time, and equally impossible to believe that the second mate of the steamer, when at first he saw a light, and only one light, on the schooner, saw her green light and not her red light.

This is a clear case for the application of the rule announced in the case of The Carroll, 8 Wall. [75 U. S.] 302, that fault on the part of a sailing vessel at the moment preceding collision does not absolve a steamer which has suffered herself and such sailing vessel to get into such dangerous proximity as to cause inevitable alarm and confusion, and collision as a consequence; and that the steamer, as having committed a far greater fault in allowing such proximity to be brought about, is chargeable with all the damages resulting from the collision.

There must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain and report the damages.

[NOTE. Upon the report of the commissioner, a final decree was entered for the damages found in favor of the libellants. From this decree the claimants appealed to the circuit court, which affirmed the decree in this court. Case No. 17,353a. Thereafter the libellants moved for summary judgment against the sureties upon the appeal bond, which motion was denied, as having been made prematurely. Case No. 10,181. From the decree of the circuit court affirming the district court, an appeal was taken to the supreme court. Here, likewise, the decree against the vessel was affirmed. 106 U. S. 13.]

Case No. 10,180.

The NEW ORLEANS.

[9 Ben. 303.] [1]

District Court, S. D. New York. Jan., 1878.

COLLISION AT SEA — STEAMER AND PILOT-BOAT — LIGHTED TORCH.

1. A steamer, before colliding with a pilot-boat schooner, stopped and reversed and ported, it being proper for her to stop and reverse, and her officers exercising what seemed to them to be the best judgment, in porting. The schooner being in fault in not having a proper green light visible at a proper distance, *held*, that no consequences of such manoeuvres could operate to impute them to the steamer as faults.

[Distinguished in The Alaska, 22 Fed. 553.]

2. The provision of section 4234 of the Revised Statutes, which requires that "every sail vessel shall, on the approach of any steam vessel during the night time, show a lighted torch upon that point or quarter to which such steam vessel shall be approaching," is one which the schooner, though a pilot-boat, was bound to observe when off pilot-ground; and there does not seem to be any reason why that section should not apply to her while on pilot ground.

3. As the schooner was carrying colored lights, which rule 11 of section 4233 says a sailing pilot vessel on pilot-ground shall not carry, she must be held to have been regarded by those on board of her as not being at the time a pilot-boat, within the meaning of rule 11, because she was not sailing on pilot-ground. Where she was she was simply a "sail vessel," and, therefore, subject to the provisions of section 4234.

4. A steamer must exhibit proper lights to a sailing vessel, in order to charge the latter with fault for not having shown a lighted torch.

5. Because of the failure of the schooner to show such lighted torch, the steamer failed to sooner discover the schooner, and it was held that such fault of the schooner freed the steamer from fault in not sooner discovering the schooner.

In admiralty.

Scudder & Carter, for libellants.
Man & Parsons, for claimants.

BLATCHFORD, District Judge. This libel is filed by the owners of the schooner pilot-boat Caprice, and by such of her company as were on board of her at the time, to recover for the damages sustained by them by the sinking of the schooner, in consequence of a collision which took place between her and the steamship New Orleans, in the Bay of New York, a short distance above the Narrows, on the morning of the 27th of February, 1876, before daylight. The schooner had been on a cruise outside of Sandy Hook, and had put all her pilots on board of vessels, and was bound up the bay to the city of New York. The wind was light from the north-east, and the schooner was beating, and was on her port tack, heading about east by south, and making about three knots an hour. The steamer was bound up the bay and was heading about north. The steamer, stem on, hit the starboard side of the schooner, just abaft the main rigging, and cut into the schooner, so that she sank as soon as the steamer had backed clear from her. The schooner was much nearer to the Long Island shore than she was to the Staten Island shore. The libel alleges that the steamer was moving at full speed; that the collision was caused by the negligence and improper conduct of those on board of the steamer, in not having a good and sufficient lookout, in running at too great a rate of speed, in getting so near to and not keeping out of the way of the schooner, in not stopping and backing in time to avoid the collision, and in being so far out of the usual channel for steamers; that the schooner kept

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

her course without change; and that the collision was not caused by the fault or negligence of those on board of the schooner.

The answer alleges that lights properly set and burning could, on the morning of the collision, be easily distinguished, and there was nothing in the atmosphere to obscure them; that the steamer was on her regular course from the Narrows up to the city of New York; that her regulation lights were properly set and burning brightly; that she had a competent lookout properly stationed and attentive; that her master was on deck, and he and others of her officers and crew were on deck and properly attending to their duties; that, when about a mile above Fort Hamilton, the sails of the schooner were made on the port bow of the steamer; that, at the time, the steamer was at half speed; that, immediately, her bell was rung to stop and reverse; that the order was at once obeyed, but, before the headway of the steamer could be entirely stopped, she struck the schooner; that, when the vessels were so near to each other as to make it impossible for the steamer to prevent a collision, and after the schooner's sails had been seen, a green light on the schooner came in sight, but it was burning so dimly that it could not be previously seen; that, although the steamer's lights could and should have been readily seen from the schooner for two or three miles, nothing was done on the schooner to call attention to her or her position; that the steamer was not moving at full speed; that she had a good and sufficient lookout; that she stopped and backed as soon as the schooner could be seen; that she was in the usual channel for steamers; and that the collision was caused by the negligence and improper conduct of those on board of the schooner, in not having proper lights set, and in not adopting any measures to call attention to the schooner when the steamer could and should have been observed from her.

The evidence establishes that the steamer was running at a moderate speed, and that the lookout kept by her was adequate and vigilant. Her master and mate were on the bridge, looking ahead through their night-glasses, and there was a lookout stationed on her forecastle near the bow. All three of these men concur in saying that they saw the sails of the schooner before they could see or did see her green light. The master saw the sails through his glass before he saw them without it. The green light of the schooner, whether it was in its box, or whether it was on the deck, was so burning as not to be visible at the proper distance. If it had been in a condition to be visible at the proper distance, it would have been seen on board of the steamer before the sails were seen. As it was, the steamer stopped and reversed (being before under a slow bell) as soon as the schooner was made out. At the same time, the steamer ported. It is claimed that the back motion of the vessel, with a port wheel, tended to throw her head to port. But, on the whole evidence, I do not think it established that the actual effect of the combined reversing and porting was to induce or contribute to the collision, or that reversing and starboarding would have avoided a collision. It was proper for the steamer to stop and reverse, and she exercised what seemed to her officers to be the best judgment, in also porting; and no consequences of those manoeuvres can operate to impute them to her as faults, in view of the fault of the schooner in not having a proper green light visible at a proper distance.

Section 4234 of the Revised Statutes requires that "every sail vessel shall, on the approach of any steam vessel during the night time, show a lighted torch upon that point or quarter to which such steam vessel shall be approaching." This provision was one which the schooner, though a pilot-boat, was bound to observe in the place where she was, off pilot-ground. A sailing pilot-vessel, on pilot-ground, is bound, by rule 11, of section 4233, not to carry colored lights, but to carry a white mast-head light, and to exhibit a flare-up light every fifteen minutes. There does not seem to be any reason why section 4234 should not apply to her while on pilot-ground as well as while off pilot-ground. However this may be, the schooner was regarded by those on board of her as not being at the time a pilot-boat, within the meaning of rule 11, because she was not sailing on pilot-ground, for she was carrying colored lights, which rule 11 says shall not be carried by sailing pilot-vessels. Where she was, she was simply a "sail vessel," and, therefore, subject to the provisions of section 4234.

The sail vessel must have proper notice of the approach of the steam vessel in order to make the requirement as to showing a lighted torch operative. Therefore, the steamer was bound to exhibit to the schooner proper lights, if the schooner is to be charged with fault for not having shown a lighted torch. The weight of the evidence is, that the steamer's mast head and side lights were in proper order and burning properly, and that any failure on the part of the crew of the schooner to see them was due to the want of proper vigilance and attention on their part. The idea was advanced, that the white mast-head light of the steamer was seen, but no colored light on the steamer was seen, and that the white light was, therefore, taken to be the receding white stern-light of a steam tug. But, it is apparent, that the white mast-head light of the approaching steamer could not be taken for a receding light. The irresistible conclusion is, that the crew of the schooner either did not, through lack of vigilance, see the steamer's lights till she was close on them, or else that they did see her lights and neglected to show a lighted torch. They had a torch on board ready at hand to be quickly lighted and shown. The steamer was entitled to this signal from the schooner, and,

for want of it, she failed to discover the schooner sooner than she did. The fault of the schooner in this respect frees the steamer from fault in not sooner discovering the schooner.

The libel must be dismissed, with costs.

Case No. 10,181.

The NEW ORLEANS.

[17 Blatchf. 216;[1] 8 Reporter, 743.]

Circuit Court, S. D. New York. Oct. 11, 1879.

APPEAL IN ADMIRALTY—JUDGMENT AGAINST SURETIES—TEN DAYS' DECREE.

Where, in a suit in rem, in admiralty, in the district court, the claimant, after a decree for the libellant, appeals to this court, and this court decrees for the libellant for a sum sufficient to allow of an appeal by the claimant to the supreme court, which may be a supersedeas, no summary judgment can be rendered by this court against the sureties in the appeal bond executed on the appeal to this court, until after the expiration of ten days after the rendering of the decree by this court.

[Cited in The Jesse Williamson, Jr., Case No. 7,297; The Sydney, 47 Fed. 262; Ex parte Warden, 108 U. S. 156, 2 Sup. Ct. 384.]

In admiralty.

Scudder & Carter, for libellants.

Man & Parsons, for sureties.

BLATCHFORD, Circuit Judge. This is a suit in admiralty. The district court, on the 11th of June, 1877, rendered a decree that the libellants recover against the steamer, for damages, interest and costs, $16,505.-65. [The opinion in this case was rendered May, 1875. Case No. 10,179.] The claimants of the steamer were John H. Clark, Samuel H. Seaman, Cornelius H. Delamater, John Baird and Alfred Moulton. The said claimants appealed from the said decree to this court. On said appeal, the said Seaman, Clark and Delamater executed a bond to the libellants in the penalty of $18,000, with the condition that the obligation should be void, "if the above-named appellants shall prosecute said appeal with effect, and pay all damages and costs which shall be awarded against them as such appellants therein, if they shall fail to make said appeal good," and that otherwise said obligation should remain in full force and effect. The libellants appealed from other parts of the decree of the district court. This court, by a decree filed September 5th, 1879, affirmed in all things the said decree of the district court, and ordered that the libellants recover against the steamer the damages ascertained by the decree of the district court, namely, $15,904 98, and interest at the rate of 6 per cent. per annum, from June 11th, 1877, on $14,026 92, (being so much thereof as is exclusive of the interest allowed by the district court) and amounting to $1,866 67, being, in all, $17,771 65, and also the costs of the district court, taxed at $690 67, and that the costs of this court be divided and set off each against the other. The decree further provided as follows: "And it is further ordered, that, unless an appeal be taken from this decree within ten days after its entry, and service of a copy thereof, and security given on such appeal to stay execution, John H. Clark and Samuel H. Seaman, the stipulators for value of the said steamer, caused the engagements of their stipulations to be performed, or show cause, within four days after the expiration of such ten days, or on the first day of jurisdiction thereafter, why execution for the sum of $40,000, the amount of their said stipulation, should not issue against their goods, chattels and lands; and it is further ordered, that the same persons cause their stipulations for costs to be performed, or show cause, in like manner, on the same day as aforesaid, why the like execution should not issue for the sum of $250; and it is further ordered, that John H. Clark, Samuel H. Seaman and Cornelius H. Delamater, the sureties of the claimants upon their said appeal, show cause at a circuit court to be held at the court rooms, in the city of New York, on the 11th day of September, 1879, at the opening of court, why a summary judgment should not be entered against them for the sum of $18,-000, the amount of their said bond." [Case No. 17,354.]

In accordance with the last of the foregoing provisions, the libellants have moved this court, on the 11th of September, 1879, to enter a summary judgment against the said Clark, Seaman and Delamater, as sureties on said appeal bond, for the sum of $18,000. The said sureties oppose said motion, on the ground that the case is one in which an appeal can be taken by the claimants of the steamer to the supreme court of the United States, from so much of the decree of this court as awards a recovery against the steamer, and that, therefore, the motion cannot be made until the expiration of ten days after the rendering of the decree. It is provided as follows, by section 1,007 of the Revised Statutes of the United States: "In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But, if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterwards, with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas,

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

executions shall not issue until the expiration of ten days." It is provided, by section 1,012, that appeals from the circuit courts "shall be subject to the same rules, regulations and restrictions as are or may be prescribed by law in cases of writs of error." Section 997 provides for a citation, and section 1,000 provides, that the judge who signs a citation on a writ of error, shall "take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only, where it is not a supersedeas as aforesaid."

It is contended for the sureties, that proceedings against the sureties upon the appeal bond are collateral to and for the enforcement of the decree, and are no part of the decree; that, where an appeal may be a supersedeas, no proceedings against the sureties in the appeal bond can be taken so long as no proceedings can be taken to issue execution on the decree; and that the words "process on the judgment," in section 1,007, include the entry of judgment against the sureties in the appeal bond.

The condition of the appeal bond is, that the appellants shall pay the damages and costs which shall be awarded against them by this court, as appellants, if they shall fail to make their appeal good. The appellants are not under obligation to pay the sum awarded against them by the decree until the time when execution can issue on the decree, which is not until the expiration of ten days after the rendering of the decree. The obligation of the sureties being an obligation only that the appellants shall pay when obliged to pay, cannot be enforced against them in any manner, even to the extent of the entry of judgment against them, until the obligation of the appellants to pay comes into force; and such obligation of the appellants does not, in a case like the present, where the appeal may be a supersedeas, come into force until the expiration of ten days after the rendering of the decree. This is a case in which an appeal lies to the supreme court and may be a supersedeas, if taken by the claimants, and where no execution could issue on the decree against the vessel prior to the time when the motion for judgment against the sureties in the appeal bond was made. It follows, that the motion was prematurely made and must be denied.

[The decree against the vessel in this cause was affirmed by the supreme court. 106 U. S. 13, 1 Sup. Ct. 90.]

NEW ORLEANS (BONNER v.). See Case No. 1,631.

NEW ORLEANS (GAINES v.). See Case No. 5,177.

NEW ORLEANS (GRAVIER v.). See Case No. 5,711.

NEW ORLEANS (INSURANCE CO. v.). See Case No. 7,052.

NEW ORLEANS (JOHN KYLE STEAMBOAT CO. v.). See Case No. 7,354.

NEW ORLEANS (MAENHAUT v.). See Cases Nos. 8,939 and 8,940.

Case No. 10,182.

NEW ORLEANS v. MORRIS.

[3 Woods, 103.][1]

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

MUNICIPAL CORPORATIONS—PROPERTY SUBJECT TO SEIZURE ON EXECUTION—POLICE POWER.

1. The property of a municipal corporation necessary to the exercise of its functions, such as markets, prisons, etc., or property which has been destined and set apart by an act of the legislature as a permanent revenue, or source of permanent revenue for the corporation, cannot be seized or sold on execution against it.

2. A place of traffic called a market bazaar, owned by a municipal corporation for the sale of merchandise, from which the sale of fresh meats, fish and vegetables was excluded, and which had been rented out by the corporation for a term of years, is not such a market as is protected from execution, and no authority having been given by the legislature to establish such a bazaar, it is subject to levy and sale.

[Cited in City of Laredo v. Benavides (Tex. Civ. App.) 25 S. W. 486.]

3. Markets are places where comestibles, perishable in their nature, are sold for the daily consumption of the people, which, from the very nature of the things therein sold, require sanitary regulations, and thus fall within the police power of cities.

4. A municipal corporation cannot, by its own act, independent of any legislative authority, make a thing which is not necessary to its municipal existence, or to the exercise of the powers which fairly belong to it, a permanent source of revenue, and thereby exempt the thing and the revenue derived from it from seizure on execution.

[Cited in City of New Orleans v. Louisiana Const. Co., 140 U. S. 662, 11 Sup. Ct. 971.]

5. A bill in equity will not lie to restrain an execution issued on a judgment at law upon grounds which might have been urged as a defense to the action at law.

[Cited in State v. Matley, 17 Neb. 568, 24 N. W. 201.]

In equity. Heard on motion for injunction. The bill was filed to obtain an injunction forbidding the seizure and sale, on execution, of the market bazaar, the property of the city of New Orleans, to satisfy a judgment recovered against the city by [John A. Morris] the defendant to the bill.

B. F. Jonas, City Atty., for complainant.
Thomas J. Semmes, for defendant.

BILLINGS, District Judge. This case is before me on an application for an injunction. The hearing is upon the bill, the sworn answer, affidavits and a counter affidavit.

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

There seems to be no dispute about the facts. On the 26th day of May, 1875, the defendant in the bill obtained upon the law side of the court a judgment against the complainant for the sum of fifty-three thousand dollars, with interest. A pluries writ of fieri facias has issued upon this judgment at law, and under that writ there has been seized the interest of the city in a bazaar market, and the land on which the same stands. In the year 1869 the city owned a piece of land. It executed a contract with William H. Wells, whereby he was to construct a building which was to be used for stalls for the sale of merchandise, exclusive of fresh meats, salt meats, fish and vegetables. The contract with Wells strictly followed the terms of an ordinance of the city council, which ordinance declared that the said building was made a source of public revenue. The building was constructed and leased for the period of ten years. Rent notes were given, but prior to the seizure, the unmatured notes were withdrawn and delivered up to the maker. The seizure is of the interest of the city, subject to all the leasehold rights of Wells and his assigns.

This is a bill in equity, then, to restrain the enforcement of a levy under an execution issuing upon a judgment at law. The bill sets forth two grounds upon which the decree is sought. First, that the property seized is a source of public revenue to a municipal corporation, and therefore is not liable to seizure under a fi. fa.; and, secondly, that the obligation on the part of the city upon which the judgment was obtained, pledged in perpetuity to the obligee certain property, and created no other obligation, and that, therefore, the plaintiff in the judgment at law, the defendant here, cannot resort to other property of the defendant beyond that to which he was restricted in the obligation. First, that the bazaar market and the ground upon which it stands are not subject to seizure; because they are sources of public revenue to the city. It was conceded by the solicitors on both sides that certain property belonging to the city is exempt from seizure; the discussion upon this branch of the case being altogether as to where the line limiting the exemption should be drawn. Much light is thrown upon this subject by a careful consideration of the decisions of the supreme court of Louisiana bearing upon it. In Egerton v. Third Municipality, 1 La. Ann. 435, it was held "that taxes were not the subject of a levy under an execution." In that case an attempt had been made to garnishee the tax-payers. In the case of Police Jury of West Baton Rouge v. Michel, 4 La. Ann. 84, it was held that the court house and jail of a parish were not subjects of seizure. In the case of Municipality No. 3 v. Hart, 6 La. Ann. 570, it was held that the funds collected on judgments for taxes in the hands of a constable were not liable to seizure. In the case of New Orleans & C. R. Co. v. Municipality No. 1, 7 La. Ann. 148, it was held that "ground rents to which the legislature had given a destination or appropriation, as a portion of the permanent revenue of the city to enable the municipal authority to exercise its powers of police and government, were removed beyond seizure." The circuit court, in the case of Peterkin v. New Orleans [Case No. 11,026], and in two unreported cases, that of Hayem v. City, and Klein v. City, No. 7,801, has followed the law as laid down by the supreme court of this state. In the first of these cases the circuit court held that "money which had been received in payment of taxes by the city was not from the mere fact that it was deposited in a bank made subject to seizure." In the case of Hayem v. City, it was held that "a party who had given rent notes as lessee of what was beyond all dispute a market, could not compensate against these notes the ordinary obligations of the city." The case of Klein v. City, was but a reiteration of the doctrine laid down by the supreme court of the state, in the case of New Orleans & C. R. Co. v. Municipality No. 1, supra. An analysis of all these decisions shows that the exemption has not been extended beyond two classes of cases. The one where the property seized, as in the case of taxes, court-houses, jails and markets was of such a nature as to be necessary to the continued exercise of the functions of the corporation, indeed, to its very existence; the other, where the property has been destined and set apart by an act of the legislature as a permanent revenue of the city, or a source of permanent revenue.

Does this case fall within either of these classes? If a market bazaar, that is to say, a place in which merchandise is sold and purchased, but from which traffic in all comestibles is excluded, can be considered a market, it would fall within both of these classes; if it cannot be considered as a market, then it would fall within neither, for it is not contended that the legislature has given the city any authority to establish a market bazaar unless it be contained in the general authority to establish market places. The nature of a market, to wit, a place where vegetables, fish and meats of all sorts are furnished for the daily sustenance of the population of a city, makes it an incident, and, indeed, a necessity, to a large and populous town. The establishment and regulation of such places is but the exercise of the police power of a city for the preservation of the health of the citizens; but with reference to a market bazaar no such necessity exists. Any block of buildings used for selling dry goods is as much within the purview of this police power as is a market bazaar. I think, therefore, the nature of the thing is against its having any public destination, as being a municipal necessity. Secondly, has the legislature given to the city the power to establish a market bazaar as distinguished from a

market? In the amended charter of the city (Acts 1870, No. 7, pp. 35, 36, § 12), the city is given the power in subdivision fifth to fix the mode of inspecting all comestibles sold, either in the market or other public places, and by the thirteenth subdivision to establish ferries and market places. Although these clauses are separated in the charter, yet in the Acts of 1816 (page 92, § 1, cited in Bullard & Curry's Digest, at page 100), as originally enacted, they occur together as a distinct branch of a sentence, as follows: "To establish one or more market places, and to determine the mode of inspection of all comestibles sold publicly either in said market or markets, or in other places." The inference, therefore, is that the legislature originally confined markets to places where comestibles should be sold. In the case of Morano v. Mayor, etc., 2 La. 217, the supreme court, through Martin, J., says: "The city council has the power to establish markets and to provide for the cleanliness and salubrity of the city. In establishing markets they designate certain spots or places for the sale of certain articles of provisions. In doing so they facilitate the people in the purchase of provisions of the first necessity by confining the sale of them to particular places and hours of the day; and they facilitate the inspection of provisions, and by the hire of stalls they raise money to defray the expenses of building market-houses, and pay the salaries of officers they appoint to prevent the sale of unsound provisions; and they have an undoubted right to prevent the violation of the ordinances they may pass in establishing markets." In the case of David's Heir v. City of New Orleans, 16 La. Ann. 404, the supreme court says: "In two cases, David v. Municipality No. 2, decided in December, 1853, and not reported, and in the case of Guillotte's Heirs v. City of New Orleans [12 La. Ann. 479], decided in November, 1856, it was expressly held that a market-house is not necessarily public property, but may be the object of individual ownership. It is a place to which the public have free admission for the purpose of purchasing provisions. But the right of selling them is not free to the public at large. That right is usually reserved to a limited number for a rent paid." In City of New Orleans v. Guillotte's Heirs, 12 La. Ann. 818, the supreme court says as follows: "Although a market may not be a locus publicus in the sense that the ownership of the soil is necessarily vested in the public, still it is a public place in this sense. It is a place to which all persons have a right to resort daily to supply themselves with such provisions and necessaries as are there vended; and as order and cleanliness are essential to the public welfare and health, the market, which is thronged at certain hours with all classes of persons, and filled with all manner of perishable comestibles, must, of necessity, be under the control of a vigorous and efficient police, to prevent it from becoming an intolerable nuisance. It is, therefore, a public place, because it is submitted to the exclusive control and government of the city authorities." In the case of First Municipality v. Cutting, 4 La. Ann. 335, this court said: "The right to establish markets is a branch of the sovereign power, and the right of regulating them is necessarily a power of municipal police. See 1 Bl. Comm. p. 274; Domat, Droit Public, lib. 1, § 3. This is vested by positive law in the mayor and council of each municipality upon whom rests the responsibility of the peace, comfort and order of the assemblages collected at fixed hours at these great thoroughfares." I will add that markets are not established as a source of public or private profit, but for the public good. I think that the supreme court in these cases in which they have incidentally spoken of markets, have unmistakably characterized them, and that, as thus characterized by that tribunal, markets are places where comestibles, perishable in their nature, are sold for the daily consumption of the people, which, from the very nature of the things therein sold, require peculiar sanitary regulations, and thus fall within the police power of cities. If this limitation be not accepted, then the right of a city to establish and regulate the place, time and manner of selling everything in which men deal must be conceded. Can it be that the legislature meant to make the police power of a city a vortex which should draw into itself the regulation of all the commerce of the city? That is the question.

It seems to me that the city, when it executed the contract under which the market bazaar was created and leased, by the very terms they employed, by their coupling together the two substantives, market and bazaar, and designating the place a market bazaar, show that the place which they established there, although resembling a market, was, in their opinion and intention, different from a market; that is, it was a place in which the manner of sale of articles was to be the same as in a market, but from which the things ordinarily sold in a market were altogether excluded. The method was that of a market, the matter entirely distinct. But the whole power of the city over markets springs from the fact that vegetables and meats liable to decay and putrefy are therein sold daily in large quantities; these being excluded from the place, it loses the essential quality of a market as it is defined in our jurisprudence. I think, therefore, that the designation of this market bazaar as a public revenue rests entirely upon the ordinance of the city itself, and has a legal foundation neither in the nature of the thing nor in any act of the legislature. But it cannot be contended that the city can, by its own act and independent of any legislative authority, make a thing which is not necessary to its municipal existence, nor to

the exercise of the powers which fairly belong to the municipal corporation, a permanent source of revenue, and thereby exempt the revenue and the thing from seizure under execution. If this doctrine be admitted the city might build and run factories, and, having simply declared that they made them sources of public revenue, render them exempt. I do not find that any of the decisions or the text-writers go to this length, but, on the contrary, limit the exemption to the two classes of cases above specified, first, to such things as are necessities to the existence or successful operation of a corporation; or, second, to such things as by the statute have been set apart as public revenue for the city. In neither of these classes does this case fall. The character of the title under which the city holds the land upon which the market bazaar is built has not been discovered. Second, it is urged that the nature of the original obligation upon which the judgment of law was rendered was such as to preclude the defendant from making the seizure upon this property.

My own opinion in the case of Ranger v. City of New Orleans [Case No. 11,564], was cited and urged as having a bearing on this question. In that case I held that the power to tax was a prerogative of the legislature, and not in any sense judicial. That since the legislature had clearly implied in the act authorizing the obligations that they were not to be paid by taxation, the court could not direct a tax to be levied to pay them in the absence of any provision of the legislature to that effect, I therefore refused the mandamus directing the levy of a tax. The doctrine which I there laid down, if correct, would have been a complete defense to the action at law. The ground of the decision in that case was that the legislature had not authorized the levy of the tax. A subsequent case, in which a mandamus was asked to compel the city council to put a judgment into the annual budget, accordingly as the legislature has directed should be done, with final judgments against the city, is now under consideration. In the Ranger Case it was enough to say there was no act of the legislature authorizing the levy of the tax, and authority could not be implied, because the legislature intended the obligation should be paid out of the specific property, and only to that extent was the city bound. My conclusion in that case may be entirely correct—that the city was not bound as a general debtor upon its bonds, and my conclusion here may be equally correct, that the levy of this execution cannot be stayed. In a word, the defense to a debt is one thing, the defense against a final judgment, in which the debt is merged, is quite another. The question in the Ranger Case was whether the authority to levy the tax could be inferred from its having authorized the issuance of the bonds, for it was that ground alone upon which the argument for the mandamus was based. My conclusion was that the legislature, in the act which gave the authority, so far from giving power to tax, by implication, had negatived any such power, and, as it seems to me, limited the obligation to that of a pledge of certain specified property. The case of Klein v. City of New Orleans was also cited, and it was thought I had then passed upon a similar question. I have examined the bill of exceptions in that case, and find that my ruling was confined entirely to the fact that squares which were public property, which formed a portion of the wharves, or levees, and ground rents, which were considered to be public revenue, could not be seized. Indeed, the question here is simply this: Will a suit in equity lie to restrain a seizure under an execution, issued on a judgment at law, upon grounds which might have been urged as a defense in the action at law? I find the authorities, without exception, to hold that such a suit will not lie. 3 Daniell, Ch. Prac. (Perk. Ed.) 1728; Kerr, Inj. 22; and the numerous authorities cited by these authors. Judge Story, in his Treatise on Equity Jurisprudence (section 894), says: "In the next place, courts of equity will not relieve against a judgment at law where the case in equity proceeds upon a defense equally available at law, but the plaintiff ought to establish some special ground for relief."

The injunction must, therefore, be denied.

[For proceedings on a motion for injunction based on amended bill, see Case No. 10,183.]

Case No. 10,183.

NEW ORLEANS v. MORRIS.

[3 Woods, 115.][1]

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

MUNICIPAL CORPORATIONS—ALIENATION OF PUBLIC PLACE — BATTURE IN FRONT OF NEW ORLEANS —LEASE—CONSTITUTIONALITY OF ACT ABOLISHING FIERI FACIAS AGAINST CITY.

1. As a general rule a public place is inalienable except by the sovereign.

2. But a public place, which is a portion of the batture in front of the city of New Orleans, has a distinctive quality impressed upon it, and may be withdrawn from the use of the public by the city.

3. The leasing, by the city, of a portion of the batture for a market bazaar, for a term of ten years, for a certain rent reserved, is a withdrawal from public use of so much of the batture as is included in the lease.

4. An act of the legislature of Louisiana abolished the writ of fieri facias for the enforcement of judgments against the city of New Orleans, and declared that the effect of the judgment should be limited to fixing the amount of the plaintiffs' demand, and that said judgment should be registered and paid out of any money in the city treasury designated for its payment, and, if none were designated, that the city council might, if they deemed it proper, make an

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appropriation for its payment. *Held*, that the act was inoperative as to an antecedent debt, because it impaired the obligation of the contract.

[Cited in Hart v. City of New Orleans, 12 Fed. 294; Canal & Claiborne Streets R. Co. v. Hart, 114 U. S. 662, 5 Sup. Ct. 1132.]

5. Said act is not made obligatory upon the courts of the United States by section 916 of the Revised Statutes.

[This was a bill in equity by the city of New Orleans against John A. Morris.] Motion for injunction based on amended bill.

B. F. Jonas, City Atty., for complainant.

Thomas J. Semmes, for defendant.

BILLINGS, District Judge. This case is before me upon an amended bill for an injunction to restrain the levying of an execution issued upon a judgment on the law side of the court. The grounds urged for the injunction in the original bill have already been passed upon. See City of New Orleans v. Morris [Case No. 10,182]. In delivering my opinion on refusing the injunction on the first hearing, I stated that the character of the title of the city to the land was not disclosed. Such disclosure is made by the amended bill. The two additional grounds set up in the amended bill will now be considered. 1. That the land upon which the bazaar market is built is a locus publicus, and is, therefore, inalienable and exempt from seizure. 2. That no execution can issue upon a judgment against the city of New Orleans rendered in the circuit court of the United States sitting in this district.

As to the first ground, that the land upon which the bazaar market is built is a locus publicus, and is, therefore, inalienable and exempt from seizure: The bill alleges that this land is a part of the batture or public levee belonging to the city of New Orleans, and dedicated to the public use. According to the allegations of the amended bill, therefore, the fee is in the city of New Orleans, subject to the servitude or use, for the public. Three things, then, are determined, so far as this case is concerned, with reference to this land; that the fee is in the city; that it is a public place, and that it is a part of the batture.

Judge Martin, in the case of Morgan v. Livingston, 6 Mart. [La.] 215, thus defines "batture": "In its grammatical sense as a technical word, and, we believe, in common parlance, it is then an elevation of the bed of the river under the surface of the water, since it is rising towards it. It is, however, sometimes used to denote the elevation of the bank when it has risen above the surface of the water, or is as high as the land on the outside of the bank." In this latter sense it is synonymous with "alluvion," which is defined to be an insensible increment brought by the water. It means, in common law language, land formed by accretion.

There is no doubt of the correctness of the general proposition, that a public place is inalienable except by the sovereign, but a public place which is a portion of the batture, according to the well settled jurisprudence of this state, has a distinctive quality impressed upon it, and may be withdrawn from the use of the public by the city. This qualification is seen to be a public necessity when we consider that by the action of the vast stream which half encircles the city, the levees may be so widened as that unless a portion of them were used for buildings, and the inhabited city extended over them, the city itself would possibly be left at an inconvenient distance from the river. Accordingly we find, both in the decisions of the highest tribunal of the state, and in the act of the legislature, a clear recognition of the authority of the city to withdraw from the public use any portion of the batture which it deems no longer necessary to be held for that purpose.

In the case of Remy v. Municipality No. 2, 12 La. Ann. 502, the court say: "The administrative control which the city council has over the alluvial deposit was settled in the case of Municipality No. 2 v. Orleans Cotton Press [18 La. 122], and in Pulley v. Municipality No. 2, Id. 278."

The corporation had the exclusive right to determine when and to what extent the riparian proprietor may take possession of the batture. Until the act of the 30th April, 1853, the riparian proprietor was bound to await patiently the action of the corporation, and was not allowed to take the initiative in limiting or terminating the public occupation of the batture. In the case of Remy v. Municipality No. 2, 15 La. Ann. 657, the court say: "It is recognized by many decisions that the city has, by law, the administration of the batture, and until the act of April, 1853, the exclusive right in determining when and to what extent the riparian proprietor might occupy the batture or alluvion within the limits of the corporation." The legislature has spoken with equal clearness upon this subject. Act No. 333 of the Acts of 1853, provides: "That whenever any riparian owner of property in the incorporated towns and cities in this state is entitled to the right of accretion, and batture has been formed in front of the said owner's land, more than is necessary for the public use, which said incorporation withholds from the owner, he shall have the right to institute suit against said corporation for so much of said batture as may not be necessary for the use of commerce and navigation, and for the necessary public highways and other public uses. And if it be determined by the court that any portion of said batture be not necessary for the public uses above mentioned, the court shall decree that the said owner is entitled to said property, and compel said corporation to permit him to enjoy the use and full ownership of such portion of said batture." It is to be observed that the terms of this act do not directly apply to a case where, as here, the city is the riparian owner. It provides

that the riparian owner shall have the right to bring suit and have it determined whether and to what extent the batture is not necessary for the public use, and to such an extent he shall be entitled to the use and full ownership of it. This act applies to cases where the "said corporation withholds from the owner." Now, if upon a demand being made by the owner, the city should assent to his taking the portion claimed, it is clear that the legislature designed that he should so take it. For they could not have intended that a party should be placed in a worse position, where the city assented to his taking what he claimed than would be a person from whom the city withheld it. If the legislature intended, as they clearly did, to give the city the right to withdraw from public use any portion of the batture where they themselves were not the riparian proprietors, can it be doubted that they believed the city to have that right where she herself was the riparian proprietor? The case of New Orleans, M. & C. R. Co. v. City of New Orleans, 26 La. Ann. 478, has an important bearing upon the question here. True it is that that case was with reference to a portion of the batture above Canal street, where the city obtained the title by grant under a compromise. But the city could have no more under these circumstances than the fee, which, under the pleadings, it has here. At page 484 the court says: "If it be urged that the third section of said act of 1850 required the portion not then laid off into streets to be kept open forever for commerce, the answer is that Act No. 333 of 1853 authorized the withdrawal therefrom of such as may not be needed for public uses, and this has been done by the city." Again the court says: "But the title of the said parties vested by the notarial act of June, 1851, is, we think, in the municipality which then took the place of the former owners, with all their rights, including the right to bring into commerce such portions as might become necessary for public use."

It may well be doubted whether the city could, under any system of pleading, be allowed to change the attitude on this point which she assumed in her original bill. The city then had the right to withdraw this property from the use of the public and to bring it into commerce. Has it done so? The city, by its Ordinance No. 1538, ordained as follows: "Whereas, the vacant space of ground situated in the Second district, and bounded by the beef market, red stores, Peters street and the levee, has become almost worthless to the city, and a source of constant annoyance to the authorities; and, whereas, the said vacant space could be made the means of producing larger revenues to the city by the erection of a bazaar market; therefore, be it resolved, that the city auctioneer be, and he is hereby authorized and instructed to adjudicate, after ten days' notice in the official journal, to the highest bidder or bidders, a contract for the erection of a bazaar market and the collection of the revenues of the same for the term of ten years, on the vacant space bounded by the beef market, red stores, Peters street and the levee, Second district, the market to be erected in strict accordance with plans and specifications to be furnished by the city surveyor; said market and improvements thereto belonging to revert to the city of New Orleans at the expiration of said lease, without cost or indemnity to the lessor." Under this ordinance the lease was executed, and the lessees went into possession. The rent has been paid for the full period of ten years. It seems to me that this is as effectively withdrawing from public use property which is no longer necessary as could be done by the decree of any court at the suit of a riparian proprietor, and that such withdrawal so made is sanctioned by the legislature and by the supreme court. It follows inevitably that the city, by withdrawing this property from the public use, has changed its destination and its capacity to be alienated. The servitude of the public was lawfully terminated. It ceased to be a public thing, and became, so to speak, the private property of the city. Rev. Civ. Code, art. 458. Nor does the argument avail that in the progress of time this property may become necessary for the public use, for according to the present charter (Acts of 1870) they have the power of causing the expropriation of all property needed for any public use.

It is next claimed that no execution can issue upon a judgment against the city of New Orleans rendered in the circuit court of the United States sitting in this district. The argument in behalf of the city upon this point is briefly this: The law of congress in common law cases in the United States courts has adopted the law of the state with reference to executions, and the law of the state prohibits any execution in suits where the city is judgment debtor. The law of congress, found in section 916 of the Revised Statutes, is as follows: "The party recovering a judgment in any common law cause in any circuit or district court shall be entitled to similar remedies upon the same by execution or otherwise to reach the property of the judgment debtor, as are now provided in like causes by the law of the state in which such court is held." The act of the state legislature upon which the exemption is claimed is Act No. 5, passed at a special session of the legislature in 1870, p. 10. The title of the act is as follows: "An act to limit and restrict the power of courts to issue orders, writs of mandamus and fieri facias against the city of New Orleans and the officers thereof." Section 1 prohibits any court having authority or jurisdiction to allow, order, hear or entertain any writ or order of mandamus, or any order or proceeding against the comptroller, deputy comptroller or any auditing officer of the city of New Orleans, the object of which shall be,

either directly or indirectly, to obtain or compel said comptroller or deputy comptroller or auditing officer to deliver or issue any order or warrant, etc.; or against the treasurer or assistant treasurer, or any officer charged with the disbursement of the moneys to enforce the payment of money claimed to be due from New Orleans, but that the proceeding must be against the city itself and not against any branch, department or officer thereof. Section 2 abolishes the writ of execution, or fieri facias, to enforce the payment of any judgment, and provides, that the effect of the judgment shall be limited to fixing the amount of the plaintiff's demand; said judgment shall be registered in the office of the comptroller of the city, and that the comptroller, to pay the same, may draw his warrant against any money that there may be in the treasury designated and set apart for the purpose of paying such judgment. Section 3 provides, that in case there is no money to pay the judgment, the common council shall have power, if they deem it proper, to make an appropriation. If this act were to be viewed by this court as a state tribunal would be bound to view it, it would be liable to objections which impress me as serious.

In the first place, as was urged in the argument, it has been held by very high authority that any change made in the remedy which takes away the substantial right of a party to gain by his suit, that to which at the time of the making the contract he was entitled, impairs the obligation of the contract itself. The city of New Orleans at the time this contract was made, had impressed upon it by express statute, the capacity to be sued. The capacity to be sued carries with it not only the right to bring the city into court and recover the judgment, but the right to enforce that judgment. Lord Coke, in the Reports (part 5, p. 89), defines an execution upon a judgment, to be the "life of the law," and again, at page 91, he says, "which (executions) are the fruit and the life of every law." Writs of fieri facias may be said to be universally the incident of a judgment for the recovery of money, which a court renders after the hearing of the case, and without them the proceedings would be for the most part vain; and when the creditor gives credit to the city upon the faith of its having the capacity to be sued, it seems to me that the argument is very strong in favor of the capacity to be sued, including all the proceedings necessary to take compulsorily the property of the judgment debtor.

An analysis of the act of the legislature of Louisiana with reference to the city of New Orleans shows that there can be no effective compulsion; there can be no writ of mandamus upon any of the officers of the city, no writ of execution against the city. The judgment creditor is limited to taking either what is found in the treasury already appropriated, or which the common council may thereafter. if they deem proper, appropriate for the payment of the judgment. It seems to me that the chief part of the capacity of being sued, so far as the creditor is concerned, is by this act annulled. But it is not necessary for me to pass upon this question; for in my opinion the practice act of congress has not adopted this exceptional law with reference to the city of New Orleans. When congress says that the judgment creditor in the federal courts shall be entitled to similar remedies by execution or otherwise to reach the property of the judgment debtor as are now provided in like cases by the laws of the state in which the court is held, it clearly means this: That the remedies by execution or otherwise upon judgments in the federal courts shall be the same as are provided by the laws of the state for judgments in suits of the like nature; that is to say, in order to determine what remedy the judgment creditor shall have, the court in the first place examines the judgment, and sees what is the nature of the thing recovered, whether it be money or land, or a right to some office or to have some act done that should be enforced by a mandamus, and that then in the second place the creditor shall have the same remedies to enforce his judgment in the federal court as he would have in the state court, in judgments of a like nature, or that belong to that class. The judgment here is a judgment for the recovery of a sum of money. If we turn to the statutes of Louisiana we find (Code Prac. art. 641) "that when the judgment orders the payment of a sum of money, the party in whose favor it is rendered may apply to the clerk and obtain from him a writ of fieri facias against the property of his debtor." This then is the remedy in the state courts provided by the state law for cases like this. It is true that the legislature has seen fit to except from the operation of this law, so far as their own courts are concerned, the city of New Orleans, but that at best could be treated only as an exception which would operate upon the municipal tribunals. Congress has adopted the method which the state laws have given to enforce judgments of this class or nature, and the method thus adopted by congress is not at all affected by this exceptional provision. Let the injunction be refused.

NEW ORLEANS (PETERKIN v.). See Case No. 11,026.

NEW ORLEANS (RANGER v.). See Case No. 11,564.

NEW ORLEANS (SALA v.). See Case No. 12,246.

NEW ORLEANS (UNION BANK v.). See Case No. 14,351.

NEW ORLEANS (UNITED STATES v.). See Case No. 15,871.

NEW ORLEANS, The (WEEKS v.). See Cases Nos. 17,353a and 10,181.

NEW ORLEANS & C. R. CO. (CASE v.). See Case No. 2,493.

NEW ORLEANS, ETC., R. CO. (BILLS v.). See Case No. 1,409.

NEW ORLEANS, ETC., R. CO. (ELLERMAN v.). See Case No. 4,382.

NEW ORLEANS GASLIGHT CO. (KILGOUR v.). See Case No. 7,764.

Case No. 10,183a.

NEW ORLEANS, M. & C. R. CO. v. NEW ORLEANS.

[See 14 Fed. 373.]

NEW ORLEANS, M. & T. R. CO. (AMES v.). See Case No. 329.

NEW ORLEANS, M. & T. R. CO. (MORGAN v.). See Case No. 9,804.

NEW ORLEANS, M. & T. R. CO. (SOUTHERN & A. TEL. CO. v.). See Case No. 13,185.

NEW ORLEANS MUT. INS. ASS'N (LEVI v.). See Case No. 8,290.

Case No. 10,184.

NEW ORLEANS NAT. BANKING ASS'N v. ADAMS et al.

[3 Woods, 21; 2 Nat. Bank Cas. (Browne) 207.][1]

Circuit Court, D. Louisiana. Nov. Term, 1876.

ERASURE OF MORTGAGE IN LOUISIANA — RULE — RES JUDICATA — JURISDICTION OF FEDERAL COURTS—NATIONAL BANK CASES — ACT FEB. 18, 1875.

1. The act of congress of February 18, 1875 (18 Stat. 320), which is incorporated in section 5198, Rev. St., does not confer exclusive jurisdiction upon the courts of the United States to try the actions therein referred to.

[Cited in Continental Nat. Bank v. Folsom (Ga.) 3 S. E. 272.]

2. Under the jurisprudence of Louisiana the proceeding to cause the erasure of a mortgage is properly instituted in the proper court of the parish wherein the mortgaged premises lie.

3. By the same jurisprudence, a mortgage may be erased in a proceeding by rule.

4. To maintain the plea of res judicata, the judgment must be final; if it is open to appeal, the plea will not hold.

In equity. Heard on bill, plea, replication and testimony.

The bill recited that, on or about February 24th, 1860, the said Bank of New Orleans became the holder and owner of certain promissory notes for the sum of $5,000, made by Robert Tucker and others, payable to the order of Robert Tucker, and by him indorsed; that said notes were secured by mortgage of the same date, which was recorded in the mortgage office of the parish of Lafourche, where the mortgaged property was situate, on the 24th of February, 1860; that on September 4, 1866, the bank brought suit on said note against Tucker, the maker, praying for judgment against him, and for a sale of the mortgaged property. In June, 1866, the district court of the parish of Lafourche rendered judgment in recognition of said bank's right of mortgage for the full amount of said notes; and a writ of fieri facias was issued and the property seized and sold, and adjudicated to one Albert N. Cummings, for the price of about $13,000. On September 7, 1867, Cummings being unable to comply with his bid in cash, it was agreed between him, Tucker, and the Bank of New Orleans, they then being the sole parties interested, that Cummings should be allowed a certain time to pay the said price on the following terms: That he should pay to one Gaubert the sum of $1,851, in satisfaction of a judgment he held against Tucker, which was secured by mortgage and vendors' lien on a part of the mortgaged premises; that he should pay one Barnsley $9,400, and the residue, $6,269.50, to the said Bank of New Orleans. It was further agreed that the claims of Barnsley and the Bank of New Orleans were to be secured by mortgage upon the whole of said tract of land, and that the claims of Gaubert and others were entitled to a mortgage preference on the lower three arpents. It was also agreed that the original mortgage and privilege securing said notes and claims of the Bank of New Orleans and Barnsley, as aforesaid recorded in the mortgage office on February 24, 1860, should remain in full force and effect, and the present privileges and mortgages were declared to exist and were recognized by said agreement as operating against said property. All this was done by authentic act duly recorded in the office of the recorder of mortgages for the parish of Lafourche on September 12, 1867. Gaubert's debt had been paid, and the claims of the present complainants and Barnsley were secured under the registry of that agreement. The bill further alleged that the defendants [John I. Adams, Jay L. Adams, William H. Regnaud, and others] claimed a mortgage privilege in preference to complainant, and he prayed that his mortgage claim be recognized as having a priority over all the claims of the defendants, and for a sale under said agreement, treating it as a mortgage.

To this bill a plea was filed by the defendants, wherein they recited that, on July 20, 1875, they being the holders of certain promissory notes secured by mortgage upon the property described in the complainants' bill of complaint, instituted a certain suit or action against Thomas J. Daunis in a court of competent jurisdiction, and obtained from the said court a writ of seizure and sale against said property, to which they were entitled under the laws of Louisiana; that the said writ was issued to the sheriff of the parish of Lafourche, in pursuance of which he proceeded to sell, after all the legal requirements were complied with, and the property was adjudicated to John I. Adams, who was the

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission. 2 Nat. Bank Cas. (Browne) 207, contains only a partial report.]

last and highest bidder; that the said sheriff thereafter declined to make a title to said property on account of sundry inscriptions of mortgages and privileges, among which were those set up in the bill of complaint; that on October 19, 1875, the defendants appeared before the judge of the Fifteenth judicial district court and obtained a rule nisi against the complainant in this bill and others, as the owners of the inscriptions and mortgages, to show cause why they should not be canceled and erased, that being the proper course of practice in the courts of Louisiana, and that the said court had jurisdiction exclusively over all questions affecting the legality, reality, inscription and effect of all said inscriptions, judgments and mortgages; that upon the hearing of said rule, the complainant was present, and the case was submitted to the court; that on December 18, 1875, judgment was rendered in favor of these defendants and against the complainant in this case, declaring that the mortgages and inscriptions set forth in the present bill of complaint, should be canceled and erased so far as the said property described in the bill of complainant is concerned, finally settling and closing all issues between the complainant and defendants herein, as set up and alleged in said bill; that on December 18, 1875, the judgment was signed by the judge, and no appeal having been taken within the legal delay allowed by the law of Louisiana for an appeal to be taken, the said judgment became final; and that said judgment has the force of res judicata. To this plea replication was filed, and the case, so far as these parties were concerned, was submitted by agreement upon the bill, the plea, the replication and the evidence. It appeared that the judgment upon the rule, which was the basis of the plea of res judicata, was signed on December 18, 1875. It seemed by the record, which was made evidence (being a transcript of record from the Fifteenth judicial district court), that the complainant, who was defendant in the rule, appeared and pleaded various matters against the same, both by way of exception and upon the merits.

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

J. P. Hornor, W. S. Benedict, F. W. Baker, Clay Knoblock, Thos. Allen Clarke, T. L. Bayne, and Henry Renshaw, Jr., for defendants.

BILLINGS, District Judge. It is urged in the first place that the court which rendered this judgment had no jurisdiction; that the complainant could not be sued or proceeded against in a court holding its sessions in the parish of Lafourche, first by reason of the United States statute which provides, by way of amendment to section 5198, "that suits, actions and proceedings against any association under this title, may be had in any circuit, district or territorial court of the United States, held within the district in which said association may be established; or in any state, county or municipal court in the county or city wherein the association is located, having jurisdiction in similar cases." Section 5198, to which this clause is amendatory, provided that actions might be brought against national banks to recover twice the amount of usurious interest. These are the only cases, so far as I can discover, which are expressly authorized by the title 52 with reference to national banks. This amendment does not exclude other forums, and relates only to actions expressly authorized by that title, and this action is not one of them.

Second. That the said court had not jurisdiction over the complainant, by reason of the statutes of the state of Louisiana which regulate the forum for actions. Code Prac. art. 163. In Gravier v. Baron, 4 La. 240, the supreme court of this state says: "Actions to foreclose mortgages, with all the incidental proceedings, are properly brought in the forum where the mortgaged property is situated." The proceeding, therefore, to cause the erasure of these mortgages was in the proper forum.

It is urged in the third place that the court rendering this decree had no jurisdiction, because the procedure was by rule. The rule is in the nature of a petition, and notice of the rule conforms very nearly to the textual provisions of a citation. But I shall consider this objection as if the incidental proceeding had been instituted as an ordinary rule, and the question is whether, according to the laws of Louisiana and the construction given to these laws by the supreme court of this state, mortgages can be erased by rule, as an incident to the foreclosure and sale? The case of Merrick v. McCausland, 24 La. Ann. 256, is conclusive, if this court has to take that decision as a guide.

It is urged that the supreme court of the United States in the case of Marshall v. Knox, 16 Wall. [83 U. S.] 557, have held that such procedure could not be taken by way of a rule. But that case, so far as this point is concerned, simply decided that in bankruptcy proceedings, where the object was to compel a seizing creditor whose claim was for rent, and who had instituted his proceeding in the state court and got possession of the property through the sheriff before the bankruptcy proceeding, to deliver up certain property to the assignee; and where the creditor thus situated had not made himself a party to the bankruptcy proceedings, he could not be brought in by rule, but must be sued in the form of a direct action. But that decision has nothing to do with the correctness of this procedure, which pertains to the proper manner pointed out by the Louisiana Code, for causing mortgages to be erased, and I am necessarily referred to the Louisiana statutes and the decisions of our supreme court. Earlier decisions were against the propriety of the rule, but the last decision on this subject in

Merrick v. McCausland, 24 La. Ann., supra, lays down as correctly stated in the syllabus, that "a judicial mortgage creditor of an inferior rank to that of a conventional mortgage creditor, may proceed by rule against the latter to show cause why his conventional mortgage should not be erased without proceeding by a direct action to set aside the conventional mortgage." It undoubtedly overrules the case of Bank of Louisiana v. Delery, 2 La. Ann. 650. In Leffingwell v. Warren, 2 Black, 603, Mr. Justice Swayne lays down the following propositions: "The construction given to a statute of a state by the highest judicial tribunal of the state, is regarded as part of the state law, and is as binding on the courts of the United States as the text." "If the highest judicial tribunal of the state has adopted new views as to the proper construction of the state statute and reversed its former decision, this court will follow the latest settled adjudications." I consider, then, that it is settled by the supreme court of Louisiana that this procedure might properly be taken by rule.

This disposes of the question presented which involved the jurisdiction of the court, my conclusion being that the court had jurisdiction. The next question is, does the decree present a case of res judicata? Article 2286, Civ. Code, gives a complete definition of what would maintain the plea of res judicata so far as the subject matter and the parties are concerned: "The thing demanded must be the same, the demand must be founded upon the same cause of action; the demand must be between the same parties, formed by them against each other in the same quality." I have no difficulty in coming to the conclusion that the cause of action was the same in both cases. The question presented here, and the question presented in the state court, was as to the binding force of the judgment, and the recorded agreement immediately subsequent thereto. The facts recited in the rule, and the issue relied upon in the answer, present the same facts and the same issue as here. The decision of the state court was, in effect, that the sale under the judgment to Cummings extinguished the mortgage note, and that whatever validity the judgment and the recorded agreement had, could only be from the date of inscription, which was subsequent to the mortgage under which Adams, the respondent here, holds. The whole transaction of the extension given to Cummings and the recording of the judgment and agreement was indivisible, and the court of the Fifteenth judicial district decreed in substance that it created no mortgage prior to that of the defendants here. The parties are clearly the same, and appear in the same quality in both proceedings. But not only according to the common law, but under our Code, to maintain the plea of res judicata, the judgment relied upon must be final. Civ. Code, art. 3556, subdiv. 31, declares: "The thing adjudged is said of that which has been decided by a final judgment, from which there can be no appeal, either because an appeal did not lie, or because the time fixed by law for appealing has elapsed, or because it has been confirmed on an appeal." To be sure these definitions are declared to be given with reference to the terms of law implied in the Civil Code, but the courts of Louisiana refer to them and adopt them with reference to all judicial proceedings. In the case of Escurix v. Daboval, 7 La. 575, it was held by Judge Martin that a judgment quashing an execution has not passed in rem judicatum when the matter in dispute is sufficient to authorize an appeal, and when a year has not elapsed from the date of it to the time of the trial when it is offered as evidence to show the writ was properly quashed. The case in the Fifteenth judicial district court was clearly appealable, and a motion for an appeal, according to the record, had been made. It does not appear whether it was ever perfected. The judgment was rendered on December 18, 1875, and this plea was filed in this cause on November 3, 1876. The year within which an appeal could have been taken had not then expired. That the decree appears to have been executed by the actual erasure of the incumbrances from the record does not change the case, for if an appeal has been taken, and the decree should be reversed, the very judgment of reversal by the supreme court would, so far as these parties are concerned, re-instate the mortgages.

If the appeal from the judgment in the state court has not been perfected, the defendant may amend his plea by setting up that fact.

[Upon the final hearing a decree was entered dismissing the bill. This was affirmed upon appeal by the supreme court. 109 U. S. 211, 3 Sup. Ct. 161.]

NEW PHILADELPHIA, The (BRADY v.). See Case No. 1,797.

Case No. 10,185.

The NEWPORT.

[5 Ben. 231;[1] 14 Int. Rev. Rec. 37.]

District Court, S. D. New York. June, 1871.

COLLISION IN EAST RIVER—STEAMBOAT OVERTAKING ANOTHER.

1. The tug Q., with a barge in tow alongside, was bound from Jersey City to the Atlantic Basin, in Brooklyn. The steamboat N. came out from a pier in New York City, on a trip through the Sound, and swung her head to port down the North river, during which movement the Q. passed from the starboard to the port side of the N., ahead of her. The N. then swung still further to port to enter the East river, but blew a single whistle to tell the Q., as she alleged, that she intended to go outside of and

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

pass her. The Q. kept on her course, and was struck by the N. on the starboard side, and sank with the barge. *Held*, that, as the N. was behind the Q., and to starboard of her, the course up the East river which she wished to take must cross that of the Q. either ahead or astern of the Q.

[Cited in The St. Paul, Case No. 12,243.]

2. In adopting the manoeuvre of crossing ahead of the Q., the N. chose the most hazardous of the two manoeuvres, and that, under these circumstances, the burden was on her to excuse herself.

[Cited in Thompson v. The Great Republic, 23 Wall. (90 U. S.) 34.]

3. On the evidence, the excuse which she had set up, that the Q. sheered to starboard, and thus crossed her course, was not made out.

4. If the effect of the ebb tide from the East river, striking the port bow of the barge, as the Q. entered such tide, was to deflect the Q. to starboard, this was an effect which the N. could have foreseen, and guarded against by not approaching the Q. so closely.

5. If the Q. had slowed and stopped while under the bows of the N., such action, under the circumstances, would not be held to have been a fault.

In admiralty.

C. Donohue and W. J. Haskett, for libellants.

J. H. Choate and W. G. Choate, for claimants.

BLATCHFORD, District Judge. This is a libel filed by the owners of the steam propeller Quickstep against the steamboat Newport, to recover for the damages caused to the Quickstep by a collision which took place between her and the Newport on the 17th of August, 1866, shortly after 5 o'clock, p. m., in the East river, near Diamond Reef buoy, between the Battery and Governor's Island. The Quickstep, with a barge loaded with coal in tow on her port side, was bound from Jersey City to the Atlantic Basin, in Brooklyn. The Newport had left her berth at pier 28, North river, and passed down the North river and into the East river, and was bound up the East river, through Hell Gate and the Sound, to Newport, Rhode Island. The tide was about half ebb, and running with the strength of the ebb from the East river into the North river from between Governor's Island and the Battery, and also from the East river through the channel between Governor's Island and the Long Island shore. As the Newport came out of her slip heading to the west, she gradually swung to port till she headed down the North river. The Quickstep, coming from Jersey City, passed across the bows of the Newport from starboard to port of the Newport. As the Newport swung around still further to port to head through between the Battery and Governor's Island into the East river, she had the Quickstep on her port hand and ahead, and was, therefore, following and overtaking the Quickstep. Under these circumstances, it was the duty of the Newport to avoid the Quickstep, and keep out of her way. She did not avoid her, but ran into her. The stem of the Newport struck the starboard side of the Quickstep, not far from amidships on the Quickstep, at an angle of about forty-five degrees, angling forward on the Quickstep, crushing in her side so that she sank almost immediately, as did also the coal barge and the cargo of coal. The Newport, being behind the Quickstep, and to the starboard of the Quickstep, and the Quickstep being bound to the Atlantic Basin and the Newport being bound up the East river, the Newport could gain her course up the East river only by crossing the course of the Quickstep. This she could do, either by going under the stern of the Quickstep, or by overtaking the Quickstep and passing her, leaving her to the left and going across her bows and around her. The former was obviously the safe course. The Newport rejected that method, and undertook to accomplish the result of running around the Quickstep while the latter should keep on—a project dangerous in its inception and fatal in its result. Under these circumstances, the burden is on the Newport to excuse herself, she being the overtaking vessel, and having actually overtaken the Quickstep and run her down. The Quickstep was a small propeller. The Newport was a large and powerful side-wheel steamer.

The answer of the Newport sets up, that, after the Quickstep, coming from Jersey City, had crossed the bows of the Newport, and while the Newport was opposite Castle Garden, and the Quickstep was proceeding along the New York shore, between that shore and the Newport, the Newport sounded one blast of her whistle, to notify the Quickstep and the several other vessels which were between the Newport and the New York shore, that it was the intention of the Newport "to take the outside, and commenced gradually to turn up towards the East river, as nearly as possible in the middle of the river, at which time said steam-tug," the Quickstep, "was running a course parallel with the Newport, inside of her, on her port bow, and, to all appearance, seemed bound, like the Newport, up the East river." The answer also avers, that those in charge of the Quickstep took no notice of the whistle from the Newport; that, as the Newport, continuing her course, opened the East river, being then nearly opposite the southern extremity of the Battery and about midway between that and the buoy on Diamond Reef, the Quickstep gave a sheer towards Governor's Island, directly across the course of the Newport, and so near to her as to render a collision imminent; and that, immediately on perceiving the position in which the Quickstep had been thus placed, the wheels of the Newport were stopped and reversed, and her helm was put hard aport, in the hope, if possible, of avoiding a collision, but, at the same moment, the Quickstep also slowed her engine or stopped it wholly, by which the Quickstep was left

directly under the stem of the Newport. The answer charges, that the collision was the fault of the Quickstep in these respects: (1) In not paying due regard to the whistle of the Newport, by which the Quickstep was warned of the intention of the Newport to pass on the outside; (2) in making a sheer to starboard, and attempting to cross the bows of the Newport after the Newport had signalled her intention to take the outside; (3) in attempting to cross the known course of the Newport without notifying, by whistle or otherwise, a desire or intention to do so; (4) in slowing or stopping her engine, when she had thus been brought directly under the bows of the Newport, instead of making an effort, by press of steam, to escape the danger; (5) in not answering the Newport's whistle; (6) in not having any efficient lookout; (7) in not exercising proper care, having regard to the size and superior power of the Newport, and having full knowledge of the course to be necessarily taken by her into and up the East river.

It is manifest from the answer that it proceeds upon the theory that the Quickstep was bound up the East river, as the Newport was, and not across the East river, to the Atlantic Basin, and that the Newport, as the overtaking boat, and the faster boat, had the right to determine and announce that she would, in passing the Quickstep, pass on the starboard hand of the Quickstep, and to follow out such determination, without receiving from the Quickstep any assent to such course of proceeding. The Quickstep was, in fact, not bound up the East river, but was bound to the Atlantic Basin. The Newport could not tell where the Quickstep was bound. There was nothing in the heading, or course, or movement of the Quickstep to indicate that she was bound up the East river rather than to the Atlantic Basin. The Quickstep had not yet arrived at the point where a divergence from the course she was on would be necessary, if she were bound up the East river. In this posture of affairs, the Newport, as the answer says, whistled her determination to go outside, and commenced gradually to turn up towards the East river, the Quickstep being then on her port bow. The whistle, the answer says, was not noticed by the Quickstep. Still, as the answer says, the Newport continued her course, and, when the Newport had opened the East river, the Quickstep sheered directly across the course of the Newport, whereupon, seeing that a collision was imminent, the Newport stopped and reversed, and put her helm hard aport, and the Quickstep slowed or stopped, so as to leave herself directly under the stem of the Newport.

It is shown, by the trials of collision cases, to be very much the habit of large steamers, in dealing with small tugs, to determine on a course and announce it by whistling, and then persist in it, whether an acquiescent response is obtained or not. The case set up in this answer is one of that kind. It is manifest, that, if the Newport had kept at a proper and safe distance behind the Quickstep until she had learned satisfactorily where the Quickstep was bound, she would not then have attempted to take the outside, or to whistle the Quickstep to the inside, but would have passed under the stern of the Quickstep. And, after the Newport had whistled, and found her whistle unanswered, it was wrong in her to continue her course, as the answer says she did, and approach so close to the Quickstep. The evidence makes out three separate signals of a single whistle, each by the Newport, none of which were answered by the Quickstep. This only aggravates the fault of the Newport.

I am satisfied, on the proofs, that the Quickstep made no sheer to starboard whatever, across the bows of the Newport, but kept her course, in so far as the load she had and the tide would allow, towards her objective point in Brooklyn. As regards any effect which her load and the tide from the East river may have had upon her, she was in full view from the Newport. The effect of the tide on a small tug, so loaded, was or ought to have been known to the Newport, and, if the action of the tide, striking the port bow of the barge on the port side of the Quickstep, as they entered such tide, produced a deflection of the Quickstep and her tow to the starboard, which the Newport mistook for, and now calls, a sheer, this was a movement which the Newport could have foreseen, and could have guarded against by not allowing herself to approach so close to the Quickstep.

If there was any slowing or stopping of the engine of the Quickstep, when she was directly under the bows of the Newport, such a movement cannot be regarded as a fault. Those in charge of a small tug may well lose their self-possession, and not act with coolness or make exactly the right manoeuvre, in the moment of peril, when they see their boat about being run over by a steamer many times their size. I do not mean to say, however, that the fact of such slowing or stopping is established, or that, if it were, it would have been a wrong manoeuvre.

There was no deficiency in respect of a lookout, on the Quickstep. It was the business of the Quickstep to keep her course, to the best of her ability, and she did so. It was the business of the Newport, overtaking her, to avoid her.

The suggestion, in the answer that the Quickstep did not exercise proper care, having regard to the size and superior power of the Newport, and having full knowledge of the course to be necessarily taken by her, into and up the East river, ought properly to be reversed in its application. The Newport, being superior in size and power to the Quickstep, and approaching her from behind, and being in ignorance of whether the

Quickstep was going to the Atlantic Basin or up the East river towards Hell Gate, did not exercise proper care. She suffered herself to approach too close to the Quickstep, seeing her plainly ahead, and knowing what the tide was, and how it would affect her, so that, with the speed the Newport had, she could not, when the exigency arose, succeed, by stopping and reversing and changing her helm, in avoiding a collision. The libel alleges, as faults in the Newport, causing the collision, that the Newport did not slacken her speed and reverse her engine and wheels, when approaching the stern of, and overtaking, the Quickstep, when within a proper distance from her for that purpose, and in not exercising proper care, when the persons navigating the Newport had the Quickstep in full view. These faults are established by the evidence.

There is something very obscure in the account given by those on board of the Newport, of the occurrence. They make out, that, having the Quickstep on their port hand, and seeing her sheer to starboard across the course of the Newport, the Newport ported. This would be to follow up the Quickstep, and run into the peril which they claim the Quickstep was inviting. Still further, they claim that a hail was given from the Newport to the Quickstep, urging the Quickstep, when she was presenting in view her starboard side, crossing the bows of the Newport to the starboard, to quicken her speed, and go ahead across the bows of the Newport; and this, while the Newport herself was swinging to starboard, as they claim, on a port helm. All these appearances, and the hail to the Quickstep, are explicable and consistent, on the view, that the Newport, thinking, as her answer says, that the Quickstep was bound up the East river, was herself rounding gradually to port, to breast against the effect of the ebb tide on her port bow, and to head up the East river, and that she mistook this gradual rounding on her own part, for a sheer of the Quickstep to starboard, and then saw that a more rapid forward movement of the Quickstep would aid in causing the Newport to go clear to port under the stern of the Quickstep, and so gave the hail to the Quickstep to go ahead faster. If the Newport were in fact swinging to starboard on a port helm, with the Quickstep crossing ahead from port to starboard, a hail to the Quickstep to go ahead to starboard faster, seems quite out of place. The more natural hail would seem to have been, for the Quickstep to starboard and stop, and get out of the way to the port side, while the Newport was sheering to starboard on a port helm.

There must be a decree for the libellants, with costs, with a reference to compute the damages.

[NOTE. The owners of the barge towed by the Quickstep libeled the latter vessel for the damage suffered by them in the collision. The court held in this case, as in the one above, that the Quickstep was without blame. Libel dismissed. Case No. 8,909.]

Case No. 10,186.

NEWPORT & C. BRIDGE CO. v. UNITED STATES.

[3 Am. Law Rec. 19.]

Circuit Court, S. D. Ohio. 1874.[1]

CLAIMS AGAINST THE UNITED STATES — LIABILITY FOR COMPELLING CHANGES IN BRIDGES.

[1. By act of March 3, 1869 (15 Stat. 347), congress authorized the Newport & Cincinnati Bridge Company to construct a bridge across the Ohio river on certain conditions as to length and height of spans, etc. While the bridge was in course of construction, congress, by the act of March 3, 1871 (16 Stat. 572), materially changed these conditions, but authorized the company to sue the United States for the purpose of determining the question of any liability on its part in consequence of such changes, and directed the court, in case it found a liability to exist, to ascertain the amount and necessary cost and expenditures "reasonably required to be incurred in making the changes" directed. *Held*, that this gave no right to recover the amount of damages for which the company became liable by reason of the breach of a contract with a third party for furnishing stones, which breach was a necessary result of the change in the plans.]

[2. Quaere: Whether the original act prescribing the conditions upon which the bridge might be built was in effect a contract between the United States and the bridge company, so that an arbitrary change in the conditions prescribed would render the United States liable in any sum whatever.]

This was a bill in equity filed under authority given by the act of congress of March 3, 1871, upon the following case: By joint resolution of congress of March 3, 1869, the consent of congress was given to the erection of a bridge by plaintiffs across the Ohio river, between Newport and Cincinnati, upon condition that its span over the main channel should be not less than four hundred feet long, from pier to pier, and in all other respects according to the conditions and limitations of the act of July 14, 1862 [12 Stat. 569], to establish post roads, regulating bridges across the Ohio river above the mouth of the Big Sandy river, but reserving the right to withdraw the assent thereby given in case the free navigation of the river should at any time be substantially and materially obstructed by the bridge to be erected under the authority of that resolution, or to direct the necessary modifications and alterations of it.

The plaintiffs proceeded to erect their bridge upon the plan of a draw-bridge, seventy feet high above low-water mark, and progressed therein during the years 1869 and 1870, until they built all the piers to nearly the height contemplated by their span; had in the main completed their approaches and placed their iron superstructures upon some of the shore spans, but not over the main channel. The

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[1] [Affirmed in 105 U. S. 470.]

work was suspended by the act of March 3, 1871 (16 Stat. 572, 573), which made it unlawful to proceed in the erection of the bridge unless the bridge should be so constructed that the channel span of the bridge should have under it a clear headway at low water of one hundred feet below any point of the span; dispensed with a draw, and required all other spans over the river at low water to have a clear headway of not less than seventy feet above low-water mark. The act further provided that after the bridge should have been completed according to its requirements, that it should be lawful for the company to file its bill in equity against the United States in the circuit court of the United States for the Southern district of Ohio, and full jurisdiction was conferred upon that court to determine—First, whether the bridge according to the plans on which it has progressed at the passage of this act has been constructed so as substantially to comply with the provisions of law relating thereto; second, the liability of the United States, if any there be, to the said company, by reason of the changes by this act required to be made. And if it shall determine that the United States is so liable, and that said bridge was so being built by them, the said court shall further ascertain and determine the amount and necessary cost and expenditures reasonably required to be incurred in making the changes required in said bridge and its approaches. The act further gave the right of appeal to either party to the supreme court, but provided that no money should be paid until the supreme court should render final decree in favor of the company. The plaintiffs made the changes and completed the bridge according to the requirements of the act, and in their bill allege that they expended in making such changes, including interest claimed, the sum of $350,791.95. The bill further alleges that the company has become liable to G. A. Smith & Co. for breach of contract with them for stone work, by reason of the changes required, which is claimed to be $206,658.53.

The bill prayed for a decree against the United States for the amount actually expended, and for such damages as might be found due to G. A. Smith & Co. To this bill the district attorney filed a general demurrer, and also a special demurrer to the damages claimed by Smith & Co.

Judge Johnston opened the argument for the United States, making the following points: First. Passing by for the present the reserved right of congress to withdraw their assent or modify the bridge, the bill presents the very common case of parties who have suffered loss and inconvenience as a necessary consequence of the progress of public improvements—with this shade of difference, that these sufferers had an alternative by which, if they had been wise, they would have avoided both loss and inconvenience. None of their private property was taken for the public use. None of their property suffered physical damages at the hands of the United States; and we maintain, both on principle and authority, that they have no claim to relief. Second. By the reserved right of congress to withdraw their assent or modify the bridge, the complainants were put fairly on the lookout for their own safety. The reservation was a part of the charter under which they built; and the right of congress to withdraw was as fully secured by the charter as the right of the complainants to build. They incurred the loss and inconvenience, whatever it was, with their eyes open, and have no right to complain. Third. The right to withdraw the assent of congress or modify the bridge was a legislative right, inherent in congress, by their power to regulate commerce, and was secured to them by the terms of the charter; and no judical determination was required, prior to the change. Fourth. The act of March 3, 1871, confers no rights on these complainants which they did not possess without it. It simply opens the doors of this court and lets them in, to show, if they can, that they have rights arising out of the acts of congress in the premises.

Judge Stanley Matthews, in behalf of the company, claimed that the demurrer raised three questions: First, the jurisdiction of the court; second, the lawfulness of the original bridge; third, the liability of the government.

As to the jurisdiction, he claimed that, as to the persons and subject-matter, the act of congress was expressed, and its power to confer it undoubted. That no objection could be made on the ground that the questions involved were political, and not judicial, or on the ground that no rule of decision was prescribed, because the authority to bring the suit was a conclusive admission by the government that the question of its liability was properly a judicial one, and that the court was authorized to decide on it, on the principles of equity.

As to the lawfulness of the bridge as originally proposed, that was admitted by the demurrer, and was not argued.

As to the liability of the United States, it was contended: First. That the resolution March 3, 1869, giving the assent of the United States to the construction of the original bridge, acted on by the company, became an executed contract, under which a right of property became vested, being the franchise and right to build and use the bridge as authorized, upon the faith of which the investment had been made. That the act of congress of March 3, 1871, violated this contract in three particulars: First. It withdrew the assent of congress before the bridge was finished, contrary to the terms of the resolution, and before it was or could be ascertained as a matter of fact that the bridge was a material and substantial obstruction to navigation. Second. It not merely withdrew

its assent, which was the only right it had reserved, but went much further, and made the bridge, so far as constructed, a nuisance, and declaring its completion and use illegal, and so putting the company in much worse condition than if no such assent had ever been given. This breach of contract on the part of the United States has violated the rights of the company in three particulars: First. By taking its property without due process of law. Second. By taking its property for public use without just compensation. Third. By making the company liable, by a deprivation of its property, as guilty of a public nuisance, by an ex post facto law.

Warner N. Bateman, Dist. Atty, argued: First. That if, as claimed by the plaintiffs' counsel, the operation and effect of the law of 1871 was to deprive plaintiffs of their property without due process of law; to take it without compensation, and to make plaintiffs' proceeding unlawful by an ex post facto law, the act was void, as a plain infraction of three distinct provisions of the federal constitution. It imposed no obligation upon plaintiffs, and their changes of their bridge according to its requirements was wholly a voluntary act. Second. The states of Ohio and Kentucky hold the title to the bed of the river and the entire jurisdiction over it, subject only to the power of congress to regulate commerce upon it, and the bridge company derives its franchise to build and maintain their bridge from them, and the title to their whole property from them and private citizens; it derives nothing from the United States. Third. That authority to regulate commerce is vested in congress, is a mere legislative power derived from the constitution, to be exercised wholly in its discretion as to the terms and occasions of doing so, and cannot be made the subject of contract of any description; but the power of alteration and repeal is as absolute as that of enactment; and that therefore congress neither can make, nor has it in the act of 1869 made, any contract with the company in restraint of this unconditional right of amendment or repeal which is implied in the act itself as a part of its conditions. Fourth. That included in this authority to regulate commerce is the power and duty to protect the public right to the commercial use of navigable rivers; to remove all obstruction, and to determine what shall constitute an obstruction; that this is a police power to be exercised whenever in the judgment of congress the protection of navigation demands. Fifth. That whether the plaintiffs' bridge, on the plan it was being built, was or was not an obstruction to navigation, so far as it was a fact to be considered by congress, was a legislative and not a judicial question, and the decision of congress was final. Sixth. That congress could order the removal of plaintiffs' bridge, or a modification thereof, without making the government liable for compensation.

Upon the conclusion of the argument, Justice SWAYNE, presiding, rendered substantially the following decision:

It is important to avoid delay in this case, inasmuch as the act requires that in any event it should go to the supreme court, and that he would, therefore, dispose of it according to his impressions as they now exist.

He recognized the importance of the consideration that, inasmuch as the case had to go to the supreme court, it was desirable to make such disposition of the demurrers as would avoid the delay and expense of going there, possibly, twice, and it had controlled him, in part, in the conclusions he had reached. The special demurrer covers that portion of the damages alleged arising out of the claim of Smith & Co. The bill alleges that the plaintiffs contracted with Smith & Co. for the stone-work of the bridge upon the plans of building allowed by the act of 1869, and that in consequence of the change in the plan required by the act of 1871, Smith & Co. claim damages to the amount of over $200,000 of the plaintiffs for a breach of contract as to the kind of work provided for, resulting from the change in the plan of bridge; and the bill claims that these damages, if allowed to Smith & Co., should be paid by the United States as a part of the reasonable necessary costs of the change. He said as to the question presented he had no doubt. Upon no rule of damages in like cases could it be allowed. Upon breach of contract for sale of property, the party claiming it is entitled to the profit of it, to be ascertained by the difference between market value and contract price. But he had never heard of a case in which it had been held that he was entitled also to recover either profits or losses arising out of contracts made upon the faith of the contract broken. But he said the rule of damage is fixed in the law, and limited to the actual and necessary cost and expenditure to be incurred in making the change required. His mind was clear that the damage claimed could not be allowed, and would therefore sustain the special demurrer thereto. Proceeding to consider the general demurrer, he said that the power to regulate commerce was vested by the constitution in congress, and that they were the sole judges as to mode and occasion of its exercise, and that no judicial determination was necessary in any case of such exercise to enable congress to act. The power of congress was a perpetual one, derived from the constitution, and could be exercised as often as congress might in its discretion do so, and that it could both enact and repeal without condition.

There was another proposition that was likewise clear, that congress, in the exercise of this power, had the right to order the removal of all obstructions to the navigation of the river, and to determine what should constitute such an obstruction. As was said by the court in Gilman v. Philadelphia, 3 Wall. [70 U. S. 713]: "Congress may interpose by

general or special laws whenever it shall be deemed necessary. It may regulate all bridges over navigable waters, remove offending bridges and punish those who may hereafter erect them. Within the sphere of their authority, both the legislative and judicial powers of the nation are supreme." He had no doubt of its power to order the removal of any bridge across a navigable stream, and the legislation in this case was constitutionally competent. Whether it was wise or just, it was for congress to determine. The courts could not revise their judgment in that respect. As to the liability of the government to pay damages for the removal of property, congress might order to be abated as a nuisance. He knew of no case in which it had been allowed, nor did he, indeed, remember any case in which such liability had been claimed. So far as he knew, when the supreme court ordered the removal of the Wheeling bridge as an obstruction to navigation, no one even suggested that the plaintiff or the government, whose law required it, were liable for damages; and in the case of Gilman v. Philadelphia [supra], such liability was not considered or mentioned. There was no doubt that congress could order the removal of obstructions which it declared to be nuisances without any legal obligations on the part of the government to make compensation. If this was such a case merely, he would have no hesitation in sustaining the demurrer.

But this case presents a feature that is novel, and of first impression. Before building their bridge, plaintiff applied to congress for instruction as to the mode in which it should be done. In the joint resolution of 1869, this mode was prescribed, and upon the faith of that act the plaintiff proceeded to erect its bridge according to its terms. So far as it appears it acted in good faith. Before having completed their bridge, however, congress passed the act of 1871, by which it prohibited the completion of the bridge upon the plan it had before authorized. It would be unsafe for any company to proceed to erect a bridge across a navigable stream, without first making an application to congress for directions as to its plan, and he believed that such had been, and was now, the uniform practice.

It is claimed on behalf of the plaintiffs' counsel, with great plausibility, that the act of 1869 constitutes a contract between the bridge company and the United States, by which the bridge company should be entitled to complete and maintain its bridge upon the plan permitted by that act, until experience shall have shown that the bridge was a substantial obstruction to the navigation of the river. It is insisted, on the other hand, with great force, by the counsel for the government, that congress retained, as a necessary incident of its legislative power, the right of unconditional repeal at its discretion, and that this right is implied in every exercise of this power, including the act in question, and passed as a necessary condition with it, and that it could not qualify or restrain its right in that respect by any contract. Upon these two propositions a great array of authorities and an exhaustive discussion has been presented. My own impressions are against the claim of the plaintiff in this respect; but they may be perhaps altered upon a fuller representation of the case upon its merits, as shown in final trial. The question is one upon which eminent counsel might form opposite opinions. In view of this doubt, and the possibility that the other members of the supreme court might disagree with me, and that I might, indeed, change my own views, I think it is a better administration of justice in the case to permit the case to proceed, and have the question presented to the supreme court fully upon the whole merits of the case. I shall, therefore, overrule the general demurrer, and give leave to answer.

[On appeal to the supreme court, the decree of this court was affirmed; Justices BRADLEY, FIELD, and MILLER dissenting. 105 U. S. 470.]

NEWSOM (JONES v.). See Case No. 7,484.

NEWSOME (PERRY v.). See Case No. 11,-009.

Case No. 10,187.

NEWSOM v. WELLS et al.

[5 McLean, 21.] [1]

Circuit Court, D. Ohio. Oct. Term, 1849.

EXECUTORS AND ADMINISTRATORS—LAND SUBJECT TO DECEDENT'S DEBTS—LAWS OF OHIO.

Lands, by the laws of Ohio, are subject to the payment of a deceased person's debts, and where such sale has been made, under an order from the proper court, by the administration, the court will not disturb the rights of innocent purchasers, after the lapse of thirty years.

In equity.

OPINION OF THE COURT. This case is submitted to the court on bill and answer. The complainants are children and devisees of Richard Newsom, deceased, of Steubenville, who died in 1809, having an equitable interest in Lot No. 4, in said town, the legal title being held in trust for him by Bazaleel Wells. His widow was appointed administratrix with the will annexed. On petition of the administratrix in the common pleas Newsom's interest was sold to pay debts, and an order made confirming the sale and directing Wells to convey to the purchasers, Carroll and Kells. This order was made in 1812. The lot has since been subdivided and sold to numerous purchasers who are made defendants. The bill is filed to set aside these proceedings, and declare the trust in favor of the complainant's devisees alleging their disability by reason of infancy and non-residence, until within twenty-one years before suit brought. The answer admits the

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

original trust in Wells, Newsom's equitable estate, but sets up the order of sale to pay debts, denies the disabilities, and insists on the lapse of time and their character as bona fide purchasers, to protect their title against any irregularities in the proceedings. Their possession commenced in 1812. Bill filed September 9th, 1845, 33 years after the sale. That the court of common pleas had a general jurisdiction to subject lands of deceased persons to pay debts, is undoubted. Under such a proceeding the lot in controversy was ordered to be sold. No want of jurisdiction in the court, or irregularity in the proceeding, is averred in the bill. The devise of the ancestor, whether expressed in the will or not, did not withdraw the land from the rights of creditors. There seems to be no ground to set aside the proceedings in this case, more than 30 years ago, except that the heirs and devisees were infants. The bill must be dismissed.

Case No. 10,188.

NEWTON'S CASE.

[2 Cranch, C. C. 467.] [1]

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

INSOLVENCY — TRIAL OF ISSUE — SHOWING AS TO CREDITOR'S INTEREST—AMENDMENT OF ALLEGATIONS AFTER JURY SWORN—FORM OF JUDGMENT AGAINST DEBTOR.

1. Upon trial of the issue upon allegations filed against an insolvent debtor, it is incumbent upon the persons filing the allegations, to show that they are creditors of the insolvent.

2. After the jury is sworn, the court will not permit the allegations to be amended by inserting the name of another creditor.

3. The judgment upon verdict against the debtor, is, "that he be precluded from any benefit under the act entitled," &c.

[Cited in McClean v. Plumsell, Case No. 8,693.]

Walter Newton had applied to one of the judges of this court on the 19th of February, 1822, to be discharged under the insolvent act of the 3d of March, 1803 (2 Stat. 237), and obtained his discharge on the 4th of March, 1822.

Mr. Key, in behalf of Ann Key and Bernard Spaulding, claiming to be creditors of Newton, on the 17th of February, 1824, filed allegations against him, charging: 1. That by a deed to Clement Newton, dated December 5th, 1821, he had conveyed away a large part of his property with intent to defraud his creditors. 2. That by the said deed he had assigned and conveyed the property therein mentioned, with intent to give a preference to the said Clement Newton as a creditor or surety of the said Walter Newton. 3. That he had disposed of a cart with intent to defraud his creditors.

After the jury was sworn to try the issues joined upon these allegations, Mr. Jones, for the defendant, objected that Mrs. Key and Mr. Spaulding were not creditors.

Mr. Key contended that it was too late to make the objection after the jury was sworn.

Mr. Jones. The proceeding up to the time of joining issue is ex parte. It is a summary proceeding, and the forms of pleading are dispensed with. The objection as to the time of calling upon the plaintiffs to show their right to question the validity of the defendant's discharge, rests only upon the technical rule of formal special pleading. But such technical rules do not apply to this summary trial. The plaintiffs must show their right to file allegations, and to call upon the debtor to answer them.

THE COURT (THRUSTON, Circuit Judge, contrà) decided that the plaintiffs must, as part of their title to litigate, show that they were creditors of the debtor at the time of his discharge. The plea of not guilty, obliges the plaintiffs to make out their right to sue.

Mr. Key then asked leave to insert, in the allegations, the name of another creditor; one whose name had been returned as a creditor in the debtor's schedule.

THE COURT (MORSELL, Circuit Judge, contrà) was at first inclined to grant the leave, but upon further argument and reflection, refused. (THRUSTON, Circuit Judge, contrà.)

Mr. Key, saying that he did not anticipate such an objection, asked for time till to-morrow to show that Mrs. Key and Mr. Spaulding were creditors of Newton at the time of his discharge.

THE COURT (MORSELL, Circuit Judge, contrà) granted Mr. Key's request.

The jury, on the next day, found the defendant guilty, and the COURT ordered the following entry to be made on the minutes: "Whereupon, it is considered by the court, that the said Walter Newton be precluded from any benefit under the act entitled, 'An act for the relief of insolvent debtors within the District of Columbia.'"

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

NEWTON (BEALL v.). See Case No. 1,164.

NEWTON (CAMMEYER v.). See Cases Nos. 2,344 and 2,345.

Case No. 10,189.

NEWTON et al. v. CARBERY.

[5 Cranch, C. C. 626.] [1]

Circuit Court, District of Columbia. March Term, 1840.

WILLS—UNDUE INFLUENCE—SOUNDNESS OF MIND OF TESTATOR — EVIDENCE — APPEAL FROM ORPHANS' COURT—VALIDITY OF LEGACY.

1. The court, in forming its opinion as to the soundness of mind of a testator, will look rather to the facts upon which the witnesses may have

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

formed their opinions, than to the opinions themselves, but will form its opinion from the whole evidence, consisting of facts and opinions.

2. The influence which will set aside a will must be undue influence. The influence of the general doctrines of the church, of which the testator was a member, is not such undue influence; nor can the holding of such doctrines be adjudged to be such delusion as will vacate the will. The court has no jurisdiction to decide whether a doctrine held by any particular religious sect will not avoid the will.

3. Upon an appeal from the sentence of the orphans' court, sustaining a will, this court has no jurisdiction to inquire into the validity of any particular legacy bequeathed by the will.

Appeal from the sentence of the orphans' court for the county of Washington, which overruled a caveat, and admitted the will to probate.

On the 12th of February, 1839, the appellants filed, in the orphans' court, a caveat against the will of Eloysa Mattingly, which was, on that day, offered for probate, by the appellee, Lewis Carbery, who is named therein as sole executor. The will was dated on the 17th of December, 1838.

The caveat states that the appellants are the next of kin and legal heirs and representatives of the deceased, and are entitled to all her estate, real and personal, and to administration of her personal estate; and they object to the probate of the will: (1) because the supposed testratrix was not "of sound and disposing mind, and capable of executing a valid deed or contract." (2) That she made it under undue influence operating upon her mind; and that it was not her own free will and consent. (3) That the bequests and devises therein named, or many of them, cannot be carried into effect, and are null and void.

By the will, the testratrix bequeathes small legacies, varying from five to fifty dollars, to eleven of her relations, including the appellants; she then bequeathes to the Rev. William McSherry, president of the Georgetown College, $100, to be distributed equally among the clergy of the said college for the purpose of having masses offered up for the repose of her soul. She then makes the following bequests, namely: Her sideboard to the Rev. Mr. Lucas, pastor of Trinity church, for the use of the said church. To the pastor of the Catholic church at Newtown, in St. Mary's county, ten dollars, one-half to go to the poor of that congregation and the other for masses for her soul. She then gives ten dollars each to the archbishop of Baltimore; Bishop Fenwick of Boston; to the pastors of Trinity church in Georgetown, (where she resided and died;) to the Rev. S. L. Dubuisson, and eighteen other priests and societies, &c. On the 15th of February, 1839, the appellee appeared and denied the allegations of the caveat, and asserted the validity of the will; to which the appellants replied, affirming their allegations, and joining issue upon the facts, and praying the orphans' court to decide the same; whereupon, the court proceeded to take the depositions of the witnesses; and thereupon sustained the will, and admitted it to probate; from which sentence the caveators appealed to this court.

W. L. Brent, for appellants, cited the testamentary law of Maryland of 1798, c. 101, Subc. 1, § 3; the book called "Principles of the Roman Catholic Religion," pp. 43, 44, 184; Dorsey, Test. Law, 45, note, and p. 142; Davis v. Calvert, 5 Gill & J. 269; Huguenin v. Baseley, 14 Ves. 287, 288; Hale v. Hills, 8 Conn. 39; 6 Wheeler, 526, 527; Norton v. Relly, 2 Eden, 286; Ridgeway v. Darwin, 8 Ves. 66, 67; Ex parte Cranmer, 12 Ves. 450–452; Barker's Case, 2 Johns. Ch. 232; Mary Morris' Will, [Griffiths v. Robins], 3 Madd. 192; 2 Bl. Comm. (Chitty's note) 497; 3 Starkie, Ev. 1702, note 1, 708; Swinb. Wills, pt. 2, § 5; Clark v. Fisher, 1 Paige, 171; 2 Har. Dig. p. 587; the book called "True Piety," pp. 179, 181, § 12; Id. p. 182, § 6; Id. p. 184, § 8, art. 5; Id. p. 186, § 10.

Mr. Bradley, contra, cited Harrison's Case, 2 Phillimore, Ecc. 291, 292, 294, 320, 326, 329, 340; Morice's Will, 5 Ecc. 211, 223; Davison v. Rowan [Case No. 6,141]; Stevens v. Vancleve [Id. 13,412]; also a sermon by —— in London, that the priests have no power to relieve from purgatory; Prin. Rom. Cath. Religion, p. 284, art. 5; Id., p. 184, art. 2, 5; Dorsey, Test. Law, 46; Crampton's Case.

CRANCH, Chief Judge. 1. Upon the first point, the soundness of mind of the testatrix, the opinions of the witnesses differed very much, according to the side on which they were produced. But there is nothing strange in this. In forming opinions, the mind is insensibly biased by its passions and prejudices, its interests and its associations. The influence of the interest of a friend, or of the society of which the witness is a member, are almost as strong as original self interest; and it is more insidious, because we are not so careful to guard against it, inasmuch as it bears the semblance of a virtue. An opinion, also, has less weight than a fact, as it can seldom be the subject of a prosecution for perjury. In forming an ultimate opinion, therefore, upon the question of soundness of mind of the testatrix, the court must look rather to the facts upon which the various opinions of the witnesses are formed, than to the opinions themselves. The fact that the witness formed the opinion from the facts stated, is itself a fact proper for the consideration of the court, as evincing the sincerity of the opinion; but the court must form its opinion from the whole evidence, consisting of facts and opinions.

The testimony is voluminous, and more contradictory as to opinions than as to facts. It appears from the evidence, that the testatrix was old, and singular in her manners and dress; penurious and miserly; and a religious devotee of the Roman Catholic

Church; that she had always managed her own affairs, and particularly her money matters herself, with much worldly prudence; lending her money and receiving the interest with great punctuality, until three or four days before making her will, when she gave a power of attorney to Mr. Carbery to transact her business, and afterwards appointed him her executor. That she was eighty-seven years old, and her mind, perhaps, in some degree enfeebled by age, and by her disease, which was dropsy in the chest; a disease not directly affecting the intellect. That she had, ten years before, made a will containing a similar disposition of her estate, and bequeathing the residue to charitable purposes, after the payment of small legacies to her relatives, and to certain priests, but omitted to dispose of the residue, which was the principal part of her estate. It was this will which she desired to alter, and which she revoked by the present will. The principal facts relied upon to prove her insanity are—First, that she was very old; second, had many peculiarities, and was very singular in her manners and appearance; third, that her mind seemed to dwell upon her riches, and money affairs, and she often spoke of them; fourth, that she was a woman of strong passions and prejudices; fifth, that she changed her mind often in respect to her will; sixth, that she was penurious, and refused to buy medicine for a colored child, whose mother she had hired out; seventh, that she was very suspicious of her servants, and some of her relatives; eighth, that she did not take her medicine regularly, sometimes taking it too often, sometimes not often enough, and some times not at all; ninth, that she was quarrelsome about trifles; tenth, that she often denied herself the necessaries of life, and wore very mean and sordid clothes, (although she had property enough,) and said she was afraid she would come to want; eleventh, that she did not buy sufficient provisions for her servants; twelfth, that she said that in the preceding summer, she buried eight hundred or one thousand dollars of bank-notes in the earth, which got so wet that "it took two or three days to spread it over her bed and dry it." The testimony, on both sides, clearly shows that the testatrix was extremely penurious and miserly; that her ruling passion was the acquisition of wealth; and it is very apparent that the peculiarities in her manners, appearance, and dress, her denial of the necessaries of life for herself and her servants; her suspicious and quarrelsome disposition, may all be traced to that source, and are evidence of that ruling passion only; not of mental insanity. The story of her having buried bank-notes in the earth, if true, may, perhaps, be accounted for by the same ruling passion; but the absurdity of the act, which would make it evidence of insanity, discredits the fact itself. It is not probable that she did the act; or, if she did, it might have been upon some sudden alarm, or fear, and as a temporary expedient. The witness, who relates her conversation upon that subject, does not state what reason she gave, if any, for an act of such apparent folly. The fact is not corroborated by any other evidence; and the fact stated as part of the story, that "it took two or three days to spread it over her bed and dry it," seems quite as improbable as the fact of burying it in the garden. The fact that she altered her will several times, is not, of itself, evidence of insanity; on the contrary, the consistency of the several wills with each other, as to the general plan of disposition of her property, shows that the subject occupied much of her thoughts for many years, and that her mind was in a sound, disposing state. The will next preceding the last was imperfect, and would have left her intestate as to the bulk of her estate. That she wished to change it, is, therefore, no evidence of intellectual insanity. But it is said that she was a woman of strong passions and prejudices, and, therefore, she was not competent to make a valid disposition of her estate. It is true that our passions and prejudices are apt to warp our judgment; but they enter into our daily transactions, more or less, and mingle with our motives; and it is impossible to draw the line beyond which they produce mental insanity. The existence of such passions and prejudices is not, of itself, evidence of such insanity.

These observations, we think, apply to all the facts which the witnesses against the will have adduced as the foundation of their opinions; and, without resorting to the opposite testimony, we think the facts not sufficient to justify the opinion expressed. They do not, in our judgment, show a prima facie case of testamentary incapacity; but, if they did, they are greatly outweighed by the facts stated by the witnesses in favor of the will, showing that she had, ten years before, made a will containing a similar disposition of the principal part of her estate; that she had continued to manage her affairs with prudence and great economy; that she had lent out her money, demanded and received the interest with punctuality; taken the securities; hired out her own servants, and received their wages; and provided for the wants of her family; and that in these transactions she evinced great acuteness of mind; that this state of mind continued quite up to the 17th of December, the date of the will; and that when she executed it she declared, in the presence of the subscribing witnesses, that she had read every word of it, and that it was just as she wished. If the case were to be decided by the opinions of the witnesses, we think those in favor of the will greatly preponderate; without considering that of Mr. Lucas, of whose legal competency we doubt, notwithstanding the instrument of writing executed by him as a renunciation or release of his interest under the will. We

are, therefore, of opinion, that at the time of making this will, the testatrix was of sound and disposing mind, and capable of executing a valid deed or contract.

2. The second objection to the will is, that it was made by the testatrix under undue influence operating upon her mind; and under mental delusion. There is no evidence in this cause, of any influence whatever, exercised over the testatrix, by any person, in relation to this will, other than the influence of the general doctrines of the church of which she was a member, as they were inculcated by the priests. It was contended that the testatrix bequeathed the greater part of her estate to the church, and the orphan asylum connected with the church, under a belief that by thus giving her property she would be entitled to the prayers of the church, which would relieve her from the pains of purgatory. That this was not an article of faith of the church, but a doctrine inculcated by the priests, and founded upon the following clause of the prayers for the church (in page 44 of the book called "True Piety"): "Finally, we pray thee, O Lord of Mercy, to remember the souls of thy servants departed, who are gone before us, with the sign of faith, and repose in the sleep of peace; the souls of our parents, relations, and friends; of those, who, when living, were members of this congregation, and particularly of such as are lately deceased; of all benefactors, who, by their donations, or legacies to this church, witnessed their zeal for the decency of divine worship, and proved their claim to our grateful and charitable remembrance." That this "grateful and charitable remembrance," as explained by the priests, consists of prayers and masses of the church for the repose of the souls of the departed; and that these prayers and masses will relieve or mitigate the pains of purgatory. That it is true, as stated in the book above quoted (in page 185, § 5), "that Catholics" of the Roman church, "hold that such souls, so detained in purgatory, being the living members of Jesus Christ, are relieved by the prayers and suffrages of their fellow members here on earth; but where this place is, or of what nature or quality the pains are, how long souls may be there detained, in what manner the suffrages, made in their behalf, are applied; whether by satisfaction, or intercession, &c., are questions which do not appertain to faith." That it is no article of faith, that indulgences can be purchased; nor that the prayers of the church will relieve a soul from purgatory; and that she was, therefore, under a delusion. There is no evidence that the priests taught the testatrix any other doctrine, upon this subject, than that which is stated in the book above cited, as the general doctrine of the church. Whether that doctrine be true or false, this court has no jurisdiction to decide. If it was a delusion, it was a delusion common to all the members of that church, and would equally avoid the will of every Roman Catholic who should bequeathe, or had bequeathed, a legacy for masses for the repose of his soul. This court, therefore, cannot say that the will was made under undue influence or delusion.

The third ground of caveat, stated in the record, is, that the bequests and devises, in the will mentioned, or many of them, cannot be carried into effect, and are null and void. This objection involved questions, of which the orphans' court had no jurisdiction, and which this court cannot decide, upon this appeal, which is only as to the validity of the will as an instrument.

The sentence of the orphans' court, that the will be admitted to probate, is affirmed with costs.

THRUSTON, J., absent.

[For proceedings on demurrers to a bill to set aside certain legacies contained in this will, see Case No. 10,190.]

Case No. 10,190.

NEWTON et al. v. CARBERY.

[5 Cranch, C. C. 632.][1]

Circuit Court, District of Columbia. March Term, 1840.

WILLS — CONSTRUCTION — MARYLAND BILL OF RIGHTS—LEGACY IN AID OF CHURCH—CHARTER TO CERTAIN PERSONS—PRESUMPTIONS—FAILURE TO ACT UNDER IT.

1. A legacy to, or for the use or support of a minister of the gospel as such; or to, or for the use or support of a religious sect, order, or denomination, is void, by the bill of rights of Maryland.

2. A devise to go in aid of a new Catholic church, then building in Georgetown, is void for uncertainty, as well as by the bill of rights.

3. A charter granted to certain persons therein named, is to be presumed, primâ facie, to have been granted at their instance, and to have been accepted by them; but such presumption is rebutted by evidence that no proceedings were ever had under the charter, although seven years had elapsed since its date.

This was a bill in equity [by Newton and others, next of kin and heirs of Eloysa Mattingly, against Lewis Carbery, executor of said Eloysa Mattingly] to set aside certain legacies in the will of Mrs. Mattingly, and for a distribution thereof among her next of kin. The defendant demurred to the bill as to all the legacies therein sought to be vacated, except the legacy of one half of the residue to "the Georgetown Free School and Orphan Asylum;" as to which he answered, affirming the existence of the school as a corporate body. This demurrer and answer were admitted to be filed for the purpose of taking the opinion of the court, as to the validity of the legacies to the priests, &c., with leave to amend the bill and answer, &c.

The testatrix, after bequeathing sundry

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

small legacies to her next of kin and heirs at law, says: "1. I will that my executor pay to the Rev. William McSherry, president of Georgetown College, one hundred dollars, to be distributed equally among the clergy of the said college, for the purpose of having masses offered up for the repose of my soul. 2. I will that my sideboard be given to the Rev. Mr. Lucas, pastor of Trinity Church, for the use of said church. 3. I will to the pastor of the Catholic Church at Newton, in St. Mary's county, ten dollars; one half to go to the poor of that congregation, and the other for masses for me. 4. I will that my executor pay to the Archbishop of Baltimore, ten dollars. 5. To Bishop Benjamin Fenwick, of Boston, ten dollars. 6. To the two pastors of Trinity Church, of this place, ten dollars each. 7. To the Rev. S. L. Dubuisson, ten dollars. 8. To the Rev. William Matthews, ten dollars. 9. To the Rev. Mr. Donelson, of the city of Washington, ten dollars, to go in aid of the new Catholic church, now building in said city. 10. To the Rev. John McElroy, ten dollars. 11. To the Rev. Mr. Detheux, of Missouri, ten dollars. 12. To the Rev. Joseph Carbery, of St. Mary's county, ten dollars. 13. To the Rev. Mr. Mudd, ten dollars. 14. To the Rev. Mr. N. Coombs, ten dollars. 15. To the Sisters of Visitation of Georgetown, District of Columbia, ten dollars. 16. To the Carmelite Nuns of Baltimore, ten dollars. 17. To the Catholic Bishop of Ohio, ten dollars. 18. To the Convent of Dominicans, in Bardstown, Kentucky, ten dollars. 19. To the pastors of Trinity Church, in this place, for the use of the poor of that congregation, ten dollars. 20. To the Sisters of Charity, of St. Vincent's Asylum, in Washington City, ten dollars. 21. To the pastor of St. Joseph's church, St. Mary's county, twenty dollars; one half for the poor of that congregation, and the other half for the use of that church. 22. To the pastor of St. Aloysius' Church, of said county, twenty dollars; one half for the use of the poor of that congregation, the other half for the use of that church. 23. I will to the pastor of St. Joseph's Church aforesaid, and to his successors, the vestments, chalice, and mass-book, which I own in that county, for the use of that church. 24. I will and bequeathe that my negro woman Matilda Gordon, and her child Mary Ann Elizabeth, shall be free at my death. 25. And finally, I will and bequeathe, that after all the aforenamed legacies and bequests shall have been paid, and all necessary expenses in settling up my estate, including commission and all other legal charges, the remainder of my estate shall be applied as follows, to the two following objects, to wit: one half of said remaining part, to go in aid of the erection of a new Catholic church in Georgetown; the amount for that object to be put out at interest, or laid out in some safe stock bearing interest, as my executor shall think best, until said church shall have been begun; the other half to go as an endowment, in aid of the Georgetown Free School and Orphan Asylum, heretofore kept near Trinity Church, which, for want of funds, has, for a time past, laid in a state of inactivity. It is my desire, that the said school, having a charter conferring many benefits and rights, as it has, shall be continued and encouraged, and that its influence and effects in doing good by the educating of poor children, and doing all other things as was intended by its charter, should be done, shall be placed upon a permanent footing, and be a blessing, as it should be, to the children admitted into it, a comfort to their parents, and an honor; and a means of sanctifying grace to those who may conduct it. It is my desire and will that the house and lot I now occupy may be either sold or kept, as my executor may think best, as it will fall, probably, within the distribution to be applied to the last two objects named in my will; namely, the building a new church in Georgetown, and the Georgetown Free School and Orphan Asylum."

W. L. Brent and Mr. Marbury, for plaintiffs.

Mr. Bradley, for defendant.

The counsel for plaintiffs cited the bill of rights of Maryland, § 34; the act of congress of March 2, 1833 [6 Stat. 538], incorporating the Georgetown Free School and Orphan Asylum; Dashiell v. Attorney General, 5 Har. & J. 392; and Barnes v. Barnes, in this court, at December term, 1827 [Case No. 1,014].

The counsel for defendant cited 1 Kent, Comm. 286, 312.

[For proceedings on appeal from the orphans' court for the county of Washington, which overruled a caveat, and admitted the will to probate, see Case No. 10,189.]

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

CRANCH, Chief Judge (THRUSTON, Circuit Judge, dissenting). By the declaration of rights, prefixed to the constitution of Maryland, and which was a part of the laws of that state on the 27th of February, 1801, when they were adopted and continued in force in this county, by the act of congress of that date [2 Stat. 103], it is declared in section 34: "That every gift, sale, or devise of lands, to any minister, public teacher, or preacher of the gospel, as such; or to any religious sect, order, or denomination; or to, or for the support, use, or benefit of, or in trust for, any minister, public teacher, or preacher of the gospel, as such; or any religious sect, order, or denomination; and every gift or sale of goods or chattels to go in succession, or to take place after the death of the seller or donor, to or for such support, use, or benefit; and also every devise of goods or chattels to or for the support, use, or benefit of any minister, public teacher,

or preacher of the gospel, as such; or any religious sect, order, or denomination, without the leave of the legislature, shall be void; except always any sale, gift, lease, or devise, of any quantity of land, not exceeding two acres, for a church, meeting, or other house of worship, and for a burying-ground, which shall be improved, enjoyed, or used only for such purpose; or such sale, gift, lease, or devise, shall be void." Under this declaration of rights, it is admitted, in argument, that the legacies numbered 2, 3, 4, 6, 9, 17, 19, 21, 22, and 23, are void, as being made either to some minister of the gospel, as such, or to, or for the use or benefit of some religious sect, order, or denomination, without the leave of the legislature. The legislature, however, is presumed to give leave to the donor to make the gift, when it permits the donee to accept and hold it.

The Sisters of the Visitation of Georgetown, and the Sisters of Charity of St. Vincent's Asylum, in Washington, it is understood, have been incorporated, with powers to take and hold property by devise or bequest. The legacies, therefore, Nos. 15 and 20, are not within the prohibition of the declaration of rights.

We have no evidence that the Carmelite Nuns of Baltimore, or the Convent of Dominicans in Bardstown, in Kentucky, have been incorporated with like powers. The legacies, therefore. Nos. 16 and 18, must be considered as within that prohibition, and, therefore, void.

The legacies Nos. 5, 7, 8, 10, 11, 12, 13, and 14, being bequeathed to the several legatees personally by name, and not to them as ministers, are not within the prohibition of the declaration of rights, and are valid. One of the remaining disputed legacies is No. 1, of one hundred dollars to the Rev. William McSherry, president of Georgetown College, to be distributed equally among the clergy of said college, for the purpose of having masses offered up for the repose of the soul of the testatrix. This is substantially a bequest to "the clergymen of the college," not by name, but as clergymen; for it was only in that character that they could offer up the sacrifice upon the altar, which the mass is supposed to be.

Another of the remaining disputed legacies is, of one half of the residue of the estate "to go in aid of a new Catholic church in Georgetown." This legacy is disputed upon two grounds: 1. Because it is prohibited by the declaration of rights; and 2. Because it is uncertain who is to claim it. We think it void upon one of those grounds, if not upon both. It was intended for the use of a religious sect, order, or denomination; and if the legatee were sufficiently described, it would still be void under the declaration of rights. But the legatee is not sufficiently certain, and therefore, also, it is void.

The remaining disputed legacy is, that the other half of the residue of the estate is "to go as an endowment in aid of the Georgetown Free School and Orphan Asylum," which was incorporated by the act of congress of the 2d of March, 1833, c. 87 (6 Stat. 538), whereby the corporation is authorized to purchase, take, and receive, any lands, or other property, which should thereafter be given, granted, sold, bequeathed, or devised to them, within a certain limit. The corporation was to consist of the persons named in the charter and their successors in office; and vacancies were to be filled from time to time, "according to the mode to be described in the by-laws," which by-laws were to be made by the corporation. They were authorized to appoint and remove all necessary officers, and to prescribe their duties, and regulate their compensation. The annual contributors were to meet in June in every year, and elect nine female managers, whose duties were to be regulated by the by-laws which were to be made by the corporation; but the meetings of the contributors, and the election of the female board of managers, were not necessary to the existence of the corporation, which was to consist of the board of trustees alone. It is, however, contended that the corporation never existed, because the charter never was accepted. It is admitted, in argument, that the persons named in the charter were previously trustees of a school in Georgetown, called "The Georgetown Free School." The presumption, from that fact, is, that the charter was granted at their instance; and the presumption, also, is, that a charter is accepted by those who have applied for it, unless, from the terms of the charter itself, it appears, that some act of acceptance is to be done, to give validity or perfection to the act of incorporation. By the present charter no such act was required. The burden of proof, therefore, rests upon the plaintiffs to rebut these presumptions. In order to do this, they show the minute-book of the proceedings of the board of trustees of the old school, (which existed before the date of the charter,) continued on for four years after that date, that is, until 1837, when their meetings were discontinued. In the minutes of those proceedings, nothing is said of the charter, nor of the asylum, nor of any meeting of the contributors, nor of an election of a board of female managers, nor of any by-law regulating the duties of that board of managers; or prescribing the mode of filling vacancies in the board of trustees. Seven years have elapsed since the date of the charter, and nothing appears to have been done to organize the school and asylum under the act of incorporation.

These circumstances seem to us sufficient to rebut the primâ facie presumption of acceptance, and we must say, that there is not sufficient evidence that the charter was ever accepted, and consequently, that the corporation does not exist, and did not at the death of the testatrix. We think, therefore, that this residuary bequest is also void.

The consequence of this opinion, if correct, will be, that these void legacies will fall into the intestate residuum, to be distributed among the next of kin, according to the statute of distribution.

MORSELL, Circuit Judge, concurred. THRUSTON, Circuit Judge, dissented, and delivered an oral opinion.

NEWTON (HARDON v.). See Case No. 6,054.
NEWTON (HOWE v.). See Case No. 6,771.

Case No. 10,191.

NEWTON v. MUTUAL BEN. LIFE INS. CO.

[2 Dill. 154.] [1]

Circuit Court, E. D. Missouri. 1873. [2]

LIFE INSURANCE—RES GESTAE—EX PARTE AFFIDAVITS AS EVIDENCE.

1. In an action on a life policy, where the issue on trial was whether the assured "died by his own hand," and where it was clear that he had been killed by a pistol shot, the court admitted in evidence as part of the res gestae, the declarations (under the circumstances stated in the case) of another person since deceased as to the manner in which the death had been caused. Following Insurance Co. v. Mosley, 8 Wall. [75 U. S.] 397.

2. Ex parte affidavits of third persons furnished to the company by the plaintiff, to show the fact of death, were rejected as evidence when offered by the company on the trial to establish a controverted fact as to the mode of death.

[Cited in Hiles v. Hanover Fire Ins. Co., 65 Wis. 592, 27 N. W. 348.]

[This was an action at law by Hallie Newton against the Mutual Benefit Life Insurance Company.]

Geo. P. Strong and T. Z. Blakeman, for plaintiff.

Lackland, Martin & Lackland, for the company.

1. On the trial this question of evidence arose: It appeared that Newton, whose life was insured for the benefit of the plaintiff, went to Los Angeles, in California, a stranger, but with letters of introduction to prominent citizens, and registered himself at the hotel. The landlord's deposition was taken to prove the death of Newton, and the circumstances. He testified, in substance, that on the same night, about two o'clock, he heard the report of a pistol, called his wife's attention to it, immediately arose, and at once went out into the hall, not stopping to dress himself, and on reaching the door of the room next to his (which room was occupied by a man by the name of Burns) he met Burns coming out, seemingly excited, saying something about the man having shot himself. The landlord passed into the room, found Newton sitting upright on the bed, with part of his clothing off, with eyes open, with fresh blood over the region of the heart, a pistol lying beside the bed, and on being approached, it was found that Newton was dead. This was not the room assigned to Newton, but to Burns. It was proved at the trial that Burns was then dead, and that no one was present at the time when the pistol was fired, unless Burns was then present. The issue on the trial was, whether Newton "died by his own hand," within the meaning of the policy. The plaintiff objected to that portion of the testimony of the landlord in which he states that Burns, as he came out of the room, said something about the man having shot himself. The court, upon consideration, ruled that the declaration of Burns ought to be received for the consideration of the jury, and the declaration was part of the res gestae of the event under investigation, within the reasons and principles of the decision of the supreme court in the case of Insurance Co. v. Mosley, 8 Wall. [75 U. S.] 397.

2. The policy contained a provision that the sum insured should be paid "within ninety days after due notice and proof of death." The mode of proof was not prescribed. The father of the plaintiff, acting for her, delivered to the agent of the company several ex parte affidavits of third persons, taken in California, to show the death, but these affidavits were accompanied with no statement by the plaintiff, or for her. The company, claiming that these affidavits showed that the person whose life was insured committed suicide, refused, on that ground alone, to pay. These facts being shown by the plaintiff, the company offered in evidence on its part these affidavits so delivered to it. The plaintiff objected. After consideration of the cases cited by counsel (particularly, Campbell v. Charter Oak Ins. Co., 10 Allen, 213; Cluff v. Mutual Ben. Ins. Co., 99 Mass. 317; Irving v. Excelsior Fire Ins. Co., 1 Bosw. 507), the court ruled that the evidence was not competent.

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

THE COURT observed that the affidavits, etc., may be received in evidence to show that due proofs of death were made, where there has been no waiver; but they are not competent evidence on the issues joined at the trial as to the controverted facts. Preliminary proofs are for the satisfaction of the company in the first instance, so that it may determine whether it will pay without a contest, or will remit the claimant to a judicial forum to establish his demand. When that judicial forum is resorted to, the case is to be tried on the issues, under the ordinary rules of evidence.

NOTE. The plaintiff recovered, and the defendant sued out a writ of error to the supreme

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

[2] [Reversed in 22 Wall. (89 U. S.) 32.]

court [where the judgment of this court was reversed, and a new trial ordered. 22 Wall. (89 U. S.) 32.]

NEWTON (NORRIS v.). See Case No. 10,-307.

Case No. 10,192.

NEWTON et al. v. REARDON.

[2 Cranch, C. C. 49.][1]

Circuit Court, District of Columbia. July Term, 1812.

TRESPASS ON THE CASE—USE AND OCCUPATION OF LAND—NECESSARY PARTIES.

Case will lie for use and occupation of land in Virginia; but all the joint tenants or tenants in common interested with the plaintiffs must be joined as plaintiffs in the action; and if they are not, the defendant may take advantage of the omission without pleading it in abatement.

Case for use and occupation of land at Occoquan in Virginia.

E. J. Lee and Mr. Taylor, for defendant, contended that an action for use and occupation did not lie before the statute of 11 Geo. II., c. 19, § 14, and that as that act is not in force in Virginia, no such action could be maintained in Alexandria county, which is governed by the laws of Virginia as they existed in 1801. Esp. 19; Green v. Harrington, Hut. 34; 1 Bac. Abr. (Gwillim's Ed.) 257; Wilkins v. Wingate, 6 Term R. 62; Brett v. Read, Cro. Car. 343.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that the action for use and occupation would lie; but that, as the plaintiffs [Newton and Muncaster] had read in evidence a deed to them and one Smoot, who is dead, but whose heirs are living, the plaintiffs could not recover in this suit; there being no evidence of any express agreement to hold under the plaintiffs.

The plaintiffs thereupon became nonsuit, with leave to Mr. Swann to move to reinstate the cause without costs. At a subsequent day Mr. Swann made the motion, and contended that the defendant could only take advantage of the omission to join the other tenants in common, by a plea in abatement, and cited the following authorities: Addison v. Overend, 6 Term R. 766; 3 Bac. Abr. (Gwillim's Ed., by Wilson) 708; Stowel's Case, Moore, 466; Deering v. Moor, Cro. Eliz. 554; Anonymous, Skin. 12; Haywood v. Davies, 1 Salk. 4; Blackborough v. Graves, 1 Mod. 102; Carth. 63; Nelthorpe v. Dorrington, Bull. N. P. 36; Leglise v. Champante, 2 Strange, 820; 2 Bl. Comm. 186; Co. Litt. §§ 314, 316, 317; Harrison v. Barnby, 5 Term R. 246; Martin v. Crompe, 1 Ld. Raym. 340; 3 Bac. Abr. 706; Cutting v. Derby, 2 W. Bl. 1077; Cooke v. Loxley, 5 Term R. 4; Doe v. Prosser, Cowp. 217. In ejectment, the defendant cannot, upon the general issue, take advantage of the omission of the other joint tenants. Tenants in common may join or sever in the recovery of their rights. By the law of Virginia the right of survivorship is abolished, and the plaintiffs were tenants in common with the heirs of Smoot. In debt for rent they may join, but in avowry they must sever; because the first is a personal action; but the other savors of the realty. One tenant in common may distrain and recover although the tenant has paid the whole rent to the other tenant in common. If tenants in common sever in debt for rent, each will recover only his share. Where the plaintiffs' claim is founded upon their title in law, they shall recover according to the title they can show. But in this case the plaintiffs can recover the whole rent. This would certainly have been the case if the defendant had expressly agreed to hold under the plaintiffs. He could not then deny their title. By the death of Smoot the possession was severed. It is not necessary to show that the heirs of Smoot were ousted by the plaintiffs. They were infants and could not have licensed any one to occupy the land. The defendant therefore did, in fact, hold under the plaintiffs alone, and having been permitted by them to use and occupy the land, he cannot now deny their title.

Mr. Taylor, for defendant, contra. There is no evidence that the possession of the plaintiffs is adverse to the heirs of Smoot. The cause of action arises merely by implication of law, in consequence of the defendant's use and occupation of land which in law belongs to or is in the possession of the plaintiffs. Unless there was some agreement by the defendant to hold of the plaintiffs, their title to recover depends upon their title to the land. All the tenants in common must join in an action which affects the possession alone; but whenever the action brings the title in question they must sever. The reason is given in Co. Litt. § 314, namely: that tenants in common have several titles, and several reversions, if they make a lease for years or life rendering rent, a tenant in common may bring debt for his moiety of the rent. But the action for use and occupation, is not a claim for rent; it is a mere personal demand; it has no relation to the reversion; there can be no distress. In an action upon a joint contract brought by one only the defendant is not bound to plead in abatement. But it is otherwise in cases of tort. Culley v. Spearman, 2 H. Bl. 386; W. Jones, 253; s. p., Leglise v. Champante, 2 Strange, 820; Graham v. Robertson, 2 Term R. 282; Kirkhan v. Newsted, 1 Esp. 117; Chit. Pl. 6, note 7; Saund. 125, 291; Scott v. Godwin, 1 Bos. & P. 73; Addison v. Overend, 6 Term R. 770.

Mr. Swann, in reply. This is not an action merely in the personalty. It is in the nature of an action for rent. Whenever the suit is for the issues and profits of the land, it savors of the realty, and tenants in common may sever, whether the action be covenant,

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

or debt, or avowry, or case, or assumpsit for use and occupation. Debt for double rent may be maintained by one tenant in common. If the claim arises out of the title, and if it be necessary to show the title, then it comes under the law respecting the realty. The action for use and occupation is a substitute for the action of debt for rent, and is governed by the same rules. King v. Fraser, 6 East, 348.

CRANCH, Chief Judge, after reviewing authorities, cited: All the cases in which it has been held that the defendant must plead joint-tenancy, or tenancy in common of the plaintiff with others in abatement, are cases of tort. In cases of contract, whether express or implied, the defendant may show in evidence upon the general issue, that other persons than the plaintiffs are equally entitled to sue. I therefore think we were correct in the opinion which we gave at that trial and would refuse to reinstate the cause. And of this opinion was the whole court.

In addition to the cases cited in the argument, the following were noticed by the court: Dockwray v. Dickenson, Skin. 640, Comb. 366; Harman v. Whitchlow, Latch, 152; Child v. Sands, 1 Salk. 32; Brown v. Hedges, Id. 290; Garret v. Taylor, Cro. Jac. 567.

NEWTON (SCHUYLER STEAM TOW BOAT LINE v.). See Case No. 12,496.

NEWTON (THOMAS v.). See Case No. 13,-905.

Case No. 10,193.

NEWTON v. WEAVER et al.

[2 Cranch, C. C. 685.] [1]

Circuit Court, District of Columbia. May Term, 1826.

PRACTICE AT LAW—JOINT ACTION—AMENDMENT OF DECLARATION AFTER JUDGMENT AGAINST ONE DEFENDANT—SERVICE OF PROCESS.

In a joint action against two defendants, if one only be taken on the first writ, and the other be taken on a subsequent writ, and the plaintiff, not knowing that this other had been taken, alters his declaration by stating that he had not been taken, and proceeds to judgment against the defendant first taken; the court will, at a subsequent term, permit the judgment to be set aside and the declaration to be restored to its original form, and the cause to proceed as a joint action against both.

This was originally a joint action against Weaver and Burdick. Burdick was first taken, and the writ returned non est as to Weaver; but the latter was taken on the second or third writ before May, 1825.

At the last term, namely, December term, 1825, Mr. Wallach, for plaintiff, supposing that Weaver had not at that time been taken, altered his declaration by inserting that fact, and by declaring against Burdick alone, who thereupon confessed judgment.

Mr. Wallach, now, upon motion, was permitted by THE COURT (CRANCH, Chief Judge, contrà) to restore his declaration to its original form, as a declaration against both defendants, and ordered the judgment to be set aside and the cause brought back to this term and consolidated with this, against Weaver.

CRANCH, Chief Judge, thought that the court ought not now to permit any alteration of the record of the last term for the purpose of making the judgment erroneous, merely because the counsel of the party was so negligent as erroneously to state a fact upon the record, the truth of which he had the means, by ordinary attention, of ascertaining. The judgment was correct according to the record.

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

NEWTON, The ISAAC. See Cases Nos. 7,089-7,092.

Case No. 10,194.

The NEW YORK.

[1 Ben. 211.] [1]

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

COLLISION IN EAST RIVER—EVIDENCE.

1. Where a bark in tow of a steamtug was injured by a collision with a ferry boat, on a clear day, the vessels having seen each other at abundant distance to have avoided each other, and the testimony was in conflict; but the man at the wheel of the bark was not called, nor his absence accounted for, while the man in charge of the tug testified that the ferry boat did not stop, though under full headway, till she was within ten feet of the bark, and then did not reverse her engine. *Held*, that such a collision must have been the result of carelessness.

2. The statement of the man from the tug must be incorrect; such a blow would have produced far other injuries, and the statement is a case of gross exaggeration.

3. Such a tendency to misdescribe, causes mistrust in the libellant's case; and a decree will not be rendered in his favor on such testimony.

This was an action by Lewis Foster, owner of the bark Free Trade, to recover for injuries sustained by the bark in a collision with the ferry boat New York, on the 28th of October, 1865.

The accident happened in the harbor of New York, off the South Ferry slip, on the New York side, on the morning of a clear day. The tide was young flood, the wind light, and the vessels in no way embarrassed by other vessels.

The witnesses on both sides agreed that the ferry boat was heading for her slip, and that the bark, having a steamtug upon her starboard quarter, was being towed out of the East river on a westerly course, across the mouth of the slip, and at right angles with the direction of the ferry boat.

The evidence also showed that the bark was struck upon her larboard side, amidships.

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

As to the other elements of the case, the evidence was in direct conflict. The witnesses for the ferry boat declared that the ferry boat had stopped before the approach of the bark, and lay in the river waiting for another ferry boat to vacate the slip; that the bark came down inside the ferry boat and where there was plenty of room for her to pass in safety, and that instead of keeping her course, when near the ferry boat the bark sheered off toward her, upon seeing which the ferry boat instantly backed, but the sheer of the bark was so sudden that she came upon the ferry boat before the latter had time to back out of her way. The witnesses for the bark denied the sheer or any other change of course, and said that the ferry boat was on a course at right angles to the course of the bark, and that she kept her course and speed until the moment of a collision, when she brought up square upon the starboard side of the bark.

A. J. Heath, for libellant.

B. D. Silliman, for claimants.

BENEDICT, District Judge. It is manifest that this collision, happening as it did on a clear day, between two vessels which saw each other at abundant distance to avoid accident, was the result of carelessness, but where the negligence was is not clear. I notice this, however, that the man at the wheel of the bark, who from his position and duty would be best able to say whether the course of the bark was or was not changed, as charged by the claimant, is not called as a witness, nor is any attempt made to account for his absence, while the person in charge of the tug, and who was, as he said, responsible for the movements of the bark, is positive in the assertion that he saw the ferry boat all the time; that she was under full headway, and did not check her speed till within about ten feet of the bark's side, when she first stopped her engine but did not reverse.

This statement, flatly contradicted by the men on the ferry boat, must be wholly incorrect. A ferry boat like the New York approaching the bark head on, and keeping full speed till within a few feet, would have produced results far different from the injuries caused here. This is a case not of miscalculation of distances or wrong estimate of time, but as it seems to me of gross exaggeration on the part of a most important and intelligent witness in charge of the injured vessel, and from whom the court was entitled to receive a frank and accurate account of what took place.

The exhibition of such a tendency to misdescribe the occurrence, makes me distrustful of the libellant's case, and unwilling to render a decree upon such testimony.

I shall therefore dismiss the libel and leave the libellant to prove his case, if he can, before the appellate court, by calling his wheelsman and some of the many passengers who saw the accident, and who may be able to give reliable information as to what was the action of the two vessels on the occasion in question.

Case No. 10,195.

The NEW YORK.

[6 Ben. 405.][1]

District Court, S. D. New York. April, 1873.

COLLISION AT PIER—PROPER MOORING—FENDERS.

1. A canal-boat lying at a pier was sunk by injuries received by her during the night, in consequence of her coming in contact with a bark, which was also moored there. A libel was filed to recover damages for the injury, which alleged negligence on the part of those in charge of the bark, in not putting out fenders between the canal-boat and the bark and in not having the bark properly moored. The evidence showed that the wound on the canal-boat which caused her to sink was such a one as would have been caused by a fender, and that there was nothing on the outside of the bark which could cause the injury except a fender. As to whether a fender was put out or not, the evidence was contradictory: *Held*, that, on the evidence, the presence of the fender was proved, and the charge of negligence, in not putting out a fender, was not established;

2. The bark was properly moored and out of contact with the canal-boat; that the canal-boat drove against the bark, and the bark then did all that could be required of her, by putting out the fender and keeping it there: *Held*, that the bark was not in fault.

This was a libel by William A. Graham, owner of the canal-boat Elias Tremaine, to recover damages for the sinking of the canal-boat while lying at pier 62, East river, by a collision between her and the bark New York, which was also moored at the same pier.

Scudder & Carter, for libellant.

Beebe, Donohue & Cooke, for claimant.

BLATCHFORD, District Judge. The libel does not allege that the bark, when moored, was lying in contact with the canal-boat of the libellant. It alleges that the bark was moored so negligently, that, at some time during the night, she chafed against, or cut into, the canal-boat, causing her to leak; and that the damage was caused by the negligence of those on the bark, "in that they did not take the proper precautions, nor make use of proper seamanship, in putting down fenders" between the canal-boat and the bark, and making use of proper means to keep the bark from crushing in the side of the canal-boat, and in mooring a vessel so large and heavy in the manner they did alongside of the canal-boat.

The evidence as to the character of the wound found in the side of the canal-boat, and which was under water, shows that it was such a wound as would be made by the

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

pressure of a fender. The evidence also shows that there was nothing on the outer side of the bark which could have made such a wound, or any wound, in the place where the wound was except a fender. The wound was in the place on the canal-boat where a fender, put over the bark's side in the place where the bark's mate says he put a fender over her side, between the bark and the canal-boat, would have come. This tends to corroborate the testimony of the mate, that he did put such a fender over. He says that, during the evening, the wind commenced blowing fresh; that, between 8 and 9 o'clock in the evening, the stem or bow of the canal-boat was driven up under the quarter of the bark; and that he put a fender over between the quarter of the bark and the canal-boat. It is true that the master of the canal-boat denies that the mate of the bark put a fender over. But, unless there was a fender there, it is impossible to see how the canal-boat was injured. If there was a fender there, it is plain that the injury arose from the pressure of the fender. I am satisfied that there was a fender there, and that the injury was thus caused.

The presence of the fender disposes of the allegation in the libel, that the bark was negligent, in not putting down fenders. I am also satified that the libellant has not established that there was any negligence in the manner of mooring the bark, or in respect to the precautions adopted by the bark to keep her from injuring the canal-boat. The weight of the evidence is that the bark was properly moored, and out of contact with the canal-boat; that it was the canal-boat that was allowed to move and drive against the bark and not the bark that was allowed to move and drive against the canal-boat; and that, when the canal-boat so moved, the bark did all that could be required of her, by putting out the fender and keeping it there.

The libel must be dismissed, with costs.

NEW YORK (ALLEN v.). See Case No. 232.

Case No. 10,196

NEW YORK v. HICHLAND.

[6 Ben. 289.] [1]

District Court, S. D. New York. Jan., 1873.

OVERLOADING PIER—EXCEPTIONS TO LIBEL.

A libel to recover damages for injury to a pier by overloading it, which states that the pier is within navigable waters from the ocean and within the ebb and flow of the tide, and does not show that the pier is a part of the land, is not liable to exception, as failing to state a case within the jurisdiction of the admiralty.

The libel in this case alleged that the libellants were owners of pier 46, East river, in the city of New York; that the pier was within navigable waters from the ocean, and within the flow of tide water; and that the respondent [William Hichland] was the owner of the bark Maggie L. Carvill, which, while lying alongside such pier, negligently discharged cargo on the pier and damaged it to the amount of $10,000. The respondent excepted to the libel, because the cause of action was not of admiralty cognizance.

A. J. Vanderpoel, for libellant.

C. Donohue, for respondent.

BLATCHFORD, District Judge. I must overrule the exceptions to the libel in this case, on the ground that it does not appear, by the libel, that the pier named was part of the land, and was not a floating pier, while it is alleged, by the libel, that the pier was "within navigable waters from the ocean, and within the flow of tide water."

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

NEW YORK, The (MERCHANTS TRANSP. CO. OF NORWICH v.). See Case No. 9,454.

NEW YORK (MILLER v.). See Case No. 9,585.

NEW YORK (MILNE v.). See Case No. 9,618.

Case No. 10,197.

NEW YORK v. NEW ENGLAND TRANSFER CO.

[14 Blatchf. 159; 15 Alb. Law J. 199.] [1]

Circuit Court, S. D. New York. March 10, 1877.

FERRY—EXCLUSIVE RIGHT TO ESTABLISH—WHAT IS INVASION OF SUCH RIGHT—LEGISLATIVE INTERFERENCE.

1. By the 15th section of the Montgomerie charter, granted to the city of New York in 1730, there was granted to the corporation of that city the sole power of establishing such ferries "around Manhattan's Island," "for the carrying and transporting people, horses, cattle, goods and chattels from the said Island of Manhattan to Nassau Island, and from thence back to Manhattan's, and also from the said island, Manhattan's, to any of the opposite shores all around the same island," in such and so many places as the common council should think fit, and the ferriages from such ferries were also granted to the corporation. The boundaries of the city were made co-extensive with Manhattan Island. In 1874, part of another county was annexed by the legislature of New York to the city of New York, and declared to be a part of the city as if it had always been so, and the like powers were given to the corporation, over the annexed territory, as if it had always been a part of the city. Afterwards, a ferryboat, fitted up to transport railroad cars only, was run to and fro between a place in such annexed territory and a place in New Jersey opposite the city of New York, connecting with railroads running from the termini of the ferry. The boat was provided with two railroad tracks, which prevented the entrance of ordinary vehi-

1 [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 15 Alb. Law J. 199, contains only a partial report.]

cles and of foot passengers, except as transported in the cars: *Held*, that such ferry was not such a ferry as the charter contemplated, and did not invade the exclusive franchise of the corporation.

2. Whether the legislature can interfere with the ferry franchise granted by said charter, quere.

3. Whether the franchise so granted is limited to establishing ferries from the original territory of the city, quere.

In equity.

George Ticknor Curtis, for plaintiffs.

Simeon E. Baldwin and George H. Forster, for defendants.

SHIPMAN, District Judge. This is a bill in equity, which is brought by the corporation of the city of New York, to restrain the defendants from operating a ferry, without the license of the plaintiffs, from Mott Haven, on the north shore of the Harlem river, within the 23d ward of the city of New York, to Jersey City. The following agreed statement of facts specifies the character and uses of the boat which is employed by the defendants, the route over which the boat passes, and the object for which the said boat and route are used: "The defendants are a corporation, organized under the laws of the state of Connecticut. A certified copy of their charter may be read in evidence. They hold a contract with the United States for the carriage of certain mails. They are owners of a side-wheel steamboat, called the Maryland, of about 1,093 tons burthen, enrolled and licensed for the coasting trade, under the laws of the United States. The said steamboat is constructed as what is popularly called a 'double ender,' i. e., with open ends for entrance upon and egress from the main deck fore and aft, and capable of being run either end foremost, having at each end a rudder controlled from the rudder wheel in the pilot house on the upper deck, but she is not adapted to or capable of the transportation of ordinary vehicles or traffic, and her sole purpose and adaptation is to the transfer of railroad cars. On the main deck two railroad tracks are laid down, occupying the entire space on the main deck to the bulkheads on the sides of the vessel, extending from end to end of the boat, and preventing the entrance or egress of vehicles, and also of passengers, baggage or freight, except as the same may be transported in railroad cars run over the said railroad tracks, which are so adjusted as to connect with corresponding tracks on the platform or bridge at the railroad dock, or of the railroad landing place to which the boat runs. Cars containing passengers and their baggage, other freight and mails, are run upon the boat at the place of embarkation, on the arrival of trains at the terminus of the railroad at such place of embarkation, and are run off from the boat at the place of disembarkation, for further transportation by land; but no passengers, baggage, freight, goods or merchandise are taken or transported on said steamboat, except as the same may be contained in railroad cars run on and off said tracks as aforesaid. Used in this manner, the Maryland has been employed by the defendants since the 10th day of May, 1876, for the transfer of drawing room, sleeping and ordinary passenger cars containing passengers and baggage, freight, express and mail cars containing baggage, freight, express matter and mails, from a point at a place called 'Mott Haven,' on the north shore of the Harlem river, now within the Twenty-Third ward of the city of New York, but formerly the town of Morrisania, in the county of Westchester and state of New York, to a point in Jersey City in the state of New Jersey, at the dock of the Pennsylvania Railroad Company, and vice versa. The trips of the Maryland are dependent upon the arrival of trains connecting by railroad from places north and east of the city of New York, and arriving at Mott Haven, bound south and southwest, and upon the arrival of connecting trains by railroad from places south and southwest of Jersey City, arriving at that city and bound north and northeast, with no other delay of the journey than such as is necessary to run the cars on and off the boat. The drop platform or bridge at Mott Haven, by means of which the cars of the defendants are run upon and off from the deck of the Maryland, is so constructed and operated as to rise and fall with the tide in the Harlem river; but it does not project into the river beyond the natural line of low-water mark, sufficient artificial excavation having been made to give ample depth of water to float at any tide. The course of the Maryland on leaving the dock at Mott Haven is down the Harlem river to its junction with the East river, down the East river southward to the bay of New York, through the said bay around the Battery to the Hudson or North river, and up the Hudson river to the dock at Jersey City in the state of New Jersey, on the west shore of the Hudson river, and crossing the dividing line between the states of New York and New Jersey in the course of the trip. On the trip of the boat from Jersey City to the place of landing at Mott Haven, the course (being reversed) is over the same water. No fixed or separate toll is charged or taken by the defendants in respect to the carriage of passengers' baggage or freight upon the said steamboat, but the defendants operate their said route as a part of a continuous line for the transportation to the place of destination, of passengers, baggage, freight, mails, and other property, on their way from places north and east of the city of New York, in the states of Massachusetts, Connecticut and New York, to places respectively south and southwest of the said city of New York, in the states of New Jersey and Pennsylvania, respectively, and vice versa, under arrangements made by the defendants

with the New York & New England Railroad Company, the Hartford, Providence & Fishkill Railroad Company, the New York, New Haven & Hartford Railroad Company, the Pennsylvania Railroad Company, and the other railroad companies whose roads form a part of said continuous lines, and which are incorporated and exist under the laws of the states of Massachusetts, Rhode Island, Connecticut, New York, New Jersey and Pennsylvania, and, as part of such continuous line between Mott Haven and Jersey City, the defendants transport such passengers, baggage and freight by water, in the manner above mentioned. Neither of the railroad companies above mentioned had separately or jointly, prior to the 10th day of May, 1876, established or effected a transportation of passengers, baggage, freight or mails, or by means of what is herein described as the continuous route between Mott Haven and Jersey City. Through coupon tickets, in the usual form, are sold to the passengers. The compensation of the defendants for the carriage by water between Mott Haven and Jersey City, is included in a through rate, and collected by the railroad companies selling a through ticket to a passenger or delivering freight to a consignee, and is paid over to the defendants. The compensation of the defendants in respect to the carriage of United States mails upon the said continuous line and route, by their said steamboat, is paid to said defendants by the postmaster-general, in the manner established by law, and is fixed by and included in a contract made between the defendants and the post office department of the United States, for the transportation of such mails over their portion of said continuous line, from places north and east of the city of New York to places south and southwest of the said city of New York, and vice versa. The Pennsylvania Railroad Company own and control the dock and slip at Jersey City, and the New York, New Haven & Hartford Railroad Company own and control the dock and slip at Mott Haven, and purchased the same prior to the passage of chapter 613 of the Laws of New York, 1873, up to which time the place called Mott Haven was, as it had ever prior thereto been, a part of Westchester county. Neither the mayor, aldermen and commonalty of the city of New York, nor the common council of said city, have ever taken any action to establish any ferry between the termini of the route navigated by the said steamer Maryland, nor over any other route or line with which said Maryland competes or interferes. The maps identified by the signatures of the counsel for the respective parties, and made under the direction of Mr. G. W. Greene, Jr., engineer-in-chief of the department of docks, are admitted to be correct, and may be referred to at the hearing by either party. All charters, grants and legislative acts of the state of New York, of the United States, or of any state of the United States, material to this cause, may be referred to, on the hearing thereof, by either party."

The Montgomerie charter, granted in 1730 (4 Geo. 11.), "is the chapter upon the foundation of which the city of New York is at present governed." Kent's Charters, note 19, p. 212. It recited and ratified the Dongan charter, which was the first English charter granted to the city of New York, in 1686, and the Cornbury charter, granted in the 7th of Queen Anne, and conferred new and additional powers upon the corporation. By the 15th section of the Montgomerie charter, the crown of England granted and confirmed to the mayor, aldermen and commonality of the city of New York, and their successors, forever, "the sole, full and whole power and authority of settling, appointing, establishing, ordering and directing * * * such and so many ferries around Manhattan's Island, alias New York Island, for the carrying and transporting people, horses, cattle, goods and chattels from the said Island of Manhattan to Nassau Island, and from thence back to Manhattan's, and also from the said Island Manhattan's to any of the opposite shores all around the same island, in such and so many places as the said common council" shall think fit. The rents, issues, profits, ferriages, fees and other advantages arising from such ferries were also granted to the said corporation. By the 37th section, there was also a grant of the existing ferries, "and all other ferries now and hereafter to be erected and established all round the island of Manhattan's." The boundaries of the city were made co-extensive with Manhattan Island.

By an act of the legislature of the state of New York, passed May 6, 1874 (Laws 1874, c. 329), the towns of Morrisania, West Farms and King's Bridge, all of Westchester county, were annexed to the city of New York, and were constituted the 23d and 24th wards of that city. The first section of this act declared that this terrritory was thereafter to be a part of the city, and to be entitled to the immunities, privileges and franchises of the city, in every respect, and to the same extent, as if the annexed territory had always been included within the city. The eleventh section provided that the mayor and common council of the city of New York should thereafter exercise over the annexed territory the same powers, in like manner and to the same extent, as if said territory had always been a part of the city of New York, except as limited or excepted by the act itself.

Upon the foregoing facts, three questions of law arise: 1st. Did the city of New York obtain, by the Montgomerie charter, exclusive power to establish all the ferries from the original limits of the city to any of the opposite shores? 2d. Was this exclusive franchise extended to and impressed upon the annexed territory, so that a ferry could not be established from a point within the 23d ward, without the license of the common council, or is the franchise limited to

the establishment of ferries from Manhattan Island? 3d. Is the user, by the defendants, of the Maryland upon its route, a ferry, within the true meaning of the Montgomerie charter?

1. The grant was of an exclusive right in the corporation to establish future ferries from any part of the original territory of the city, to any of the opposite shores, and to receive, for the exclusive benefit of the corporation, the ferriages arising therefrom, or the emoluments arising from any ferry licenses which the common council might give. Whether the legislature of New York can or cannot interfere with this exclusive grant, and divest the city of the rights which it acquired by such charter, is a question which has not yet arisen. The grant seems to have been one of property as well as of public or political power; and, whenever the question shall arise in regard to the control of the state, acting by its legislature, over the grant, the remarks of Chancellor Kent, in his notes to the charters of New York (note 30 p. 235), in opposition to the theory that the grant is within the reach of gratuitous legislative resumption, will undoubtedly receive the consideration which has always been given to the opinions of that eminent judge. Benson v. New York, 10 Barb. 223; Darlington v. New York, 31 N. Y. 164, 203; People v. Mayor, etc., 32 Barb. 102; Mayor, etc., v. New York & Staten Island Ferry Co., 40 N. Y. Super. Ct. 232.

2. The second question is, whether the exclusive franchise is or is not limited to the establishment of ferries from Manhattan Island, the original territory of the city. The grant, which has been heretofore substantially recited, was a grant of an exclusive right to establish ferries around Manhattan Island, from said island to any of the opposite shores. On the one hand, it is urged, that municipal jurisdiction extended throughout the whole island, and that, whenever, in either of the three charters, Manhattan Island was referred to, it was referred to for the purpose of designating the territory made subject to the corporate franchises and powers of the city, and was referred to as the territorial limit to which the ferry franchises could then extend, because the island and city territory were then identical, and that the meaning of the charter is, that, wherever the jurisdiction of the corporation extended, namely, throughout the island, that territory was affected with a corporate and exclusive right in the corporation to establish all needful ferries, and that the powers which the mayor and common council rightfully exercised over the old territory, were by the act of annexation, to be exercised over the new teritory, to the same extent as if such teritory had always been a part of the city, and that thus the ferry franchises were extended to and impressed upon such new territory. On the other hand, it may be urged, that the charter was of a municipal corporation, which was established upon an island; that the prosperity, and the very existence of the city depended upon its abundant, permanent and regular means of intercourse with the main land; that there was a necessity that the city should be furnished with the exclusive power to authorize the permanent establishment of regular and frequent means of communication with the opposite shores and with Long Island; that, therefore, the power was given to the corporation to connect the island by ferries with other places, as a power indispensable to the welfare of the city; that this power, being in terms for the establishment of ferries around the island, was not, by the act of annexation, extended to a power to establish ferries from the newly acquired territory beyond the island, but the construction of the grant should be governed and controlled by the circumstances which existed when the charter was given, and which made such a grant necessary; and that, therefore, the city of New York, as enlarged by the annexation, possesses only the same franchise which it previously had —that of establishing ferries from the island, and not necessarily from the territory of the city, and that this construction limits the grant to the natural meaning of the words employed. The view which I take of the third question, renders it unnecessary to express an opinion upon this point.

3. Is the liberty or privilege, which the defendants now use, of running the steamer Maryland, in the manner and for the uses described in the statement of facts, a ferry, within the meaning of the grant in the Montgomerie charter? In Bridge Proprietors v. Hoboken Co., 1 Wall. [68 U. S.] 116, the supreme court held, that a railroad bridge, which was an extension of the iron rails which composed the material part of a railroad over the Hackensack river, together with such substructure as is necessary to keep the rails in place and enable them to support the cars, was not a bridge, within the meaning of an act of the legislature of New Jersey, passed in 1790, by which that state empowered certain commissioners to contract for the building of a bridge over the Hackensack, and provided that it should not be lawful for any person to erect any other bridge across the said river for ninety-nine years. The decision was upon the ground that a railroad bridge, on which there was "no planked bottom, no roadway or path, nothing on which man or beast or vehicle could pass, save as it is carried over in the cars," was not a bridge, within the minds of the framers of the act of 1790, or within the true intent and meaning of the exclusive grant contained in that act. To the same effect are Mohawk Bridge Co. v. Utica & S. R. Co., 6 Paige, 554; McRee v. Wilmington & R. R. Co., 2 Jones (N. C.) 186; Thompson v. New York & H. R. Co., 3 Sand. Ch. 625. The decision in Enfield Toll Bridge Co. v.

Hartford & N. H. R. Co., 17 Conn. 40, where the contrary doctrine was ably maintained, is not in accordance with the prevailing opinion which is now entertained by the courts of this country.

The reasoning which denies that a railroad bridge is an interference with an exclusive right theretofore granted to build an ordinary bridge, applies with almost equal force to the question, whither a ferry franchise is interfered with by a ferry which is designed for the transportation of railroad cars only. The boat of the defendants is provided with two railroad tracks, which prevent the entrance or egress of ordinary vehicles, and also of foot passengers, except as they are transported in cars which run upon the railroad tracks. The boat is exclusively used for the transportation of railroad cars, in connection only with the arrival of trains. It is impossible to transport ordinary vehicles upon the boat, it is impracticable to transport foot passengers, except as they are conveyed to the boat in cars. The whole arrangement of boat and docks is for the ingress and egress of railroad cars, and not for the accommodation of anything else. The ferry is a part of a continuous through railroad line from places north and east of the city of New York, to places south and southwest of that city, and the trips of the boat are dependent upon the arrival of through railroad trains.

Such a ferry is unlike an ordinary ferry for the transportation across a river of persons, animals and freight, at intervals more or less regular, for fare or toll. The ordinary ferry is a substitute for the ordinary bridge, and is a means of transportation of all persons and ordinary vehicles, and is for the accommodation of the public generally, and should, therefore, be accessible to the public. The railroad ferry is a substitute for a railroad bridge, and is a part of a railroad route for the transportation of the cars which are used upon a railroad track, and the burden which they bear, and is not for the accommodation of any persons except those who happen to be, for the time being, railroad passengers. A railroad ferry is a means of connecting railroad tracks, or two railroads, as a railroad bridge is the continuation of railroad tracks across a stream of water. It differs widely, except in name, from a general or unlimited ferry (Fitch v. New Haven, N. L. & S. R. Co., 30 Conn. 38), and is not within the spirit of the grant which was made to the city of New York in the year 1730; and the adoption of the word ferry, "to express the modern invention, does not bring it within the terms of the" charter, "if it is not within the intent of it." (Bridge Proprietors v. Hoboken Co., 1 Wall. [68 U. S.] 116).

But, it is urged, that, in Aikin v. Western R. Corp., 20 N. Y. 370, a ferry which was used by a railroad for the transportation of its passengers and freight, has been held to interfere with a ferry franchise theretofore granted. The ferry which the Western Railroad Company used at Albany was not the ferry which is described in the agreed statement of facts, and which is now known as a railroad ferry, and designed for the transportation of cars, although it was used by a railroad corporation, but was an ordinary steamboat and transported other persons. teams and carriages than such as were borne upon the railroad. It was justly held, that the maintaining by a railroad company of a ferry, upon which it regularly and constantly transported gratuitously persons not passengers nor in its service, was an invasion of the right of a proprietor of a ferry franchise. The decision in this case does not conflict with the doctrine which is recognized in Fitch v. New Haven, N. L. & S. R. Co., 30 Conn. 38.

It results, that the establishment of the railroad ferry of the defendants is not an invasion of the exclusive franchise of the plaintiffs, assuming that their franchise was extended to the territory which was annexed in 1874.

Let there be a decree dismissing the bill.

NEW YORK (NEW YORK & N. H. R. CO. v.). See Case No. 10,199.

NEW YORK (RANSOM v.). See Case No. 11,573.

NEW YORK, The (SCHURTZ v.). See Case No. 12,492.

NEW YORK, The (WALDORF v.). See Case No. 17,057.

NEW YORK (YOUNGS v.). See Case No. 18,185.

NEW YORK & B. BRASS CO. (WATERBURY BRASS CO. v.). See Cases Nos. 17,255 and 17,256.

NEW YORK & L. B. R. C. (PENNSYLVANIA R. CO. v.). See Case No. 10,953.

NEW YORK & E. BANK (WOOLEN v.). See Case No. 18,026.

Case No. 10,198.

NEW YORK & E. R. R. v. SHEPARD et al.

[5 McLean, 455.] [1]

Circuit Court, D. Ohio. April Term, 1853.

JURISDICTION—CITIZENSHIP OF CORPORATION.

1. The circuit court takes jurisdiction where a suit is brought by a corporation, from the place where it is located, and where its corporate functions are discharged.

2. No further allegation of citizenship is required.

[This was a bill in equity by the New York & Erie Railroad against Shepard & Shepard.]

Mr. Willey, for plaintiffs.

Mr. Stanbery, for defendants.

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

OPINION OF THE COURT. The declaration states, the New York and Erie Railroad, doing business and resident in the state of New York, plaintiffs, complain, &c. The defendants demurred on the ground that there was no sufficient allegation of citizenship, to give jurisdiction to the court. Where a corporation of another state sues in this court, an allegation of citizenship is not now necessary, as was formerly required. The state where the corporation is located and in which its corporate functions are exercised, if alleged, is sufficient to give jurisdiction. The demurrer is overruled.

NEW YORK & E. R. CO. (WINANS v.). See Case No. 17,863.

NEW YORK & H. R. CO. (WINANS v.). See Case No. 17,864.

Case No. 10,198a.

NEW YORK & L. STEAMBOAT CO. v. WILSON.

[Nowhere reported; opinion not now accessible.]

NEW YORK & L. B. R. CO. (EASTON v.). See Case No. 4,259.

NEW YORK & N. H. R. CO. (ANDERSON v.). See Case No. 360.

NEW YORK & N. H. R. CO. (ILLINS v.). See Case No. 7,010.

Case No. 10,199.

NEW YORK & N. H. R. CO. v. NEW YORK.

[4 Blatchf. 193.] [1]

Circuit Court, S. D. New York. Sept. 7, 1858.

RAILROADS—MUNICIPAL REGULATIONS—RESERVATION AS TO MOTIVE POWER—LAWFULNESS—CONSTRUCTION OF CHARTER.

1. By the act of the legislature of New York, passed April 25, 1831, incorporating the New York and Harlem Railroad Company (Sess. Laws 1831, c. 263), the consent of the authorities of the city of New York was required to the construction of the road within the city, and the act authorized those authorities "to regulate the time and manner of using the same." The authorities consented to the construction of the road within the city, and, at the same time, the company covenanted that the authorities should retain "the right of regulating the description of power to be used" in the propulsion of cars within the limits of the city: *Held*, that the condition so annexed to such consent was authorized by said act.

2. An unrestricted power to make a grant or concession enables the party to make it upon conditions.

[Cited in Pepin Co. v. Prindle, 61 Wis. 309, 21 N. W. 256.]

3. The authorities had the right to forbid the running of locomotive engines, by the company, on their road, within the city, at any time when, in their judgment, the interests of the public demanded it.

4. The act of the legislature of New York, passed March 29, 1848 (Sess. Laws 1848, c. 143), did not confer upon the New York and New Haven Railroad Company any greater privileges, in respect to the running of locomotive engines, within the city of New York, upon the tracks of the New York and Harlem Railroad Company, than had been, or might be, conferred on the latter company, and the city authorities have the right to prevent the running of such engines, within the city, by the former company, on the tracks of the latter company.

This was a motion for a provisional injunction, to restrain the defendants from interfering with the running of the plaintiffs' locomotive engines on their tracks in the Fourth avenue, in the city of New York, south of Forty-Second street. The common council of the city of New York passed an ordinance, on the 27th of December, 1854, declaring that no locomotive or steam engine should be allowed to run on the tracks of the New York and Harlem Railroad Company, or of the New York and New Haven Railroad Company, in the Fourth avenue, south of Forty-Second street, eighteen months after the passing of the ordinance. The board of police commissioners threatened to carry into effect that ordinance. The two companies used the same track in entering the city, the New York and New Haven Company having been authorized to use the tracks of the New York and Harlem Company, by an act of the legislature of the state of New York.

The New York and Harlem Railroad Company was incorporated by the legislature of New York, April 25th, 1831. By the first section of the act of incorporation (Sess. Laws 1831, c. 263), it was empowered to construct their road from any point on the north bounds of Twenty-Third street, to any point on the Harlem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, &c., and "to transport, take, and carry property and persons upon the same, by the power and force of steam, of animals, or of any mechanical, or other power, or of any combination of them, which the said company may choose to employ." By the sixteenth section, it was provided, that nothing in the act should be deemed to authorize the company to construct their road across or along any of the streets or avenues, as designated on the map of the city of New York, &c., without the consent of the mayor, aldermen, and commonalty of the city, who were authorized to grant or refuse the construction of the road, and, after the same should be constructed, "to regulate the time and manner of using the same, and the speed with which carriages shall be permitted to move on the same, &c."

The common council, in pursuance of that act, passed an ordinance, giving their consent to the construction of a road along the Fourth avenue, from Twenty-Third street to Harlem river, with certain conditions annexed; and, among others, section 3 of the ordinance provided, that "the right of regulating the description of power to be used in propelling

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

carriages on and along said railways, and the speed of the same, &c., be, and the same are hereby, retained and reserved." The eighth section provided, that the ordinance should not be considered binding until the Harlem Company should engage, under their corporate seal, to abide by the conditions contained therein. This engagement was entered into, accordingly, on the 13th of January, 1832.

By the sixth section of the act of the legislature of New York, passed March 29, 1848 (Sess. Laws 1848, c. 143), the New York and New Haven Railroad Company were authorized to enter upon, and run their cars and engines for passengers, &c., over the Harlem road, from the point of junction of the roads of said companies, at Williams' Bridge, in Westchester county, to the city of New York, "and as far into the said city as the said Harlem Railroad may extend, upon such terms, and to such point, as has been, or may hereafter be, agreed upon by and between said companies," "and to take, transport, and convey persons and property upon said Harlem Railroad, by the power and force of steam, or animals, or any mechanical power, or combination of the same."

NELSON, Circuit Justice. The only question which I deem it material to consider, on this motion for an injunction, is, whether or not the common council of the city of New York possessed the power to pass the ordinance of the 27th of December, 1854, prohibiting the running of locomotives on the Fourth avenue below Forty-Second street, (1) as it respects those belonging to the Harlem Company, and (2) as it respects those belonging to the New Haven Company.

It is insisted, on the part of the plaintiffs, that, under the charter of the Harlem Company, of the 25th of April, 1831, the common council, after giving their consent to the construction of the road along the Fourth avenue to Twenty-Third street, possessed no power to prohibit the use of it as authorized by said charter, namely, the carrying of property and persons, by force of steam, &c., and that, if the Harlem Company cannot be deprived of this right, neither can the New Haven Company, as they possess an equal right with the Harlem Company, under the sixth section of the act of March 29th, 1848. The plaintiffs further insist, that, even conceding the power of prohibition to exist in the common council, as it respects the Harlem Company, such power does not, as it respects the New Haven Company, come within the true meaning of such sixth section.

(1.) As it respects the Harlem Company. That company expressly covenanted, under its corporate seal, at the time the common council consented to the construction of its road, that the latter should retain the right of regulating the description of power to be used in the propulsion of cars within the limits of the city. In answer to this, it is said, that the condition thus annexed to the consent was not authorized by the act of 1831. I have looked into the provisions of that act with some attention, and find nothing in the same, either expressly, or by implication, forbidding a qualified consent to the construction and use of the road. The propriety and fitness of annexing conditions by which some control should be exercised by the municipal authorities over the running of the cars, in a city rapidly increasing in population and business, are too obvious to require argument. The charter confers on the company the power to construct a road, and to transport their cars by the force of steam, of animals, or of any mechanical power, or by any combination of them. But the sixteenth section forbids the construction of their road within the city without the consent of the city authorities. The terms or conditions of that consent are not prescribed, and would seem, therefore, to be left to be arranged and settled by the parties concerned. The burden lay upon the company to procure this consent, and, there being no restraint upon them in their charter, as to the terms they might choose to offer, nor upon the common council, in giving the consent, it was natural, and even a necessity, that the terms should be a matter of arrangement, and such as might be satisfactory to both of the parties. Therefore, I can see no reasonable objection, within the provisions of the act of 1831, to a consent originally on condition that steam power should not be used at all within the city, or that none but horse power should be used, or to the limitation of the company to the use of any one of the descriptions of power enumerated in their charter; nor any objection to the reservation of the right to prohibit the use of steam power, when, in the judgment of the common council, its use should become inconvenient or detrimental to the public interests of the city.

Besides this view of the true meaning of the terms of the charter, it is a general principle, that an unrestricted power to make a grant or concession enables the party to make it upon conditions. In other words, a person possessing a given power may do less than such power enables him to do, in the execution of the same. "Omne majus in se continet minus."

Again, independently of the view above taken in respect to the power reserved to the city, to consent to the construction of the road, I am of opinion that the sixteenth section of the charter confers upon the common council the authority to forbid the running of locomotives on the road within the city, at any time when, in their judgment, the interests of the public demand it. The section provides, that, after the road shall be constructed, the common council shall be authorized "to regulate the time and manner of using the same, and the speed with which carriages shall be permitted to move on the same, or any part thereof." The authority here conferred upon the city is ex-

ceedingly broad—to regulate the time and manner of using the road. "Manner of using" may very well refer to the description of power used to drive the cars—to the way or method of driving them. The use of the road contemplated by the act was by cars moved by steam, animal or mechanical power; and the authority to regulate the use, would seem not only fairly enough, but necessarily, to embrace the description of the power to be used, as well as supervision and control in the use of it; that is, whether it should be steam, or horse power, or any other contemplated in the charter. Regulating the use of the road does not necessarily mean a regulation of the different descriptions of power which the company are authorized to use. That would be a very restricted construction of the clause. The language is broad enough to include the nature and species of the power employed in using the road.

Upon the whole, I am satisfied that the authorities of the city had full power to pass the ordinance of the 27th of December, 1854, as it respects the Harlem Company.

(2.) The remaining question is, whether or not the New Haven Company possess any rights, in this respect, superior to the Harlem Company, so as to enable them to run their locomotives, against the ordinance of the city.

I agree, that the rights and powers of the New Haven Company depend upon the act of the legislature of New York, of March 29th, 1848, and are independent of the Harlem Company, and that the eighth section of that act does not, in terms, restrict those rights and powers to those possessed by the latter company. In other words, the New Haven Company do not come into the city under a grant from the Harlem Company, so as to be restricted to what that company can grant. But, construing the sixth section of the act of 1848, in connection with the charter of the Harlem Company (and they must be taken as acts in pari materia), I cannot resist the impression, that the meaning and intent of the legislature were to confer upon the New Haven Company no greater privileges than had been or might be conferred on the Harlem. They are authorized to run their cars, &c., over the road of the latter company, from the junction at Williams' Bridge, to the city of New York, and "as far into the said city as the said Harlem Company may extend." The power conferred on them is simply to use the Harlem road and nothing more, and they possess no right to construct a road in the city. And it would be singular, if the legislature had vested in the New Haven Company a right, as against the common council, superior to that of the Harlem Company.

Besides, I am of opinion, that both the New Haven Company and the legislature are to be presumed to have had a knowledge, at the time of the passage of the act of 1848, of the limitation of the use of the road by the Harlem Company, and, hence, that the privileges granted should be construed as subject to such limitation. The act of 1831 reserved, in express terms, to the city, the right to consent to or prohibit the construction of the road, and the right to regulate the use of it after its construction. Of that act the New Haven Company and the legislature, of course, had notice, and it should be presumed that they inquired into the terms and conditions upon which the consent was given, and under which the road was constructed and the cars were run into the city.

Without pursuing the argument further, I am satisfied that the city authorities possessed the power to pass the ordinance of the 27th of December, 1854, and that the motion for the injunction should be denied.

NEW YORK & N. H. R. CO. (POMEROY v.). See Case No. 11,261.

NEW YORK & O. M. R. CO. (HEWITT v.). See Case No. 6,443.

NEW YORK & O. M. R. CO. (STEVENS v.). See Cases Nos. 13,405 and 13,406.

NEW YORK & VIRGINIA STEAMSHIP CO. (HOTCHKISS v.). See Case No. 6,718a.

Case No. 10,200.

In re NEW YORK & W. STEAMSHIP CO.

[9 Ben. 44.] [1]

District Court, E. D. New York. Feb., 1877.

ADMIRALTY—LIMITATION OF LIABILITY—PRACTICE —STIPULATION FOR VALUE.

1. Where the owners of a steamship filed a petition under section 4283, Rev. St., to obtain a limitation of their liability by reason of a certain collision, after their steamer had been proceeded against in an action in rem and released from custody upon their stipulation in her full value given for the benefit of all persons who might have demands arising out of said collision, and after a final hearing had been had in such action and a decree entered upon such stipulation: *Held*, that notwithstanding the vessel had been released upon a stipulation in her full value for the benefit of all who might have demands arising out of the collision, the proceeding for a limitation of liability was not vain or fruitless.

2. The right to take proceedings to obtain a limitation of liability was not impaired by giving in an action in rem a stipulation in the full value of the vessel for the benefit of all who might have demands arising out of the same collision.

[Cited in Thomassen v. Whitwell, Case No. 13,930.]

3. The right to resort to proceedings by petition to attain a limitation of liability, cannot be exercised after a final hearing has been had and a final decree entered in an action in rem

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

brought to recover the claims against which relief is sought by the petition.

[Cited in Gokey v. Fort, 44 Fed. 365.]

[This was a libel in rem by the owners of the schooner Susan Wright against the steamship Benefactor (the New York & Wilmington Steamship Company, claimants) for collision. From a decree of the district court for the libellants (Case No. 1,297), the claimants appealed to the circuit court, where the decree of the district court was affirmed (Case No. 1,298). Subsequently an appeal was taken to the supreme court, where the decree of the circuit court was affirmed. 102 U. S. 214. The case is now heard on a petition filed by the owners of the steamship to obtain a limitation of their liability, pursuant to Rev. St. § 4283, and the fifty-fourth admiralty rule.]

BENEDICT, District Judge. In March, 1875, certain actions were instituted in this court against the steamship Benefactor to recover for losses occasioned by the sinking of the schooner Susan Wright, in a collision that occurred on the 25th day of February, 1875. The steamship having been seized in these actions, her owners, who are the present petitioners, applied for leave to file a stipulation in the full appraised value of the steamer, for the benefit of all persons who might have demands arising out of said collision, and upon the giving of such stipulation to receive the said steamship discharged from all liability to arrest on such demands. Permission being given, the steamer was appraised and a stipulation in the sum of $40,000 having been filed the steamer was released from arrest. The stipulation so given was in the form heretofore adopted in similar cases. See stipulation given for Place v. The City of Norwich [Case No. 11,202]. Thereafter the several actions against the steamer were consolidated, and a trial upon the merits having been had, a final decree was rendered in favor of the libellants for the sum of $61,810.49, and the amount for which the stipulators for value were bound, that is to say the appraised value of the vessel with interest from the date thereof, (such being the provision in the stipulation) was decreed to be distributed among the several libellants in proportion to their respective demands as ascertained in the said action.

After the entry of the above-mentioned decree the owners of the steamship filed the present petition to obtain a limitation of their liability, as provided by section 4283, Rev. St., and general admiralty rules Nos. 54–57.

To this petition exception is taken by those who were parties libellant in the consolidated action in rem against the steamer, upon the ground that the facts stated in the petition show that the relief sought thereby cannot now be granted by this court. This exception, which has been treated as having an effect similar to a demurrer at common law, is based upon two grounds. One ground is that the proceeding appears on its face to be vain and fruitless, inasmuch as the petition shows that the libellants in the consolidated action represent all existing demands arising out of the collision in question, and also that by the decree already entered in that action the value of the steamer, being represented by the stipulation given in that action, is to be distributed among the said libellants.

This ground of exception does not appear to me to be well founded. It cannot be said that the result of the present proceeding will be the same as the result already attained by the action in rem, because in the first place the stipulation given in the action in rem is not for the same amount as that sought to be given in this proceeding. The stipulation in rem is for the value of the steamer at the time of her arrest, with interest from the date of her release, such being the terms of the stipulation. The stipulation sought to be given under this petition is for the value of the steamer and of her freight then pending.

In the second place the petitioners, in addition to a distribution of the value of the steamer and her freight pending among the persons having claims for losses arising out of the collision in question, are entitled to seek the further relief that this court not only restrain all further proceedings in the action in rem, but also all proceedings against the petitioners in personam to recover for such loss. The relief sought by this proceeding in behalf of the owners of the steamer they cannot therefore obtain in the proceedings in rem.

To secure the relief sought by the petitioners this petition is not only not vain, it is necessary; and here I deem it proper to repeat what has been said on other occasions, that the practice of taking such stipulations as the one given in the action against this steamer has proved to be convenient and advantageous, for it enables a vessel seized to be released at once from liability to arrest, while, at the same time, the right of her owners to obtain the benefit of the limited liability act by means of the proceedings authorized by the general admiralty rules is in no way impaired. The proceeding under the statute and the general admiralty rules has been treated in this court as wholly distinct from any action in rem that may be pending, and it takes effect upon such action only by means of the restraining order authorized by rule 54. It would be regretted, therefore, if it should be found necessary to determine that the giving of such a stipulation as was given in the action against this steamer had any effect to impair the rights derived from the limited liability act, or was a waiver of the right to present this petition. In my opinion no such determination is necessary or proper, and I

therefore hold that the right to the relief sought by this petition was not impaired by the giving of the stipulation that was given in the action in rem.

But a second ground of exception to this petition is presented for consideration, namely, that the petition is too late and cannot now be entertained, inasmuch as it appears upon the face of the petition that, prior to its being filed, the action in rem sought to be restrained had proceeded to a final decree after a hearing upon the merits. This objection I believe to be well taken. It is true that the general admiralty rules under which the petition is filed do not contain any express limitation of the time within which the proceedings authorized thereby may be taken. Nevertheless some limitation is clearly implied. Thus it is quite manifest that it was intended that the petition should be filed before the action sought to be restrained should have been taken by appeal from the district to the circuit court, and I think it may be inferred that it was the intention that the proceeding should be instituted before a final decree upon the merits, after hearing upon pleadings and proofs in such action. It will be observed that the rules permit the question of liability to be raised by the petition, and to be tried in the proceedings taken thereon. So this petition contains a full statement of the circumstances attending the collision in question, and seeks a determination of the question of negligence as preliminary to a resort to the stipulation tendered, and I am invited to consider anew the evidence in respect to the collision in question, and to say over again whether I find the steamer in fault. But it could never have been intended to permit a second trial of the question of liability. The permission given to present that question in the petition therefore shows that the right to resort to proceedings by petition must be exercised, if at all, before a trial upon the question of liability has been had in the action sought to be restrained, while the libel is in esse and before the demand has passed into the form of a final decree.

Whether any other limitation can be derived from the language of the rules or that of the limited liability act, it is not now necessary to consider.

My conclusion therefore is that inasmuch as it appears, by the petition under consideration, that prior to the filing thereof a hearing upon the merits had been had in the action sought to be restrained, and that the rights of the libellants had become fixed so far as this court is concerned by the final decree of this court entered in such action, it is now too late to resort to this proceeding.

There will therefore be a decree entered herein, dismissing the petition, but without costs.

[NOTE. On appeal to the circuit court, this decree was affirmed. Case unreported. An appeal was then taken to the supreme court, where the decree of the circuit court was reversed, and the record remanded, with directions to enter a decree reversing the decree of the district court, and giving directions for further proceedings. 103 U. S. 239. The cause was again before the supreme court on motions to modify judgment and mandate. The order of the court was modified so far as it contained directions to the circuit court to enter a decree reversing the decree of the district court, and giving directions for further proceedings. It was further ordered that each party pay their own costs on these motions. 103 U. S. 247.]

Case No. 10,201.

NEW YORK BALANCE DRY DOCK CO. v. HOWES et al.

[Affirming Case No. 10,202. Nowhere reported; opinion not now accessible.]

Case No. 10,202.

NEW YORK BALANCE DRY DOCK CO. v. HOWES et al.

HOWES et al. v. NEW YORK BALANCE DRY DOCK CO.

[9 Ben. 232.][1]

District Court, E. D. New York. Oct., 1877.[2]

DOCKAGE—CONTRACT—PERFORMANCE.

1. A dry-dock company contracted to raise and dock a vessel for $150; but on beginning the work a bulkhead of the dock burst, and the vessel had to wait till the dock was repaired. The vessel was then successfully raised, and her repairs completed. The company asked $250, as on a new contract, and brought suit. The owners of the vessel also brought an action, claiming damages of the dock company for delay in performance of the contract to raise the vessel. *Held*, that the dry-dock company could only recover $150, the amount originally named, as it appeared that no new contract had been made, nor had the old contract been abandoned.

[Cited in Norwich & N. Y. Transp. Co. v. New York Balance Dock Co., 22 Fed. 674.]

2. The owners of the vessel could not recover for delay. The breaking of the dock was a temporary destruction of the thing in reference to which the contract was made, and furnished a legal excuse for the delay, unless it appear that the obstruction was allowed to continue an unreasonable time or that the breaking was caused by negligence.

In admiralty.

Owen & Gray, for Dock Co.

Taylor & Fowler, for Howes et al.

BENEDICT, District Judge. These two actions have been tried together. The facts out of which they arose are as follows: Prior to May 2d, 1877, an agreement was made between the New York Balance Dry Dock Company and the owners of the steamer Erickson, whereby the dock company agreed, for a consideration of $150, to raise the steamer Erickson upon their dock for the purpose of enabling her there to receive some repairs. On the morning of the 2d of May the raising of the steamer upon the dock

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

[2] [Affirmed by circuit court. Case unreported.]

was commenced, but before it was completed one of the bulkheads in the bottom of the dock burst by reason of the pressure of the water, and it became necessary to lower the dock and remove the steamer until the break could be repaired. The dock was accordingly lowered and the steamer removed on the afternoon of the same day on which she went on. The next morning the dock was repaired, and on the evening of that day the steamer was again taken upon the dock and successfully raised.

Out of this state of facts these two suits have arisen, the first being brought to recover of the owners of the steamer two hundred and fifty dollars, as being a reasonable sum to be paid for raising this vessel; the second being brought by the owners of the steamer to recover of the dock company damages for their failure to raise the steamer according to the contract.

In regard to the claim of the dock company, I am of the opinion that they are entitled to recover $150 and no more. The evidence shows that the original contract was not rescinded and that the work done was in performance of the contract made. The agent of the steamer says that when the steamer was taken off the dock because of the accident, he gave notice that she must be allowed to go back in her turn. When the injury was repaired she claimed the right to be put on the dock in preference to another vessel then waiting, and the preference was accorded to her. And when the work was done, the dock company rendered a bill for $150 for raising vessel "as per agreement." Upon these facts it must be held that the raising of the vessel was in pursuance of the contract, and consequently the recovery must be limited to the contract price.

An effort was made to show that the agreement was to raise the vessel light for $150, and that when raised she was partly loaded, and the raising in that condition worth more. But the price was fixed at $150 to raise the vessel as she was. All vessels have some cargo or ballast. No objection to the cargo in the vessel was made at the time she was tendered, and when the work was completed the bill rendered was for the contract price. It is plain, therefore, that the contract price must determine the amount of the recovery.

The second action raises the question whether the delay in raising the steamer, occasioned by the bursting of the bulkhead, gives to the owners of the steamer a right of action for the damages caused by such delay. This cause of action is not affected by the fact that the dock company was allowed to proceed with and complete its contract to raise the ship. Whether such a cause of action would have arisen if the failure to raise the vessel on the first attempt had been treated as an absolute failure on the part of the dock company to accomplish their undertaking need not be considered, for both parties treated the failure as temporary. Both knew that the vessel could be raised as soon as the dock should be repaired, and when the dock was repaired the owners of the steamer claimed the right to have her then raised under the contract, to which the dock company assented, and thereupon proceeded to complete their contract.

The case is therefore one of delay in performance caused by a defect in the dock. I entertain no doubt that the principles applicable to this case are those governing contracts dependent upon the continued existence of a given thing, for it is apparent that it was the use of this balance dock that was contracted for, and it was never supposed by either party that any other dock could be resorted to in fulfilment of the contract. So the answer of the ship-owners expressly admits that they employed the dock company to raise the steamer upon their dock. In this class of contracts performance is excused by the destruction of the thing upon the existence of which the contract is based. In this instance, when the bulkhead of the dock burst, the performance of the contract became physically impossible until the dock should be repaired, and pending such repairs the dock did not exist as such. This temporary destruction of the thing in reference to which the contract was made furnished a legal excuse for the delay that ensued, unless it appears that the obstruction was allowed to continue an unreasonable time or it be shown that negligence was the cause of the accident.

It is contended on the part of the steamer that although it be shown that the defect that caused the bulkhead to give away was unknown to the dock company, and could not have been discovered by any amount of care, nevertheless the dock company is liable because the delay arose from weakness in the dock and not from any unexpected event. The circumstance of the bursting under ordinary pressure is said to furnish conclusive proof of insufficiency, rendering the company liable. The bursting of the bulkhead may prove insufficiency in the dock, but it does not prove negligence on the part of the dock company. Here the evidence is that the dock on many previous occasions had proved sufficient, that it was kept under careful supervision, that upon examination the bulkhead disclosed no sign of weakness, and that there was nothing to lead one to suppose that the bulkhead would not raise this vessel as it had often done larger ones.

Delay in raising the libellant's vessel beyond the ordinary time required, arising under such circumstances by reason of the occurrence of an unforeseen event, against which care and diligence afforded no protection, does not give a right of action when there was no stipulation as to time in the contract.

The libel of Osborn Howes must, therefore, be dismissed with costs.

[On appeal to the circuit court the decree of this court was affirmed. Case unreported.]

NEW YORK BELTING CO. (DECKER v.). See Case No. 3,727.

Case No. 10,203.

NEW YORK CENT. & H. R. R. CO. v. BAILEY.

[20 Int. Rev. Rec. 25.]

Circuit Court, N. D. New York. 1874.[1]

RAILROADS—CONSOLIDATION—EFFECT UPON REMEDIES FOR ENFORCING LIABILITIES—STOCK CERTIFICATES OF OLD COMPANY—TAXATION—SCRIP DIVIDEND.

1. By the act of the legislature of New York consolidating the New York Central and Hudson River Railroads, the remedies for enforcing liabilities against the property of the former corporation are extended so as to allow enforcement from the property of the new corporation formed by the consolidation, to the same extent as though it were the debtor.

2. But the stock certificates issued by the New York Central Railroad, to represent the earnings invested in construction and equipment, are not taxable as "scrip dividends," within the meaning of the internal revenue law [13 Stat. 223]. A verdict is therefore directed for the plaintiffs for the amount of $594,002.89.

[This was an action at law by the New York Central & Hudson River Railroad Company, against John M. Bailey, collector of internal revenue, to recover certain assessments alleged to have been illegally exacted by defendant.]

WALLACE, District Judge. The section of the internal revenue law under which this tax was imposed, requires "every railroad company that may have declared any dividend in scrip or money payable to its stockholders as part of the earnings, profits, income or gains of such company," to pay a tax of "five per centum on the amount of such dividend whenever the same shall be payable." Another clause of the same section requires every railroad company to pay a tax of five per centum "on all profits of such company, carried to the account of any fund, or used for construction." In March, 1870, the assessor of the 14th collection district of this state assessed the interest certificates issued by the New York Central Railroad Company on the 19th day of December, 1868, describing in his assessment the subject of the tax as a "scrip dividend." Subsequently a warrant of distraint was issued by the collector of said district against the property of the New York Central and Hudson River Railroad Company, directing the seizure and sale of the property of the last named corporation for the satisfaction of such part of the said assessed tax as had not prior thereto been remitted by the commissioner of internal revenue, and upon the warrant levied upon the property of the last named corporation, sold a portion of it, and thereupon the corporation, under protest, paid the sum remaining unsatisfied upon the warrant. This action is brought to recover the sums received from the plaintiff under such levy, sale and payment, and involves the question whether such tax was illegally or erroneously imposed by said assessor or illegally collected by the collector.

Passing over certain other questions which have been raised in this case by the plaintiff, the serious questions in my view of the case to be decided are these: 1. Was the assessment valid against the N. Y. C. Railroad Company, assuming it had declared a dividend in scrip within the meaning of the revenue act? 2. If the assessment was valid, did it justify the seizure and sale of property of the New York Central and Hudson River Railroad Co.? 3. Did the New York Central Railroad Co. declare a dividend in scrip within the meaning of the section referred to?

The first and second of these questions can be most conveniently considered together. It is insisted by the plaintiff that when under act of the legislature the New York Central Railroad Company consolidated with the other corporation thenceforth known as the New York Central and Hudson River Railroad Company, the first named company passed out of being and could not be assessed, and even if it could have been, such an assessment would not justify a levy upon the property of a new and distinct corporation. In my judgment the peculiar provisions of the act of consolidation under which the New York Central Railroad Co. united with the Hudson River Railroad Company, and were both thus constituted a single and new corporation, obviate the objections urged by the plaintiff. By that act it is provided that the "rights of all creditors of and all liens upon the property of either of said corporations, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence, to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation and be enforced against it and its property to the same extent as if said debts and liabilities had been incurred or contracted by it." A liability existed by the former corporation to pay this tax. It was a debt which the United States might have enforced by action. The former corporation by the act is deemed to continue in existence, to preserve the rights and remedies of creditors unimpaired. Among these rights was that of the United States to enforce payment of the tax if one was due. Its officers could have assessed it upon, and collected it of the former corporation. The assessment therefore was valid. By the act the remedies for enforcing the liability are preserved, not only as against the property of the former corporation but are extended so as to allow enforcement from the property of the new corporation to the same extent, as though it was the debtor. By force of the statute then, the assessment against the

1 [Reversed in 22 Wall. (89 U. S.) 604.]

former corporation became in law an assessment against the new, and its property could be properly seized and sold to satisfy the liability.

My conclusion is that these questions must be determined adversely to the plaintiff.

As to the third question, whether the New York Central Railroad declared a dividend in scrip within the meaning of the section referred to, it is to be determined from certain undisputed facts, which are as follows: From the organization of the company in 1853, to the time of the adoption of the resolution hereafter to be mentioned, the company had expended a large portion of its earnings in the purchase of real estate, the construction of additional tracks, and for general additions to its property. On the 19th day of December, 1868, its directors passed the following resolutions: "Whereas, this company has hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of properties with a view to the increase of its traffic, moneys equal in amount to eighty per cent. of the capital stock of the company, and whereas, the several stockholders of the company are entitled to evidence of such expenditure, and to reimbursement of the same at some convenient future period. Now, therefore, resolved, that a certificate signed by the president and treasurer of the company be issued to the stockholders, severally, declaring that such stockholder is entitled to eighty per cent. of the amount of the capital stock held by him, payable ratably with the other certificates issued under this resolution, at the option of the company, out of its future earnings with dividends thereon, at the same rates and times as dividends shall be paid on the shares of the capital stock of the company. And that such certificate may be at the option of the company convertible into stock of the company, whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion. Resolved, that such certificates be delivered to the stockholders at the office of the company in the city of New York, on the presentation of their several certificates of stock, and that the receipt of the certificates provided for in these resolutions shall be endorsed on said certificates." Pursuant to these resolutions, certificates were issued by the company to its stockholders, and a copy of the resolutions was annexed to each certificate. The certificates are in the following form: "The New York Central Railroad Company, No. ——. Interest certificate Under a resolution of the board of directors of the company, passed December 19th, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that ——, being the holder of —— shares of the capital stock of said company, is entitled to —— dollars payable ratably with the other certificates issued under said resolution, at the pleasure of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid upon the shares of the capital stock of the company. This certificate may be transferred on the books of the company on the surrender of this certificate. In witness whereof, the said company has caused this certificate to be signed by its president and treasurer, this 19th day of December, 1868."

Was the action of the company declaring a dividend in scrip within the meaning of the act? It is best to dismiss at the outset any distinction which may be claimed to exist between a "dividend in scrip" and a stock dividend. Abstract definitions of the words "scrip" and "dividend" are not profitable in the inquiry. The whole scheme of the portion of the internal revenue act in which the section in question is found, contemplates the taxation of incomes of individuals and corporations. Dividends are included as well known indicia of the income of corporations, and constitute the profits divided by them after paying the expenses of their business and operations. They are usually declared in money, but as they are sometimes declared in stock and known as "scrip dividends," and as when so declared they represent income as profits which are apportioned to stockholders in stock instead of in money, congress intending to reach income in every form, subjected to tax, "dividends in scrip or money." The inquiry then is, were the interest certificates as issued by the company a stock dividend? If they conferred on the respective stockholders any greater interest in the earnings or capital of the corporation than they had before receiving them, then they were a stock dividend, though called "interest certificates." If they did not, they were not a stock dividend. Congress did not intend to tax dividends in stock which were not so in fact, and did not seek while in search of income to subject to tax that which is not income. In other words they did not intend to tax as stock dividends those myths, which in the process known as "watering stock" are sometimes assigned to shareholders of corporations as stock dividends. This intent is apparent from the limitation expressed, the tax is imposed on dividends declared in scrip or money "due as part of the earnings, profit, income or gains of such company." The certificates issued by the New York Central Railroad Company were issued as representing earnings and profits accruing from the operations of the company, and to that extent meet the requisites of a stock dividend. But did they vest in its stockholders any greater interest in its earnings or capital than they had prior thereto? In my judgment they did not. By the certificates and resolutions the stockholders are entitled severally to eighty per cent. more of the stock than they had before "at the option of the company." In other words, each stockholder shall have additional stock to that amount if

the company shall in its discretion and at its pleasure see fit to assign it to him. The directors of the company reserve the right to decline at their volition or caprice to assign any additional stock. The stockholder receives nothing by the declaration of the resolutions and certificates but the naked assurance of a possibility which at some indefinite future period may result to his advantage. It is in no sense a vested right capable of enforcement, for he never could compel the company to transfer to him additional stock. It is true that the resolutions and certificates entitle the stockholder to a dividend to be paid on the 80 per cent., "at the same time and ratably with dividends on the capital stock." But I fail to see how this in any manner enures to his advantage. The earnings of the company, instead of being applied to dividends on his capital stock, are applied on that and the certificates ratably, and to the extent that he receives a dividend on the certificates, his dividend on the capital stock is reduced. The stockholder derives and the company appropriates no income by the transaction which would not have been derived and appropriated if the certificates had never been issued. Another feature of the certificates is an important one, as marking a wide difference between their legal effect and that of a certificate of stock. The 80 per cent. is not to be paid out of the general assets and earnings of the corporation, neither are the dividends which are thereafter to be made. The dividends to be declared upon the certificates are only to be paid out of the future earnings of the company. Upon a dissolution of the corporation these certificate holders would receive no part of the assets, except those accumulated from the earnings after the certificates were issued. An assignment of all dividends thereafter to arise upon stock may in law amount to a transfer of the stock, because it would entitle the assignee to receive all the original stockholder could have obtained of the assets of the corporation. But a holder of these certificates would have no such right and would not stand at all in the position of a stockholder toward the corporation in case of a dissolution. It is not claimed that these certificates give to the holder the right to vote, and here again in an important feature these certificates fail to vest the holder with the rights of a stockholder.

Tested by all the rules by which we are to determine whether these certificates were certificates of stock and as such entitle the holder to the rights of a stockholder in the corporation, the result is adverse to a conclusion in the affirmative. The tax was intended to be imposed upon gains and profits actually appropriated by the company and derived by the stockholder. The section which imposed it, authorizes the company to deduct or withhold from all payments on account of any dividend due and payable as aforesaid, the tax of five per centum from the stockholder to whom the same is payable. Can it be seriously asserted that if the New York Central Railroad Company had withheld five per cent. of the eighty per cent. from the amount of its dividend next declared after it issued these certificates, and deducted that sum from the dividends due to a stockholder, the company would have been protected? The stockholder would have insisted that he had received no additional income by reason of the certificates, and it was not intended by the law to tax him through the corporation for that for which he could not be taxed personally. Or suppose again the assessor had attempted to compel the stockholder to pay a five per cent. tax on a sum equivalent to eighty per cent. of his stock in the company, on the ground that the company had not deducted the tax from his dividend. Would it not be revolting to common sense to insist that he should pay on these certificates as income actually received by him, when he had not only received no income in fact, but had not received that from which he could enforce or derive income in the future by any legal remedy? If the certificates did not represent income received by the stockholder, they were not of the character which the law intended to reach, because the dividends subjected to the tax were only those from which by the act the corporation could deduct the five per cent. imposed on the income of a stockholder derived by him in the form of a dividend.

It is insisted on behalf of the collector that the resolutions and certificates were artfully expressed by those who originated them, with the design thereby to evade the payment of the tax in question, and that the company should not be permitted by artifice to escape payment of the tax. Whatever may have been the intent, if the company did not declare a dividend it did not become liable to the tax. The tax is imposed on the act, not on the motive. While the stamp tax was in force, individuals frequently declined to take receipts for payments to save the cost of the stamps, but it has never been supposed that such individuals were liable for penalties.

Entertaining these views, my conclusion is that the tax was erroneously assessed, and the defendant must pay the amount realized by his proceedings. Had the tax been assessed upon the "profits of such company, carried to the account of any fund or used for construction," it might have been enforced for the amount actually carried to the fund or used for construction since 1862 when the internal revenue act was adopted. By the assessment made it was attempted to compel the plaintiff to pay a tax on income derived and expended by it in construction for nine years prior to the adoption of the law as well as for that derived and expended for the six years after such law was passed. The gross injustice which would result if such an assessment was contemplated by the act affords a strong argument against any interpretation that would permit it. It is an elementary

rule that no construction will be tolerated in a statute which will allow it to operate retrospectively.

It is unnecessary to discuss the effect of a remission of a portion of the tax by the commissioner of internal revenue. The action now on trial must stand or fall upon the validity of the assessment upon which the warrant of restraint was issued and collected. If the railroad company was indebted to the government for taxes because it had expended sums in construction on which it did not pay the tax, the amount so expended should have been ascertained from competent sources of information and collected by assessment for the amount so expended as by action. The remedy by action still remains, having been preserved, although the act imposing the tax has been repealed. In such an action the exact sum due, if any there is, can be ascertained and the amount collected. I therefore direct a verdict for the plaintiffs for the amount of $594,002.89.

[NOTE. Pursuant to this direction a verdict was entered for the full amount claimed. This judgment was reversed by the supreme court, where it was carried by writ of error. 22 Wall. (89 U. S.) 604. A second trial was then had, which resulted in a verdict and judgment in favor of the plaintiff, amounting, with costs, to $518,940.99. Case unreported. A writ of error was then sued out to the supreme court, where the judgment of the circuit court was affirmed. 106 U. S. 109, 1 Sup. Ct. 62.]

NEW YORK CENT. & H. R. R. CO. (COOKE v.). See Case No. 3,176.

NEW YORK CENT. & H. R. R. CO. (FRALOFF v.). See Cases Nos. 5,025 and 5,026.

Case No. 10,204.

NEW YORK DRY DOCK v. HICKS.

[5 McLean, 111.] [1]

Circuit Court, D. Michigan. June Term, 1850.

EVIDENCE—RECORDED INSTRUMENTS—CERTIFIED COPY—WITNESSES TO DEED AT COMMON LAW—EJECTMENT—SUIT BY FOREIGN CORPORATION—COMITY—LAND TAKEN FOR DEBT.

1. When an instrument is required by law to be recorded, a certified copy, the person being authorised so to certify, is evidence. The keeper of the records is the proper person to certify.

2. When a law declares that deeds for the conveyance of lands in the state shall be valid, when executed in any other state, conformably to the laws of such state, when recorded, copies, when duly certified, are evidence.

3. A deed at common law did not require witnesses.

4. An act required deeds to be recorded by the register of probate, but by law the records were transferred to the register of deeds; he may certify, as the records are legally in his custody.

5. In an ejectment the plaintiff has a right to show a legal title, however, acquired fairly.

6. A corporation may sue in a state, other than that which granted the charter, by comity.

7. And on the same principles lands when taken in security for the payment of a debt, or in payment, may be held. There is nothing in the nature of the association which prohibits this.

[Cited in American Mut. Life Ins. Co. v. Owen, 15 Gray, 494; Mayer v. Mayer, 30 N. J. Eq. 411; Thompson v. Waters, 25 Mich. 232.]

At law.

Barstow & Lockwood, for plaintiffs.

Mr. Campbell, for defendant.

OPINION OF THE COURT. This is a motion for a new trial, by the defendants' counsel, on the following grounds: 1. Because the transcript of the record of the deed from Isaac Carrier to Lathrop A. G. Grant, was improperly admitted in evidence. 2. Because the transcript of the record of the deed from the said Grant to William Hines, was improperly received in evidence, said deed having been recorded in the office of the register of probate, and said transcript being signed by the county register. 3. Because the deed from Seaman & Norton to plaintiff was improperly admitted in evidence. 4. Because the plaintiff, as a foreign corporation, cannot hold said lands under the laws of Michigan.

The first objection to the deed from Carrier to Grant was, that it was not entitled to be recorded. And if this be sustained, it will follow that the transcript of the record cannot be received as evidence. A certified copy is evidence only where the instrument is required by law to be recorded, or where the law expressly makes the copy evidence. This deed, it is said, was executed under the act of 1827 (Rev. Laws Mich. p. 258). The deed was recorded in 1832. The 1st section of the act provides: "That all deeds or other conveyances of any lands, tenements or hereditaments lying in this territory, signed and sealed by the parties granting the same, having good and lawful right and authority thereunto, and signed by two or more witnesses, and acknowledged by such grantor or grantors, or proved and recorded as is hereinafter provided, shall be good and valid to pass the same lands," &c. But the deed in question was executed in the state of New York, and under a law which gives effect to it as such, if executed as deeds are required to be executed by the law of New York. Seeing that deeds executed in the territory or state of Michigan, are regulated by statute, it cannot be important to inquire what constituted a valid deed at common law. It is known that at an early day in the history of England, it was not usual for the grantor to affix his signature to the deed, except by his seal, as but few could write. And especially was this the case in regard to witnesses. Their names, when required, were found endorsed on the back of the deed or were mentioned within it. The 7th section of the same act which requires

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

two or more witnesses to a deed, provides, that deeds for lands in Michigan made without the territory "shall be acknowledged, and proved, and certified according to and in conformity with the laws and usages of the territory, state, or country, in which such deeds or conveyances were acknowledged or proved, or in which they shall be acknowledged or proved, and all such conveyances are hereby declared effectual, and valid in law, to all intents and purposes, as though the same acknowledgments had been taken, or proof of execution made, within the territory, and in pursuance of the laws thereof; and such deeds and conveyances, so acknowledged or proved as aforesaid, may be admitted to be, and shall be recorded in the respective counties." This places a deed executed out of the state or territory, according to the laws of the place where it was executed, on the same footing, as if executed within the territory, and conformably to its laws, and such deeds may be recorded.

The objection to the authentication of the copy seems not to be sustainable. The law authorized the deed to be recorded at first by the register of probate, but the records kept by him have been transferred by law to the register of deeds, and they are now legally in his custody. Under such circumstances the keeper of the records may certify copies, the same as the register of probate might have certified, had he retained the custody of the original records. The law which makes copies evidence, when duly certified, is satisfied by the certificate of the person who has the legal custody of the records. No other individual could certify copies. This right appertains to him from the legal possession of the records. In the case of U. S. v. Percheman, 7 Pet. [32 U. S.] 85, the supreme court say: "We think that, on general principles. a copy given by a public officer, whose duty it is to keep the original, ought to be received in evidence."

The third objection is, that the deed from Seaman and Norton was improperly admitted in evidence, because the title set forth in said deed is inconsistent with the title sought to be traced to the said Seaman, and also because it appears by said deed that the title to said premises obtained through the sheriff's sale set forth therein, had been previously conveyed to Henry H. Elliott. And also because the plaintiff had no authority to take or hold the lands in controversy in this suit. Under the declaration the plaintiffs had a right to show a vested legal title, no matter how, if it was fairly acquired, or through whom it may have been derived. It is sufficient to show that the legal title was in Seaman, and that a quit claim was executed by him. Whether Norton had title or not is of no importance. The recital in the deed shows no title, inconsistent with that which the plaintiff claims through the quit claim of Seaman. It does not appear from the recitals as alleged, that the title had been conveyed to Elliott. The sheriff did not deed the land to Elliott—at most the recital can show nothing more than an equity. The objection that the plaintiff under its charter had no power to hold the land in controversy, is founded on the supposition, that a corporation must show the land was taken in its regular course of business, and within its corporate powers. Under the common law, a corporation, unless prohibited, may purchase and hold real estate. Ang. & A. Corp. 65; 1 Kyd, Corp. 69; 2 Kent, Comm. 277, 281. The restriction in England to this is found in the statutes of mortmain, which have not been enacted in Michigan. The right to take and hold real estate in connection and in furtherance of their corporate powers, is incidental to a corporation. A bank, without any express powers to that effect, may take and hold real estate as a banking-house, and also in furtherance of its business. Ang. & A. Corp. 65, 66, 87–92, 200; 5 Hammond [Ohio] 205; 3 Pick. 239. In the 1st section of the act of incorporation, a right to take and hold such real estate as may be necessary in the transaction of its business, is expressly given. Having this power, the corporation received the land in the exercise of its legitimate functions, as this will be presumed in the absence of proof to the contrary. 3 Wend. 94; 16 Mass. 102; 7 Serg. & R. 313; 7 Cow. 540; Virginia & Farmers' Bank v. Poitiaux, 3 Rand. [Va.] 136.

It is never necessary for a bank to allege, when suing on a note, that it was taken in the ordinary course of business. A corporation is never presumed to have violated its charter. 15 Pick. 310; New Haven Steamboat & Transportation Co. v. Vanderbilt, 16 Conn. 420; 19 Johns. 347; 11 Johns. 517. A note and mortgage appearing on its face to have been executed to the State Bank of Indiana, in its corporate name, will be presumed to be taken in conformity with its charter. Sparks v. State Bank, 7 Blackf. 469. In [Society for Propagation of Gospel v. Town of Pawlet] 4 Pet. [29 U. S.] 501, it is said that the general issue not only admits the general right to sue, in a corporation, but also to bring the action set forth in the declaration. And that case was brought by a foreign corporation, and the action was in ejectment. In the discharge of its corporate functions, a bank or any other corporation, is limited to the jurisdiction in which it is created, but it is not controverted, that a bank may sue to recover a debt in any other state. This is placed on the ground of comity, and the right may be exercised wherever it is not prohibited. This doctrine was laid down fully in the Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519. The right of suing in another state is not only recognized, but also the right to make contracts which are clearly within its powers, through comity. Any state may prohibit the making of such contracts or the prosecution of suits, but, until this is done, the comity will be presumed to exist.

By an amendment to the original charter

dated 29th of April, 1829, the New York Dry Dock Company was authorized, at such time and in such manner as the board of directors may deem expedient, to establish an office of discount and deposit in any part of the city of New York, and it was required to keep open for the transaction of business a banking-house in the Eleventh ward of the city of New York. Now in the exercise of this power a debt is incurred by a citizen of Michigan, and he executes a deed for land in that state in payment of the debt, or to secure the payment. We suppose that the contract would be a valid one, and the corporation could hold the land for the purposes for which it was conveyed. The function of banking could not be exercised in Michigan; but through comity bills of exchange may be sold by the bank in that state, and suits may be brought by the bank to recover on such contracts. And no principle of law is perceived against the validity of a deed for land given to the plaintiff, lying in the state of Michigan, whether it be conveyed to secure the payment of a debt or in satisfaction of it. Foreigners, in some of the states, may hold lands, but they do not descend to their heirs unless by statutory provision. But they stand in a different relation from citizens of the United States. Each citizen of a state may claim, under the constitution, "all privileges and immunities of citizens in the several states." A corporation aggregate is constituted of citizens who, for the purposes of their charter, are authorized to act in the name they have assumed, having the rights generally which may be exercised by an individual. Their functions as a corporation are limited to the business in which they are engaged, and to the jurisdiction under which they are organized. Still, representing the rights of citizens, there is nothing in their organization which should deprive them of the comity of collecting their debts by suits in other states, and of holding property therein received as security for their debts, or in payment of them. The holding of real estate in other states, in their corporate name, is no more the exercise of their corporate functions, than in bringing a suit in their corporate name, which is now a right not controverted. The states may deny this comity, but until it shall be denied, it is presumed to exist.

The motion for a new trial is overruled.

NEW YORK EYE INFIRMARY (MORTON v.). See Case No. 9,865.

NEW YORK GUARANTY & INDEMNITY CO. (UNITED STATES v.). See Case No. 15,872.

NEW YORK GUARANTY & INDEMNITY CO. (YARDLEY v.). See Case No. 18,-125.

NEW YORK GUTTA PERCHA, ETC., CO. (GOODYEAR v.). See Case No. 5,580.

NEW YORK GUTTA PERCHA COMB CO. (POPPENHUSEN v.). See Cases Nos. 11,281–11,283.

Case No. 10,205.

NEW YORK HARBOR TUGBOAT CO. v. The WYOMING.

[2 N. J. Law J. 278.]

District Court, D. New Jersey. July 22, 1879.

MARITIME LIENS—SUBSTITUTION OF ONE VESSEL FOR ANOTHER—LIBEL FOR SERVICES AS FOR SALVAGE.

A steamboat making regular daily trips on tide waters having become disabled, her owners arranged with the owners of another boat that the latter should make one trip in the place of the former for a certain sum. The trip was made, but was not paid for. A libel in rem filed against the former boat as for services in the nature of salvage was dismissed with costs.

Libel in rem.

NIXON, District Judge. The libel sets forth the following case: The steamboat Wyoming was a passenger and freight boat running between New Brunswick and New York, through tide waters, making daily trips, Sundays excepted, on regular time, leaving New Brunswick in the morning and New York in the afternoon on her return trip. On the 17th of December, 1878, the Wyoming being at the city of New York, became disabled, her steam chimney needing repairs, so that she was not able to make her return trip on that day. Her owner, in company with the captain, arranged with the tow boat Seth Low, a large side wheel steamer belonging to the libellant corporation, to take her place, and make a trip to and from New Brunswick, carrying freight and passengers each way, for the price of ninety dollars. The service was duly performed by the Seth Low, but was never paid for, and the libellants claim that they had a lien upon the Wyoming and have now a lien upon the remnants and surplus in the registry of the court, for the amount due thereon, on the ground that the service was maritime and in the nature of salvage, and was rendered to the Wyoming in distress, to save her from loss and damage by enabling her to fulfil her contracts for the carriage of passengers and freights. I am quite clear that such a suit cannot be maintained. The transaction has none of the characteristics of a salvage service, as stated by the libellant; nor am I able to understand upon what principle a libel can be claimed to exist against the Wyoming for the sum of money that her owner agreed to pay for the use of the libellant's vessel. That she took the place of the Wyoming in running to New Brunswick and back, under a special contract determining the amount of compensation to be paid, does not give any more lien upon the Wyoming than upon any other property which her owner happened to have at the time. The proceedings seem to have been founded upon the idea that the law compelled the Wyoming to make her trip on that day, and that she would be involved in claims for damages if for any reason she failed to do so. But a general notice or advertisement that a vessel will make daily

trips from one port to another does not compel the owner to respond in damages, if, from accident or other cause, she fails to perform a trip. It might be different if tickets were sold or merchandise received for a particular day, and special loss could be shown, arising from the failure of the boat to go upon that day. But nothing of that sort is alleged or proved in the present case.

The libellants have their remedy in the courts of the common law upon the contract with the owner, and the libel must be dismissed, with costs.

Case No. 10,206.

In re NEW YORK KEROSENE OIL CO.

[The case reported under above title in 3 N. B. R. 125 (Quarto, 31), is the same as Case No. 7,726.]

Case No. 10,207.

NEW YORK LIFE INS. & TRUST CO. v. COWPERTHWAITE et al.

[Betts' Scr. Bk. 31.]

District Court, S. D. New York. 1841.

NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITY—PRINCIPAL AND SURETIES.

[Where, at the time of making a loan, the borrower passes to the lender, along with his own note, certain notes made by third parties, and payable to the borrower, these latter notes, even if intended merely as collateral security, must be regarded as valid and operative paper against the makers, although, as between them and the borrower, there was no consideration; and they cannot protect themselves as sureties unless they have, by positive notice, brought home to the lender the fact that the paper was only to be used as security, and that there was no consideration for it.]

This was an action on a promissory note for $5,000, made by the defendants to the order of Warren Kimball, and endorsed by him to the plaintiffs [H. Cowperthwaite and George W. Lord]. The defence set up was, that the defendants were sureties only, and as such were, under the circumstances of the case, exempt from payment.

The following are the circumstances of the case as they appeared in evidence: In January, 1837, Warren Kimball negotiated with the plaintiffs for a loan of $10,000 on his own notes, endorsed by Bailey, Keeler & Remsen, and when getting the money, or immediately after, Kimball also gave the plaintiffs two notes made by the defendants, as collateral security to his own notes, one of which notes, or rather a renewal of it, was the note now in suit. When Kimball's notes became due, he paid a part of them, and got a renewal for the remainder, and also got the defendants' notes renewed. When Kimball's notes became due a second time, he again got a renewal of them, and also got a renewal of the defendants' notes for their full original amount, although he had paid part of the debt for which these notes were collateral security. When Kimball's notes became due a third time, he again got a renewal of them, but the plaintiffs did not again ask him to renew the notes of the defendants, but held them over, after they fell due, without giving the defendant any notice until after Kimball had suspended payment.

For the defence it was contended, that from the circumstances of the case, the plaintiffs must have known, or inferred, that Kimball had given the defendants no consideration for the notes, and that the plaintiffs had made the loan on Kimball's own notes only, and took the defendants' notes as collateral security. And that had the plaintiffs, before they gave the last renewal to Kimball, informed the defendants of it, or demanded payment of their notes, the defendants could have sued Kimball and recovered the amount of their accommodation to him, as he was then in solvent circumstances. But instead of doing so, the plaintiffs had given him an extension of time, without the consent or knowledge of defendants, and by doing so they had exonerated the defendants from their liability as sureties.

For the plaintiffs it was contended, that the defendants could not exempt themselves on the ground of being sureties, unless they could prove that they had given notice of it to the plaintiffs.

Mr. Betts, for plaintiffs.
Mr. Ketchum, for defendants.

BETTS, District Judge (charging jury). In a commercial community like ours, it is always important that questions arising in relation to commercial paper, should be settled on such clear, definite and distinct principles, that they may be a guide for practical men in their business affairs. In the present case, the defence set up is, that the parties executed these papers merely as securities, and are to be considered but as sureties, and that as the plaintiffs did not proceed with that due diligence on the original debt which the law demands, they have lost their claim on the defendants.

The question thence arises, are the defendants to be held but as sureties? As respects Kimball, they are sureties, as between Kimball and the defendants no consideration was given for this note. But as regards the plaintiffs, they are either sureties or principals, and this proposition presents the question which you are now to consider. Mr. Kimball was the only witness in the case, and on his evidence there may be a doubt whether he dealt with the company, to have his own notes discounted, and that afterwards he should leave with them the notes of Cowperthwaite & Lord, as collaterals, or that he dealt with the company, on the understanding that they lent him the money on the notes of both parties. If it was on both notes, then Kimball's own notes were no more discounted than the notes of defend-

ants. It was in that case a loan on both the notes together, and either party could with equal propriety be called principals or collaterals. And if the money was thus advanced on their notes, the holders of them could enforce payment on them. If when the money was advanced, it was understood that it was alike on the notes of Bailey, Keeler & Remsen and Cowperthwaite & Lord, then it was an original undertaking on the part of the defendants, and they are bound for the debt.

There is some little uncertainty upon the proofs as to the real character of the transaction. It appears at one time that Kimball was to have the discount on his own notes, and that he gave these notes as collateral security. But a further examination gave ground for belief that he received his loan on the foundation of both papers. If you find that it was a loan on both notes unitedly, then there is no question as to the nature of the security. It was an original undertaking. But if you find that it was a collateral security, then applies the question of law, are the defendants entitled to claim to themselves the privileges and immunities of sureties only? I think the rule of law settles that question, for although, as between Kimball and Cowperthwaite & Lord, they are but sureties, they cannot protect themselves, on that ground, against other persons who take the paper, unless they can bring home to such holder positive notice that they were only sureties in the transaction. If several persons sign a note as obligors, all but one, as between themselves, may be but sureties. Yet, if there is a loan given on the whole note, no claim to exemption as sureties can be maintained, unless they notify the parties taking the paper that they were but sureties. And they must establish their right to exemption as sureties, by proving positive notice to the parties holding the paper. This relieves the question from all speculation or implication as to what the plaintiffs might have reasonably inferred, or understood respecting the origin and consideration of the note in question. It must be regarded as a valid operative paper against the defendants, at the time it was passed to the plaintiffs, inasmuch as no direct and positive notice was given them that it was intended only as security by the defendants and was given without consideration to them. You will therefore say, was the loan originally made on the paper of Kimball, and not on the paper of Cowperthwaite & Lord? If you find that this paper was received as collateral security, you must still find for the plaintiffs, on the ground that they had no direct notice that the parties were sureties only. If the court is under any error as to this point of law, it will be corrected on a review of the case, when moved by the defendants.

The jury found a verdict for the plaintiffs for $6,011, and 6 cents costs; and they further found that the loan was made upon Warren Kimball's note, with Cowperthwaite & Lord's notes as collateral securities.

NEW YORK LIFE INS. & TRUST CO. (UNITED STATES v.). See Case No. 15,-873.

NEW YORK LIFE INS. CO. (DAVIS v.). See Case No. 3,644.

NEW YORK LIFE INS. CO. (DUTTON v.). See Case No. 4,211.

NEW YORK LIFE INS. CO. (ENSWORTH v.). See Case No. 4,496.

NEW YORK LIFE INS. CO. (HANCOCK v.). See Case No. 6,011.

NEW YORK LIFE INS. CO. (MOREY v.). See Case No. 9,795.

NEW YORK LIFE INS. CO. (OWEN v.). See Case No. 10,631.

NEW YORK LIFE INS. CO. (TAIT v.). See Case No. 13,726.

Case No. 10,208.

In re NEW YORK MAIL STEAMSHIP CO.

[7 Blatchf. 178;[1] 3 N. B. R. 627 (Quarto, 155); 3 N. B. R. 756 (Quarto, 185).]

Circuit Court, S. D. New York. March 19, 1870.

INVOLUNTARY BANKRUPTCY—ALLOWANCE OF COUNSEL FEE TO CREDITOR.

Where, as the result of proceedings in involuntary bankruptcy, a large amount of property was in the hands of the assignee subject to distribution to creditors, this court allowed to the petitioning creditor who instituted the proceedings, to be paid out of the fund in the hands of the assignee, a reasonable sum for the expense incurred by him in employing counsel to conduct such proceedings to an adjudication.

[Cited in Re Mead, Case No. 9,364; Re Cook, 17 Fed. 330.]

[In bankruptcy.]

James Emott, for the application.

WOODRUFF, Circuit Judge. The petition of the National Bank of the Commonwealth in this proceeding having been presented to the district court of this district, and the district judge, as a stockholder in the said bank, being concerned in interest, the proceeding has been certified to this court, pursuant to section 11 of the act of May 8, 1792 (1 Stat. 278, 279).

This petitioner was the petitioning creditor upon whose application the above-named debtor was decreed bankrupt. In the proceeding, the property of the debtor was protected for the benefit of creditors, an adjudication declaring the debtor bankrupt was had, an assignee was appointed, and a large amount of property came to, and is now in the hands of, such assignee, subject to distribution to creditors. For the institution and conduct of those proceedings the petitioning creditor was obliged to and did employ counsel, and incur the expense of such employment, and the amount of such expense is

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

shown to have been reasonable. Such petitioning creditor now asks, in substance, that, in making distribution of the fund in the hands of the assignee, this expense, incurred for the common benefit, shall be charged on the fund, so that, practically, the creditors who come in to share the benefit of the decree in bankruptcy, and the fruits thereof, may share also in the said expense of procuring them.

The mere statement of the application shows the eminent justice and equity of the relief sought. No reason can possibly be suggested why this petitioning creditor should pay these expenses without chance of reimbursement, and thereby, to this extent, lose, for the greater advantage of the other creditors, the benefit of the proceeding. Independently of any adjudications already had upon the subject, I should say that the principles governing a court of equity in dealing with a fund brought within its jurisdiction for the purpose of distribution, or in lending its advisory aid for the purpose of guiding or controlling the administration of such a fund, sanction the allowance of this expense; and yet there, as truly as in proceedings in bankruptcy, the ordinary fee bill providing for taxable costs does not provide for it.

I concur in the conclusion of several of the district judges who have passed upon the question; and the sanction of those decisions by Chief Justice Chase renders extended discussion unnecessary. In re Williams [Case No. 17,704]; Ex parte Jaffray [Id. 7,170]; In re Schwab [Id. 12,498]; Ex parte Plitt [Id. 11,228]; In re Mitteldorfer [Id. 9,675]. Such allowances should be guarded by the most cautious regard for the rights and interests of the creditors at large, lest, under the form of necessary expenses, undue liberality to counsel should be sanctioned, in reduction of the fund; and, if there was any suggestion, in this case, that the charge was in any degree unreasonable, I should deem it proper, by a reference or otherwise, to cause further enquiry to be made.

Let an order be entered directing the allowance, to the petitioning creditor, of the expense of counsel, as prayed for, being the expense in conducting the proceedings to an adjudication.

[See Cases Nos. 10,209–10,212.]

Case No. 10,209.

In re NEW YORK MAIL STEAMSHIP CO.

[2 N. B. R. 74 (Quarto, 26).] [1]

District Court, S. D. New York. Aug. 12, 1868.

BANKRUPTCY—REMOVAL OF ASSIGNEE.

In bankruptcy.

BLATCHFORD, District Judge. Upon the application made in this matter for the removal of Robert J. Hubbard, one of the assignees of the bankrupts, I have come to the conclusion, on an examination of the petition, answer and affidavits, that the case is a proper one for the granting of an order under section 18 of the act, according to form No. 42, calling a meeting of the creditors of the bankrupt, to consider the question of the removal of Mr. Hubbard. If at such meeting the greater part in value and in number of the creditors who shall have proved their debts, shall vote in favor of Mr. Hubbard, the court will not consent to his removal. If the vote at such meeting shall be in favor of his removal, a successor will be elected at the same meeting.

[NOTE. The case was subsequently heard upon the question of allowance of counsel fees. Case No. 10,210. Counsel for the company before its bankruptcy claimed lien on papers in their hands for fees. Id. 10,211. This last claim, together with others, was referred to register to examine proofs. Id. 10,212. The case is finally reported as heard upon the matter of allowances for fees paid by petitioning creditor. This matter was heard by the circuit court upon certificate of interest in the subject-matter by the district judge. Id. 10,208.]

[1] [Reprinted by permission.]

Case No. 10,210.

In re NEW YORK MAIL STEAMSHIP CO.

[2 N. B. R. 423 (Quarto, 137); 1 Chi. Leg. News, 210.] [1]

Circuit Court, S. D. New York. Feb. 27, 1869.

BANKRUPTCY—COUNSEL FEES—SERVICES BY SALE OF ASSIGNEE.

1. No charges for professional services of counsel to assignees will in general be allowed, where the services were rendered prior to the appointment of the assignees.

2. Where two assignees were jointly appointed, a charge for professional services by the son of one of them disallowed, as tending to abuses. [Cited in Re Nounnan, 7 N. B. R. 22.]

In bankruptcy.

[This case is reported as first heard upon the question of removal of one of the assignees. Case No. 10,209.]

BLATCHFORD, District Judge. The bill of James Emott is allowed at two thousand five hundred and fifty dollars, all the items being allowed except the counsel fee, in proceedings to obtain adjudication of bankruptcy, and counsel fee in suit to restrain forfeiture of lease of pier, both of those items being for services prior to the election of assignees. The bill of Andrew Hennion, Jr., is wholly disallowed. Converse & Lyman are entitled to the amount of a bill of costs to be taxed to the petitioning creditors, as successful parties in the proceedings to put the company into bankruptcy. This bill would include the seventy-two dollars and seventy-five cents disbursements named by them, and twenty dollars solicitor's fee, and such other

[1] [Reprinted from 2 N. B. R. 423 (Quarto, 137) by permission. 1 Chi. Leg. News, 210, contains only a partial report.]

items as are taxable under the regular equity fee bill, the bankruptcy act, and the general orders. The two hundred dollars counsel fee charged by them is disallowed. The eighty-nine dollars charged by them in the suit in the common pleas is disallowed. John McDonald's bill is allowed at two thousand two hundred and eighteen dollars and fifteen cents. The general principle adopted is, that no charges for professional services of counsel can be allowed against the assets in the hands of the assignees, for payment in full, and as expenses of the assignees in the administration of their trust, which were rendered prior to the appointment of the assignees. Perhaps, under special circumstances, services might be included which were rendered as far back as the adjudication of bankruptcy; but the general principle before referred to, covers, I believe, all the items disallowed in the bills of Mr. Emott and of Converse & Lyman. The bill of Mr. Hennion, one thousand and sixty-five dollars, is disallowed, because, on the testimony, he cannot be regarded as having acted as counsel or attorney for the assignees. Besides, in a case like this, where there are two assignees, who unite in the employment of counsel as competent as Mr. Emott and Mr. McDonald, and no necessity is shown for the services of a son of one of the assignees, on behalf of the estate, he must be regarded as acting on behalf of his father as an individual. If one assignee could charge the estate in this way for the benefit of one person, the other might do the same for another person, and great abuses might creep in.

[NOTE. The case was subsequently heard upon claim of counsel for company, before its bankruptcy, to have a lien upon certain papers in their hands for fees due them. Case No. 10,211. This claim, together with others, was referred to the register to examine proofs. Id. 10,212. The case is finally reported as heard upon the matter of allowance to petitioning creditor for counsel fees. Id. 10,208.]

Case No. 10,211.

In re NEW YORK MAIL STEAMSHIP CO.

[2 N. B. R. 554 (Quarto, 170).][1]

District Court, S. D. New York. May 3, 1869.

BANKRUPTCY—COUNSEL FEES PRIOR TO ADJUDICATION—PROBABLE DEBT—REFEREE.

1. Where attorneys, among other charges against the assignees, claimed payment of fees out of the general fund for professional services rendered in opposing petitions to have a corporation adjudged an involuntary bankrupt, *held*, that the services were not rendered to the assignee, but to the bankrupt, prior to the adjudication, and the claim was a debt provable in bankruptcy.

[Cited in Re Hennocksburgh, Case No. 6,367; Re Jaycox, Id. 7,239; Re Ward, 12 Fed. 327.]

[Cited in Re Nounnan, 7 N. B. R. 22.]

2. Referee appointed and ordered to take testimony and report on other claims for services.

[1] [Reprinted by permission.]

[This case is first reported as heard upon the question of removal of one of the assignees. Case No. 10,209. It was then heard upon the matter of allowance of fees to counsel for assignees. Id. 10,210.]

Brown, Hall & Vanderpoel, and Isaiah T. Williams, of New York City, were attorneys for the New York Mail Steamship Co. prior to its adjudication in bankruptcy. A different attorney was employed by the assignees in bankruptcy. Brown, Hall & Vanderpoel, and I. T. Williams claimed that the services rendered by them were a lien on the papers in their hands in the various suits pending at the time of adjudication, in which the company was a party. And it is further claimed by Brown, Hall & Vanderpoel, that the services rendered by them for New York Mail Steamship Co., in opposing the various petitions filed for the purpose of obtaining an adjudication against the company should be paid in full.

BLATCHFORD, District Judge. On the petition in this matter by the assignees for the delivery of papers by attorneys, I have examined the affidavits and other papers submitted to me, but it is impossible for me, on them, to come to any satisfactory conclusion as to some of the questions involved. As to the claim for services rendered to the bankrupts in opposing the petitions to have them declared involuntary bankrupts, those services were rendered prior to the adjudication of bankruptcy, and, therefore, under section nineteen, the debt for them is one provable in bankruptcy, and the services were not rendered to the assignees. As there is no lien on any papers in respect of such services, the debt from them cannot be paid as a preferred debt.

As to the other matters involved, an order will be entered referring to John Sedgwick, Esquire, as a referee to take testimony as to the matters involved in the petitions, affidavits, and bills for professional services herein, and report such testimony, with his opinion on the following points, in each one of the two cases: First. As to what suits ought to be proceeded with by the assignees, either in prosecution or defence. Second. As to whether any and what papers in such suits are in the possession of the attorneys, which are necessary to the assignees in prosecuting or defending the suits which ought to be proceeded with by the assignees either in prosecution or defence. Third. As to whether any and what papers in such suits are in the possession of the attorneys, which are necessary to the assignees in prosecuting or defending the suits which ought to be proceeded with. Fourth. As to the amounts which are due, and unpaid, to such attorneys severally, in respect of professional services rendered by them, in and about the several suits which ought to be proceeded with, which are a lien on such papers, and which ought to be paid

to such attorneys on the delivery by them of such papers to the assignees.

[NOTE. At a subsequent date this claim, with others, was referred to the register to examine proofs. Case No. 10,212. The case was finally heard upon the matter of allowance of counsel fees to petitioning creditor. Id. 10,208.]

Case No. 10,212.

In re NEW YORK MAIL STEAMSHIP CO.

[3 N. B. R. 280 (Quarto, 73).] [1]

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

BANKRUPTCY—CLAIM FOR COUNSEL FEE—DIVIDEND.

1. Dividend was ordered on claims of certain lawyers for alleged professional services rendered bankrupt. *Held*, reference ordered to register to examine into the proof of such debts, and the register and assignee restrained from further proceedings until further order of the court.

2. Motion to vacate an order for a dividend may be made on proper papers and notice.

In bankruptcy.

[This case is first reported as heard upon the question of removal of one of the assignees. Case No. 10,209. It was then heard upon the matter of allowance of counsel fees. Id. 10,210. Counsel for the bankrupt claimed a lien on papers. Id. 10,211.]

BLATCHFORD, District Judge. In this case, an order must be entered in the usual form, referring it to the register in charge of the case to examine into the three proofs of debt filed by Horatio P. Allen, Marshall B. White, and others, and Brown, Hall & Vanderpoel, with a view to determine their validity and proper amount. It is impossible for me to determine, on the paper before me, whether the declaration of the dividend ordered at the second meeting of creditors, ought or ought not to be set aside, but the case is a proper one to restrain the register and the assignee from taking any further steps towards making or paying such dividends, until the further order of the court, with a view to give an opportunity to any person interested to apply to the court, on proper papers and proper notice, to vacate the order for the dividend.

[The case was finally heard upon the claim of petitioning creditor for allowance for counsel fees. Case No. 10,208.]

Case No. 10,213.

NEW YORK MAIL STEAMSHIP CO. v. The BALTIC.

[5 Int. Rev. Rec. 3.]

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

WHARFAGE—LIBEL IN REM—LOCAL LAW.

In admiralty.

J. T. Williams, for libelants.

Mann & Parsons, for respondents.

[1] [Reprinted by permission.]

The following is the substance of the opinion of SHIPMAN, District Judge: "This is a suit, in rem, against the steamship Baltic to enforce a claim for wharfage. The libelants allege that they are lessees of a dock in the city of New York, and that the Baltic occupied a berth thereat, at various times named, in pursuance of an agreement between her owners and her libelants. The particulars of the agreement are not set out, and the court is not informed whether or not there was a fixed rate of compensation agreed upon between the parties. If the rate of wharfage was specified in the agreement, that would end the case, even if she was a foreign ship, for no lien would attach, and of course no proceeding in rem can be maintained. Ex parte Lewis [Case No. 8,310]."

Judge SHIPMAN then says that the vessel being owned and registered in this port, wharfage, even granting that it is a lien upon the ship on the same ground as other necessaries, does not apply to this vessel. As to the claim that a lien is given by the local laws of this state, that is conceded; but that this lien can and ought to be enforced by this court is denied. After stating that the old rule, which he quotes, giving power to this court to enforce such a lien had been abrogated, and a new rule adopted, Judge SHIPMAN says: "The object of this alteration was to take away the power to enforce liens in rem, created by the local law, and resting upon that alone. The St. Lawrence, 1 Black [66 U. S.] 522. The libel should therefore be dismissed with costs. Let a decree be entered accordingly."

NEW YORK MUT. INS. CO. (HERNANDEZ v.). See Case No. 6,414.

NEW YORK, N. H. & H. R. CO. (UNITED STATES v.). See Case No. 15,874.

Case No. 10,214.

NEW YORK RECTIFYING CO. v. UNITED STATES.

[14 Blatchf. 549.] [1]

Circuit Court, S. D. New York. June 27, 1878.

INTOXICATING LIQUORS — "WHOLESALE DEALERS."

Under section 3319 of the Revised Statutes, if a rectifier purchases from an authorized distiller, who is not an authorized rectifier or an authorized wholesale liquor dealer, distilled spirits, in quantities greater than 20 gallons, which were not produced by such authorized distiller, such purchaser is liable to the penalty imposed by said section 3319.

[In error to the district court of the United States for the Southern district of New York.]

Thomas Harland, for plaintiff in error.

Stewart L. Woodford, Dist. Atty., for defendants in error.

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

WAITE, Circuit Justice. Section 3319 of the Revised Statutes is as follows: "It shall not be lawful for any rectifier of distilled spirits, or wholesale or retail liquor dealer, to purchase or receive any distilled spirits, in quantities greater than twenty gallons, from any person other than an authorized rectifier of distilled spirits, distiller, or wholesale liquor dealer. Every person who violates this section shall forfeit and pay one thousand dollars: provided," &c. The plaintiff in error, a rectifier of distilled spirits, contracted with Fleischman & Co., authorized distillers, for twenty-five barrels of highwines, to be delivered August 14th, 1873. On the day named Fleischman & Co. delivered fifteen barrels of their own manufacture, and announced their inability to deliver more. The full number being insisted upon, Fleischman & Co. delivered, and the plaintiff in error received, under the contract, the remaining ten barrels, stamped and marked in a manner to indicate that they had been made by some distiller other than Fleischman & Co. Fleischman & Co. were not authorized rectifiers, or authorized wholesale or retail liquor dealers. Upon this state of facts the district court properly gave judgment against the plaintiff in error, for the penalty imposed by the section just quoted. A distiller is only authorized, by virtue of his occupation as a distiller, to sell spirits of his own production. Every person who sells spirits, except as a distiller properly may, is a wholesale or retail liquor dealer, according to the quantity he sells. Rev. St. § 3244, par. 4. Fleischman & Co., in their sale and delivery of the ten barrels, acted as wholesale dealers and not as distillers. Not being authorized wholesale dealers, the plaintiff in error, a rectifier, was prohibited by the statute from receiving this delivery from them. Judgment affirmed.

Case No. 10,215.

NEW YORK RUBBER CO. v. CHASKEL.

[9 O. G. 923.]

Circuit Court, S. D. New York. 1876.

PATENTS—INFRINGEMENT—SLIGHT DIFFERENCE IN RESULTS.

Where the defendant in an action for infringement uses substantially the same devices as plaintiff, and produces the same result and certain other results differing from those produced by plaintiff, it will still be considered that the patent of plaintiff has been infringed, and that defendant appropriates the invention of complainant.

[This was a bill in equity by the New York Rubber Company against James Chaskel, impleaded with Henry Besels.]

B. F. Lee, for complainant.

S. Hirsch, for defendant.

JOHNSON, Circuit Judge. The answer of the defendant, Chaskel, makes an issue upon the novelty of the invention for which the patent owned by the complainant was granted; but as no evidence was given in support of the allegation of the defendant in this respect, the presumption arising from the patent itself is sufficient to determine the question in favor of the complainant. The defendant's answer sets up that the articles claimed by the complainant to work an infringement of its patent were made under a patent granted to Chaskel by the United States, being patent No. 153,155, dated July 21, 1874. Assuming this to be so, and that the fact of the patent creates the usual presumption of validity and consequently of patentable distinction between the claims of the defendant's patent and that secured by the complainant it still remains to be considered whether this presumption is not overthrown by a comparison of the article made and sold by the defendant with the patent owned by the complainant. The claims in this patent are two: The first for the combination of a hollow elastic toy, of rubber or the like, with a reed or other speaking device, so that by compressing the toy the reed or other device is made to speak; and, second, for joining the two parts by a groove in the frame of the reed, around which the rubber will close tightly by its elasticity when the reed-frame is inserted through a small hole cut out of the rubber. In the body of the specification a whistle is mentioned as one of the forms of the speaking contrivance contemplated by the inventor. The defendant's manufacture is the exact thing there described and something more. He uses a whistle sounded by compressing an elastic rubber ball, which is attached to the whistle by its contraction around and into a groove cut around the frame of the whistle. He prolongs the frame of the whistle so that it also serves as a handle to the toy, and he adds to it a whistle at the further end of the handle to be blown in the usual fashion. Whatever may be thought of the patentable quality of these additions, there can be no mistake in the proposition that the defendant's toy or manufacture appropriates both points of the complainant's patent. A whistle with a frame prolonged into a handle does not cease to be a whistle; nor does adding still another whistle at the end of the handle cure the violation of the complainant's patent in the employment of the first whistle in the method and for the purpose specified in and covered by the patent of the complainant. The complainant is therefore entitled to a decree in its favor in the usual form for a perpetual injunction and for an account, and the master must also inquire and report as to any damages occasioned by the breach by the defendant, Chaskel, of the preliminary injunction issued in this cause, and as to the proper fine, if any, to be imposed therefor.

NEW YORK SAVINGS BANK v. STUYVESANT BANK. See Case No. 12,919.

NEW YORK STATE BANK v. TOWNSEND. See Case No. 9,381.

Case No. 10,216.

NEW YORK STATE MARINE INS. CO. v. PROTECTION INS. CO.

[1 Story, 458; [1] 4 Law Rep. 233.]

Circuit Court, D. Massachusetts. May Term, 1841.

MARINE INSURANCE—DEFENCE BY REINSURERS—RECOVERY—COSTS AND EXPENSES.

1. Reinsurers may make the same defence, and take the same objections, as the original insurers might in a suit upon the first policy.

[Cited in Eastern R. Co. v. Relief Ins. Co., 98 Mass. 424; Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 447.]

2. The party reassured is entitled to recover a full indemnity for the entire loss sustained by him, and also for the costs and expenses, which he has reasonably and necessarily incurred in order to protect himself, and to entitle him to a recovery over against the reinsurers. Especially is this true, in a case where the reinsurers have notice, that a suit has been commenced, and that they will be looked to for the costs and expenses, and make no objection.

[Cited in Dubois v. Hermance, 56 N. Y. 675; Hoppaugh v. McGrath, 53 N. J. Law, 81, 21 Atl. 106.]

3. But the costs and expenses must be incurred in good faith, and not wantonly and unnecessarily in a plain case of loss, where there is no reasonable ground of defence.

[Cited in Gantt v. American Cent. Ins. Co., 68 Mo. 531.]

4. Quaere, whether notice to the reinsurers, of the commencement of a suit against the first insurers, is indispensable.

[Cited in Cashan v. Northwestern Nat. Ins. Co., Case No. 2,499.]

Assumpsit on a policy of reinsurance by the defendants for the plaintiffs, "lost or not lost, four thousand dollars on the brig Evelina, at and from her port or place of loading in Massachusetts, to Amsterdam, and at and from thence to New York." The parties agreed to the following statement of facts for the opinion of the court: During the voyage insured from Massachusetts to Amsterdam, the vessel sustained damage by perils of the seas, and put into St. Thomas in distress. She was there repaired with funds procured on bottomry, and proceeded to Amsterdam, where she was attached and sold by the holders of the bottomry bond. The owners claimed of their insurers (the present plaintiffs) a total loss, which they refused to pay, and a suit was instituted in New York, in which the owners recovered only a partial loss. The plaintiffs then claimed of their reinsurers (the present defendants) the amount they were obliged to pay to the owners, by reason of the judgments recovered in New York, and also the expenses of costs and counsel fees incurred by them in defending the suit. The defendants denied their liability to pay any thing under their policy, and a suit was commenced upon it. Afterwards a compromise was made of all the matters in dispute, except the liability of the defendants, as reinsurers, to indemnify the plaintiffs for the expenses incurred by them in defending the original suit, which were as follows:

Costs recovered against New York State Marine Insurance Company	$612.75	
Counsel fees paid by them..	300.00	
Their own costs incurred in the suit	99.99	—$1012.74

If, upon this statement, the court shall be of opinion, that the plaintiffs are entitled to recover, the defendants are to be defaulted, and judgment rendered for the plaintiffs for one half of said amount, with interest and costs. Otherwise, the plaintiffs are to become nonsuit.

F. C. Loring, for plaintiffs.

Rand & Fiske, for defendants.

STORY, Circuit Justice. The only question, which is submitted by the parties for the consideration of the court is, whether the plaintiffs are bound to pay any part or proportion of the costs and expenses of the suit, brought on the original policy against the plaintiffs, including the fees of attorneys and counsel in the cause. It does not appear to me to be a question, under all the facts, of any intrinsic difficulty. This is a case of reassurance, and nothing is clearer, upon principle and authority, than that, in such a case, the reassurers are entitled to make the same defence, and to take the same objections, which might be asserted by the original insurers in a suit upon the first policy. The consequence would seem to be, that, as no voluntary payment by the original insurers would be binding or obligatory upon the reassurers, they are compellable to resist the payment, and to require the proper proofs of loss from the assured in a regular suit against them, so as to protect themselves by a bona fide judgment to the amount of the recovery against them under their reassurance. It was to avoid this inconvenience and delay, as well as peril, that the French policies of reassurance, as mentioned by Emerigon and Pothier, usually contain a clause, allowing and authorizing the original insurers to make, bona fide, a voluntary settlement and adjustment of the loss, which shall be binding upon the reassurers. See 1 Emerig. Assur. c. 11, § 9; Pothier, D'Assurance, note 50; 2 Valin, Comm. liv. 3, tit. 6, art. 20, pp. 65–67. This, of course, puts the whole matter within the exercise of the sound discretion of the party reassured, whether to contest, or to admit the claim of the first assured. But, independently of such a clause, it is clear, by the French law, that the original assurers must, in a suit brought against the reassurers, establish the same facts, as would entitle the assured to recover upon the original policy. Id.

It seems to me, that upon the principles of the common law, under the like circumstances, the party reassured is entitled to recover a full indemnity for the entire loss sustained by him, and also for the costs and

[1] [Reported by William W. Story, Esq.]

expenses, which he has reasonably and necessarily incurred, in order to protect himself, and entitle him to a recovery over against the reassurers. I think, that is the fair interpretation of the text of Roccus, although it is certainly somewhat indeterminate and general in its expressions. "Iste secundus assecurator tenetur pro assecuratione facta a primo, et ad solvendum omne totum, quod primus assecurator solverit." Roccus, De Assur. note 12. The case of The La Très-Sainte Trinité, cited by Emerigon (1 Emerig. c. 11, § 9), is strongly in point. But it appears to me, that the doctrine must be taken with all its appropriate qualifications. The contestation of the suit, by the original assurers, must be just and reasonable; the expenses must be fairly and reasonably incurred; the conduct of the original assurers must be bona fide, and in the exercise of a sound discretion. Now, it is precisely in this view, that the consideration of notice of the suit becomes most important, even if it be not (as I am not prepared to say, that it is) indispensable. If notice of a suit, threatened or pending, upon the original policy, be given to the reassurers, they have a fair opportunity to exercise an election, whether to contest, or to admit the claim. See Clark v. Carrington, 7 Cranch [11 U. S.] 308. It is their duty to act upon such notice, when given, within a reasonable time. If they do not disapprove of the contestation of the suit, or authorize the party reassured to compromise or settle it, they must be deemed to require, that it should be carried on; and, then, by just implication, they are held to indemnify the party reassured against the costs and expenses necessarily and reasonably incurred in defending the suit. If they decline to interfere at all, or are silent, they have no right afterwards to insist, that the costs and expenses of the suit ought not to be borne by them, as they are exclusively, under such circumstances, incurred for the benefit of the reassurers, and are indispensable for the protection of the party reassured. But expenses and costs wantonly and unnecessarily incurred by the party reassured in a plain case of loss, where there is no reasonable ground of defence, or where the reassurers do not sanction the contestation, either expressly, or by implication, can never constitute a just charge against the latter. This was the doctrine held by the supreme court of New York in Hastie v. De Peyster, 3 Caines, 190; and I entirely accede to its authority, as conformable to the true principles of law in analogous cases. In the present case, the deposition of Mr. Cook, taken since the statement of facts was agreed upon, is perfectly conclusive upon this point. The defendants not only had full notice of the suit, but were also informed, that they would be looked to for reimbursement of the costs and expenses of the suit. They made no objection, and interposed no offer of payment. Under such circumstances, they must be taken to have approved the resistance of the plaintiffs to the claim, and to have authorized the defence to be made; and, therefore, as there is not the slightest pretence, that the whole defence was not conducted with entire good faith and sound discretion, they must pay their proportion of the costs and expenses, including the fees of the attorneys and counsel employed in the defence.

Judgment will be entered accordingly for the amount, as soon as it is ascertained.

Case No. 10,217.

NEW YORK WIRE-RAILING CO. v. CAKE et al.

Circuit Court, E. D. Pennsylvania. 1863.

PLEADING—AMENDMENT OF ANSWER AFTER TRIAL ORDERED—CUMULATIVE TESTIMONY.

Leave to file an amended answer will not be granted where trial has been already on an issue ordered on the bill and answer, and the amended answer offers only new and cumulative testimony on the issue tried.

[This was a suit by the New York Wire-Railing Company against Henry L. Cake and Nicholas Seitzinger. Heard on motion to file an amended answer.]

GRIER, Circuit Justice. Leave to amend an answer in many cases is a matter of course, and in all cases it is a matter of discretion. Without attempting to lay down any general rule affecting this subject, I may say that in this case the respondents have not shown a case in which it would be a just and proper exercise of discretion to allow the amended, or rather supplemental, answer now proposed to be filed. Previous to the extension of the patent to Jenkins, of which complainants are now the assignees, the defendants had the use of the invention by some contract or license from the patentee, or, at least, claimed to have such a license. They have continued, nevertheless, to use the invention patented since the renewal of the patent in 1861, and the bill in this case was filed to enjoin them from its further use. The bill was filed at April term, 1861, and subpoena made returnable on the first Monday of August. This was served on respondents October 7. The court, on application of respondents, ordered a preliminary injunction, and a rule was granted on respondents to answer in ten days, or the bill be taken pro confesso. On the 18th a final decree was made, and a final injunction ordered, which was served. On the 28th of December, 1861, for the first time, the respondent, Seitzinger, comes into court, and moves for leave to file an answer contesting the validity of the patent. This leave was granted, and an issue was ordered to try this question at law, as the infringement of the patent was not denied, and its validity contested only on the ground that the patentee was not the first inventor, and as this was a fact depend-

ing wholly on the credibility of witnesses, it was a case peculiarly proper to be tried by a jury. This issue was tried, and after a full and patient investigation the question of originality was decided in favor of complainant. This ought to have made an end to this litigation, as the question which the respondent by special favor of the court had leave to contest had thus been decided against him by his own chosen tribunal. A question of infringement is one of fact, and in most cases decided by inspection of models; but in such case a court will not require the assistance of a jury to inform their conscience in matters "oculis subjecta fidelibus," or suffer a verdict to avail against their own convictions thus derived. But where the question depends wholly on the credibility of witnesses as to matters of fact and not of opinion, the court will always be disposed to yield even their own convictions, unless very strong and clear, to the force of the verdict. In this case I would have been satisfied with a verdict either way, having no clear opinion of my own on the question after hearing the testimony, and am glad to be relieved from guessing at the truth from the frail recollections of conflicting witnesses. The supplemental answer now proposed to be put in, offers only new and cumulative testimony as to originality. It does not allege that it is newly discovered, or might not, by due diligence, have been as well included in the original, and heard on the trial before the jury. It involves the necessity of a new issue to try the same question of fact. I do not say that there might not be possible cases of hardship in which the conscience of a chancellor might be constrained to grant such a request. But this application presents no such case. The supplemental answer also proposes another distinct defense, which was not made in the original answer, nor was it a part of the issue tried by the jury. It alleges that application by Jenkins to the commissioner of patents was made about the 26th day of February, 1847, and that the invention was in public use and sale with the consent and allowance of the patentee for more than two years prior to such application. On the trial of the issue before the jury, one of the respondent's witnesses, named Carter, alleged that this improvement in the art of screen-making was a sort of joint production of Jenkins and himself, who in the years 1843 and 1844 were endeavoring to invent some machine by which the improved mode might be made profitable, and partly succeeded; and, assuming Jenkins' first application for a patent to have been in 1847, the defense now offered might possibly have been established.

But the records of the patent office show that Jenkins' application for this invention, both as to the "improved method" and as to a machine to perform it, was made as early as July, 1845; so that defense, if permitted to be now set up, would be of no avail. It would also be a very doubtful exercise of discretion to open the pleadings of any case merely to let in such defense; and much more so in the present case, where a respondent, after a final decree, has been permitted to make a certain defence, and had it tried by a jury, and one year having elapsed since the decree was opened and between two and three months since the verdict, before the application now made to renew the litigation.

The motion is refused.

Case No. 10,218.

NEW YORK WIRE-RAILING CO. v. WALKER et al.

[2 Fish. Pat. Cas. 179.] [1]

Circuit Court, E. D. Pennsylvania. May, 1861.

PATENTS—CONSTRUCTION—SCOPE—WIRE FENCE.

Whether a patent for a wire fence can properly be held to include a window guard, quaere.

In equity. This was a motion for an attachment for contempt, in violating an injunction previously allowed by Mr. Justice Grier, restraining the defendants [Matthew Walker, Daniel S. Walker, and Matthew Walker, Jr.] from the infringement of letters patent for "an improvement in wire fences," granted to Henry Jenkins, February 13, 1849 [No. 6,106], and assigned to complainants.

The claim of the patent was as follows: "I claim constructing the wrought iron wire fence, substantially as herein described, that is to say, by forming the top and bottom rails and posts of the panel of grooved bars, through which the ends of the wires, of which the meshes are made, are drawn and the ends turned down into said grooves, and then covered by other similar bars to hold them in place, by which a perfect finish is effected, and the expense and difficulty of riveting is avoided."

Leonard Myers, for complainants.
George Harding, for defendants.

GRIER, Circuit Justice. Complainants filed their bill against respondents, charging an infringement of their rights under a patent granted to Henry Jenkins for a new and useful improvement in wire fences, dated February 13, 1849. In September, 1859, by order of this court, an injunction was issued "extending only to making, using, or selling to others to be used beyond the eastern counties of Pennsylvania." An application is now made for an attachment against respondents for a contempt in disobeying this injunction. The complainants allege that respondents have sold certain "window guards" to a person in Norfolk. Samples of the patented machine or improvement, and also the "window guards" supposed to have been sold, have been exhibited to the court. On inspection

1 [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

of them, it requires no evidence of experts to prove that the "window guards" do not infringe the patent. The patent is for "an improved method of manufacturing wrought iron fence." The essential part of this improvement is properly described to consist in having the frame of the panel composed of double bars of wrought iron rolled into a groove; every part of such frame consisting of two such bars put together. The wires, forming the mesh work of the fence, have these ends drawn through holes in the grooved bar and turned down into the groove, and another groove bar is then put over them. By this means, the necessity of riveting the wires is obviated. The claim is for constructing the wrought iron wire fence, substantially as described, that is to say, forming the top and bottom rails and posts of the panel, of grooved bars, through which the ends of the wires are drawn and turned down and covered by other similar bars. Waiving the question of whether a "window guard" is properly within the category of a "wire fence," it is very evident that the window guards in question do not infringe the patent. They have not the double-grooved bar which constitutes the whole of the invention patented. That an iron wire could be drawn through a hole in a bar, and fastened roughly by bending it and clinching it without riveting, has been known probably since the days of Tubal Cain; and if the patent included such a claim it would be void, but such is not the claim, and the "window guards" have not the double-grooved bars, which is the only improvement made or claimed.

The motion for an attachment is, therefore, overruled, with costs.

NEYHARDT (FOURTH NAT. BANK v.). See Case No. 4,991.

N. H. QUIMBY, The (LUBKER v.). See Case No. 8,586.

Case No. 10,219.

The NIAGARA.

[6 Ben. 469.] [1]

District Court, S. D. New York. April, 1873.

TUG-BOAT AND TOW—NEGLIGENCE—LOOKOUT.

A tug-boat, having a schooner on her port side, and two schooners on her starboard side, was towing them through Hell Gate. In going up the channel between Blackwell's Island and Long Island, a schooner passed them and got some distance ahead, but at the upper end of Blackwell's Island she lost the wind and lost great part of her headway. The pilot of the tug did not observe this as soon as others on the tow did and ran up quite close to her, and then stopped till the schooner got the wind again and went on, when he started his tug ahead, endeavoring to pass between the schooner and the Long Island shore. This movement and the set of the tide carried the tow too near the Long Island shore, and the starboard schooner struck on rocks and began to leak, and afterwards sank: *Held*, that the pilot of the tug was in fault for not sooner seeing that the schooner ahead had lost her way, and taking measures accordingly, and that the tug was liable for the damage.

This was a libel by the owners of the schooner Margaret Powell to recover damages for her sinking, while in tow of a steamtug. The tug had taken in tow three schooners, one on her port side and two on her starboard side, to tow them through Hell Gate, the Powell being the outside schooner on the starboard side. While passing Brown's Point, opposite the eastern end of Blackwell's Island, the Powell struck a rock, causing her to leak, so that, when she reached near Little Hell Gate, she was cast off and sank.

Beebe, Donohue & Cooke, for libellants.

Benedict, Taft & Benedict, for claimants.

BLATCHFORD, District Judge. The libel attributes the loss of the Margaret Powell to the negligence of the tug, in not slowing when she found that the schooner ahead had substantially lost her headway, in not passing between the said schooner and the Blackwell's Island shore, in passing between the said schooner and the Long Island shore, in changing her course so as to pass Astoria Point in such close proximity thereto as to be unable to prevent the tide and her own headway from causing the Margaret Powell to be carried upon the rocks, in not backing and turning around when she found she was in such close proximity to the rocks, and in not having power enough to control the tow against its headway and the tide. The defence set up in the answer is, that the schooner ahead lost, by the temporary dying out of the wind, a large part of her headway; that the engine of the tug was at once stopped; that the tug and her tows were carried on by the tide alone until the schooner ahead got out of the way, when the engine of the tug was at once set in motion, to proceed; that, by reason of such stoppage, the tug and her tow were carried over by the tide, towards the Long Island shore; that, in spite of every effort of those in charge of the tug, the Margaret Powell was so carried over; that, after passing Brown's Point, the master of the Margaret Powell sung out that his vessel had struck and was leaking; that, after reaching nearly to Little Hell Gate, another tug was signaled, which took hold of her and towed her till she sank; that the Margaret Powell was not properly supplied with pumps, nor were the pumps or pump which could be used on board of her used, as should have been done, otherwise she would have been kept afloat; and that the accident was solely caused by the sudden dying away of the wind, for which the tug is in no way responsible.

I think that the case on the part of the libellants is made out, and that the defence

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

fails on the evidence given by those who were navigating and in charge of the tug.

Hibler, the master of the tug, who was in her pilot house, and steering her, testifies, in his direct examination, that the schooner passed him when he was almost at the lower end of Blackwell's Island; that, at that time, he was going full speed; that the schooner got pretty near up to the other end of the Island, a good distance off; that he slowed down when he was within 300 feet of her; that he did not see that she lost the wind until he got within 100 feet or so of her; that, when he was about ten or fifteen feet off from her he stopped his engine; that he did not reverse it; that the schooner then got the wind and went on, and he rang to go ahead; and that the tide and his stopping was the cause of their being carried over towards Long Island shore. On his cross-examination he testifies, that the schooner got 700 or 800 feet ahead of him, when he had got about half way up the length of the island; that he could not see her, at that time, because she was hidden from him by the foresail of the vessel in tow on his port side, and that the same cause prevented his seeing her till he got within fifteen or twenty feet of her; and that then he came unexpectedly on her, and stopped his engine, and discovered that she had lost her wind. On his redirect examination, he reiterates the statement that the foresail of the vessel on his port side prevented his seeing the schooner ahead until he was right upon her; and that he went quite a distance with the schooner out of his sight, 400 or 500 feet.

Ward, the engineer of the tug, testifies, that, when he got the bell to slow, he looked out and saw the schooner 200 or 300 feet ahead; and that he got the bell to stop when the schooner was ten or fifteen feet off.

The deck hand on the tug testifies that he noticed the schooner when he heard the bell to slow, and saw that she had not wind enough to sail.

The necessary conclusion from this testimony is, that the tug did not stop her engine soon enough, or as soon as it might have been stopped, if her master had been in a position to observe sooner the losing of the wind by the schooner ahead, or had observed it as soon as, by careful attention, he might have observed it. With the wind as it was, the tendency to have it cut off by the buildings on the island from a vessel going up on the Long Island side was a well known fact, and the actual losing of the wind by the schooner was observed by persons on board of the vessels in tow at a distance sufficiently great for the tug to have stopped much sooner than she did. Her master confesses to negligence in saying that he did not observe it at the same distance off. It is very clear, that, at the time when he ought to have seen that the schooner had lost her wind, he might have so retarded the onward movement of his boat as to have allowed time for the schooner to get out of the way before he reached her. The consciousness that it was the duty of the tug to stop as soon as the schooner lost her wind, is shown by the averment of the answer that the engine of the tug was at once stopped when the schooner lost a large part of her headway by the temporary dying out of the wind. But that averment is not supported by the evidence.

But, irrespective of this, the weight of the evidence is, that the tug undertook to get by the schooner by going between her and the Long Island shore, and that that caused the accident, coupled with the negligence of the tug in getting up so near to the schooner as to make it necessary for her either to hit the schooner or to attempt to go around her.

The allegation in the answer that the Margaret Powell did not have a proper supply of pumps, and that she might have been kept afloat if the pumps she had had been properly used, is not sustained by the proofs.

No such matter is set up in the answer, as that the Margaret Powell might have been put ashore by the other tug, if those in charge of the Margaret Powell had cast off their lines sooner. If she could have been so put ashore, it was the business of the Niagara to see that measures were taken to that end, and to have the lines cut off or cast off. It is not shown that any orders to have the lines cast off sooner came from the Niagara. Moreover, I am not satisfied, by the evidence, that the vessel could have been beached.

There must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain their damages.

Case No. 10,220.

The NIAGARA.

[3 Blatchf. 37;[1] 29 Hunt, Mer. Mag. 719.]

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

COLLISION—BETWEEN STEAMERS—FAILURE TO PORT HELM—USAGE.

1. Where a steamboat going up the East river, above Corlear's Hook, on the New York side, met another steamboat coming down, and the latter ported her helm to pass on the right, but the former starboarded her helm to pass on the left, and a collision between the two ensued, and it appeared that, if the former had ported her helm, there would have been no collision: *Held*, that the former was liable for the damages caused by the collision, on account of her failure to port her helm.

[Cited in The E. C. Scranton, Case No. 4,273; The Johnson v. McCord, 9 Wall. (76 U. S.) 154.]

2. In this case it was set up by the former vessel, as an excuse for not porting her helm, that it was a custom, in navigating that part of the river, for vessels coming down in an ebb-tide to keep off in the middle of the river and in the true tide, and give to vessels going up the benefit of the eddies and slack water on the New York shore, but the evidence failed to establish any such custom.

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1 [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

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

This was a libel in rem, for collision, filed by John Van Pelt, in the district court, against the steamboat Niagara, to recover for damage done by that vessel to the steamboat Cleopatra. The district court decreed for the libellant, and the claimants appealed to this court. [Case unreported.]

Luther R. Marsh and Oscar W. Sturtevant, for libellant.

Alexander Hamilton, Jr., and Washington Q. Morton, for claimants.

NELSON, Circuit Justice. This is a libel for a collision, filed by the owner of the steamboat Cleopatra against the steamboat Niagara. The collision took place in the East river, opposite Cherry street. The Cleopatra was coming down the river on the New York side, with passengers, on her trip from Norwich to New York, at about half-past seven o'clock on the morning of the 30th of December, 1847. The Niagara had left her berth in the city that morning, with passengers, for Bridgeport, had rounded Corlear's Hook, and was straightening up the river, also on the New York side, when the collision occurred. It was a clear morning, and there was abundance of room for the vessels to pass each other without danger. It is quite apparent, therefore, that there was gross fault in the navigation of one or the other or both vessels, or the collision need not have occurred. The Cleopatra was struck on her larboard side, some one hundred feet from her bow, by the Niagara, the blow being a glancing one. It is clear, upon the evidence, that the Cleopatra, at the time she first descried the Niagara, as the latter was rounding the Hook, ported her helm to pass on the right, and that, if the Niagara had ported hers, as was her duty, according to the established general rule, both vessels would have passed free. They were from four to five hundred yards from each other when the Niagara opened on rounding the Hook, and each vessel could be seen; and, of course, in sufficient time for each to have made the proper manoeuvre to pass to the right. But the Niagara, instead of porting, starboarded her helm, to pass inside of the other vessel. This is, in the answer, claimed as a right, founded upon the custom and usage of vessels navigating this stretch of the river—that vessels coming down in an ebb-tide are bound to keep off in the middle of the river and in the true tide, giving to vessels going up the benefit of the eddies and slack water on the New York shore. The evidence in the case fails to establish any such custom. The error of the Niagara, no doubt, led to the collision.

The steamboat Traveller had left her berth that morning on her trip up the Sound, and was ahead of the Niagara, on the New York side, some five or six hundred yards. She was hugging the shore, and passed the Cleopatra on the inside. Some witnesses have been examined in this court, on the part of the Niagara, for the purpose of establishing that the Cleopatra was in fault in porting her helm after she passed the Traveller, as the Niagara was then in the wake of that vessel, and so far in shore that there was not time for her to change her course to the right to avoid the collision. But, upon a careful examination of this evidence, I am not satisfied that the position taken can be maintained. The weight of the whole evidence in the case is, that the Traveller was close in shore at the time she passed the Cleopatra, and that she had sheered in before meeting her, for the purpose of getting on the inside; and further, that, as soon as she passed, the Cleopatra ported her helm, to take the right of the Niagara, crossing the stern of the Traveller as she inclined nearer to the shore. This brought the Cleopatra on a line with the course of the Niagara, and indicated to the latter at the time that the Cleopatra intended passing her on the right; and this in season for her to have ported her helm, as was her duty, according to the established nautical rule.

In order to establish fault in the direction thus taken by the Cleopatra, it must appear to the satisfaction of the court that the Niagara, at the time, was so far west of the Cleopatra, and within so short a distance of her, as the two vessels were approaching each other, that there would not have been time for the Niagara to port her helm and pass to the right without danger of a collision. Under such circumstances, the Cleopatra would not have been justified in persevering to pass on the right. The evidence, in my judgment, warrants no such conclusion. It is apparent that the Niagara persevered in her supposed right to pass up the western or New York side of the river, after her pilot saw the direction of the Cleopatra, until it was too late to correct the error; and that the management of the Niagara, under this mistaken view of her right, led to the catastrophe. [The testimony of the captain of the Niagara was offered in evidence on the part of the appellees in this court, and was objected to on the ground of interest. He was part owner of the vessel, appeared as claimant, and put in the answer. He has since assigned his interest, and been released from all contribution by his associates, and indemnified against any damages and costs that may be recovered. I have not looked into the question, as in my judgment his testimony would not change the result.][2]

I am satisfied that the decree of the court below is right and should be affirmed.

[2] [From 29 Hunt, Mer. Mag. 719.]

Case No. 10,221.

The NIAGARA.

[16 Blatchf. 516; 16 Alb. Law J. 156.][1]

Circuit Court, S. D. New York. July 31, 1879.

SHIPPING—STOWAGE—COMMINGLING OF SALT AND ARSENIC—DAMAGES.

A vessel carrying fine table salt in sacks, with powdered arsenic in casks, stowed the arsenic so negligently that, during the voyage, by severe weather, the casks of arsenic were broken, so that the arsenic escaped, and was distributed on some of the sacks and in the vessel. The vessel, without notifying the consignees of the salt of what had occurred, and without separating the sacks with which the arsenic had come in contact from the other sacks, allowed the sacks to be indiscriminately discharged, so that it was impossible to make such separation afterward. On examination of a sack it was found that the arsenic had penetrated the sack covering and impregnated the salt. Nothing but an analysis of each sack could have determined whether the salt in it was fit for consumption. The commercial value of the salt was destroyed and it was sold for fertilizing purposes: *Held*, that the vessel was liable for the difference between the commercial value of the salt, as sound salt, when it was discharged, and what it sold for for fertilizing purposes.

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

This was a libel in rem, filed in the district court, in admiralty. That court decreed for the libellant [case unreported], and the claimants appealed to this court. The decision of the district court (BLATCHFORD, District Judge) was as follows: "The libellant in this case, Charles A. McDowell, in March, 1875, shipped on board of the ship Niagara, at Liverpool, to be carried to New York, 1,950 sacks of fine table salt, called Ashton salt, under bills of lading in the usual form, which recited that the sacks were received by the ship in good order, and were to be delivered in like good order. The libel alleges that the ship carried, on the same voyage, about 100 kegs of powdered arsenic, which were stowed on the main deck immediately abaft, and near to, the main hatch; that a portion of the salt was stowed in the lower hold abaft the main hatch, and another portion on the main deck abaft the main hatch, and the residue in the between decks abaft the main hatch; that the kegs of arsenic were stowed on the main deck immediately between the salt on that deck and the main hatch, and in such position, that, in case the arsenic, or any part of it, should break loose, or become scattered, during the voyage, it would be in a situation to come in contact, and become mixed, with the salt on the same deck, and with that in the hold below the place of stowage of the arsenic; that the Niagara is a large vessel, having two decks below the spar deck; that, during the voyage, the main hatch below the spar deck, remained uncovered; that the planks of the two lower decks were in such loose condition as to permit the arsenic, if it were to break loose, to sift through the cracks of said decks and become mixed with the salt stowed in the hold; that, during the voyage, the kegs of arsenic, or a large part of them, either through defect of stowage, or for some other cause, became loose and were broken to pieces, and the arsenic spread over and sifted through the said decks, and down the main hatch, and became scattered throughout those portions of the vessel in which the salt was stowed, to such extent as to render the same, or a great part thereof, poisonous and utterly unsafe and unfit for use, and valueless, or nearly so, and so that it became entirely unsafe to use any part of it for the purposes for which it was intended, or for any other ordinary purpose, or to permit it to be sold or disposed of in market, and the damage to the salt amounted substantially to a total loss of the whole; that the disaster ought to have been guarded against, and would have been prevented by proper care and precaution on the part of the owners and master of the ship, but they failed to exercise such care and precaution; that, by reason of the dangerous condition of the salt, the consignees thereof were not able to dispose of it in the ordinary course of their dealings, but have been obliged to transport and stow it in places of security, to prevent the possibility of its being used as an article of food, and the libellant has thereby incurred expenses of lighterage, labor and storage to a large amount; and that such damage, loss and charges have been occasioned by the improper receipt and stowage of the arsenic, and by the wrongful acts, defaults and want of due care and caution of the owners and master of the ship. The answer avers, that the kegs of arsenic were stowed on the between decks and not on the main deck; that a portion of the salt was stowed on the between decks, abaft the second stanchion aft of the chain locker, and the piles or tiers thereof ran back on the between decks to about midway between the last stanchion and the forward combings of the after hatch; that a portion of the salt was stowed in the lower hold, extending from the stanchion in front of the main-mast back to the tank or chain locker, and thence aft, and the remainder of the salt was stowed on the orlop deck, (an extra deck between the lower hold and the between decks;) that all the salt was stowed abaft the main hatch; that the sacks of salt on the between decks did not reach within 32 feet of the arsenic, and the rows or tiers of salt on the between decks, nearest the arsenic, were fully protected by matting, so as to render it impossible for the arsenic, under any circumstances, to come in contact with the salt on the between decks; that none of the salt stowed in the lower hold was stowed immediately under the arsenic stowed on the between decks; that, in case the arsenic, or any part of it, should have broken

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 16 Alb. Law J. 156, contains only a partial report.]

loose on the voyage, it would not be in a situation to come in contact with the salt in the lower hold, except so far as small portions of the arsenic might sift through the floor of the between decks; that none of the salt stowed on the orlop deck could come in contact with the arsenic, if scattered from the kegs in which it was contained; that no part of the salt in the lower hold was directly under the main hatch for at least 12 feet, such space being stowed with hogsheads of soda ash and dirt ballast; that there was an aperture around the main-mast, where it passed through the between decks, of small dimensions, where the mast wedges worked during the heavy weather encountered on the voyage, and also two small cracks, one on the port and the other on the starboard side of the between decks, in the space on the floor of the between decks abaft the main hatch, through which, if the arsenic were to break loose, small portions of it might be sifted and fall down on the top tier of the sacks of salt immediately contiguous to said aperture or cracks; that 30 or 40 of the kegs of arsenic became loose, during the voyage, and were broken to pieces, not through defect of stowage, but solely on account of extreme stress of weather; that the only arsenic that sifted through the decks was such as escaped through said aperture around the main-mast, and through the said two small cracks on either side of the between decks, and that the same did not cover more than a comparatively small number of the sacks of salt which were in the lower hold immediately under the main-mast, and the ends of the tiers thereof on the port and starboard sides of the lower hold; that, as to those sacks on which the arsenic fell, the salt was not thereby rendered poisonous and unsafe and unfit for use, nor was it incapable of being sold in market; that all proper care and precaution were taken on the part of the owners and master of the ship, to prevent the alleged disaster; and that at least 1,350 bags of the salt were wholly free from arsenic. On the same voyage, there were shipped by the same vessel, under like bills of lading, by one Bowen, consigned to St. John & Avery 2,850 sacks of fine table salt, called Marshall salt. The consignor and consignees file a libel against the vessel, to recover for a total loss of that salt. The libel in that case makes, in substance, the same averments as the libel filed by McDowell, except that it alleges that the 2,850 sacks were stowed partly in the lower hold abaft the main hatch, and another portion in the between decks below the main deck, and probably a small portion on the main deck, all of it abaft of the main hatch. The answer to the last named libel makes, in substance, the same averments as the answer to the libel filed by McDowell, and alleges that at least 1,950 bags of the Marshall salt were wholly free from arsenic. The salt in question was intended solely for table or other domestic use, and was of the finest quality, and commanded a high price in the market. It was stowed in the lower hold, and on the between decks, and on an intermediate deck called the orlop deck, and, in each case, abaft the main hatch. On the between decks, and abaft the main hatch, but forward of the salt on the between decks, were stowed 99 casks of white powdered arsenic, each cask being about 20 inches long and containing about 300 pounds. These casks were in three rows across the ship, the heads fore and aft, each cask against the deck below, nothing on top of them, the forward row up against the after combing of the main hatch so far as such combing extended across the deck, but, outside of such combing on each side, nothing to stay the casks, nothing to stay the after row aft, the forward end of the second row against the after end of the first row, and the forward end of the third row against the after end of the second row, the casks being chocked by pieces of wood sidewise and at the end of the rows. The arsenic occupied a space of 5 feet fore and aft directly aft from the main hatch. The nearest salt to the arsenic on the between decks was 30 feet aft of the arsenic. Those bags of salt were piled up all across the between decks, but there was a space of about three feet between the top of them and the deck roof above, and the bags next to the arsenic were covered from the deck floor to the top of the pile, all across, with pieces of matting, which lapped over the top of the pile. The main-mast came up through the between decks in the 30-feet space between the arsenic and the salt. That space was empty. In the lower hold the salt was piled to within about 3 feet of the deck roof above, on both the starboard side and the port side, directly underneath said 30 feet of empty space, the bags of salt on the starboard side projecting a little forward of the main-mast, and those on the port side projecting as far forward as the after part of the main-mast. The after part of the main-mast was 16 feet aft of the after combing of the main hatch. The openings of the main hatch from the between decks to the lower hold were not covered during the voyage. The kegs of arsenic broke loose during the voyage, a large number of them had their heads broken away, and the contents of those were discharged and scattered all about, in the free area which was open in the between decks and in the opening of the main hatch. This tossing about of the loose arsenic continued for a considerable time before any of it could be secured and put into the casks again, with new heads. The weather was stormy, and, when the casks had been put in place again, after a fashion, the same breaking loose of casks and staving of the heads of casks occurred a second time, and there was the same tossing about of loose arsenic. After all, there was a pile of loose arsenic in the between decks, which remained there during the voyage. The first time the kegs broke loose, 30 or 40

of them had their heads broken, and the loose arsenic and the unbroken kegs seem to have remained free, for 9 days, to follow the motions of the vessel, before anything was done to secure either the loose arsenic or the kegs. The evidence shows that the loose arsenic reached a good many of the bags, and that, in some, it penetrated through the bagging and mingled with the salt. To what extent any bag with which the loose arsenic had come in contact was impregnated by it could not be told, with any safe reliance, except by analysis. The salt and the arsenic were alike white and undistinguishable to the eye. Two bags of the salt were analysed. In one, arsenic was found, to such an extent that there might have been as much as 3½ grains of arsenic in a pound of salt, less than one grain of arsenic having destroyed human life. In the other bag, arsenic was found in salt taken carefully from the centre of the bag, by digging down. Knowing that the arsenic had so broken loose, the master and officers of the ship not only did not, before breaking out the sacks of salt, or discharging any of them, inform the consignees of the salt of the facts, with a view of separating the sacks on the outside of which the presence of loose arsenic could be detected from those which were clean, nor did they take any steps to make such separation, but they discharged indiscriminately sacks which were clean and sacks which had arsenic on them. There can be no doubt that there were, as the sacks lay in the vessel, after her arrival, before the discharging of the sacks commenced, some sacks which were clean, untouched by arsenic. How many there were can never now be ascertained. Then it was easy to make the separation, because the arsenic was visible to the eye on the outside of the bag. But, indiscriminate discharging, and the putting of bags with arsenic on them in contact with clean bags, during transportation on lighters and other handling, would not only diffuse the loose arsenic more widely, and contaminate and impregnate bags before clean, but make it doubtful, in many cases, how far bags before clean remained wholly safe. For whatever difficulty thus resulted the ship is responsible. The delivery of the salt commenced on the 16th of April. On that day 775 sacks of the Marshall salt were delivered from the after hatch to a lighter. On the 17th, which was Saturday, 500 sacks of the Marshall salt were delivered from the after hatch to another lighter. On the same day, 200 sacks of the Marshall salt were delivered from the after hatch to the lighter Zouave, and 300 other sacks of the same salt were delivered to the same lighter from the main hatch, some from the lower hold and some from the between decks. On quite a number of those from the lower hold a white powder was noticed by the delivery clerk, and the captain of the lighter refused to receive those as in good order. The fact was mentioned to McFarlane, the master of the ship, and the mate, who must have known what the white powder was, said, on the 17th, in the hearing of the delivery clerk, that he would brush off the white powder, if it was found on any more bags. Yet the delivery clerk did not know until the 19th that the white powder was arsenic, and went on delivering 430 sacks of Ashton salt on the 19th, until he was, on that day, directed to stop delivering. No more were delivered till the 22d. On the 19th, and not till then, the master of the ship informed the consignees of the ship of the breaking loose of the arsenic, and of the delivery of some of the salt, and that he desired the consignees of the salt to be notified that some of the arsenic might have got on to the salt. Thereupon, the master, with Mr. Smith, the representative of the ship, called on the consignees of the Ashton salt, and notified them that there had been arsenic on the ship, and that a large portion of it had got loose. The Ashton salt had been sold to arrive and was being delivered to the purchaser. The consignees of the salt told the master and Mr. Smith to stop discharging, and then took legal advice, and then notified the purchaser to prevent the use of any of the salt. The action of those in charge of the ship had made it impossible to tell, without chemical analysis, which of the sacks already delivered were affected by arsenic and which were not. Such analysis would have cost more than the value of the salt. The consignees of the Ashton salt at once employed a chemist, Professor Doremus, who went to the ship on the 21st, and inspected the between decks and the lower hold, and the remaining sacks of salt and the kegs of arsenic and the loose arsenic, and took various samples for analysis. At that time 2,205 bags, out of 4,800, had been delivered. The result of the examination and analysis by Professor Doremus was, that he advised the consignees of the salt, that all the salt which came on the ship ought to be used solely for purposes where human life would not be endangered. After that the rest of the salt was discharged and stored separately, and every bag that had been before discharged was put with it. The whole remained for a year and was then sold for manure, under an arrangement between the parties. It satisfactorily appears, from the analyses of the specimens and articles from different parts of the vessel, made by Professor Doremus and Mr. Waller, another chemist, and from their testimony, that the loose arsenic had diffused itself quite extensively through the vessel, and had penetrated through some of the sacks into the salt. The sack analysed by Mr. Waller appeared to him to be clean on the outside, yet he found arsenic in it. Professor Chandler, a chemist, and president of the board of health, made, at the vessel, a like examination to that which Professor Doremus made, and caused the specimens to be taken which Mr. Waller analysed, and, on Mr. Waller's report, was of opinion that no harm could come from the use of the

salt, because no one person would consume enough of the salt to appropriate to himself arsenic enough to be hurtful. It is contended, for the claimants, that, on the evidence, there was no ground for any reasonable supposition that the salt in the between decks could have been at all impregnated with the arsenic, or that any portion of the salt in the lower hold could have been so impregnated, except what was in the lower hold directly under the space on the between decks between the after combing of the main hatch and the salt on the between decks; that the master of the vessel had no reason for supposing, when he commenced the delivery of the salt, that the arsenic had contaminated any of the bags of salt other than some in the lower hold, near the main hatch; and that, therefore, the master was guilty of no negligence in not giving notice to the consignees of the salt, of what had occurred, before delivering any of the salt. The answer to this view is, that it was the duty of those in charge of the ship to take care that such bags of the salt as were clearly and beyond question free from signs of arsenic, and so situated that arsenic could not have reached them, and uncontaminated, in fact, by arsenic, should, during discharge, and after discharge, be kept separate from the other bags. No reasonable man on the ship could, after what had occurred, expect that there were not some bags which the loose arsenic had reached. Perhaps the separation referred to might have been effected by the officers of the ship, without notifying the consignees of the salt, by some such method as taking all the salt out of the vessel, and separating it as it came out, and not parting with the custody of any of it till all of it was taken out and separated. But, it was hardly possible that notice of the presence of arsenic on the bags should fail to reach the consignees of the salt, when bags with arsenic on them should be delivered to them; and it was the dictate of plain prudence and ordinary common sense to notify the consignees of the salt before taking any of the bags out of the vessel, in order that they might co-operate in making the proper separation, if it could be made. As it was, the neglect of the master produced the consequences which ensued, and was a gross wrong to the owners of the vessel, and the owners of the salt, and the entire community, who might very well, some of them, have actually consumed some of the salt and some of the arsenic with it, but for the prompt action of the consignees of the salt. It is also urged, for the claimants, that the libellants were not prejudiced by the want of notice before the discharge of any of the salt, because it must be assumed that they would have rejected all of the salt, on the ground that, although there were no visible traces of arsenic on the outside of some of the bags, it might have penetrated through the tissue of the bags. The answer to this suggestion is, that the giving of the notice, followed by a careful separation of the bags, would have enabled the court to determine which of the bags were free from arsenic, or to determine that none were free, or to determine that it was impossible to say which were free, or that any were free. The claimants also contend, that the course taken by the libellants, after they received the notice from the master, was calculated to create the belief that all of the salt was contaminated by arsenic, and, therefore, unfit for consumption, and that such cause destroyed the commercial value of the salt. It is shown, that the master, at the time he notified the consignees of the Ashton salt, notified, also, the consignees of the Marshall salt, and said to the latter, that he was afraid the salt was impregnated with the arsenic, and advised them not to have it used, or anything done with it, until an examination could be made. As some of the salt had been delivered, the only way to follow and give effect to the advice of the master was to notify those persons who had the salt not to use it, and, of course, the reason why must be stated—the reason given by the master—the fear that the salt was impregnated with arsenic. Therefore, the course taken by the consignees of the salt was the course suggested by the master, who best knew what had happened on the vessel, and the master's advice was sanctioned by Mr. Smith, who represented the consignees of the ship. The expert testimony of one of the principal dealers in salt in the city of New York, and which is not contradicted, is, that, on the facts proved in this case, the whole of the salt was unmerchantable, as table salt, unless there were some means of being satisfied that there was not arsenic enough in the salt to be injurious; that an indiscriminate delivery of the salt, with arsenic on some of the bags, would destroy the commercal character of the whole of the salt; and that he would not buy the salt, to sell it again, unless he could satisfy himself that the arsenic had not come in contact with it. In view of this, I see no ground for the suggestion made against the libellants, that they negligently or wilfully allowed the damages to be unnecessarily enhanced. I should rather be inclined to say that the master of the ship negligently caused the damages to be unnecessarily enhanced. The claimants further urge, that the libellants must have known, that, if it were once bruited abroad, that arsenic, to any extent, had been discovered on the sacks of salt, rumor would magnify the injury, and the value of the salt would practically be destroyed; that the course which they took virtually proclaimed to the community that all the salt which had come, and was coming, from the vessel was poisonous and unfit for consumption; that what the libellants ought to have done, when informed by the master of the presence of arsenic on some of the sacks, was, to invite the consignees of the ship to unite with them in having an examination of the salt and of

all the circumstances of the case made by medical or chemical experts, who would have certified that all of the salt, except, perhaps, a very few sacks, might safely have been used for edible purposes, and, on such a certificate, the salt could have been sold for, at least, a better price than it brought when sold for manure; and that, on the facts of the case, the libellants cannot be allowed to urge the damage done to the commercial reputation of the salt, but can recover only such damages as they can show they have actually sustained by the incorporation of arsenic with the salt in the sacks, to such an extent as to render the salt unfit for sale. The course taken by the libellants was not only a proper one, and the only proper one, in view of the circumstances of the case, but was a course suggested by the master of the vessel. They could do nothing but recall the salt which had gone out, as those in charge of the ship had deprived them of any means of identifying the contaminated bags which were out of the ship. Why, if it were at all possible to separate contaminated bags from uncontaminated bags, in discharging the rest of the bags, that was not done by those in charge of the ship, does not appear. No evidence is given that they made such separation or attempted to make it. Whether the failure to do so arose from inability or from neglect, the result is the same. Under the circumstances of the case, it was the duty of the ship, as it had the means of doing so, to separate and set apart the bags which appeared externally to have come in contact with the arsenic, and to do that bag by bag, as each bag was broken out from the bulk. Then, a certificate of a chemical expert as to the rest of the bags might have been of some value. As it was, the ship drove the libellants to a chemical analysis of each bag or a reckless sale of all the bags, with a concealment of the facts of the case. They were not bound to take either course. Those in charge of the ship destroyed the commercial value of the salt, as table salt, by the course they pursued, and the ship must respond for the damages, on the basis of the difference between the value of the salt in the market of New York as table salt, and what it in fact brought, on its sale. Let a decree to the above effect be entered in each case, with costs, with a reference to ascertain such damages."

This court found the following facts: "The ship Niagara sailed from Liverpool for New York on the 2d of March, 1875, having on board a cargo consisting of fine table salt, soda ash and arsenic. The salt was in sacks and consisted of two lots, one branded 'Ashton,' containing 1,950 sacks, and the other branded 'Marshall,' and containing 2,850 sacks. Both lots were of superior quality and intended for edible and other domestic uses. The libellant was the owner of the Ashton brand. Both shipments were made in good order, under bills of lading in the usual form. The Ashton lot was consigned to Samuel Thompson's Nephew & Co., in New York, who were the agents for its sale in that market, and the Marshall lot to St. John & Avery. The ship had two decks besides her main or spar deck. The first above the lower hold was known as the orlop deck, and the other, which was next below the main deck, as between decks. The salt was all stowed in tiers across the vessel, abaft the main-mast, on the two decks and in the lower hold. The different brands were not kept separate. That stowed between decks extended from a point thirty-five feet abaft the main hatch to, or a little aft of, the first stanchion forward of the after hatch. About seven hundred sacks were stowed on the orlop deck. That in the lower hold commenced at, or a little forward of, the main-mast and extended aft to the tank. On the orlop deck and between decks it was piled so that a space varying from eighteen inches to three feet was left between it and the deck beams above. In the lower hold it was piled nearer the deck beams, but still a very considerable space was left between them and the salt. The orlop deck, aft of the main hatch, did not extend as far forward as the main-mast, and the sacks beyond it were piled from the lower hold up even with those on the orlop deck. Between decks the forward end of the sacks toward the main hatch was covered with a matting reaching from the deck and lapping over the top. It was held in place on deck with loose pieces of wood. Neither the between deck nor the orlop deck were perfectly tight, but, in some places, especially in the wings, there were cracks through which fine substances would pass. The main-mast was fifteen or sixteen feet abaft the main hatch, and around this, while the ship was working, like substances could pass. The main hatch, below the main or spar deck, was open down to the lower hold, during the entire voyage. The salt was piled in tiers, one sack above another, as close as it could be. The arsenic was pulverized and white. It was only a little coarser than flour, and could not be readily distinguished from the salt when the two were mixed. It was packed in one hundred casks, weighing from three to four hundred pounds each. It was stowed between decks, in three tiers of thirty-three casks each and one cask over; each tier extending entirely across the ship. The first tier commenced at the combing of the main hatch, and the three reached about five feet aft. The casks were all laid on deck, supported by pieces of wood and chocked, but there was nothing to hold them down to place, or to keep them from working fore and aft in a sea. This was bad stowage, and was entirely insufficient to keep the casks from breaking away when the ship rolled in heavy weather. The soda ash was stowed forward of the main hatch in the lower hold and the between decks. The space between decks from the arsenic to the salt was unoccupied,

except by the chain boxes. On the 10th of March the ship was overtaken by a severe storm, which lasted six days, and caused her to roll and pitch very heavily. Soon after it commenced, the arsenic, on account of its bad stowage, broke away, and was thrown about on deck from side to side with very great violence. About forty of the casks had one or both the heads broken out, and the contents, in whole or in part, were scattered around on deck. Nothing could be done towards the re-stowage until after the storm was over, as it was unsafe to open the hatches, and dangerous to work below while the ship was pitching and tossing so heavily. The third day after the storm abated the arsenic was put back into the casks and the deck swept up. The heads of about twenty of the casks were replaced, but the others were so badly broken that this could not be done with them. The casks were then stowed between the chain box and the sides of the ship, some of them standing on end. They were blocked up as well as they could be with wood. On the 24th of March another storm came on and the arsenic again broke adrift. This time about the same number of casks were stove, and the contents scattered about the deck. The largest part, however, was found in the wings. Four of the casks were so badly broken that they could not be again used. When the gale abated, all the arsenic that the casks would hold was put back, and the remainder swept into a pile on deck, a little abaft the main-mast and between that and the side of the ship, and covered with matting kept in place by pieces of wood. Ten or twelve of the casks could not be headed up in one end. The casks were again stowed, some of them standing on end, between the chain box and the sides of the ship. There was nothing between the loose arsenic in the pile and the deck. The vessel arrived in New York, without having experienced any further heavy weather, on the 4th of April. No report whatever was then made to the consignees of the salt, of what had occurred on the voyage. The soda ash and arsenic were discharged from the forward and main hatches before any of the salt was taken out. New casks were procured to replace those that had been broken up, and the others were repaired. After this, the discharge of the salt was commenced from the after hatch. All of the Ashton salt, and a part of the Marshall, had been sold to arrive. The delivery commenced on the 16th of April, and the salt was taken first from the orlop deck and between decks, and then from the lower hold. Seven hundred and seventy-five sacks of the Marshall salt were put out on the 16th, and five hundred on the 17th, all of which came from the after hatch. On the 17th, also, a lighter came alongside for another load of the Marshall salt. About two hundred sacks, for this load, were taken out of the after hatch, and, no more of the Marshall brand being accessible from that hatch, the main hatch was opened, and the remainder of a load of five hundred sacks taken from there. As the sacks were coming out of the main hatch, the captain of the lighter discovered on some of them a white powder and objected to receipting in good order. This powder proved to be arsenic. The mate, who was superintending the getting out of the cargo, at once reported what had been discovered, to the captain. This was Saturday afternoon, and the captain, suspecting that the powder was arsenic, went to the office of the ship's consignees, to consult with them. They had left, however, before he arrived and nothing more was done until Monday morning. The lighter finished taking on her load that night. About ten o'clock Monday morning the captain had an interview with his consignees, and, upon their advice, he went to the consignees of the salt and told them what had occurred, at the same time saying he found some of the salt had become impregnated with the arsenic. One of the consignees of the salt went at once to the ship to stop further deliveries. At that time, 1,775 sacks of the Marshall brand had been delivered and had actually gone into store. This included the two or three hundred sacks that had been taken out of the main hatch. One hundred and thirty sacks of the Ashton brand, taken out of the main hatch, had been delivered upon drays, and three hundred had been loaded on a lighter alongside. All, or nearly all, save the three hundred sacks on the lighter, had actually gone into store. No attempt was made to keep that which had arsenic upon it separate from the rest, but it was thrown together indiscriminately. After the delivery had been stopped, an expert was employed by the consignees of the salt, to make a thorough examination of the vessel and such of the cargo as remained on board. Arsenic, in the form of dust, was found pretty generally diffused throughout the ship, from the main hatch aft about twenty-five feet. It was found on projecting timbers, on the floor, in some places, on rough places in the ceiling of the ship, and in the matting. It was found on very many of the sacks, in appreciable quantities. The sacks in the wings and around the main-mast were the most affected. In some instances it stood half an inch thick on the sacks. Some of the sacks were only touched on the ends. On some it extended several inches, and on others the whole upper half was covered. The point furthest aft, where any arsenic was found, was twelve feet beyond the fifth tier of sacks, in a piece of matting used for covering, and on the sacks as far as the sixth tier. The tiers beyond the sixth had mostly been removed. It had evidently sifted through the cracks in the decks and the opening around the mast. One of the sacks was taken out and opened. Samples were taken from the outside and the middle of this package, and analyzed. In all arsenic was found in appreciable quantities. On the 23d of

April the expert reported to the consignees as follows: '70 Union Place, April 23d, 1875. Messrs. Webster & St. John—Gentlemen: The day I accompanied you (April 21st, 1875) to visit the ship Niagara, pier 47, East river, I obtained dust brushed from sacks of salt stowed near the main hatch in the lower deck of said vessel; also, from sacks in the orlop deck; also, from near the main-mast; also, a white powder from the after part of the combings of the main hatch; also, a piece of matting from around the lowest part of the main-mast; also, another piece of matting from the starboard wing of the ship in the lower hold, said matting being used to protect the bags from being soiled. On submitting these to chemical analysis I found arsenic in all of them. The matting was thoroughly impregnated with the powdered arsenic. It had sifted through every portion of it. On Thursday, the 22d inst., I received at the City College, from John Welsh, truckman of Messrs. St. John & Avery, a sack of Marshall salt, which he stated he saw taken out of the middle hatch of the Niagara by the mate of the vessel, assisted by three men, and in the presence of Mr. Collins, salesman of the before-mentioned firm. I found the sack of salt covered, in great part, with a white powder, which, on analysis, proved to be arsenic. It was so liberally distributed that the slightest touch caused its removal. I carefully cut open the sack, laid back the cut sides, and removed a portion of the salt from different parts. I dissolved the samples thus obtained in water, and, by various chemical tests, obtained arsenic from the salt, thus demonstrating that, notwithstanding the compact texture of the sack, the arsenic had sifted through. From these examinations, I am of the opinion, 1st. That arsenic, in the form of a powder, has been distributed through the holds of the ship Niagara. 2d. That the white powder on many of the sacks of salt is arsenic. 3d. That the arsenic has sifted through the tissue of such sacks, and has contaminated the salt contained therein. 4th. That, in consequence of this poisonous admixture, said salt should not be used for edible purposes, as, in the household, the salting of butter, the preservation of meat, &c., &c. 5th. That, since the arsenical powder covers the sacks to so large an extent, and is so easily removed, said sacks should not be conveyed with or stored where articles used for food may be contaminated by the fine arsenical dust necessarily discharged in ordinary handling of the sacks. 6th. That, from the fact of the discovery of arsenic on the lower part of the main-mast, and in the matting covering the same, and in the matting obtained from one of the wings of the vessel, in the lower hold, and in the dust from some of the sacks of salt there stowed, this poison has gained access to this part of the ship. 7th. That, from the discovery of arsenic in the dustings of sacks of salt near the main hatch, in the lower hold of the ship, though less in amount than found on those in the upper hold, still said sacks and their contents are not free from contamination. 8th. That, inasmuch as I have learned from one of the officers of the ship Niagara, that about three thousand sacks of salt have been removed from the vessel, in my opinion, those powdered with arsenic may have contaminated others comparatively free therefrom. Hence, without a chemical analysis of the contents of each sack, it would be impossible to predicate which are free from this poison. 9th. That many sacks of salt in the hold of the vessel on the 21st of April are probably uncontaminated, but, in my opinion, it would be wise, as a matter of precaution, not to use the said salt as a condiment, or in any articles of diet. Furthermore, I have learned from the captain of the Niagara that one hundred kegs of arsenic were stowed near the main hatch in the upper hold of said ship, and that, during two severe storms, on the passage from Liverpool, nearly the half of said kegs were broken, and their poisonous contents scattered, and, as I have found said arsenic disseminated, in a pulverulent form, in the holds of the vessel, even passing in considerable quantities between the main-mast and the deck, and through crevices in the deck to the lower holds, and as it is known that from one to five grains of arsenic may produce fatal results in the human being, from my experience as a toxicologist, I am of the opinion that all the salt imported by the ship Niagara, during her last voyage from Liverpool, should be used solely for purposes where life would not be endangered. I have the honor to remain, your obt. servt., R. Ogden Doremus.' The expert, as a witness in the cause, substantially reiterated the statements in his report. On the receipt of this report, the consignees declined receiving any more of the salt, and stopped the sale of that which had been delivered. A few days afterwards, the agents of the ship called upon Charles F. Chandler, professor of chemistry in Columbia College and president of the board of health, to make an examination of the ship and the cargo on board. He carefully inspected the vessel and took samples, which were analyzed for him by the chemist of the board of health. He also selected one of the sacks for examination, and parts of its contents were analyzed. Arsenic was found in the salt, but he was of the opinion that there was not danger of harm coming from the use of the salt, and, therefore, as a member of the board of health, did not condemn it. When these examinations were made, nearly all of the salt had been removed from the orlop deck and the between decks, and many of the tiers in the lower hold had been broken up, in selecting out the different brands to fill the various delivery orders, and there was no way of determining the actual condition of the sacks which had been discharged, except by chemical analysis, the expense of which would be more than the

salt would be worth afterwards. Soon after the last report of the examiners was made, the remainder of the salt was discharged and placed in store, under an amicable arrangement, for that purpose, between the parties. All that which had been before delivered was collected and placed in the same store. It remained there for something more than a year, when, under another arrangement between the parties, it was sold for fertilizing purposes. The loss on the Ashton salt, by this sale, it was agreed between the parties, amounted, at the date of the decree below, January 3d, 1878, to five thousand three hundred and eight $^{03}/_{100}$ dollars. After the salt had been placed in store, under the arrangement between the parties, the libellant refused to permit the respondents to put it on the market for sale, to go into consumption."

John E. Parsons, for libellant.
Henry Nicoll, for claimants.

WAITE, Circuit Justice. It was conceded, upon the argument in this court, that the arsenic was badly stowed, and that the ship was liable to the extent it could be shown the salt had been actually impregnated with the poison. The whole controversy here has been in respect to the amount of damages. On the part of the ship, it is claimed that the sacks which had come in contact with the arsenic should have been separated from those that had not, and that the good should have been sold as sound, the others only being condemned. Undoubtedly, a very large part of the cargo was free from taint when it arrived. If a careful inspection had then been made, and pains taken to keep such of the sacks as had been exposed to contamination from such as had not, it is clear that a separation might have been made of the good from the bad, which would have ensured safety. But, unfortunately, this was not done. Whether designedly or not, the consignees were kept in ignorance of what had occurred on the voyage, and an inspection of the ship delayed by her officers and agents, until bulk had been broken, and a large number of the impregnated sacks mixed with others, that were probably sound, in such a way that it was impossible to distinguish the one from the other. Confessedly, all the sacks of the Marshall brand which came out of the main hatch on the 17th, and all the sacks of the Ashton brand which came out on the 19th, were taken from around the main-mast and from the other places that had been most exposed to the poison. No attempt whatever was made on the 17th to confine the arsenic to the places in which it then was. In fact, no attention at all was paid to it until complaint came from the lighterman. Even then notice could not have been given that the powder which was the cause of the complaint was arsenic, for, the delivery clerk, who was sent by the consignees of the ship to check out the cargo, was not made acquainted with the facts until Monday, when the consignees of the salt came to stop further deliveries. It was then clearly too late to make an absolutely reliable separation. The evidence shows, beyond all question, that the poison had become mixed with the salt in some of the sacks, in quantities sufficient to endanger life, and that, after the dust had been knocked or brushed off the outside of the sack, as it easily could be, there was no way of telling what had become impregnated and what had not, except by an expensive chemical analysis. When, therefore, the consignees of the salt became aware of the dangers to which it had been exposed and stopped further deliveries, the commercial character of their property, as a superior article of fine salt for the table and other domestic uses, was necessarily gone. The consignees of the arsenic had told the consignees of the salt that there was arsenic enough scattered about the ship, during the voyage, "to poison a nation," and from two to three hundred sacks, that were known to have been exposed to contact with the poison, had been mingled indiscriminately with fifteen hundred, or thereabouts, which might have been sound, without any way of distinguishing the good from the bad. The tiers, as they had been piled in the ship, were broken up, and the poisonous dust, which, in some places, stood half an inch thick upon the outside of the sacks, had been suffered to fall where it would, without any attempt whatever at confinement. Clearly, under such circumstances, there was no way of ensuring absolute safety, except to condemn the whole. It matters not that persons might have been found, who, tempted by the hope of gain, would pay for the property more than it was worth for fertilizing purposes, and run the risk of selling it for domestic uses. To have exposed a single sack to sale for such uses would be a gross wrong, unless it was known to be entirely free from danger. The public safety required that no risks should be taken. A mistake could not be tolerated, and, as the ship alone was at fault for putting the property in such a condition that absolute certainty in this particular was not attainable, it is but just that she should be charged with the difference between its value, according to the commercial character to which it had been reduced by her gross and palpable neglect, and that which it originally had. Human life is not to be needlessly exposed to danger.

But, it is useless to proceed further. This whole subject was carefully considered by the learned district judge, and I agree fully with the views expressed in his elaborate opinion filed below. Let a decree be prepared in favor of the libellant, for the amount of the decree below, with interest on the actual amount of the loss, from the date of that decree until the present time, and also for the costs in both courts.

NIAGARA, The. See Case No. 4,339.

NIAGARA, The (ALLEGRO v.). See Case No. 207a.

Case No. 10,222.

The NIAGARA v. VAN PELT.

[See Case No. 10,220.]

Case No. 10,223.

NICHOLAS v. MURRAY et al.

[5 Sawy. 320;[1] 18 N. B. R. 469.]

Circuit Court, D. Oregon. Nov. 25, 1878.

DEMURRER FOR WANT OF EQUITY—NE UNQUES ASSIGNEE—FRAUDULENT CONVEYANCES—LIMITATION—ANNULLING A DISCHARGE—LIMITATION—ESTATE OF BANKRUPT.

1. A demurrer for want of equity will not lie to a bill that is not deficient in substance, although for some technical reason—as the lapse of time or want of jurisdiction in the court—the relief sought for cannot be attained in that suit.

2. A demurrer that a bill does not state facts sufficient to constitute a cause of suit is unknown to chancery practice, and at most is nothing more than the general demurrer for want of equity.

3. An objection to a bill, in which the complainant describes himself as an assignee, that he is not legally such assignee must be made by plea and not demurrer.

4. A suit by an assignee to set aside a fraudulent conveyance, made by the bankrupt after his discharge, of property concealed prior thereto, is not a suit to annul such bankrupt's discharge, and may therefore be brought in the circuit court.

5. Such suit may be brought at any time within two years from the discovery of the fraud by the assignee or those whom he represents.

[Cited in Re Brown, Case No. 1,983; West Portland Homestead Ass'n v. Lownsdale, 17 Fed. 207.]

6. The district court which granted a discharge alone has jurisdiction of a proceeding to annul it; and semble, that such proceeding must be brought by the creditor and may be brought at any time within two years from the discovery of the fraud for which it is sought to be set aside.

7. The statute of limitations of the state where the bankrupt resides, applies to the proof of debts against his estate; and such statute continues to run against such debts after the adjudication in bankruptcy, and therefore no claim can be proven or enforced against such estate, unless an action could be maintained thereon in the court of such state.

[Disapproved in Re McKinney, 15 Fed. 912.]

8. The estate of a bankrupt, after satisfying the valid claims against it, belongs to the bankrupt, and therefore a conveyance by him alleged to be fraudulent as against creditors, will not be set aside on a suit by the assignee, where it appears that there are no debts provable against the estate.

[9. Cited in U. S. v. Griswold, 8 Fed. 501, 562, to the point that a discharge, even though fraudulently obtained, is binding until set aside or annulled in a suit brought for that purpose, in the court where it was granted, by an existing or injured creditor or the official assignee.]

This suit was brought on May 21, 1878 [by H. B. Nicholas, assignee in bankruptcy, against James W. Murray and others], to have a discharge in bankruptcy heretofore granted to the defendant Murray declared fraudulent and void; and to have certain conveyances of lots 1, 2, 7 and 8, in block 65 in Caruthers's addition to Portland, set aside as being made to defraud the creditors of said bankrupt.

John B. Waldo, for complainant.

Joseph N. Dolph, for defendants.

DEADY, District Judge. The material facts stated in the bill are that on June 6, 1868, the defendant Murray was duly adjudged a bankrupt in the district court of this district, upon his own petition filed therein on May 30, 1868; that an assignee of his estate was appointed and acted as such until his discharge on April 17, 1872, and that on February 20, 1869, said Murray fraudulently procured his discharge in bankruptcy; that it appeared from the schedules of said bankrupt that his assets amounted in value to only two hundred and fifty-eight dollars, all of which was set apart to him as exempt, and that his creditors were four in number—three of whom resided in San Francisco and one in Missouri; that these debts aggregated five thousand five hundred and twenty-seven dollars and forty-eight cents, and arose upon simple contract, four thousand dollars of which was contracted in Missouri and became due not later than January, 1864, the remainder—one thousand five hundred and twenty-seven dollars and forty cents—being contracted in California, and coming due not later than August, 1866; that the California creditors relying upon the statement in said schedule, from which it appeared there were no assets applicable to the payment of claims against the estate, failed to prove their debts; that the debt stated to be due the Missouri creditor was not proven and is false and fictitious; that at and before the filing of the petition aforesaid the bankrupt was the owner of the premises aforesaid, and during the year 1857 erected a dwelling thereon, but fraudulently omitted the same from his schedule; that the legal title thereto was in a third person, who held the same in trust for the bankrupt, and with intent to defraud the creditors of the latter; that on July 13, 1869, said third person conveyed the premises to the bankrupt, who continued to hold the property in his own name until February 4, 1878, when he conveyed the same to his co-defendant, without any or upon a grossly inadequate consideration, with intent to defraud his creditors, and that said defendant now holds the same in trust for the bankrupt and with intent to defraud the creditors of the latter; and that none of said California creditors, nor said assignees, ever knew or became aware of the alleged fraud concerning said property until December, 1877. The defend-

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

ants demur to the bill separately, but allege the like causes of demurrer.

The first cause is the general one, that the complainant has not made out a case which entitles him to any relief, and the second is like unto it—that the bill does not state facts sufficient to constitute a cause of suit. But there is no such defect or insufficiency in the substance of this case as will sustain a demurrer for want of equity. On the contrary, the case made by the bill is one of a gross and palpable fraud, against which the complainant is entitled to have the relief prayed for, unless for some special and technical cause—as the lapse of time, a mistake in the forum or the like, this suit cannot be maintained. The second cause is borrowed from the code practice, but I believe is unknown to equity pleading. So far as it has any significance it amounts to an allegation that there is no equity in the bill, and in effect is the equivalent of the first cause. They are neither well taken and are both overruled.

The third and seventh causes are substantially the same, and are both to the effect that the complainant is not entitled to sue because he does not really sustain the character he pretends to—that is, he is not the lawful assignee of the estate of Murray. But the complainant is described in the bill as the assignee of the estate, and that is sufficient on demurrer, both at law and in equity. If the defendants wish to contest the right of the complainant to sue in the character assumed —as the assignee of Murray's estate—they must make the objection by a plea denying the right. The case is like the one where a party sues as administrator. The defendant cannot assume that the complainant is not a lawful administrator and question his right to sue in that character by demurrer, but he must make the objection by a plea of ne unques administrator. Story, Eq. Pl. § 727; 1 Chit. Pl. 525; Curt. Eq. Prec. 159. Neither is the demurrer well taken so far as these causes are concerned.

The sixth cause of demurrer is that this court has no jurisdiction to hear the cause or grant the relief prayed for. This is insufficient as a special demurrer, because it does not give any reason why this court is without jurisdiction. But on the argument the ground of the objection was disclosed as follows: This is a suit, among other things, to annul the bankrupt (Murray's) discharge upon the ground of fraud in obtaining it, and no court has jurisdiction of that matter but the district court that granted it.

The argument is, that as by section 5119 of the Revised Statutes, a discharge in the bankruptcy, subject to certain exceptions, of which this case is not one, shall "release the bankrupt from all debts, claims, liabilities and demands, which were or might have been proved against the estate in bankruptcy;" and as by section 5120 of the Revised Statutes, provision is made that any creditor "who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same;" it follows that no one but a creditor can maintain a proceeding to annul a discharge, and that no court but the court which granted it has jurisdiction of the same.

But on the other hand it is maintained that, correctly speaking, this is not a proceeding to annul a discharge, but simply to set aside certain fraudulent conveyances whereby the property of the bankrupt has been and now is covered up and prevented from coming to the hands of his assignee, and that the bankrupt is made a party to the suit not for the purpose of affecting in any manner his discharge or establishing or enforcing any claim against him personally, but to relieve the property which rightfully belongs to his assignee from the effects of the fraudulent conveyances received and made by him since the date of the discharge.

There is no doubt but that a direct proceeding to annul a discharge must be brought in the district court which granted it; and the better opinion seems to be that it cannot be attacked or called in question otherwise or elsewhere. Way v. Howe [108 Mass. 502]; contra, Perkins v. Gay, 3 N. B. R. 772. It may be also that such suit must be brought by a creditor in person and not by his representative, the assignee. But whether the limitation of two years within which such proceeding may be brought is to be counted from the date of the discharge or the discovery of the fraud on account of which it is sought to set it aside is a question upon which my mind, in the light of Bailey v. Glover, 21 Wall. [88 U. S.] 346, inclines to the latter view.

Apart, then, from the question, is this a suit to annul a discharge? there is no doubt of the jurisdiction of the court to hear the cause and grant the relief. This suit is one by the assignee against the defendant claiming an adverse interest "touching certain property * * * of the bankrupt transferable to or vested in the assignee," and jurisdiction of it is expressly conferred upon the court by section 4970 of the Revised Statutes. It is not barred by the limitation of two years prescribed by section 5057 because it is alleged in the bill that the fraud was not discovered by the complainant or the former assignee or any of the creditors until December, 1877; and in Bailey v. Glover, supra, the supreme court held that the general principle applies to this limitation, so that where the suit is intended to obtain redress against a fraud concealed by the party, or which from its nature remains secret, "the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing or those in privity with him." The same ruling was made by Mr. Justice Curtis in Carr v. Hilton [Case No. 2,436], upon a similar limitation, contained in section 8 of the bankrupt act of

1841; and this agrees with the rule prescribed by the law of this state in cases of fraud and mistake. Civ. Code Or. § 378.

My best impression is that this is not a suit to annul the bankrupt's discharge, and that so far this court has jurisdiction of it. Indeed, it is not certain that he is a necessary party to the suit. The only relief that can be obtained against him is a discovery. The remaining relief—the conveyance of the property to the assignee, or the setting aside of the fraudulent deeds—is sought only against his co-defendant, in whom the title to the premises is now vested by the wrongful act of the bankrupt. Suppose, for instance, that after the bankrupt's discharge he should receive a conveyance of property purchased by him before he was adjudged a bankrupt, or should unlawfully obtain possession of some of the personal property of the estate, would a suit by the assignee against the bankrupt, to compel a conveyance or delivery of this property to himself, be a proceeding to annul the discharge, or could the bankrupt shelter himself behind this certificate and defraud his creditors of the property with impunity? I think not. The discharge relates back to the filing of the petition, and as to any subsequent intermeddling with or act concerning the estate done or suffered by him, he is liable to the assignee or creditor, as any third person. In this case, the bankrupt, after his discharge, wrongfully took the title to the property, well knowing it to belong to his estate in bankruptcy, and with the like knowledge and the intent to defraud his creditors, subsequently conveyed to his co-defendant; and his discharge, which is a protection against suits, on account of any debt, demand or liability, existing at the time of the adjudication, is no defense to any proceeding on this account.

The fourth cause of demurrer is that this suit was not commenced within two years from the date of the bankrupt's discharge. This, of course, assumes that this is a suit to annul the discharge, and that the statute commenced to run from the date of the discharge, whether the fraud was then discovered or not. Both these assumptions are, I think, incorrect. The demurrer as to this and the sixth cause is not well taken.

The fifth and last cause of demurrer is, that it appears from the bill that the claims of the creditors mentioned therein were barred by the statute of limitations before the commencement of this suit.

In the consideration of this question, I think it must be taken for granted that there are no other creditors of the bankrupt than those named in his schedule and mentioned in the bill. There is no allegation in the bill that there are any other creditors. It must also be admitted that all these claims, though not barred by the statute of limitations of Oregon, at the date of the adjudication, were so barred before the commencement of this suit, the causes of action arising thereon having accrued more than six years prior thereto. Civ. Code Or. § 6.

The question, what effect have the statutes of limitations of the several states upon the proof of debts in bankruptcy, has not been passed upon by the supreme court, and the decisions of the lower courts upon the matter are conflicting.

In Re Ray [Case No. 11,589], Judge Blatchford held that a debt, although barred by the statute of the state in which the debtor resided, was provable in bankruptcy, unless barred throughout the United States.

In Re Shepard [Id. 12,753] Judge Hall held that a debt against which the statute of limitations of the state had run, was nevertheless a debt, and might be proved and allowed in bankruptcy, for the reason that there was no statute of the state (N. Y.), or the United States, which prevented it. On the other hand, in Re Kingsley [Id. 7,819] Judge Lowell held that a debt, barred by the statute of the state where the debtor resides, cannot be proved against his estate in bankruptcy; which agrees with the English rule: Ex parte Dewdney, 15 Ves. 479. In Re Hardin [Case No. 6,048] Judge Fox made the same ruling. In Re Reed [Id. 11,635] Judge Blodgett held that the defense of the statute of limitations might be made "to the claim of a creditor seeking to prove his debt in bankruptcy, whenever that defense might be made in a suit in the state where the debtor resides." In Re Noeson [Id. 10,288] Judge Dyer ruled that a debt barred by the statute of Wisconsin could not be proved in bankruptcy therein. In Re Cornwall [Id. 3,250] Judge Woodruff held that the courts of the United States, when sitting as courts of bankruptcy, were as much bound by the statutes of limitations of the states in which they sit as in ordinary cases, and therefore a debt barred by the statute of New York was not provable therein, in bankruptcy.

From this summary of the cases it will be seen that the decided weight of authority is in favor of the application of the statute of limitations to claims in bankruptcy, and, in my judgment, that of reason also. Doubtless congress might have established a uniform rule of limitation as to the proof of debts in bankruptcy, as it may do in regard to proceedings in the national courts generally. Peiper v. Harmer [8 Phila. 100]. But it has not done so, and the inference therefrom is strong and convincing that it was the intention to leave the matter to be governed by the local law. This is more evident, from the fact that if a claim is contested upon the proof, an appeal lies to the circuit court (Rev. St. §§ 4980, 4984), where the claim must be declared upon and tried as in an action at law. In such action the court would be bound, under section 34 of the judiciary act (Rev. St. § 721) to give effect to the statute of limitations of the state, and if the claim was barred by such statute the creditor could not recover. It can hardly be supposed that con-

gress intended that the state statute of limitations should be applicable to the claim on the trial in the circuit court, and not so in making proof of it in the district court.

My conclusion is, that the statute of limitations of the state where the debtor is adjudged a bankrupt, applies to all debts due from the bankrupt with the same effect, as if the claim was then sued upon in the state court.

The next question is, if a claim is not barred when the petition in bankruptcy is filed, does the statute of limitations continue to run against it thereafter, or may it be proven at any time after the adjudication, although the period prescribed by the statute as a bar to an action thereon has elapsed?

In Re Eldridge [Case No. 4,331] Judge Hughes held that the statute ceases to run from the commencement of the proceedings in bankruptcy, and if a debt is not then barred it may be proven at any time afterwards. In support of this ruling the case of Ex parte Ross, 2 Glyn & J. 46, and cases arising under the Massachusetts insolvent law were cited. In Ex parte Ross, supra, the commission issued in 1810, and the debt was due in the same year. On an application to prove the debt in 1824, and an objection that six years had elapsed, the vice-chancellor held that the statute did not run against a creditor after a commission issued; that the commission was a trust for the benefit of all the creditors, and the statute never ran against a trust; and upon appeal to the lord chancellor, this ruling was affirmed. The case In re Eldridge is the only one I have found in the national courts upon the point.

I am not satisfied with the doctrine of this case. It seems to me it avoids in a great measure the rule that the local statute of limitations shall govern. But for the adjudication in bankruptcy these claims would all have been barred before 1873. And yet this adjudication in no way hindered the creditors from proving these claims in the court of bankruptcy before the expiration of six years from their maturity, and thus have prevented the bar of the statute from attaching to them. The bar of the statute is founded upon the presumption of payment from the lapse of time, and there is as much reason in presuming payment or satisfaction of a debt maturing after the bankruptcy of the debtor as before. Both on the ground of public convenience and private security the presumption ought to prevail in the one case as well as the other. The motion that the case becomes a trust fund in the hands of the assignee, and, therefore, the statute of limitations ceases to run against an unproved and unknown claim upon such fund, seems to rest upon a mistaken analogy. True, the assignee may be called a trustee by operation of law, in invitum, to distribute the estate according to law; that is, to pay the valid subsisting claims as far as the assets will permit, and to pay over the residue, if any, to the debtor. But this does not make each creditor, whether known to the assignee as such or not, a cestui que trust, between whom and the assignee there is that relation of personal trust and confidence that prevents any presumption arising to the prejudice of the former from mere lapse of time. On the contrary, there is no actual trust and confidence between the parties—prior, at least, to the proof and allowance of the creditors' demand—and, therefore, it cannot be that, by reason of adjudication in bankruptcy, his claim is exempt from the ordinary law of proof and presumption, but may be dug up at any time and proved against the estate, when in the common course of affairs the evidence of its payment or illegality is lost or forgotten. I do not forget in this connection that the debts in question are upon the bankrupt's schedules. But the doctrine that there is an actual trust between the assignee and each creditor, and, therefore the statute of limitations does not run against the latter after an adjudication in bankruptcy, applies, if at all, to debts off the schedules as well as those upon them. Neither is the mere fact that the claim is mentioned in the schedules any sufficient security against the danger of delay in making proof thereof. The claim, although upon the schedules may not be valid as against the other creditors, if at all. Indeed, in this very case, it is alleged in the bill that the principal debt named in the bankrupt's schedule is fictitious and fraudulent.

An assignee, like an administrator, is really the officer or agent of the law to distribute the estate among those legally entitled to it. Each creditor is interested in preventing the allowance of illegal claims—claims which could not be collected by the ordinary process of law.

The statute (Rev. St. § 5067) provides that "all debts due and payable from the bankrupt at the time of the commencement of the proceedings in bankruptcy, and all debts then existing but not payable until a future day, * * * may be proved against the estate of the bankrupt."

It must be admitted that this language taken literally and alone, would permit the proof of these debts. There is no limitation in the statute upon the time of making the proof. But it must be construed with reference to existing laws upon the subject of "debts due and payable"—among others, the local statute of limitations. Considered in this connection, a simple contract debt after six years from maturity, being no longer "a debt due or payable," the statute must be construed as if it read, "may be proved against the estate of the bankrupt, if done so before the lapse of time has raised the presumption of their payment or satisfaction."

Of course, a case may arise where the limitation upon the proof of the claim would expire between the filing of the petition and the adjudication in bankruptcy, in which event it might be necessary to hold that this period

should not be counted in the limitation, or that the creditor should have some reasonable time after notice of the adjudication to make his proof. Indeed, this is a proper subject of legislation, and the bankrupt act should have contained a provision covering the whole subject of limitation upon the proof of debts, and not left it to be worked out in the courts by means of otherwise unnecessary and profitless litigation.

Having reached the conclusion that the debts mentioned in the bill cannot be proven against the estate of the bankrupt, it follows that this suit cannot be maintained.

For whatever the character of the transactions complained of concerning this property, the court cannot interfere with it unless it appears that the assignee represents some creditor who has a claim which he is now entitled to have paid out of it. The remainder of the bankrupt's estate, if any, after the payment of all valid debts, belongs to the bankrupt himself, and the assignee holds it in trust for him. In re Hoyt [Case No. 6,806]; In re Lathrop [Id. 8,104].

To grant the relief prayed for in this bill would then be a useless act. It does not appear that there are any debts that could be proven against the estate, and therefore, if the property was given to the assignee, he would be bound to reconvey it to the bankrupt.

A decree will be entered dismissing the bill.

Case No. 10,224.

NICHOLAS v. The PENANG.

[See Case No. 10,915.]

NICHOLAS (PRICE v.). See Case No. 11,415.

Case No. 10,225.

NICHOLL et al. v. SAVANNAH STEAMSHIP CO.

[2 Cranch, C. C. 211.][1]

Circuit Court, District of Columbia. June Term, 1820.

CORPORATIONS—ATTACHMENT—APPEARANCE WITHOUT BAIL.

An attachment under the Maryland act of 1795, c. 56. against the property of a corporation aggregate, will be dissolved by its appearance without bail.

A ship, the property of the Savannah Steamship Company, incorporated under an act of the legislature of Georgia, was attached under the Maryland act of 1795, c. 56, for a debt due to the plaintiffs [F. Nicholl and others]. A writ of capias ad respondendum was issued at the same time, commanding the marshal to take the Savannah Steamship Company.

Upon the return of these writs, Mr. Taney offered to appear for the defendant to the capias, without bail.

Mr. Jones, for plaintiffs, objected to the appearance without bail, or security equivalent to bail, and moved the court for judgment of condemnation against the attached effects.

Mr. Taney, for defendant. A capias will not lie against a corporation aggregate. It is an invisible, intangible body. The only process against it, to compel an appearance, is summons and distress. It has a right to appear, and the court cannot rule it to give special bail. The attachment is only to compel an appearance; and for that purpose also the act provides that a capias ad respondendum shall be therewith issued, and if both writs are served, the capias supersedes the attachment, and the attached effects are discharged; and if it be a case in which the defendant cannot, according to law, or the rules of the court, be held to special bail, his appearance will be entered without bail.

THE COURT (nem con.) was of opinion that the defendant had a right to appear to the capias, and that such appearance dissolved the attachment.

Mr. Jones, for plaintiffs, took a bill of exceptions, which stated "that the attorney for the plaintiffs, on the 7th day of July, at the session of the court which commenced on the first Monday of June, (which was the return day of the attachment,) moved the court for judgment of condemnation against the property and effects of this defendant attached in this cause; and in support of the grounds alleged by the plaintiffs in their affidavit, account, and short note, upon which the attachment issued, produced and read in evidence to the court, the depositions of H. B. P. and H. C. &c."

Whereupon, A. Taney, Esq., as attorney for defendant, applied to the court for leave to enter a common appearance by attorney for the defendant in the said suit, and without showing any cause against the condemnation or any defense against the debt so proved as aforesaid, to dissolve the said attachment upon a mere appearance, to which the plaintiffs by their counsel objected, and insisted that the said attachment should not be dissolved, but that the court should proceed to judgment of condemnation, notwithstanding the appearance of the defendant by attorney, as aforesaid, unless the defendant, besides offering such appearance, should make an effectual defence in the said suit, and show good cause against the condemnation prayed by the plaintiffs.

But THE COURT overruled the objection of the plaintiffs' counsel, and refused to proceed to a determination of the merits of the said attachment, and refused to render judgment of condemnation upon the said attachment, and ordered the said attachment to be dissolved upon a mere appearance by attor-

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

ney as aforesaid; and ordered the suit upon the capias, issued with the attachment, to be continued under the ordinary rules to plead, &c.

NICHOLLS (DIX v.). See Case No. 3,926.

NICHOLLS (ELLIOTT v.). See Case No. 4,394.

Case No. 10,226.

NICHOLLS v. FEARSON et al.

[2 Cranch, C. C. 526.] [1]

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

PRACTICE—SERVICE AS TO ONE DEFENDANT ONLY—ALIAS CAPIAS.

If the writ be against two defendants, and one only be taken, the cause is discontinued, unless an alias capias be issued against the defendant not taken, and continued by pluries, &c., until the trial term.

On the 21st of March, 1823, the plaintiff [William S. Nicholls] issued a capias ad respondendum against Samuel Fearson and Joseph Fearson, returnable on the 2d Monday of April, 1823, and which was returned "Cepi Joseph; non est Samuel." No alias capias was issued against Samuel. Joseph gave special bail, and pleaded the general issue; and now, at the trial term,

R. S. Coxe, for defendant, contended that the cause was discontinued by not continuing process against Samuel, the joint defendant named in the first capias.

J. Dunlop and Mr. Key, contra. The practice has not been uniform to issue a pluries. It has been generally done, as a matter of choice, but not of necessity. Perhaps an alias may be necessary; but if a pluries be not necessary, why should an alias?

THE COURT (nem. con.) decided that process of capias by alias, pluries, &c., must be continued against the absent defendant, until the trial term; and that, for the want of it in this case, the cause has been discontinued, and should be struck off the docket.

CRANCH, Chief Judge, and MORSELL, Circuit Judge, stated that they always understood the practice to be so in Maryland.

But Mr. Key having stated, that the precedents in Harris's Entries mention one non est only, and not being able to refer to the book now,

THE COURT said they would hear a motion to reinstate the cause, if Mr. Key should think he could support the motion.

No such motion was made, and the plaintiff brought a new suit, in which both defendants were taken. See McCandless v. McCord [Case No. 8,678], at March term, 1835.

[See Case No. 10,227.]

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

Case No. 10,227.

NICHOLLS v. FEARSON et al.

[2 Cranch, C. C. 703.] [1]

Circuit Court, District of Columbia. May Term, 1826. [2]

USURY—WHAT IS.

If a promissory note, indorsed by the defendants, without an understanding that they were not to be responsible upon their indorsement, be discounted by the plaintiff at a rate exceeding the lawful rate of interest for the time the note had to run, the transaction is usurious.

Assumpsit, against the indorsers of W. Stewart's note for $101, at sixty days.

The evidence was that the defendants, having received this note in a fair transaction, took it to the plaintiff's shop, with their own indorsement on it, and asked him what he would give them for it; the plaintiff replied $97, to which the defendants agreed, and received the money.

Mr. Coxe, for defendant, prayed the court to instruct the jury; and THE COURT (MORSELL, Circuit Judge, contrà) did instruct them, that if they believed, from the said evidence, that the plaintiff received the said note from the defendants with their indorsement thereon, and without an understanding that they were not to be responsible upon their said indorsement, and that the plaintiff paid therefor only the sum of $97, the transaction was usurious, and the plaintiff was not entitled to recover.

MORSELL, Circuit Judge, thought the whole subject ought to have been left to the jury without instruction from the court.

Mr. Key, for plaintiff, then prayed two instructions which THE COURT (MORSELL, Circuit Judge, not sitting) refused to give, because the evidence did not warrant the statement of facts upon which the prayers were founded.

Reversed by the supreme court February, 1833, 7 Pet. [32 U. S.] 103.

[See case No. 226.]

Case No. 10,228.

NICHOLLS v. GEORGETOWN.

[4 Cranch, C. C. 576.] [1]

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

If the business of selling lottery tickets is lawful, the corporation of Georgetown has not power to restrain it; if unlawful, no power to license it.

This was a motion or petition for a certiorari to bring up a prosecution pending before the mayor of Georgetown, D. C., for a penalty of $20 for selling a lottery ticket on the 27th of April, 1835, without a license from the corporation; half to the informer, half

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

[2] [Reversed in 7 Pet. (32 U. S.) 103.]

to the corporation, under a by-law of the 21st of February, 1835. Judgment below May 9, 1835, for the penalty and costs.

Mr. Brent, for plaintiff, Nicholls. The corporation can only exercise powers specifically given and such as are necessary to the exercise of those expressly given. No power is given by its charter to license the sale of lottery tickets. It has power to restrain and prohibit gambling, but not to license it. The charters of Washington and Alexandria give the specific power to license vendors of lottery tickets, but no such power is given to Georgetown.

Mr. Dunlop, contra. The charter of 1805, § 12, gives the power "to restrain or prohibit gambling." This is a species of gambling; and as it may be restrained it may be licensed. The tax operates as a restraint. State v. Smith, and State v. Lane, 2 Yerg. 272. Buying and selling tickets is gaming.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion, that if the business of vending lottery tickets was lawful, the corporation had no power to restrain it; if unlawful, no power to license it.

Case No. 10,229.

NICHOLLS v. HARRISON.

[Cited in Schofield v. Fitzhugh, Case No. 12,-474. Nowhere reported; opinion not now accessible.]

Case No. 10,230.

NICHOLLS v. HAZEL.

[2 Cranch, C. C. 95.] [1]

Circuit Court, District of Columbia. Dec. Term, 1813.

REPLEVIN—DISCONTINUANCE—REINSTATEMENT.

The court will not reinstate a replevin which has been discontinued at a previous term.

Mr. Blake, for defendant, moved the court to reinstate an action of replevin, which had been discontinued at December term, 1812, by reason of the non-appearance of the plaintiff.

But THE COURT refused.

Case No. 10,231.

NICHOLLS et al. v. HODGES.

[2 Cranch, C. C. 582.] [1]

Circuit Court, District of Columbia. June 1, 1825.[2]

EXECUTORS AND ADMINISTRATORS — ACCOUNT — CONTEST BY CREDITORS—COMPENSATION OF EXECUTOR—JURISDICTION OF ORPHANS' COURT—CONTENDING CREDITORS.

1. The creditors of the insolvent estate of a deceased debtor have a right to contest the settlement of the executor's account before the orphans' court, and to appeal from its decision to this court.

2. The amount of compensation to be allowed to the executor for his services in settling the estate within the limits of 5 and 10 per cent. on the inventory, is a matter within the exclusive cognizance of the judge of the orphans' court, and while his order upon that subject remains unrepealed, it is conclusive against the creditors, and could not be controverted upon plene administravit.

3. A claim by the executor, as a creditor of the estate, cannot be controverted by the other creditors before the orphans' court. That court has no definitive jurisdiction between contending creditors.

This was an appeal from the orphans' court.

Nicholls and others, creditors of Thomas C. Hodges, deceased, filed a petition to the judge of the orphans' court of this county on the 24th of September, 1823, stating that the estate of the deceased is insolvent; that the allowance made by the judge to the executor, on settlement of his account of administration on the 26th of October, 1822, of a commission of 10 per cent. on the amount of debts paid ($21,765.83), equal to $2,176.58, is more than a just compensation for his services in settling the estate; and praying a rehearing, as they had no notice of his application for such an allowance. They state that he had very little trouble. On the 23d of January, 1824, the petitioners amended their petition, and prayed for a rehearing as to an item of $900, allowed by the judge to the executor for his personal claim as a creditor of the estate for services rendered as a clerk to the testator in his lifetime. To this petition the executor filed his answer on the 26th of January, 1824, denying that he had little trouble, and claiming credit for the promptness and fidelity with which he had executed his trust, and insisting that his claim for services to the testator in his lifetime, was fair, legal, and equitable. To this answer a general replication was filed, and evidence taken as to the trouble and labor required to settle the estate, and as to the executor's claim against the estate for services to the testator in his lifetime, as his clerk. Upon the rehearing, the orphans' court affirmed its first judgment and the creditors have appealed to this court.

Mr. Key, for appellant.

R. S. Coxe, for appellee.

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

CRANCH, Chief Judge. The first question which occurred to me upon the opening of this cause was, whether the orphans' court had jurisdiction between the executor and creditors; and whether the creditors had any right to intervene in the cause and pray a rehearing of an order made upon the settlement of the executor's account. They were no parties to that settlement, and are

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

[2] [Affirmed in part and reversed in part in 1 Pet. (26 U. S.) 562.]

not bound thereby. Beatty v. State of Maryland, 7 Cranch [11 U. S.] 281. But upon further consideration I am inclined to think that my first impression was wrong. I think the order of the judge fixing the amount of the compensation of the executor for his administration of the estate, so long as it remains unrepealed, is conclusive in favor of the executor and against the creditors, because it is a matter within the exclusive cognizance of the judge, and left to his discretion by the very words of the statute; and his order, allowing it, could not be controverted upon the plea of plene administravit. The other items of the account, not depending upon the discretion of the judge, are not conclusive upon the creditors. As to the item of commissions, the creditors were therefore interested, and had a right to ask for a rehearing; and had a right to appeal from a decision against them on that point. But as to the other items, viz. the $900, claimed by the executor as a creditor of the estate, it is a mere contest between contending creditors, of which the orphans' court has no jurisdiction. It can decide nothing definitely between them. The whole question is open upon plene administravit. The allowance of that item is no gravamen of which the petitioners can complain. Their rights are not, in any manner affected thereby, and they have no right to intervene. I shall therefore dismiss that item, with the remark, that it is no ground for reversing the decree or sentence of the orphans' court. But the question of commission, at the rate of 10 per cent., is still before us. It was a question left entirely to the discretion of the judge. But when a statute gives a discretion to a judge, it means a sound and legal discretion; not whim, or caprice, or fancy. And if an appeal be given, the same discretion is transferred to the appellate court, who are, under all the circumstances of the case, to decide whether the court below has exercised its discretion soundly. By the civil law, and especially by the canon law, a remnant of which lurks in the orphans' court, an appeal transfers the whole cause to the appellate court, where the appellant may "non allegata allegare, et non probata probare." Clark, Praxis Adm. tits. 54, 60. The question, therefore, is now before us, whether the judge below exercised his discretion soundly and legally, in allowing the executor a commission of 10 per cent. upon the amount of the inventory, excluding what was lost upon the sales. The insolvency of the estate cannot affect the present question; for, if the estate were solvent, the allowance of the commission would be as much in derogation of the rights of the distributees as it is now of those of the creditors. The answer of the executor, which, in this respect, is responsive to the petition, and is, therefore, evidence in his favor, says that he had many months of trouble and labor, attended with a great deal of expense, and a necessary abandonment of his own private concerns, in bringing the business to a close; and that, upon the present state of the account of his administration, there is a large balance due to him. Mr. Isaac S. Nicholls, with whom the executor boarded, also testified that he seemed to have a great deal of trouble in the settlement of the business. It also appeared in evidence, that the testator had bequeathed to the executor a considerable legacy, which failed of effect, in consequence of the insolvency of the estate. It appeared, also, that the principal part of the estate consisted of a shop of goods, which the executor employed an auctioneer to sell; and having received notes from the purchasers, he paid them over to the creditors in discharge of the debts due from the estate. By the old testamentary system of Maryland, a commission of 10 per cent. upon the amount of debts paid, was allowed, in all cases, and an additional 5 per cent. in cases of extraordinary trouble; and 10 per cent. was the customary commission allowed to the factors of foreign merchants for collecting the debts due to their constituents. Taking into consideration all these circumstances, and that the orphans' court, who superintended the settlement of the estate, had the best means of judging of the merits of the executor, who was the nephew of the testator, and the intended object of his bounty, I am of opinion that the judge exercised his discretion soundly and legally, and that the decree ought to be affirmed with costs.

THRUSTON, Circuit Judge, concurred in this decision, upon the ground that this court had no right to control the discretion of the judge of the orphans' court.

MORSELL, Circuit Judge, dissented, because he thought the discretion of the judge had not been exercised soundly, and because he ought not to have allowed the executor to retain the $900 for his claim against the estate.

The supreme court (1 Pet. [26 U. S.] 562) affirmed the sentence of the orphans' court, as to the commissions, but reversed it as to the $900.

Case No. 10,232.

NICHOLLS v. JOHNS.

[2 Cranch, C. C. 66.] [1]

Circuit Court, District of Columbia. Dec. Term, 1812.

COSTS—NONRESIDENT—SECURITY.

The plaintiff having removed his family into the county of Washington, the rule for security for costs was stricken out, by leave of the court.

[Cited in Miller's Adm'r v. Norfolk & W. R. Co., 47 Fed. 266.]

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

NICHOLLS (RINGGOLD v.). See Case No. 11,848.

NICHOLLS (UNITED STATES v.). See Case No. 15,875.

Case No. 10,233.

NICHOLLS v. WARFIELD.

[2 Cranch, C. C. 290.] [1]

Circuit Court, District of Columbia. April Term, 1822.

EVIDENCE—RECEIPT OF GOODS—NOTICE TO PRODUCE ACCOUNT.

It is not competent for the plaintiff to give evidence of the defendant's acknowledgment of the receipt of the goods mentioned in a certain account which had been delivered to the defendant, without having first given notice to the defendant to produce the account.

THE COURT (THRUSTON, Circuit Judge, absent) refused to permit the plaintiff to give evidence of the defendant's acknowledgment of the receipt of goods charged in an account which had been delivered by the witness to the defendant, without having first given the defendant notice to produce it, although the witness held in his hand a copy of that account.

[See Case No. 10,234.]

Case No. 10,234.

NICHOLLS et al. v. WARFIELD.

[2 Cranch, C. C. 429.] [1]

Circuit Court, District of Columbia. Oct. Term, 1823.

LIMITATIONS OF ACTIONS—CONDITIONAL PROMISE.

The defendant's expressing a willingness to pay a debt barred by the action of limitations, if a certain account should be allowed as a set-off, is not such an acknowledgment as will take the case out of the statute.

[See Ash v. Hayman, Case No. 572.]

Assumpsit [by W. S. Nicholls and J. S. Nicholls] for goods sold and delivered.

The defendant [P. Warfield] pleaded the act of limitations. The plaintiffs' witness testified, that he called on the defendant with the plaintiffs' account for payment. The defendant said he did not like to pay money when money was due to him, and that he had an account against J. S. Nicholls, and would settle in that way, or words to that effect. The witness did not recollect the exact words, but is positive that the defendant made no objection to the account and expressed a willingness to pay it, if his account against J. S. Nicholls was allowed.

THE COURT (nem. con.) decided, in conformity with the case of Wetzel v. Bussard, 11 Wheat. [24 U. S.] 309, and Jenkins v. Boyle [Case No. 7,262], in this court, at June term, 1816, and Clementson v. Williams, 8 Cranch [12 U. S.] 72, that there was not evidence of such a promise as would take the case out of the statute of limitations.

[See Case No. 10,233.]

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

Case No. 10,235.

NICHOLLS v. WHITE.

[1 Cranch, C. C. 58.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

DEPOSITION — NOTICE — OBJECTIONS — SECONDARY EVIDENCE OF CONTENTS OF PAPERS— NECESSARY AFFIDAVIT.

1. One hour's notice of taking a deposition in Alexandria is sufficient.

2. It is not a good objection to a deposition taken by dedimus, that it is in the handwriting of the counsel of the opposite party.

[Cited in Jones v. Oregon Cent. Ry. Co., Case No. 7,486. Cited, but not followed, in United States v. Pings, 4 Fed. 716.]

[See Atkinson v. Glenn, Case No. 610.]

3. The affidavit of the party is sufficient to prove to the court the loss of papers, so as to admit secondary evidence of their contents.

Mr. Simms, for plaintiff, objected to the deposition of Thomas White, that the notice given of the time and place of caption was not reasonable. The notice was served between eleven and twelve o'clock a. m. to attend at Gadsby's tavern between twelve and one o'clock of the same day.

But THE COURT decided the notice to be reasonable.

Mr. Simms then objected, that the deposition was in the handwriting of the defendant's counsel, contrary to the act of congress (1 Stat. 89).

But the deposition being taken by dedimus from this court, and according to common usage, THE COURT unanimously decided that it might be read. The deposition was to prove the contents of certain papers which had been used at a former trial of the same cause.

Mr. Simms objected to the reading of the deposition, until the loss of the papers was proved.

THE COURT thought the loss was sufficiently proved by the affidavit of the defendant himself, which was made to procure the new trial.

NICHOLLS (WHITE v.). See Case No. 17,554.

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

Case No. 10,236.

NICHOLLS v. WRIGHT.

[4 Cranch, C. C. 700.][1]

Circuit Court, District of Columbia. March Term, 1836.

USURY—COMMISSION ON DRAFT DISCOUNTED—COMPETENCY OF WITNESS—DRAWER AGAINST ACCEPTOR.

1. It is usury to take 2½ per cent. commission, besides the usual bank discount, on a draft at 45 days to renew a like draft which had been discounted by the plaintiff at the same rate, and which had been drawn to raise money upon, and had become payable to the plaintiff.

2. The drawer of an inland bill of exchange is not a competent witness in an action against the acceptor, to prove that it was given for an usurious consideration.

Assumpsit [by W. S. Nicholls] against [Thomas C. Wright] the acceptor of a draft for $200, dated January 11, 1834, payable 45 days after date, drawn by Richard Wright, payable to his own order, and by him endorsed in blank. Defence, usury.

Mr. Redin, for defendant, offered to examine Richard Wright, the drawer and endorser of the draft, to prove the usury; and cited Gaither v. Lee [Case No. 5,182], in this court, at June term, 1820.

Key & Dunlop, for plaintiff, objected that a party to an instrument cannot be a witness to invalidate it. The supreme court of the United States in Bank of U. S. v. Dunn, 6 Pet. [31 U. S.] 51, overruled the doctrine of Jordaine v. Lashbooke, 7 Term R. 601, and set up that of Walton v. Shelley, 1 Term R. 296.

THE COURT (THRUSTON, Circuit Judge, absent) rejected the witness, upon the authority of Bank of U. S. v. Dunn.

The evidence was, that this draft was given to take up a like draft at 60 days, which had been drawn and endorsed by the said Richard Wright, and accepted by the defendant to raise money upon, and which the plaintiff had discounted, by retaining the usual bank discount for 64 days, and a commission of 2½ per cent., and paying to R. Wright $192.87. When that draft became payable, the plaintiff agreed to discount this new draft at 45 days, upon the same terms, namely, the usual bank discount, and a commission of 2½ per cent., and refused to allow more favorable terms; the drawer agreed to them, and it was accordingly discounted by the plaintiff on those terms.

THE COURT (THRUSTON, Circuit Judge, absent) on the prayer of the defendant's counsel, instructed the jury, in effect, that if they found the facts to be so, the transaction was usurious, and the plaintiff could not recover thereupon.

Verdict for the defendant.

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

Case No. 10,237.

In re NICHOLS.

[See 1 Fed. 842.]

NICHOLS (BAILEY v.). See Case No. 741.

Case No. 10,238.

NICHOLS v. BRUNSWICK.

[3 Cliff. 81.][1]

Circuit Court, D. Maine. Sept. Term, 1867.

MUNICIPAL CORPORATIONS—STREETS OUT OF REPAIR—INJURY TO TRAVELLER—CONTRIBUTORY NEGLIGENCE—MEASURE OF DAMAGES.

1. The surface of a travelled street or highway, about two rods wide, in a village, was in all respects in good condition, and had been repaired from time to time by the town authorities. At a certain point by the side of the road was a cellar, about four feet deep, the line of the wall of which extended within the line of the street. No building had existed over the cellar for a period of about eight years, nor had the town, for about that period of time, erected or maintained any guard or railing against the excavation. *Held*, that this was not, under the statute of Maine, such a condition of repair as to be safe and convenient for travellers with teams, horses, and carriages.

2. An accident occurred at this point under the following circumstances: A person driving one horse in a chaise stopped near the cellar, and turned the animal to one side, in order to admit some one into the carriage. The driver then attempted to turn the horse sufficiently to bring him into the road, but the horse came back too far and began to back; he then slapped the animal with the reins to start him forward, and the horse stopped, but the rear wheels were then passing over the cellar-wall, and the plaintiff, in attempting to jump out was caught by the fender, and together with horse and vehicle fell into the cellar. *Held*, that these facts were not sufficient to establish the defence of want of the exercise of ordinary care on the part of the person injured.

3. Under these circumstances, plaintiff was entitled to recover damages against the town for the injuries received in consequence of a defective highway. As to the amount, the plaintiff is to recover a just compensation for his injuries, which are to be estimated by an examination of all the facts of the accident, and of the plaintiff's condition in consequence thereof.

[Cited in Merrill v. Portland, Case No. 9,470.]

4. Mere opinions of physicians that ill health, subsequent to the injury, was occasioned by it, must be received with caution, and weighed in view of all the circumstances surrounding the case.

Trespass on the case [by Arthur B. Nichols] to recover damages on account of an injury received as alleged, through a defect in a highway, which the corporation defendants were bound by law to keep in repair. The injury was received on Pearl street, nearly opposite the dwelling-house of one Edward White, who lived on the northerly side of the street. The alleged defect consisted of a cellar nearly opposite White's dwelling-house. There was no fence or railing against the

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

cellar. White had lived in his house nearly thirty years, and when he first took up his abode at that place there was a currier's shop over the cellar, but the shop was burned some ten or twelve years before the accident. Before the shop was burned the highway or street was fenced on both sides. White's and the adjoining lot were fenced when he went there, and there was a continuous line of fence for a considerable distance on that side. The proofs showed that the front of the shop on the other side of the street, was on the line of the street, and that there was a fence on each side of the street on the same line. It was conceded that the shop was not rebuilt; and the evidence showed that the back of the cellar-wall, on the line of the street, extended within the line of the street on that side; that the top of the wall was nearly or quite level with the street, and that it was without fence or railing. Repairs had been made on the street, and the travelled way was slightly turnpiked, causing a depression on each side of the travelled part, of seven inches at the greatest depth, and having a space of three feet in width on the outer sides of the gutters, for sidewalks. Except the absence of a fence or railing against the cellar, the street was in good repair, and was safe and convenient as a street of that width. The cellar was four feet deep, and there were large rocks in it, besides those in the walls. When the shop was burned, or shortly after, a fence was erected on the line of the street, against the excavation, but it was soon blown down, and had never been rebuilt at the time of the accident.

The following is a summary of the plaintiff's testimony: Late in the afternoon of July 17, 1861, he went to a stable in Federal street, into which Pearl street runs, and hired a horse and chaise and drove to his own house, where his wife got into the carriage. They drove around the village for about two hours, at the expiration of which he returned to his house, left his wife, and started to return the horse and vehicle to the stable. After returning to his house, and attempting to turn the carriage, after his wife had got out, he found that the street was not wide enough for the purpose, and to obviate the difficulty, he first turned the horse to the left, then "backed" a little way, and then pulled the right-hand rein, and guided the animal around to that side. Having done so, he started to go to the stable, and had proceeded a few rods,—opposite White's house,—when he saw one Henry F. Gordon, on the north side of the street, travelling the same way. Thereupon he stopped, turned the horse to the right, and invited Gordon to ride with him. Gordon went around to the left side of the carriage and got in. After this the plaintiff drew the other rein, to bring the horse back into the road; and the witness said "the horse came back too far, and commenced to back." Perceiving this, he slapped the horse with the reins, to start him forward and stop him from backing. Gordon jumped out at the same time, and the horse stopped, but the rear wheels of the carriage were then passing over the cellar-wall. The plaintiff also attempted to jump out, but fell over the fender into the cellar, and was instantly followed by the carriage and horse. There was some testimony concerning the character and habits of the horse, and a description of the condition of the plaintiff consequent upon the injury, but sufficient allusion to these points is to be found in the opinion.

Strout & Gage, for plaintiff.

John Rand and George E. B. Jackson, for defendants.

CLIFFORD, Circuit Justice. Towns in this state are required to keep their highways, town ways, and streets in such repair that they shall be safe and convenient for travellers with horses, teams, and carriages. Rev. St. 224. Persons who receive any bodily injury, or suffer any damage in their property, through any defect, or want of repair, or sufficient railing in any highway, town way, causeway, or bridge, may recover for the same of the county, town, or person bound to keep the way in repair, provided that it appear that the county, town, or person, as the case may be, had reasonable notice of the defect, or want of repair, and that the plaintiff at the time he received the injury was in the exercise of ordinary care. Rev. St. 227. Repeated decisions in this state show that the right to recover in such cases depends upon the following conditions, and that they must all concur, before it can be held that the defendants are liable: 1. That the highway was one that the inhabitants of the town were bound to keep in repair. 2. That it was defective, and out of repair at the time of the accident. 3. That the plaintiff was injured as alleged in his declaration. 4. That the town had reasonable notice of the defect. 5. That the plaintiff was in the exercise of ordinary care, when he received the injury. 6. That the injury was occasioned solely through the defect in the highway, and not from any negligence or want of ordinary care on the part of the injured party.

The existence of the highway is not controverted, and it is conceded that the town was bound to keep it in repair. Satisfactory proof of user as such, even for a period of more than twenty years, was introduced by the plaintiff; and he also proved that the proper authorities of the town had made repairs on it within six years before the injury, which of itself estops the town to deny the location. Rev. St. 228. Defendants deny that the highway was defective, and that denial presents the first issue of fact between the parties. Uncontradicted evidence showed that the highway was only two rods wide, but that it was level, and in good repair in all respects, except that it had no

fence or railing at the place where the plaintiff was injured.

Unguarded as the street was at that place by any fence or railing, I am of the opinion that the excavation rendered the street unsafe, inconvenient, and dangerous to travellers. Evidence of the injury to some extent is full and satisfactory, and the fact is not controverted by the defendants. Notice of the defect in the street, if the excavation is found to be one, is also very properly conceded by the defendants, as the evidence is full to the point, and all one way. Means of knowledge upon the subject were open to all the inhabitants, as the defect had existed for more than ten years, and the witness who lived on the opposite side of the street testified that, several years before the plaintiff was injured, he notified one of the selectmen that this was a dangerous place in turning, and that it ought to be fenced.

Suppose these four issues to be found for the plaintiff, still, the defendants deny that he is entitled to recover, because they insist that he was not in the exercise of ordinary care at the time of the accident, and that the injury he received was not occasioned solely through the defect or want of repair in the highway. These two defences may be considered together, as the circumstances relied on in their support are either substantially the same or blended with each other so that they cannot well be separated. Pearl street runs into Federal street, and extends in an easterly direction a considerable distance beyond the dwelling-house occupied by the plaintiff.

(After a review of the details of the accident, THE COURT say:)

Such is the substance of the circumstances attending the accident, as proved by the plaintiff and the person who was with him when it occurred, and it is difficult to see how any one who reads can impute to the plaintiff any want of ordinary care in driving, or in his efforts to avoid the peril. The accident occurred towards eight o'clock in the evening, but it was not dark, and there is nothing in the circumstances attending it to authorize the conclusion that the plaintiff was guilty of any degree of negligence. On the contrary, they warrant the conclusion that the plaintiff, if he had a suitable horse and carriage, was at the time in the exercise of ordinary care, as required by law, to entitle him to recover damages of the defendants for the injuries he received. No objection is made to the sufficiency of the carriage, but it is insisted that the horse was unsuitable, and that the injury was not occasioned solely through the defect or want of repair in the highway. Many witnesses were examined on this point, and there is considerable conflict in the testimony. Where an issue in the case depends upon conflicting testimony, parties must be satisfied with the statement of the conclusions of the court, as it would extend an opinion to an unreasonable length to relate the details of the testimony as given by the several witnesses.

Defendants' witnesses testify that the horse was accustomed to back, and that he was a vicious horse. On the other hand, the plaintiff's witnesses testify that the horse was kind, safe, good driving, and without any such vice as is ascribed to him by the defendants. Nothing appears in the circumstances attending the accident to afford any support to the views of the defendants, except that the horse backed, as he had just been made to do, in front of the house of the plaintiff, in order to enable the plaintiff to turn the carriage in that narrow street. When the rein was drawn by the plaintiff, to bring the horse straight in the road, he came round too far, and backed, but when slapped with the reins he stopped; and it seems highly probable that the accident would not have happened if there had been a fence or railing around the excavation. Most of the defendants' testimony as to the character of the horse refers to his conduct when under harsh training by an owner as a means of augmenting his market value. During the period of those appliances he was known to back, as proved by that owner and other witnesses who saw him driving the horse. But many witnesses called by the plaintiff, who had owned or known and driven the horse, both before and after the period when he was in the possession of that owner, testify that the horse was kind, safe, gentle, and good driving, and that he had no such vice as that charged by the defendants. Considered altogether, the weight of the evidence is greatly on the side of the plaintiff, and it shows to the satisfaction of the court that the injury was occasioned solely through the defect or want of repair in the highway. Plaintiff therefore is entitled to recover for the injury he received; and the only remaining question is, as to the amount of the damages.

The statement of the plaintiff is, that his side struck the rocks when he fell into the cellar, and that the horse, as he fell into the cellar, struck him on his back and jammed him on to the rocks; but he got out of the cellar, and was able, with the assistance of his wife and one other person, to walk to his own house. He complained of injury in his back, right knee, and second finger of his right hand; suffered a good deal of pain; sent for a physician, who ordered that his back should be rubbed with wormwood and spirits; put a plaster on his right side, and something on his knee, which healed up in about a week; confined to his house eight or ten days, and used crutches for some two months; not able to work after he got out; pain in right side, and kneepan troubled him ever since, and always worse when he gets cold. He states that he has not been able to do half a man's work since the injury. His wife was also examined and con-

firmed his statements as to his visible injuries, suffering, and inability to labor. Two physicians were also examined, who expressed strong doubts whether the plaintiff would ever regain his vigor which he had before the injury.

The rule of law is plain that the plaintiff is entitled to a just compensation for his injuries, but the estimation of the amount is a matter attended with great difficulty. Injuries apparently slight may prove to be serious, and those supposed to be serious may prove slight under skilful treatment. Subsequent ill-health and debility may result from such an injury, or they may result from other causes wholly distinct. Mere opinions of physicians, that such complaints are consistent with the theory that the difficulty results from the injury, or is the effect of it, must be received with caution, and weighed in view of all the uncertainties which surround the case.

Impressed with these views, and anxious to administer justice between the parties, the court has attentively examined the whole testimony given to the jury, and the additional testimony introduced to the court. Considering the whole case, in all the circumstances, the court is of the opinion that the plaintiff do recover of the defendants the sum of $900 and costs of suit. The direction of the court is, that judgment be entered for the plaintiff, for $900 and costs.

[The case was subsequently heard upon the plaintiff's appeal from the clerk's taxation of costs. Case No. 10,239.]

Case No. 10,239.

NICHOLS v. BRUNSWICK.

[3 Cliff. 88.] [1]

Circuit Court, D. Maine. Sept. Term, 1867.

COSTS—TRAVEL AND ATTENDANCE—WITNESS FEE OF PARTY TESTIFYING IN HIS OWN BEHALF.

1. Both before and since the passage of the act of the 26th of February, 1853 [10 Stat. 161], costs have been allowed in this court to the prevailing party for travel and attendance.

[Cited in Jerman v. Stewart, 12 Fed. 275; Celluloid Manuf'g Co. v. Chandler, 27 Fed. 12.]

2. Where a party is called and examined as a witness in his own behalf he is not entitled to travel and attendance as a witness.

At law.

Strout & Gage, for plaintiff.

John Rand and George E. B. Jackson, for defendants.

CLIFFORD, Circuit Justice. Judgment was ordered in favor of the plaintiff at a previous day in the term, for $900 and costs of suit. [Case No. 10,238.] Since that time the costs have been taxed, and the taxation presented to the clerk for approval. Plaintiff, being the prevailing party, claimed that he was entitled to tax travel and attendance, according to the uniform practice of the court. Defendants object to those items in the taxation, and, after hearing the parties, the clerk disallowed the same, and the plaintiff appealed to the court.

Federal courts were organized by the act of congress passed on the 24th of September, 1789, commonly described as the "Judiciary Act." 1 Stat. 73. Costs are recognized as following the judgments or decrees in several sections of that act. Where the minimum or maximum sum of jurisdiction is prescribed, it is in every case declared that the sum specified is exclusive of costs. 1 Stat. 77–79.

So where a plaintiff in an action originally brought in the circuit court, or a petitioner in equity, recovers less than the sum of $500, the provision is, that he shall not be allowed costs, but may be adjudged to pay costs at the discretion of the court. 1 Stat. 83.

Other sections also of the same act recognize the right of prevailing parties to costs; but the act contained no fee bill, and none was passed by congress until the act of the 8th of May, 1792, entitled "An act for regulating processes in the United States courts," except the process act of the 29th of September, 1789, which adopts the rates of fees that prevailed in the supreme court of the state. 1 Stat. 93–275.

But the judiciary act authorizes the federal courts to make and establish all necessary rules for the orderly conducting business in the said courts, provided that such orders are not repugnant to the laws of the United States. 1 Stat. 83. Pursuant to that authority, or under the process act, the circuit court of the United States for this district adopted the fee bill of the commonwealth. Maine at that period was a part of Massachusetts, and, although erected into a separate district, was a part of the same circuit, and was governed by the same rules of practice.

Parties in the courts of the commonwealth, at the date of the judiciary act, were entitled to one shilling and sixpence for each day's attendance, and the provision was that ten miles' travel, should be accounted as one day. Act March 1, 1787. Prevailing parties were accordingly allowed one shilling and sixpence for each day's attendance in the circuit court or in the district court of Massachusetts, and the same amount for ten miles' travel. Jenkins v. Sedgwick, Mass. Dist. Nov. Term, 1790 [unreported]; Byles v. Hill, Mass. Dist. May Term, 1791 [unreported].

Congress, on the 2d of April, 1792, enacted that the money of account of the United States should be expressed in dollars and cents, and that all accounts in the public offices, and all proceedings in the courts of the United States, should be kept and had in conformity to that regulation. 1 Stat. 250, § 20.

Taxation of costs was still made in pounds, shillings, and pence, under the law of the state, but the several amounts were brought

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

into federal money in making up the judgment in the circuit court. Proceedings were continued in that form until the law of the state was changed, except so far as the taxation of costs was regulated by the fee bill in the act of congress to which reference has been made.

On the 13th of February, 1796, the legislature of the state passed a law allowing parties entitled to costs thirty-three cents for each day's attendance and travel,—ten miles to be accounted one day. 1 Laws Mass. 476, 481. That provision was re-enacted in 1804, and made permanent. 2 Laws Mass. 100.

Immediate change was made in the practice in the circuit court in the taxation of costs, in conformity to that provision, and the rate adopted at that time has been followed to the present time, without any variation. Robbins v. Witmore, Mass. Dist. Oct. Term, 1796 [unreported].

Fees of marshals, clerks, district attorneys, jailors, and witnesses were regulated by the act of the 8th of May, 1792, but inasmuch as the provision was silent as to the travel and attendance of parties, the taxation was continued as before, and the practice received the sanction of the federal judges of that day.

Acts of congress upon the subject of fees have several times been passed, but as none of the provisions referred to the travel and attendance of parties, it has never been doubted that those items were properly the subject of taxation in favor of the party entitled to judgment.

The compensation allowed by law in the federal courts to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners, and printers is prescribed by the act of the 26th of February, 1853 [10 Stat. 161], and the provision of the first section of the act is, that the prescribed compensation shall be in lieu of the compensation previously allowed by law, and that no other compensation shall be taxed and allowed. Undoubtedly that provision is in full force, but it makes no reference whatever to the taxation of costs to the prevailing party. Although it is more comprehensive and enters more into detail than the prior regulations upon the subject, still it is clear that it does not embrace the parties to the suit.

Since the passage of that act as well as before, costs have been allowed to the prevailing party for travel and attendance, and in cases where terms are imposed by the court as a condition to an order granting a continuance. Such allowances rest upon the original regulations of the circuit court, sanctioned by the uniform practice of the court, and not forbidden by any act of congress.

Where a party is called and examined as a witness in his own behalf, he is not entitled to travel and attendance as a witness. He may be sworn or not in his own favor, at his election, but he cannot claim any compensation for doing what he may omit, if he sees fit. In other words, the law gives him the privilege to introduce his own testimony if he sees fit, but cannot require the opposite party to pay him for exercising the privilege which the law confers. Correct the taxation in accordance with this opinion.

Case No. 10,240.

NICHOLS v. BURCH et al.

[5 Cranch, C. C. 553.][1]

Circuit Court, District of Columbia. March Term, 1839.

MUNICIPAL CORPORATIONS—REGULATIONS AS TO SLAVES.

The corporation of Washington have power to pass a by-law to prevent free colored persons from going at large through the city later that 10 o'clock p. m., without a pass, &c.

[Cited in Brown v. Robertson, Case No. 2,027.]

Assault and battery and false imprisonment.

The defendants [F. Burch and S. D. Waters], who were constables, justified the arrest and detention of the plaintiff [the negro Lloyd Nichols], under the by-law of the corporation of Washington, entitled "An act concerning free negroes, mulattoes, and slaves," passed on the 31st of May, 1827, by the 6th section of which it is enacted, "that no free black or mulatto person shall be allowed to go at large through the city of Washington at a later hour than 10 o'clock at night, excepting such free black or mulatto have a pass from some justice of the peace, or respectable citizen, or be engaged in driving a cart, wagon, or other carriage, and any free person found offending against the provisions of this section shall, on conviction thereof before a justice of the peace, forfeit and pay a sum not exceeding $10; and all such offenders may be confined in a lock-up-house until the following morning; provided however, that nothing herein contained shall be made to apply to any person of color passing peaceably through the streets to or from a meeting-house or place of worship; nor to any person of color sent on an errand by the owner or employer of such person."

Brent & Brent, for plaintiff, contended, at the trial, that the corporation of Washington had no power, under the charter, to pass such a by-law, applicable to persons of color, and not equally applicable to white persons. That the free blacks, by the general law of the land, have as good a right to be out after 10 o'clock at night as the whites, and that the by-law, therefore, was repugnant to the general law, and not authorized by any power given by the charter, nor necessary to exercise of any of the powers expressly given. In Carey v. Washington [Case No. 2,404], at November

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

term, 1836, this court decided that the corporation had no power to prevent a free colored person from selling perfumery; "that the by-laws must not be repugnant to the general law of the land, further than such by-laws are justified by the express provisions of the charter"; and that "the corporation has no power to restrain or prohibit the exercise of a common right, unless that power be expressly given, or be necessary to the exercise of a power expressly given."

Mr. Bradley, contra.

The charter of 1820 (section 8) gives the corporation power "to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes." To prevent them from being out after a certain hour of the night is one of the easiest and surest means of restraining such meetings, and is necessary to the efficacious exercise of that power. This case is, therefore, quite different from that of Carey, and is more like that of Johnson, at March term, 1838 [Id. 7,420], under the by-law prohibiting the grant of tavern licenses to persons of color.

THE COURT (nem. con.) was of opinion that the corporation had power to pass the by-law of 31st May, 1827, § 6, to prevent free persons of color from being out after 10 o'clock p. m.

The plaintiff became nonsuit.

NICHOLS (CAWOOD v.). See Case No. 2,531.

Case No. 10,241.

NICHOLS v. EATON et al.

[3 Cliff. 595.][1]

Circuit Court, D. Rhode Island. June Term, 1873.[2]

WILLS—CONSTRUCTION—APPLICATION OF TRUST-FUND—BANKRUPTCY OF CESTUI QUE TRUST—WHAT PASSES TO ASSIGNEE.

1. The proviso of a will bequeathing all the testator's property to certain trustees was as follows: "Provided also that, if my said sons respectively should alienate or dispose of the income to which they are respectively entitled under the preceding trusts; or if, by reason of the bankruptcy or insolvency of my said sons respectively, or by any other means whatsoever, the said income can no longer be personally enjoyed by my said sons respectively, but the same or any part thereof shall, or but for this present provision would, belong to, or become vested in or payable to, some other person or persons,—then the trusts hereinbefore expressed concerning the said income, or concerning so much thereof as should or would have so become vested in or payable to any other person or persons other than my said sons respectively as aforesaid, shall immediately thereupon cease and determine. And the same income shall be applied by my said trustees during all the then residue of the life of my said sons respectively in manner following, that is to say, upon trust to pay and apply the said income, or such part thereof as aforesaid, to and for the support and maintenance, or otherwise for the use and benefit, of the wife, child, or children, for the time being, of my said sons respectively, or such one or more of such wife, child, or children, and in such manner as my said trustees in their discretion shall think proper, and as to such wife for her sole and separate and inalienable use; and in default of any object of the last-mentioned trust at any period during the life of my said sons respectively, and when and so often as the same shall happen, then, upon trust, from time to time, so long as such vacancy or want of objects shall continue, to accumulate and invest the income aforesaid in augmentation of the principal or capital thereof in the nature of compound interest, with power of changing investments as hereinbefore expressed; and in case, at any time after my decease, such accumulation should cease to be lawful, then, upon trust, to apply the said annual produce and income, or such part thereof as may not legally be accumulated during said want of objects as aforesaid, in such and the like manner as the same would be applicable under the ulterior trusts of this my will." *Held*, such provision was valid and the life-interest given to the son ceased and determined at his bankruptcy.

2. Where trustees under a will have a discretion as to the manner of the application of the trust-fund for the benefit of a particular person, but no power to apply it otherwise than for his benefit during his life, his interest in case of bankruptcy passes to the assignee; but in this case the life estate was expressly determined by the act of bankruptcy.

3. Such a provision as above recited passes the income from the bankrupt into the control of the trustees, for the benefit, at the trustees' discretion, of the wife or children of one or more of the sons; and if these objects fail, the trustees are required to retain the income, to accumulate and pass, after the death of the sons, under the ulterior trusts of the will.

4. The will contained also the following provision: "And in case, after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay or to apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened." *Held*, under that clause no right vested in the bankrupt to any portion of the income which he could enforce in any court of law or in equity.

5. These words conferred upon the trustees a power to be exercised or not, at their discretion, and one which, if exercised, exonerated them from liability for not applying such portion of the income under the limitations of the clause first recited; but the first clause controlled their action as to the whole fund, unless a portion was withdrawn from those limitations by the exercise of the discretionary power given them.

6. Property in trust cannot pass to the assignee in bankruptcy where the will provides for an absolute cessor of the bankrupt's interest on the event of bankruptcy, if the will provides for the vesting of the interest in some other person.

Bill in equity brought to enforce a claim to certain interests alleged to have belonged to Amasa M. Eaton, a bankrupt, out of the estate of his mother Sarah B. Eaton, and which complainant [Charles A. Nichols] alleged were vested in him as assignee in bank-

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

[2] [Affirmed in 91 U. S. 716.]

ruptcy. On the 1st of May, 1864, Sarah B. Eaton of North Providence made her last will and testament, by which she devised all her estate, real and personal, to three trustees, who were invested with certain extraordinary powers and discretions. Most of the facts were admitted, or not the subject of controversy, and may be stated as follows: Mrs. Eaton at the date of her will was a widow having four children, three sons and one daughter, and it was agreed that the daughter died unmarried and without children, subsequent to the death of the mother and before her brother Amasa was adjudged a bankrupt. By her will, Mrs. Eaton devised her estate, real and personal, to three trustees, to pay the rents, profits, dividends, interests, and income of the trust property unto and equally among her four children for and during their respective natural lives and after their decease in trust for such of their children as should attain the age of twenty-one years or die under that age having lawful issue living at his, her, or their decease; and his, her, or their heirs and assigns, if more than one, as tenants in common, subject to the condition that "if any of my said children shall die without leaving any child who shall survive me, and shall attain the age of twenty-one years, or die under that age leaving lawful issue living at his or her decease, then as to the share or respective shares, as well original as accruing, of such child or children respectively, upon the trusts herein declared concerning the other share or respective shares." Claim was made by the complainant as assignee in bankruptcy of Amasa M. Eaton, one of the sons of the testatrix, to his share of the rents, profits, dividends, interest, and income of the trust estate within the control of the trustees named in the will. Amasa was a member of the firm of Bailey & Eaton, and it was admitted that the firm, on the 1st of March, 1867, became insolvent, and that they made an assignment of their property to the complainant, and it appears that Amasa, on the same day, made an assignment of all his individual property to the same party for the benefit of his creditors, and that he, on the 24th of December following, was adjudged a bankrupt, and that the complainant was duly appointed his assignee as alleged in the bill of complaint. Prior to that decree there was no question that he was entitled to one fourth of the income of the trust estate, until the death of his sister, and that subsequently to the decree in bankruptcy he was entitled to one third of the income, as it was admitted that she was never married, and that she died childless.

Horatio Rogers and C. S. Bradley, for complainant.

Property left in trust passes to an assignee in bankruptcy. This can be avoided only by an absolute cessor of the bankrupt's interest, and provisions vesting that interest in some other person. Brandon v. Robinson, 18 Ves. 429; Tillinghast v. Bradford, 5 R. I. 205. The provisions of the will are ineffectual for that purpose. 1. Because deficient in its own terms, being but a misapplication of a portion of the usual legal phraseology employed for such purposes. In construing it we can only consider the terms that have been used, and cannot import into it other terms, though usually employed for such purpose. There is no limitation over to any other person or persons of the trust income of the bankrupt accumulating during his life in the absence of wife or children. 2. Because of the discretionary clause by which it was followed and controlled, there being no persons or objects alternative to the bankrupt, in favor of whom, in the absence of wife or children, this discretion can be exercised. Where property is left upon such a discretion as exists in this will it enures to the assignee in bankruptcy. Snowdon v. Dales, 6 Sim. 524; Green v. Spicer, 1 Russ. & M. 395; Kearsley v. Woodcock, 3 Hare, 185; Page v. Way, 3 Beav. 20; Lord v. Bunn, 2 Younge & C. 98; Younghusband v. Gisborne, 1 Colly. 400; Davidson v. Chalmers, 33 Beav. 653, 12 Wkly. Rep. 592; Wallace v. Anderson, 16 Beav. 533; Graves v. Dolphin, 1 Sim. 66; Piercy v. Roberts, 1 Mylne & K. 4; Bryan v. Knickerbacker, 1 Barb. Ch. 409; 11 Byth. Prec. (3d Ed.) 486, note a; Id. 711–713, and forms referred to; Pym v. Lockyer, 12 Sim. 394; Rippon v. Norton, 2 Beav. 63. Any discretion that has been or that may be exercised by the trustees under Mrs. Eaton's will in favor of the bankrupt, must enure to the assignee in bankruptcy. At least the interest of the bankrupt, under his mother's will, after his bankruptcy, is but a conditional estate. Bankrupt Act, § 14 [14 Stat. 522]; James' Bankrupt Law, 41, tit. "Conditional Estates"; 11 Byth. Prec. (3d Ed.) 486, note a; Lord v. Bunn, 2 Younge & C. 98; Davidson v. Chalmers, 33 Beav. 653; and other cases cited supra. The discretion has been exercised in favor of the bankrupt and is binding. Bryan v. Knickerbacker, 1 Barb. Ch. 409. An agreement for its exercise was made and is binding. The peculiar circumstances of this case make the doctrine applicable.

Samuel Currey and B. R. Curtis, for respondent.

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

CLIFFORD, Circuit Justice. Assignees in bankruptcy are chosen by the creditors of the bankrupt; and it is made the duty of the judge—or, where there is no opposing interest of the register, by an assignment under his hand—to assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto. And the provision is that such assignment shall relate back to the commencement of the proceedings in

bankruptcy, and that the title to all such property and estate, both real and personal, shall, by operation of law, vest in said assignee; and the further provision is that the assignee shall have like remedy to recover all said estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. 14 Stat. 522–524.

Assignees in bankruptcy, except in cases of fraud, take only such rights and interests as the bankrupt had and could himself claim and assert at the time of the bankruptcy, and they are affected with all the equities which would affect the bankrupt himself if he were asserting those rights and interests. Mitchell v. Winslow [Case No. 9,673]; Brown v. Heathcote, 1 Atk. 162; Mitford v. Mitford, 9 Ves. 100; 1 Jarm. Wills, 816; Hall v. Gill, 10 Gill. & J. 325.

Much discussion of that proposition is unnecessary, as it is conceded by both parties, and is supported by the highest authority. Tested by that rule, the question is, whether the bankrupt, at the date of filing his petition in bankruptcy, had any vested interest in the estate of his mother under her will, which must depend upon the construction of the principal proviso, to which reference will now be made. It is as follows: "Provided also that, if my said sons respectively should alienate or dispose of the income to which they are respectively entitled under the preceding trusts; or if, by reason of the bankruptcy or insolvency of my said sons respectively, or by any other means whatsoever, the said income can no longer be personally enjoyed by my said sons respectively, but the same or any part thereof shall, or but for this present provision would, belong to, or become vested in or payable to, some other person or persons,—then the trusts hereinbefore expressed concerning the said income, or so much thereof as should or would have so become vested in or payable to any person or persons other than my said sons respectively as aforesaid, shall immediately thereupon cease and determine. And the said income shall be applied by my said trustees during all the then residue of the life of my said sons respectively in manner following, that is to say, upon trust to pay and apply the said income, or such part thereof as aforesaid, to and for the support and maintenance, or otherwise for the use and benefit, of the wife, child, or children, for the time being, of my said sons respectively, or such one or more of such wives, child, or children, and in such manner as my said trustees in their discretion shall think proper, and as to such wife for her sole and separate and inalienable use; and in default of any object of the last-mentioned trust, at any period during the life of my said sons respectively, and when and so often as the same shall happen, then, upon trust, from time to time, so long as such vacancy or want of objects shall continue, to accumulate and invest the income aforesaid in augmentation of the principal or capital thereof in the nature of compound interest, with power of changing investments as hereinbefore expressed; and in case, at any time, such accumulation should cease to be lawful, then, upon trust, to apply the said annual produce and income, or such part thereof as may not legally be accumulated during said want of objects as aforesaid, in such and the like manner as the same would be applicable under the ulterior trust of this my will." Fraud cannot be imputed to the testatrix, as the estate was her own, which she was at liberty to give or not to her children as she saw fit; and, inasmuch as the bankrupt never had any interest in it other than what is devised to him by the will, it is clear that his assignee acquired nothing by virtue of the assignment except the interest which vested in the debtor at the time he filed his petition in bankruptcy. Nothing certainly vested in him except what was devised; and the nature and extent of the devise must be controlled by the intent of the testatrix as expressed in the will, unless the intent is one in violation of law. Apply that rule to the case and it is as clear as anything can be that the estate devised to the son, in the income of the trust-fund, ceased and was determined at the bankruptcy of the devisee. No other conclusion can be reached, as the testatrix so declares in express words; and she further provides an entirely new direction for such share of the income, giving it to the wife or wives of such son or sons, in the discretion of the trustees, empowering them, if they see fit, to exclude from any share of such income the wife and children of any such bankrupt son; and if those objects of the trust should fail, the provision is that such portion of the income shall go to the trustees, to accumulate as a portion of the ulterior trust of the will. Such a provision in a will is valid, as is settled by numerous authorities not open to question. Brandon v. Robinson, 18 Ves. 433; Cooper v. Wyatt, 5 Madd. 297; Rochford v. Hackman, 10 Eng. Law & Eq. 67; 2 Story, Eq. Jur. § 974, and Id. p. 285.

Cases may be found undoubtedly where doubts have been expressed whether the provision that the estate shall be determined by the bankruptcy of the legatee is sufficient to accomplish the object unless the will goes further and provides for the future disposition of the estate; but no such question arises in the case before the court, as the will contains a provision which entirely obviates the force of any such suggestion.

Satisfactory explanations upon this point will be found in the case of Rochford v. Hackman, 10 Eng. Law & Eq. 67, to which reference is made for the purpose.

Where trustees under a will have a discretion, as to the manner of the application of the trust-fund for the benefit of a par-

ticular person, but no power to apply it otherwise than for his benefit during his life, his interest in case of bankruptcy passes to his assignee; but the case before the court is entirely of a different character, as his life-estate is expressly determined by the act of bankruptcy, and the trustees are expressly empowered to make a different disposition of the income, showing that the case is controlled by the general rule established by the prior authorities. Green v. Spicer, 1 Russ. & M. 395.

Enough has been remarked to show that it was the intent of the testatrix that the life-interest given to the son should cease and be determined by his bankruptcy; but the complainant contends that the provisions of the will are insufficient to prevent the estate from vesting in the bankrupt and from passing from him to his assignee, for two reasons, which deserve a separate consideration:

Because, as he contends, "there is no limitation over to any other person of the trust income of the bankrupt, accumulating during his life in the absence of wife or children." But such, in the judgment of the court, is not the effect of the limitation expressed in the will. On the contrary, it does pass the income from the bankrupt into the control of the trustees for the benefit, at the trustees' discretion, of the wife or children of one or more of the sons; and if those objects fail, the trustees are expressly required to retain the income to accumulate and pass, after the death of the sons, under the ulterior trusts of the will. Nothing is to go to the bankrupt under the provision in any event, nor is he to acquire any right to any portion of the same, but he is absolutely barred therefrom by the express words of the clause.

Concede that, still it is contended by the complainant that the discretionary clause subsequently found in the will, vests in the bankrupt some interest in or claim to a portion of the income of the trust-estate, which by operation of law passed to his assignee under the instrument of assignment executed agreeably to section 14 of the bankrupt act. By that clause it is declared that it shall be lawful for the trustees in their discretion, but without its being in any manner obligatory upon them, in case at any future period circumstances should exist which in their opinion should justify or render expedient the placing at the disposal of the donees respectively any portion of the real and personal estate, to transfer absolutely to them respectively, for his or her own proper use and benefit, any portion, not exceeding one half, of the trust-fund from whence his or her share of the income under the preceding trusts shall accrue; and immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the trust-fund shall absolutely cease and determine. Appended to that clause also is the following provision: "And in case, after the cessation of said income as to my said sons respectively otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened." Obviously, in construing that provision, it must be assumed throughout that all the rights which the bankrupt had before that time enjoyed under the will were determined by the bankruptcy. All such rights being determined, the only question is, whether he acquired any new rights under that clause, or, in other words, whether the clause vested in the bankrupt any property interest in the income of the trust-fund. Carefully examined, the language found in the will is very precise and expressive in its legal effect, so much so that it may be said to speak its own construction. It is as follows: "In case, after the cessation of said income as to my said sons respectively otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such parts of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened." Under that clause, no right whatever vested in the bankrupt to any portion of the income which he could enforce in any court of law or equity. Such a claim cannot be recognized by any court, as the property is held by the trustees under the limitations in case of bankruptcy provided in the antecedent clause, and could not pass under those limitations unless some portion of it was paid to, or applied for, the use of the bankrupt or his wife and children by the trustees, in their discretion, it being expressly declared by the testatrix that no obligation is imposed upon the trustees to pay any sums to him or them, or to apply a dollar in that direction, the provision being that it is lawful in the contingency described, for the trustees to do so, but without its being obligatory, showing that it is a mere naked power in the trustees which vested nothing, either in the bankrupt or his wife and children, which either he or they could enforce under any circumstances. Courts cannot adjudge under that language that such an appropriation is obligatory,—that by it the trustees are compellable to allow a portion of the fund for the use of the bankrupt or his wife and children, as the will provides that it shall not be obligatory upon them to make any such appropriation, and it is not competent for the court to alter the will or to make a new one for the decedent.

Properly construed, it is clear that these words confer upon the trustees a power to be exercised or not, in their discretion, and one which, if exercised, exonerates them from liability for not applying such portion of the income under the limitations declared in the antecedent clause; but it is equally clear that the limitations declared in the prior clause must control their action in respect to the whole fund, unless some portion of it is withdrawn from those limitations by the exercise of that discretionary power.

Different rules apply where an absolute trust is created for the benefit of a party, his wife and family; but a discretion is vested in the trustees as to the time and manner of executing the same, or of apportioning the amount among the beneficiaries entitled to receive the income or fund, as it is well held in that class of cases that a right of property vests in the bankrupt beneficiary, and that such right of property will pass to his assignee. Such a party is entitled to something, and, having a valid claim for it, his interest passes by the instrument of assignment; but in the present case the bankrupt is not entitled to anything as matter of right, as the power to grant or withhold rests entirely in the discretion of trustees. They may give or withhold, in their discretion; and if they refuse to pay anything, or to apply any portion of the fund to such a use, neither the bankrupt nor his wife and children have any claim upon them for the income, or for any damages for refusing to exercise the power. Perry, Trusts, 453, 454.

Property in trust, it is conceded, may not pass to an assignee in bankruptcy in a case where the will provides that in that event there shall be an absolute cessor of the bankrupt's interest, if the will contains a provision that his interest shall in that event vest in some other person. Tillinghast v. Bradford, 5 R. I. 205; Dommett v. Bedford, 3 Ves. 149; Joel v. Mills, 3 Kay & J. 458; Rochford v. Hackman, 9 Hare, 475.

But the complainant insists that where property is left upon such a discretion as exists in the will under consideration, it passes to the assignee in bankruptcy. Provisions of various kinds have been framed by conveyancers to effect such an object as that contemplated by the testatrix in this case, that is, that the trusts expressed in the will respecting the income of the life estate shall cease and determine by reason of the bankruptcy of the beneficiary or donee; and a learned author expresses the opinion that the only mode of effectuating the object, often anxiously entertained by donors, of securing the corpus of the property against the acts of the donee himself and the claims of his creditors, is to invest a third person with a discretionary power either to give or withhold it as he may think best, in short to defer absolutely all proprietary interest in the intended object of bounty until its application to his use, by the testator's nominee, and ultimately to give to another what remains so unapplied at the decease of the devisor. Evidently every one of these conditions was adopted in the will in question to the very letter, and it is equally clear that the defence is fully supported by that authority. Hayes & J. Wills (7th Ed.) 199.

Forms for such a provision in a will are given by conveyancers of the highest repute, and those forms have the sanction of a learned annotator. 11 Byth. Prec. (3d Ed.) 713. Exactly the same views are expressed by Mr. Jarman in his work on Wills, in which he says, "The vesting in trustees of a discretion as to the mode in which income is to be applied for the benefit of a cestui que trust does not take it out of the operation of bankruptcy or insolvency, to effect which the discretion of the trustees must extend not merely to the manner of applying the income for the benefit of the cestui que trust, but also to the enabling them to apply it either for his own benefit or for some other purpose." 1 Jarm. Wills (2d Am. Ed.) 821.

By making the payment of an annuity depend upon the discretion or will of a third person, says Mr. Atherly, no disposition can be made of it, nor can it be come at by creditors either at law or in equity, but then the payment of the annuity depending upon the mere pleasure of the trustee, the cestui que trust has no certain ascertained interest in it, which is the exact description of the case before the court. Atherly on Marriage Settlements, 333. Opposed to these views are the remarks of the annotator in Hayes and Jarman on Wills in which he says "that according to a recent case in order to exclude the claim of the assignees in bankruptcy, the power should be made incapable of being exercised in favor of the bankrupt after such event, or in other words the property should in bankruptcy be absolutely given over to another in like manner as at death." Reference is made to the case of Piercy v. Roberts, 1 Mylne & K. 4, as authority for the doctrine, but the case cited in the judgment of the court affords no support whatever to the views expressed by the annotator. In that case £400 were devised in trust to the executors to apply and dispose of, for the sole use and benefit of the son of the testatrix in such manner as the executors should in their discretion think best, and in the case of the death of the son before the whole fund was exhausted, the balance not applied was to become a part of the residuary estate of the testatrix. Insolvency of the son followed before the sum was applied to his use, and the master of the rolls held that the bankruptcy of the son terminated the discretion of the executors and that the unapplied balance vested in the assignee. Later cases such as Twopeny v. Peyton, 10 Sim. 487, and Wallace v. Anderson, 16 Beav. 536, seem to deny that the discretion of the trustees ceases in all cases of bankruptcy, but it is not necessary to decide that point in the present case, as the pro-

visions of the will in question differ widely from the clause under revision in the case of Piercy v. Roberts, where it is clear there was an absolute trust established by the will in favor of the son, and the only discretion vested in the executors was as to the amount they should apply and the time and manner of directing the application. Perry notices this distinction in his valuable work on Trusts, nor is there anything in the case of Piercy v. Roberts, which affords any countenance whatever to the proposition that the trustees must be made incapable of exercising the discretion in favor of the bankrupt, in order to prevent the fund from passing to the assignee so long as the power conferred is a mere discretionary power to be exercised or not as they shall see fit, as it is clear that such a mere naked power does not carry with it any vested right in the donee which can be enforced in a court of law or equity.

Attempt was made to show that the trustees, in the exercise of their discretion, had applied a certain portion of the life interest of the trust-fund for the use of the bankrupt legatee, and the argument is that such portion of that fund as was not expended at the time the petition in bankruptcy was filed, passed to the assignee, but the court is of the opinion that the proofs do not sustain the proposition that anything so applied remained unexpended when the petition in bankruptcy was filed, which is all that need be remarked in answer to that suggestion.

Other propositions were discussed at the bar, but having determined that the bankrupt had no estate which could pass to his assignee, it is not necessary to examine the other issues between the parties. The bill of complaint is dismissed with costs.

[On appeal to the supreme court, the decree of this court was affirmed. 91 U. S. 716.]

NICHOLS (EDWARDS v.). See Case No. 4,-296.

Case No. 10,242.

NICHOLS v. FARMERS' MUT. INS. CO.

[9 Leg. & Ins. Rep. 124.]

Circuit Court, E. D. Pennsylvania. 1868.

FIRE INSURANCE — REPRESENTATIONS AS TO TITLE —MOVABLE BUILDING.

[The interest of a tenant in a wooden building erected by him under a lease which gives him a right to remove it may be regarded as an absolute interest within the meaning of an application for fire insurance; and a representation by the applicant that the premises were "his own" will not vitiate the policy, in the absence of any fraud which misled the company as to the character of the risk.]

[This was an action by Thomas Nichols against the Farmers' Mutual Insurance Company of York, Pa.]

CADWALADER, District Judge. This is an action to recover the amount of an insurance policy upon a three-story house and its furniture at Franklin, Venango county, Pa. The building was insured at $3,000, and the furniture at $1,000, and the policy took effect from October 9, 1865, to October 9, 1866. The loss of the building and furniture took place on the 1st of February, 1865, and the damages said to have been sustained amounted to upwards of $6,000. The insurance then fell due on the 18th of May following. Due notice of the loss was given to the defendants' agent at Franklin, through whom the insurance was effected, and by him sent to the company; and this agent testified that the president of the company came to Franklin with his blanks a few weeks after the notice had been sent to the company, going to show that the notice of loss had been received in due time by defendants, which the defense deny. The amount claimed by the plaintiff is $4,000, the amount of the policy, and the interest thereon, from May 18, 1866, when the insurance fell due.

The defense was: The plaintiff falsely stated that he was the owner of the premises when he applied for insurance, and there was a mortgage of $1,000 upon the property. The building, instead of being worth $3,000, as insured, is not worth more than $2,000; the plaintiff owned nothing but a back building which he erected upon the lot, and had no insurable interest in the premises before he leased them. (3) The plaintiff did not give notice of his loss until fifteen days thereafter, whereas the policy required immediate written notice. This neglect is therefore fatal to recovery under the terms of the policy. (4) The plaintiff insured the building as a hotel, but used it as a disreputable house, which increased the risk, and he never gave the defendants notice thereof.

In answer to the defendants' 1st, 2d, 5th, 6th and 7th points the court instructed the jury as requested. To each of the 3d and 4th points the court answered that if the facts were so, the jury should find for the defendants, but these propositions respectively were not applicable if the wooden building insured by the policy in question for one year only, ending in October, 1866, was constructed by the plaintiff under the lease which enabled him to remove it at pleasure, not only during that year, but afterwards until the end of March, 1870. The court said that the plaintiff's ownership of a building thus removable by him, was neither a leasehold, nor, in a technical sense, a fee, but might, relatively to the contract of insurance, be considered as having been, during the term of the insurance, an absolute interest in a movable subject, and that if the jury so found upon the facts, and if there was no fraud, nor any misrepresentation, which in fact, misled the defendants as to the character of the risk, the plaintiff is not in law, precluded, under these points, from recovering. To which instruction of the court in answer to the said 3rd and 4th points, the

defendants' counsel excepted. Defendants' 3d and 4th points were as follows: (3) If the jury believe from the evidence, that the plaintiff, at the time of making the insurance, was not the owner in fee of the lot of ground on which the premises insured stood, but on the contrary his only interest therein was that of a tenant under a lease. And if they further believe that he gave the answer on the application as the answer to the eleventh printed interrogatory, to wit: "My own," then and in such case the jury should find for the defendants. Ang. Ins. p. 55, § 17; Id. § 186. Cooper v. Farmers' Mut. Ins. Co. 14 Wright [50 Pa. St.] 299; Hope Mut. Ins. Co. v. Brolaskey, 11 Casey [35 Pa. St.] 282. (4) If the jury believe from the evidence, that the interest of the plaintiff in the building sought to be insured, was not at the time of making the application and the policy, a fee simple absolute, but on the contrary was another interest, and that such other interest was not so stated in the policy, then they should find for the defendants. Sayles v. Northwestern Ins. Co. [Case No. 12,422].

Verdict for plaintiff for the full amount named.

Case No. 10,243.

NICHOLS v. HARRIS.

[1 MacA. Pat. Cas. 302.]

Circuit Court, District of Columbia. May, 1854.

INTERFERENCES IN PATENT CASES — COMPETENCY OF WITNESSES — CROSS-EXAMINATION — TAKING DEPOSITIONS — COMPETENCY OF MAGISTRATE INTERESTED AS COUNSEL.

[1. The wife of a party to an interference is incompetent to testify in his behalf.]

[2. The action of a magistrate taking a deposition, in excluding a question on cross-examination, cannot be sustained on the ground that, if intended to affect the credibility of the witness, counsel should have so stated when the objection was made; for this would defeat the object of the question, especially where the witness has shown himself unfair and suspicious.]

[3. A witness who, on direct examination, refers to and partially describes a device of his own, cannot refuse, on cross-examination, to give a further description on the ground of exposing his private affairs.]

[4. A magistrate who is a partner of the active counsel of one of the parties to an interference is incompetent to take depositions therein, and depositions taken before him without knowledge by the opposite party of the partnership relation are inadmissible.]

[This was an appeal by James R. Nichols from a decision of the commissioner of patents, in an interference proceeding, awarding priority of invention to Elbridge Harris.]

Hubbard & Pinkerton and Page & Co., for appellant.

MORSELL, Circuit Judge. The commissioner having declared and decided the interference, and notified the parties thereof on the 15th of November, 1853, appointed the first Monday in January then next for a hearing, in conformity with the provisions of the act of July the 4th, 1836 [5 Stat. 117], and directed that the testimony must be in conformity with the rules therein inclosed, under the oath or affirmation of persons who were not interested in the question at issue, &c., which rules were established by the commissioner of patents by authority of the twelfth section of the act of 3d March, 1839, by which it is enacted "that the commissioner of patents shall have power to make all such regulations in respect to the taking of evidence to be used in contested cases before him as may be just and reasonable." The third rule is in these words: "That before the deposition of a witness or witnesses be taken by either party, notice shall be given to the opposite party of the time and place when and where such deposition or depositions will be taken; so that the opposite party, either in person or by attorney, shall have full opportunity to cross-examine the witness or witnesses; and such notice shall, with proof of service of the same, be attached to the deposition or depositions whether the party cross-examine or not; and such notice shall be given in sufficient time for the appearance of the opposite party and for the transmission of the evidence to the patent office before the day of hearing." Arnold v. Bishop [Case No. 552].

The depositions on the part of the appellee appear to have been taken, after notice given, before a justice of the peace within and for the county of Suffolk, commonwealth of Massachusetts—he certifies himself to be such—and that the witnesses stated in his return were duly sworn by him to testify the truth, and that they were examined on written interrogatories, and their testimony taken in writing by him as therein written, and carefully read by him to the deponents, and subscribed by them in his presence to be used, &c.; that Nichols, by his attorney, G. G. Hubbard, Esq., attended the taking said depositions. He states, also, that after all the depositions were taken and signed, and proceedings closed, Mr. G. G. Hubbard desired the magistrate to state that he was a partner of Mr. H. F. Smith. Gardiner G. Hubbard, who acted as attorney for Nichols, the appellant, states, in an affidavit made by him before a justice of the peace, that as counsel for James R. Nichols he was present at the examination of the several witnesses examined on the part of Elbridge Harris, as mentioned in the proceeding just alluded to; that he had no prior acquaintance with either the counsel for said Harris or the magistrate in whose name the summons was issued; that in going to the office of the magistrate he found it the same with the office of the counsel; that it occurred to him at once that they might be partners; but, thinking he might be mistaken, as he had never before in his practice known of anything of the

kind, he made no inquiries, but went on with the examination until they came to the examination of John Newell. He proposed an interrogatory to said Newell, to which he declined answering. The point was then argued, and the magistrate decided that he must answer it. The witness still refused, and advised with his counsel, who informed him that he was not bound to answer the interrogatory, when the magistrate, without giving any reason, changed his decision, and decided that the witness was not bound to answer the question. Whereupon he (the affiant) asked him if he were not the partner of Mr. Smith, and of counsel for Mr. Harris; and he replied that he was; that said affiant then objected to all the evidence, and particularly that of Newell, and declined going on any further with the examination before a magistrate who was judge and also counsel; that he requested the magistrate to enter these facts in his return at length, &c. This affidavit was not laid before the commissioner, and therefore if it were upon the merits of the issue tried before him, could not be noticed by the judge on the appeal; but as it relates to a mere collateral matter respecting the execution of the duty in taking the testimony, and the fact is stated by the magistrate, and noticed by the commissioner in his answer to one of the reasons of appeal, I have thought it ought to be considered.

On the hearing of the parties, according to the notice given, before the commissioner, on the evidence so taken, (except that of Mr. Harris, which was rejected as inadmissible,) and on the 24th of January the decision of the office was pronounced, awarding priority of invention to Harris; from which decision Nichols appealed, and upon which the case is before me. And according to due notice of the time and place of hearing given by me, the commissioner has laid before me the grounds of his decision in writing, in answer of the reasons of appeal filed by the appellant, together with said reasons and the original papers and evidence in the cause. The respective parties appeared by their counsel and submitted the case upon their written arguments.

Various reasons of appeal were filed—some to the admissibility and others relating to the merits of the question in issue. It is my purpose to consider those of the first description. They are the second, fifth, and sixth.

The second is an objection to the wife of Mr. Harris, the appellee, as a witness on his behalf. This objection was overruled by the justice but sustained by the commissioner, and very properly, I think.

The sixth is because the magistrate refused to compel John Newell, one of the witnesses offered by said Harris, to answer certain interrogatories propounded to him by the counsel of said Nichols, although he at first ordered him to answer the same, as will appear by his return. The interrogatory alluded to was in these words: "Did the lamp you showed to Mr. Harris have a wire-gauze tube silvered?" The witness had been called on the part of Mr. Harris, and previously answered the fifth and sixth interrogatories on the direct examination. The fifth is: "Please state the earliest time, if you can fix upon any time earlier than the 19th of May, 1852, at which you had any knowledge of such invention by Mr. Harris." He answered: "I do not think I can tell any day in particular before the 19th of May; I had conversations with him in April; I showed him one of my lamps, and that led to the conversation." The sixth interrogatory: "State what was said in that conversation, and state what Mr. Harris at that time claimed as his discovery, and the description which he gave you of it." Witness answered: "Mr. Harris remarked to me that my glass lamp was safe, except as to the liability to fracture; he said his was to have a metallic lining, but I cannot say that I fully comprehended his meaning; the manner in which he intended to apply it to the lamp I did not fully comprehend at the time."

The counsel for Nichols contends that in these answers the witness gives a date and fixes it by reference to his lamp, which he then showed Mr. Harris, and which was the origin of the conversation. He (the counsel) claimed to show what particular lamp Newell referred to, and then to examine him as to the time when he first invented that lamp, which the counsel believed was not until the close of 1852 or the beginning of 1853; and hence if that were the lamp meant by him, he must have made a mistake as to time of nearly a year. He also states some other parts of the examination, particularly the witness' answer to the first cross-interrogatory and the date of the patent referred to, which show the witness' mistake about the time and the relevancy of the questions. In answer to the objection thus involved in the sixth reason of appeal, the commissioner says: "The sixth reason, at most, could affect the testimony of Newell alone; and in relation to him the magistrate exercised a discretion which the undersigned saw no reason to take exception to." The question related to the private business of the witness; and if intended to affect his credit, it should have been so stated by the counsel so propounding it. The magistrate states as his reason that the answer thereto would expose the secrets of the witness' trade and business. With respect to its being incumbent on the counsel, "if intended to affect the witness' credit, to have so stated it," it should be remembered that it was on cross-examination that the interrogatory was put, in which it is the practice to allow much greater indulgence, and that to have stated his purpose would have defeated his object; and more especially should it have been al-

lowed, as the witness showed himself to be an unfair, suspicious witness by his answer to the first direct interrogatory. With respect to the protection claimed for the witness—that the answer would expose his private affairs—if this were even conceded to be his right under some circumstances, yet as he had, in answer to an interrogatory put to him on his direct examination, voluntarily referred to the lamp, and given a partial description, I think the objection came too late.

The fifth reason is, because all the evidence in behalf of Harris is inadmissible, having been taken by a magistrate who was a partner of the counsel of Harris, as will appear by his return. To this the commissioner answers that "the relation found to subsist between the magistrate before whom the testimony was taken and the counsel of Harris was not alone a legal ground for rejecting the evidence. The office is aware of no rules of law or practice that would, in the absence of a direct charge of error in the proceedings, make the relations subsisting between these parties a proper reason for excluding evidence in a case where the magistrate was shown to have no other interest. How far it might affect the credibility of the witnesses, the judge would determine; with the commissioner, it had no weight."

The authority to take the testimony was under the rules of the office for taking and transmitting evidence, &c.; particularly under the third rule, which is, as before stated, "that before the deposition of a witness or witnesses be taken by either party notice should be given to the opposite party of the time and place when and where such deposition or depositions will be taken, so that the opposite party, either in person or by attorney, shall have full opportunity to cross-examine the witness or witnesses; and such notice shall, with proof of service of the same, be attached to the deposition or depositions, whether the party cross-examine or not; and such notice shall be given in sufficient time for the appearance of the opposite party and for the transmission of the evidence to the patent office before the day of hearing." There is no express specific provision in this or in either of the rules established by the office against the counsel or attorney of either of the parties acting under said third rule; and it may be true, as the learned commissioner has supposed, that there is none such expressly declared in any of the rules of law on patent subjects; but I think it will appear that on principle and on precedent in analogous cases the settled law is that such a relation does render the person incompetent to discharge such a trust. The authority to make rules and regulations on the subject is derived to the commissioner, as also before stated, under the twelfth section of the act of March 3d, 1839, by which it is enacted "that the commissioner of patents shall have power to make all such regulations in respect to the taking of evidence to be used in contested cases before him as may be just and reasonable." To understand what the legislature meant by "just and reasonable," in this connection, it must be supposed they had in their mind the established principles and precedents in like cases. Upon principle, every party has a right to expect in the administration of justice that his cause shall be fully and impartially examined and tried. The examination and testimony of witnesses forms a most essential part of that trial; and to that end the judge or functionary who conducts the proceeding as such must be in a condition to be entirely indifferent between the parties. Can this be the case where the officer is also the retained counsel in the case, with all the usual sympathies and desires and biases in favor of his client's cause, and selected by him for the purpose? The magistrate who acted in this case under the delegated power of the commissioner who was to try the cause shared with him in this most important part of the preparation for the trial the judicial power. Could any rule, therefore, which would authorize such a person to examine and take the testimony be just and reasonable, within the requirements of the statute?

Upon authority, the principles which are thought applicable will be drawn from other cases of trial where a similar mode of taking evidence is practiced. It seems to have been received into the practice of the common-law courts, by analogy from the chancery court, and by that court from the rules of the civil law, i. e., the commission to take depositions, at the instance of the parties, to certain persons named by them, with power, &c. It will be unnecessary for the present purpose to state the particular details of the proceeding, one of which, however, required the closing of the commission and transmitting the whole proceeding, with almost the same authenticity as that established by the patent office. I proceed to show who were deemed eligible to act in that capacity. In 1 Har. Ch. Prac. pp. 440, 441, it is stated: "The common exceptions to a commissioner are: First, that he is of kindred, allied to the party for whom he is named; second, that he is master to the party—his landlord or partner; third, that he hath a suit at law with the party adverse to him, for whom he is named commissioner, or is of counsel, or is attorney or solicitor or follower of the cause on one side; fourth, that the party is indebted to him, or any other apparent cause of partiality or siding with either side." So, also, from the provisions of the judiciary system of the United States (1789) c. 20, § 30 [1 Stat. 88], describing what shall be the mode of proof in all the courts of the United States, &c.: "When the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States who shall live at a greater dis-

tance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States or out of such district, and to a greater distance from the place of trial than as aforesaid before the time of trial, or is ancient or very infirm, the deposition of such person may be taken de bene esse before any justice or judge of any of the courts of the United States or before any chancellor, justice, or judge of a supreme or superior court, mayor, or chief magistrate of a city or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties or interested in the event of the cause," &c.

It may be observed that the being of counsel or attorney to either of the parties is placed in the same category with being interested in the event of the cause.

I might add what has been the practice under the laws of Maryland and Virginia in their courts, and the invariable practice and rule of the circuit court of this district, sanctioned and affirmed by the supreme court of the United States; but I think I have shown enough to make it clear that the magistrate by whom the examinations were made and by whom the depositions were taken was legally incompetent for the purpose, and of course that the depositions must be considered as inadmissible evidence in the case. As the decision of the commissioner was grounded thereon, it is erroneous, and must be annulled, reversed, and set aside; and I do so hereby determine and decide, and that he do further proceed in said cause according to law.

[NOTE. The commissioner decided that priority of invention was in Harris. From this decision an appeal was taken to the circuit court, where the commissioner's decision was affirmed. Case No. 10,244.]

Case No. 10,244.

NICHOLS v. HARRIS.

[1 MacA. Pat. Cas. 362.]

Circuit Court, District of Columbia. Jan., 1855.

PATENT OFFICE APPEALS — REVERSAL FOR ERRONEOUS ADMISSION OF DEPOSITIONS — REHEARING—INTERFERENCES—IMPROVEMENTS IN LAMPS.

[1. Where an appeal is reversed, not on the merits, but because some of the depositions considered were taken before a magistrate who was disqualified by interest to take them, the commissioner is not bound to issue a patent to the appellant, but may grant a rehearing and order the depositions taken anew.]

[2. An interference is properly declared where the object of both parties is to guard against the danger from the use of camphene in common glass lamps, by placing in the bowl a metallic lining to hold the camphene if the glass is broken, the only difference being that one of them covers the top of the lamp with a glass dome, while the other uses a metal dome fastened to the inner metallic lining; for this difference is immaterial.]

[This was an appeal by James R. Nichols from a decision of the commissioner of patents, in an interference proceeding, awarding priority to Elbridge Harris in respect to the invention of an improvement in lamps.] The patent issued to Harris, No. 12,550, March 20th, 1855. See 4 Pat. Off. Rep. 1855, p. 110.

Hubbard & Pinkerton, for appellant.

A. B. Stoughton, for appellee.

MORSELL, Circuit Judge. This case was once before brought before me on appeal, by referring to which [Case No. 10,243] a particular statement will appear. The objection stated and relied on in the reasons of appeal was to the admissibility of the testimony. This objection was sustained, and the decision of the commissioner based thereon reversed, and the case remanded for further proceeding. There was no decision by me on the merits of the question, because under such circumstances it was not deemed necessary. The commissioner states in his certificate to me that he proceeded subsequently to order the testimony to be again taken, with full opportunity to both parties for that purpose, and the trial thereof was appointed to take place on the third Monday of July, 1854; at which time the testimony was duly laid before him and the parties heard; on which subsequent occasion he says that he decided that so far as the parties do interfere, priority of invention rests with Harris, who seems entitled to date as far back as May 19th, 1852. Again the commissioner says: "It would seem that the interference was declared on just and sufficient grounds, inasmuch as they both claimed making and using a metallic lining to glass lamps for burning camphene. If there be anything over and above this single idea appertaining to either party, such party will be entitled to a patent therefor if, upon due examination, he shall be found to be the original and first inventor of the same."

This decision and the reasons of appeal, together with all the papers and evidence, were again produced before me, and the case submitted on written argument. The first reason of appeal relates to what is supposed to be the effect of the reversal just alluded to; that is, that it was the duty of the commissioner to have proceeded in the case by ordering a patent, according to the provisions of the patent laws, to issue to the said Nicols for the invention claimed by him; and that the subsequent rehearing was illegal, and the decision founded on such rehearing void. This is a misapprehension, as before stated. The merits of the case were not considered; it was not so intended. I know of no rule of patent law that warrants such an inference. It was supposed that, for the ends of justice, an opportunity should be afforded to the parties to have their testimony fully and impartially taken. This was thought to be a matter of common right, and which on the former occasions sufficiently appeared not to have been done. The commissioner was, therefore, entirely correct in making his order to that effect.

The second reason is, that upon the evidence it appears that the said Nichols was the first original inventor of lining "all the inside of the reservoir of a glass lamp with metal."

The third reason is, that the testimony of John Newell, one of the appellee's witnesses, ought not to have had any weight with the commissioner by reason of the suspicious conduct of the witness in testifying on the former trial. As it respects priority, the appellant's evidence does not satisfactorily prove his invention to have been earlier than the 15th of July, 1852. The evidence on the part of the appellee shows his to have been at least as early, if not earlier, than the 10th of June, 1852; so that the only question is as to the interference.

Emmerson, a witness on the part of Doctor Nichols, describes the invention as a common glass lamp, which he assisted him in cutting off the top of, for the purpose of lining it with metal. Moses H. Pearson, another witness on behalf of the same party, says: "I know of some improvements made by James P. Nichols. Some time before September, 1852, Doctor Nichols brought a glass lamp into my shop with the top broken off, and wanted me to make a lining to it. I made it at that time; it was a common glass-stand lamp. He wanted me to make a lining to it so that he could put the glass on again which he had broken off. I made the lining to it as well as I could, but could not make it so that the glass pieces would fit on again. He said it was of no consequence whether the top fitted on it, although he should like it so that the top would fit on again." The lamp lay on the shelf in the shop for a number of weeks, and he did not come after it during that time. Witness supposes the reason he did not come after it was because he had gone to the White Mountains. To the fifth interrogatory he says that he did not think those pieces of glass if produced would, with the other parts of the glass, have entirely covered the metal, because some of the pieces of glass were gone; but they would have covered it had all the pieces of glass been there. It was the intention to make the tin fit the glass; but witness could not make it an entire fit, as some of the pieces of glass were gone. Had the dome of the lamp been taken off whole so that it could have been put on whole again he would have made the lining for it.

On the part of the appellee, Gardiner S. Coffin describes Harris' lamp thus: The improvement was a metallic lining inside of a glass lamp. He (Harris) drew out on a piece of paper with a pencil a description of it, and gave witness to understand what the benefit was. Harris stated that in case the lamp should be broken the fluid would not spill. He asked witness' opinion in regard to it. A drawing of the lamp was made on paper by Mr. Harris. Then there was a drawing of a metallic lining; and this metallic lining which contained the fluid was to be placed inside of the glass part of the lamp and cemented, so that in case of the lamp being broken the fluid would not spill or ignite. Each separate part was drawn and described, and corresponded with the plan made by Leonard. He then described it so that witness could have made one, or caused one to be made, from his said description or explanation. This witness is corroborated by Leonard and Farewell, who describe the improvement as follows: Common glass lamps were to be made in a different shape by having them larger at the top than at the bottom—not oval, as usual—(leaving off that part of the glass—the oval part), and having instead an oval metallic top fastened to an inner metallic lining, made so as to drop into the glass, to be fastened at the top of the glass by cement; the cap the same as in other fluid lamps. By these means the accidents from breaking the glass would be prevented. It appears from the specifications that the object of both parties was the same—namely, to guard against the danger from the use of camphene in the common glass lamps, which both proposed to effect by a metallic lining; and though neither the glass nor the metallic lining (separately) might be deemed a patentable invention, yet in their combined use it would be otherwise. The evidence (setting aside the testimony of Newell) shows that the means used by each of the parties are so very much alike in other respects that the question is narrowed down to this, whether, for the purpose stated, there is in principle a difference between a metallic dome and a glass dome.

I need only to state what is a well-settled principle on the subject to show what must be the conclusion: "The first and original inventor is entitled to protection against all other means of carrying the principle into effect."

In the case of Gray v. James [Case No. 5,718], Washington, J., applied the same doctrine to an improvement in the art of making nails by means of a machine which cuts and heads the nails at one operation—holding that where two machines are substantially the same, and operate in the same manner to produce the same result, they must be in principle the same; and that when the same result is referred to as the test, it must mean the same kind of result, though it may differ in extent.

Governed by this rule, I must come to the conclusion that in this case the principle of the invention in the two lamps in the present case is the same, and that the appellee, being the first and original inventor, has the prior right, and that the decision of the commissioner on all the points of controversy in this case ought to be affirmed.

NICHOLS (KNOWLES v.). See Case No. 7,897.

NICHOLS (NATIONAL PARK BANK v.). See Cases Nos. 10,047 and 10,048.

Case No. 10,245.

NICHOLS v. NEWELL et al.

[1 Fish. Pat. Cas. 647.] [1]

Circuit Court, D. Massachusetts. Nov., 1853.

PATENTS — MARKING AN ARTICLE "PATENTED" WHEN NO PATENT HAS BEEN ISSUED—QUI TAM ACTION.

1. The purpose of section 5, of the act of August 29, 1842 [5 Stat. 544], is to guard the public right to use unpatented articles; and to prevent deception, by assertions that articles, not entitled to that privilege, have been patented.

[Cited in Oliphant v. Salem Flouring Mills Co., Case No. 10,486.]

2. To find for the plaintiff in an action qui tam under this section, the jury must find: (1) That the defendants affixed, or caused to be affixed the word "patent" to their articles; (2) that the defendants had no patent; and (3) that they affixed the word "patent," with the intent to deceive the public.

[Cited in Hawloetz v. Kass, 25 Fed. 766; U. S. v. Shapleigh, 54 Fed. 133.]

3. Affixing the words "Newell's patent, 1852," is affixing the word "patent" within the meaning of the act.

4. A count charging the defendants with putting the word "patent" on a lamp, is sustained by proof that the word was put upon the cap of a lamp.

5. The offense is completed by affixing the word "patent" to an article with intent to deceive. It is not necessary to prove that the article was sold. On the other hand, if the word is affixed with an innocent purpose, the offence is not committed, although the article may be afterward sold.

6. The word "patent," affixed to any article, imports to all who see it that the article is then a patented article.

7. The general rule is, that a man is to be held to intend that which is the necessary consequence of his acts, or what he infers will be the consequence of his acts.

8. If the word "patent" is affixed to articles without any purpose of using them, or of deceiving the public, but with the expectation of having a patent, and with the intention of withholding them from observation and sale until the patent should be granted, such purpose would be innocent.

9. Although some articles may be stamped innocently, if any are stamped with a guilty purpose the offense is committed.

10. If a party gives instructions to his workmen to manufacture articles, and put on the word "patent," with intent to deceive, and then goes to a distant city, and there changes his mind, without notifying or stopping his workmen, that uncommunicated change of intent does not prevent the manufacture going on under the original instructions, from being illegal and liable to the penalty.

11. Although the party may have expected a patent shortly, or within any time, if there was a purpose, at the time the word was affixed, to deceive the public, by causing them to believe that the articles were then patented, the offense would be committed.

12. The jury may assess as damages, not less than one hundred dollars, and as much more as they think proper.

This was an action qui tam, brought in the name of the informer [James R. Nichols] against the defendants [John Newell and others] to recover the statutory penalty for affixing the word "patent" to unpatented articles. The declaration contained three counts. The first charged the defendants with affixing the word "patent" upon ten lamps; the second, that they affixed the same word upon the cap of a lamp; and the third, that they affixed this word upon a can—all for the purpose of deceiving the public, there being, in fact, no patent for the lamp, the cap, or the can. The fifth section of the act of August 29, 1842, under which the suit is brought, is as follows: "And be it further enacted, that, if any person or persons shall paint, or print, or mold, cast, carve, or engrave, or stamp, upon anything made, used, or sold by him, for the sole making or selling which he hath not, or shall not have obtained letters patent, the name, or any imitation of the name, of any other person, who hath, or shall have, obtained letters patent, for the sole making and vending of such thing, without consent of such patentee, or his assigns or legal representatives; or if any person, upon any such thing not having been purchased from the patentee, or some person who purchased it from or under such patentee, or not having the license or consent of such patentee, or his assigns or legal representatives, shall write, paint, print, mold, cast, carve, engrave, stamp, or otherwise make or affix the word "patent," or the words "letters patent," or the word "patentee," or any word or words of like kind, meaning, or import, with the view or intent of imitating or counterfeiting the stamp, mark, or other device of the patentee, or shall affix the same, or any word, stamp, or device, of like import, on any unpatented article, for the purpose of deceiving the public, he, she, or they, so offending, shall be liable for such offense to a penalty of not less than one hundred dollars, with costs, to be recovered by action in any of the circuit courts of the United States, or in any of the district courts of the United States having the power and jurisdiction of a circuit court; one-half of which penalty, as recovered, shall be paid to the patent fund, and the other half to any person or persons who shall sue for the same."

Sidney Bartlett and G. G. Hubbard, for plaintiff.

Causten Browne and Rufus Choate, for defendants.

SPRAGUE, District Judge (charging jury). The laws of the United States provide that the exclusive right to an invention may be granted to any person who applies for it, the purpose being to give to inventors the exclusive right to make any articles, of which they are the first inventors, and which are useful to the public or those engaged in their manufacture.

To guard the public right to use such articles as have not been patented—to prevent deception on the public, by assertions that

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

articles, not entitled to this privilege, have been patented—the same laws affix a penalty of not less than one hundred dollars, to be paid by any person who shall affix the word "patent" for the purpose of deceiving the public. This being the purpose of the law, those who have made it have a right to judge of its propriety and expediency. Even if we did not see its propriety and utility—as I believe we all do—still our duty would be to enforce that law, as we would every other law of the land; and, if a person thinks this law has been violated, it is proper that the legal means should be resorted to, to suppress the mischief and vindicate the laws. The means, in the present instance, is an action of this description, and you are to try the action upon that law and the evidence presented to you, according to the best of your judgment.

If the plaintiff has proved that the defendants committed the offense, you are to say so; if you find that they did not commit the offense, then you are to bring in a verdict accordingly. The burden of proof is upon the plaintiff, to satisfy you, beyond a reasonable doubt, of such facts as are necessary to constitute the offense. You will, in the first place, inquire what is the offense charged, and what is necessary to be proved by the plaintiff to entitle him to a verdict. There are, in this declaration—that is, in this claim of the plaintiff—three distinct charges, embraced in what, in legal language, are known as three distinct counts.

The first alleges that the defendants affixed the word "patent" upon ten lamps, for the purpose of deceiving the public. That is one charge. The second alleges that they affixed the word "patent" upon a cap of a lamp, for the purpose of deceiving the public. That is another charge. The third alleges that they affixed the word "patent" upon a can, for the purpose of deceiving the public; and that is the third charge. Each one alleges that there was, in fact, no patent for the lamp, the cap, or the can.

Now, gentlemen, you will turn your attention to each of these. They have been argued in general; but I shall request you, when you retire to render your verdict, to be prepared to decide upon each of them separately. If you find that defendants are not guilty of either, then you have only to return a general verdict of "not guilty." If you find that they are guilty of all, then you are to return a general verdict of guilty.

Then you may be permitted to inquire as to the amount of damages—whether or not they shall exceed one hundred dollars. And, in reference to that, you will remember to return whether you find a verdict on all three of the charges, or on two of them, or on but one. The plaintiff, then, must prove, beyond a reasonable doubt, in the first place, that the defendants affixed the word "patent" to their articles—and I shall speak only in general terms, without distinguishing between the different counts, except where I shall deem it necessary. In the next place, you are to be satisfied that the defendants had no patent; and, in the third place, that they affixed the word "patent" with the intent to deceive the public. If the plaintiff proves these, he is entitled to a verdict; and if he does not, you are to acquit the defendants.

A question has been made, whether the affixing the words "Newell's patent, 1852," comes within the description of affixing the word "patent." I have no doubt of it at all. If the word "patent" was put on in any way, I think it answers the description, and corresponds sufficiently with the declaration.

Another question, gentlemen, which has been made, is whether the putting it upon the lamps, which is alleged in the first indictment, is proved by its being put upon the caps. Of that I have no doubt. The cap, when put upon the lamp, is a part of the lamp; and the mark is just as much upon the lamp when put upon one part of it as upon another. Then, if it was put upon the cap, distinct and separate from the lamp, if that was done for the purpose of deceiving the public, that would satisfy the second allegation that it was put upon the cap of the lamp.

There will not be two penalties for putting it upon the cap of the lamp, and putting the same cap on the lamp afterward. But it will satisfy the declaration to have it upon one cap, separate from the lamp; then one may be said to affix the word to a lamp, and another to a cap.

Gentlemen, I have stated to you what the plaintiffs must prove: in the first place, that those words were affixed by the defendants, and that the defendants had no patent. As to these facts, I believe there is no controversy in this case. I do not understand that there is any doubt that the defendants affixed, or caused to be affixed, the word patent to these articles; and there is no controversy that, at the time it was done, they had no patent—for the Newell patent, which they had, according to the proof, was granted to them in October, 1853. Then, it seems, the question is narrowed to this: whether the words were put on for the purpose of "deceiving the public," or, as it has been expressed by the counsel, with the "intent to deceive the public." And here, gentlemen, though there have been a great number of articles to which the word "patent" has been applied, your attention will be called to the articles particularly the subject of your examination at the present time.

The plaintiff has specified what articles he refers to. There being three distinct charges in the declaration, he has referred to three distinct classes of articles. Those sold to Mosely, on February 17, one class. Another class is those sold to Connelly; and another, those sold to Soule for himself and partner. Now, if upon any one of the articles sold, for example, to Mr. Soule, that word was

affixed by the defendants, for the purpose of deceiving the public, then that charge is made out. So, if any one of the articles sold to either of the other parties, the cap or the can, was marked by the defendants, for the purpose of deceiving the public—in that case, also, the charge is sustained.

Some question has been made as to the effect of the sales, or whether the sales constitute the offense. The statute forbids the affixing the word "patent," for the purpose of deceiving the public, upon any article. The offense is committed by affixing that word with that purpose; and, gentlemen, if it be affixed to an article for that purpose, then the offense is complete, whatever disposition of the article may subsequently be made.

On the other hand, if, when the word is affixed, it is with an innocent purpose, then the offense is not committed, whatever new purpose the defendants might have at a subsequent period. So that the inquiry is narrowed down to this: whether, as to the articles that are in question, the defendants, when they affixed, or caused to be affixed the word "patent," did it for the purpose of deceiving the public? Did, then, the defendants affix the word "patent" with that purpose? If they did do it for that purpose, then they are guilty of the offense charged against them; and although this seems to be a very narrow question, yet the evidence that has been adduced—properly and legally adduced—has branched off to a very considerable extent, and into a great variety of transactions.

In the first place, then, you look at the evidence as applicable to those articles sold to Mosely, Connelly, and Soule, they being the actual subjects of your inquiry, and those to which you will primarily look for the evidence to satisfy your minds. Then you are required to look also at the other evidence, upon the question of intent. What was the purpose of the parties at the time these articles were stamped? These sales were made in January and February last. Now, what the purpose was when these sales were made, is not a primary inquiry here, and it is only gone into to aid you in deciding upon the main question. The conduct of a person, when intent is to be ascertained, both before and after the act which is to be accomplished by it, may be gone into to determine what was his intent at the time of the act. For instance, you may take the case of larceny. An act is done in taking the property of another. For the purpose of ascertaining whether or not it was done with a criminal intent, you show the conduct of the party subsequently to the act, and prior, as showing the manner in which he approaches it. So, in all questions of intent, the conduct, as well as the declarations of the party, if they can have relation to the act, may be given in evidence, to satisfy the jury what was really the purpose and intent.

But the inquiry here still is, what was the purpose as to those articles? The first fact relied upon by the plaintiff, is the putting of the words on the article; and the inquiry he very reasonably makes of the defendants and you, is: "Why did these defendants, having no patent, and knowing that they had no patent at the time, put the words 'Newell's patent, 1852' upon an article?" It is false at the time it is put there, as the plaintiff alleges, and it must be so; it is in fact false, because there was no patent. It imports that that article is a patented article. Those words put upon it are so understood, and they import to all who see them, who are not otherwise informed, that that article is then a patented article. And here I may as well observe to you, as a general observation applying to this part of the evidence, that when we are ascertaining the intent or purpose of a man, we ascertain it by his acts. The general rule is, that a man is to be held to intend that which is the necessary consequence of his acts, or what he infers will be the consequence of his acts. It is not, for example, for a man to fire a loaded musket at another, and say he did not intend to hurt him. He must be held to know that that, being a dangerous weapon, and fired at another person, will do him injury, and he must be held to intend that consequence. And thus all criminal law is administered; a man is supposed to intend what he knows to be the natural consequence of his acts.

And now, gentlemen, another thing besides the affixing of the words "patent," or "Newell's patent, 1852." It is said that the articles in question were actually sold to customers in the store, openly, and apparently in the usual course of business, and with these words upon them. Then you are to inquire whether that is an act calculated to mislead those who receive them, and whether the defendants themselves were guilty of that act—participated in or authorized it—and thus, whether they then had the purpose of deceiving; and if they had that purpose, how far that goes to satisfy your minds that originally, when they put on the mark, they had the purpose of deceiving the public.

Another thing, gentlemen, relied upon, is that, at the time these articles were sold, a bill was given with them, in which the defendants described themselves as dealing in patent lamps and cases, and delivered to those persons—Mosely, Connelly and Soule—the articles with the words upon them, at the same time giving a bill, at the head of which is printed that they deal in patent lamps. Then, further, that there were certain declarations made verbally at the time, as to the change made by Mosely of one lamp for another, and the declaration made to Soule that the can was patented, and that he would not be permitted to manufacture it. These are the proofs to be relied upon in relation to these particular articles.

The defendants say, in answer to this, that the stamps were put on innocently, under the expectation of having a patent, and without

any purpose of using them, or otherwise deceiving the public; but, intending to keep them in their own possession, so that they would not be seen by anybody, until the patent should be granted, and they should know it, and when it would become true that the article was a patented article. That is the purpose with which the defendants say the stamps were put on. If that was the purpose, then it was an innocent purpose.

They further contend, that it is incumbent on the plaintiff to show that these particular articles, now in controversy, were made for that illegal purpose of deceiving the public; and that showing that other articles were made for that purpose is not sufficient. That is true; very many other articles were made. If these articles were not made with that purpose, then the plaintiff can not succeed. On the other hand, if these were made with that purpose, then it is immaterial what was the purpose in making any others.

Then, it is contended, that as the plaintiff has not given you evidence when these particular articles were made, you are at liberty to take such time as will be most consistent with the innocence of the defendants; and if, therefore, you find, from among the whole of those from which these may come, that any portion were made innocently, as these may be of that portion, you will find the defendants not guilty. And, gentlemen, the law is, that the burden is upon the plaintiff to show that these articles were thus stamped with a guilty intent. If you are not satisfied that these were, then you cannot find that the others were. And, if any portion of those, of which these may constitute a part, were innocently made—if the plaintiff has not shown you, if you are not satisfied from the circumstances that these came from the guilty portion—then the plaintiff has not made out that part of his case. On the other hand, if you are satisfied that all made by the defendants were made with a guilty purpose, then they are to be found guilty under the law.

If you see any ground of distinction, in the evidence, between one part and another—for you are not to act upon mere conjecture—if there be any ground of distinction, in the proof, between those manufactured at one time, and those manufactured at another time, you are to give the defendants the benefit of that distinction. If there be none, of course you will make none. But, still, if you are satisfied that these came from the guilty portion, then the guilt of the defendants is made out. The two portions particularly relied upon by the defendants, were those made in September, and those made in the last of December. You will recollect, by the evidence, taking, for example, the caps which were made by Mr. Draper, that in his testimony he says that he had manufactured, from the last of August to September 20, caps, upon which had been affixed the words "patent applied for." From that time to December 27, "Newell's patent, 1852."

If you find upon the evidence, a distinction between the articles made in the early part of September, and those made subsequently, you will consider whether or not they were made innocently.

If there is anything to show you that they were made in December, or if there is not anything to show you that they were not made then, you will ascertain whether it is proved to you whether they were made at any other time. But the importance of that consists in a request made by the defendants, upon which, as a matter of law, it is my duty to instruct you. The defendants insist that there was a change of purpose on their part, at Washington, on December 24; that then the first application for an invention made by one Phipps was rejected; that it was under that application that they had an expectation of a patent; that that being at an end, he then came home, directed his salesmen not to sell any more of the articles marked "patent," and directed his workmen not to make any more of them.

Now, the defendants further say, that if, prior to December 24, their manufacturers were going on making these articles, and that it was done with the guilty intent and purpose, yet, if they changed that purpose between December 24 and 27, and these were made between December 24 and 27, that that would exonerate them. I do not think that well founded in law. I think that if the defendants gave instructions to their workmen to manufacture articles, and put on the word "patent," and did it for the purpose of deceiving the public, and then went away to Washington, at a distance, and there changed their own wishes or views; and that that uncommunicated wish, or intent, or purpose—whatever it is called—did not reach the workmen, or any others in their employ, and the manufacture went on under the original instructions given, pursuant to an original illegal purpose, and was consummated by the act of affixing the word—this uncommunicated purpose, or wish, or intent, has no operation to prevent its being an affixing of the word "patent" on the article, with the intent to deceive the public.

The ground taken by the defendants is, that they expected a patent under Phipps' application; and, you will remember that that is the only patent that has any application to the present case; because, although they obtained a patent in October last, it was on an application made on December 24; and it is not here pretended that at the time these acts were done, they expected a patent under this application, because, even if granted, time must elapse before it could be taken up and acted upon. The expectation which the defendants relied upon, is the expectation of a patent under Phipps' application. Whatever acts, then, were done subsequently, to the application of the defendants, it is not contended were done under

the then expectation of a patent. If, then, any of these stamps were affixed after December 27—after the time when the first application had failed, and the expectation had ceased—it was done without the expectation of a patent.

Gentlemen, I have thus stated to you, I believe, all that is necessary, as matter of law, for you to understand in your investigations. You are then to inquire, under these principles and these directions, upon the whole evidence in the case, as to the intention of the party in affixing the word "patent" to these articles; and, in addition to the evidence to which I called your attention, as applicable to these particular articles, there is other evidence in the case, which you are called upon to weigh and determine.

There is one other remark, however, that I ought to make to you as a general principle; and that is, if, upon the whole of this evidence, it is left in a state of uncertainty —if, taking all the evidence together, it can be reasonably and fairly reconciled with the defendants' innocence—then they are not proved to be guilty, although it may be fairly and easily reconciled with the supposition that they committed the acts charged. It is for the plaintiff to make out the case; and, if all the evidence taken together does not establish the charge, and the whole is fairly reconcilable with the supposition that the acts were innocently done, then the defendants are to be found not guilty.

On the other hand, if, taken altogether, the conclusion of guilt is the only fair and reasonable result at which you can arrive, then you are warranted in arriving at that result. It is for you thus to weigh the evidence on both sides.

The other evidence, besides that bearing directly upon these articles, branches off, as I have said, very much, and hence to a great extent applies to other articles manufactured and sold by the defendants, and other acts done besides that of affixing the words. For example, there is evidence before you, from Mr. Draper, as to the number of caps that he manufactured for lamps; that he begun the last of August, and continued until September 20, — that during the whole period, from September 20 to December 27, he continued to manufacture articles marked "Newell's patent, 1852," and that these articles were furnished from time to time to the defendants.

Now, the inquiry is, what was done with these articles, and what was the purpose for which they were originally made, with these words upon them, and how far does that aid you in ascertaining the purpose of these particular articles? The argument is, that it was an innocent purpose. If this was an innocent purpose—that is, if the defendants, when they employed Mr. Draper to make these articles, intended to withhold them from public view, so that they should not mislead and deceive the public—why did they not put them aside where they would not be displayed to the public view, or be sold so as to be likely to meet it? If that was the purpose, you will look at the manner in which they dealt with them, to see whether it is consistent with taking care that the public was not deceived. On the contrary, if you find that, as they were manufactured, instead of being kept by themselves, they were carried to a store, and there kept openly as articles for sale, and sold, you will judge what force and effect that has to show that that was the original purpose.

It is contended, that, after a change of purpose, it is stated by some of the witnesses that these were put in boxes and put down cellar.

It may be asked, why it was not done prior to that time? And, how are you to account for the fact, that those persons employed to manufacture and mark the articles, put the words upon them, and kept them there, and sold them to customers? How is that consistent with the purpose of not deceiving the public? The quality is immaterial in this general view. Then, upon the question whether these parties were, at the time, in a state of mind to be desirous of having it understood by the public that this was a patented article, and making use of means to make the public understand that it was a patented article, you may go into the other evidence in the case—the advertisements, etc.; and, it may be well asked, if they did not mean that the public should understand that it was a patented article, why did they advertise? If they intended by that means, and by means of handbills and cards, to state that it was a patented article, then the question is, whether they had the same purpose in having the word "patented" put upon the articles at the time they were manufactured.

If you find that in the expectation of a patent, or from any other cause, they were made innocently at the time, the purpose being not to mislead the public by having it put on, then the defendants must be acquitted. If, on the other hand, you find that they were made with the purpose of misleading the public, you must find the defendants guilty of the charges brought against them.

I have only one word more to say to you on this case. If there was a purpose, at the time these words were affixed, to deceive the public, although the party may have expected a patent shortly, or within any time (if, in the meantime, they intended to put forth the articles and thereby deceive the public), then the offense would be committed. If they intended to deceive the public for a short time, and believed that they should then have their patent, still the offense is committed, because the statute forbids deceiving the public at any time.

If you find for the defendants, on all the

counts, then you have only to return a general verdict of not guilty. If you find for the plaintiff, then I shall request you to find also the amount of damages—the statute saying that the defendants shall incur a penalty of not less than $100 for each offense.

If you find them guilty on the first count, you may assess damages, not less than $100, and as much more as you may think proper. So, if you find them guilty on the second count, you may assess damages not less than $100, because any one article being marked incurs the penalty of $100, and more, if the jury think proper. On the third count, the same remarks will apply. And I will request you to say on which count you do find, or on all the counts, if you find on all of them.

The jury found a verdict for the plaintiff on the three counts, assessing as damages, $200 on the first, and $100 on each of the others.

NICHOLS (PARK BANK v.). See Case No. 10,718.

Case No. 10,246.

NICHOLS v. PEARCE et al.

[7 Blatchf. 5.] [1]

Circuit Court, S. D. New York. Aug. 31, 1869.

PATENTS—PRIORITY OF INVENTION—INFRINGEMENT—PARTIES.

1. Where a patent granted to W., as inventor, was infringed by a machine used by P., by virtue of a license under a patent granted to N., as inventor, and it was set up in defence that N. was the first inventor of what was covered by the patent to W., and it appeared that N. made his invention before the application by W. for his patent, but that W. had in successful operation a machine containing the invention at a date earlier than the date of the invention by N. of anything embodied in W.'s patent: *Held*, that W. was the first inventor.

2. Where V., as an officer of a corporation which owned the patent to N., and on behalf of such corporation, executed a written agreement between the corporation and P., under which the corporation furnished to P., for use by him, under a tariff, as rent, the infringing machines, they remaining the property of the corporation: *Held*, that V. was a proper party defendant to a suit against P. to restrain the infringement of W.'s patent by the use of such machines.

In equity. This was a final hearing, on pleadings and proofs, on a bill founded on letters patent [No. 57,232] granted to Sidney S. Wheeler and Daniel B. Manley, August 14th, 1866, for an "improvement in machines for pouncing hat bodies," and the title to which had, by sundry mesne assignments, become vested in the plaintiff [Edward A. Nichols]. The infringement alleged was the use of infringing machines by the defendants [Hosea O.] Pearce and [Samuel W.] Benedict, and the fact that the defendant [Philetus W.] Vail made, or caused to be made, or participated in the making of such infringing machines, and allowed or caused them to be used on the premises, and under the direction, of Pearce and Benedict.

George Gifford, for plaintiff.
Charles M. Keller, for defendants.

BLATCHFORD, District Judge. It is not disputed that the machines used by Pearce and Benedict embody the inventions covered by the first, second, third, fifth, and sixth claims of the plaintiff's patent. The defence set up in justification of the use of the machines is an alleged prior invention by one Emile Nougaret. The proofs show that Wheeler and Manley had in successful operation by the latter part of May or the fore part of June, 1865, a machine containing the improvements subsequently patented by them; and that their application for a patent therefor was made on the 15th of September, 1865. The evidence also shows that Nougaret does not carry back to a date earlier than July, 1865, his invention of any thing embodied in the plaintiff's patent; and that for such invention a patent was issued to Nougaret on the 18th of September, 1866. Nougaret's patent is owned by the American Hat Pouncing Machine Company, under a license from whom Pearce and Benedict are using their machines. The defendants appear to have acted in entire good faith in the use of the machines used by them, and they were warranted in defending this suit by the fact that Nougaret's invention antedated the application by Wheeler and Manley for their patent. But the case is a plain one, and there must be the usual decree for the plaintiff for an injunction and an account of profits.

The defendant Vail, as vice president of the Hat Pouncing Machine Company, and on its behalf, as the owner of the patent granted to Nougaret on the 18th of September, 1866, and of another patent granted to Nougaret on the 20th of February, 1866, and of certain improvements embodied in an application that had been made for a patent, executed an agreement in writing, made between the company and Pearce and Benedict, on the 1st of February, 1867, under which the company agreed to furnish, let, and rent to Pearce and Benedict, to be used by them, three machines, containing the improvements embraced in the said two patents to Nougaret and the said application, for a then present consideration and for a tariff to be paid to the company on all hats which should be pounced by the use of said machines, the machines to remain the property of the company. The machines were furnished accordingly and are the machines complained of in this suit. These facts warranted, I think, the making Vail a party defendant to this suit, in order to procure a perpetual injunction against his further participation in furnishing the Nougaret machine to be used in infringement of the plaintiff's patent. Whether

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

Vail will be held liable to respond to the plaintiff for any part of any profits which may have been derived from the use of the three machines referred to, will depend upon the testimony which shall be taken on the reference as to the accounting.

NICHOLS (SMITH v.). See Case No. 13,-084.

Case No. 10,247.

NICHOLS v. TREMLETT.

[1 Spr. 361;[1] 20 Law Rep. 324.]

District Court, D. Massachusetts. June, 1857.

SHIPPING—CHARTER-PARTY—LAY DAYS—USAGE—DELAYS—RIGHTS OF CHARTERER—DEFICIENCY OF COAL—DEMURRAGE—CROSS LIBELS.

1. By a charter-party, a vessel was to proceed to Pictou, and take a cargo of coal, to be furnished by the hirer. There were to be lay days, as "customary in loading," and "the cargo was to be received as customary," and in case the vessel was longer detained, by the fault of the hirer, he was to pay to the carrier demurrage. There being no custom allowing a particular number of lay days, but a peculiar custom as to the mode of loading, receiving, and furnishing the cargo: *Held*, that each party was bound to conform to such custom.

2. There being but few berths at which a vessel could load, and the custom being for vessels there to take their turn, in the order of their arrival at the port, and those which preceded this vessel being delayed by a deficiency of coal, the turn of this vessel was thereby delayed: *Held*, that the hirer was responsible therefor, such deficiency of coal having arisen from its not being supplied at the customary rate of seven hundred chaldrons per day.

3. The vessel being represented in the charter-party, as then lying in the harbor of Boston, it was the right of the hirer to have her proceed directly from that port to Pictou, without any unreasonable and unusual delay.

[Cited in Lindsay v. Cusimano, 10 Fed. 303.]

4. If the vessel was not at Boston, as stated in the charter-party, but at another port, undergoing repairs, the hirer is entitled to be placed in as good a condition as he would have been, if she had been at Boston, and proceeded directly on her voyage.

5. If, by reason of her not having proceeded directly from Boston, she was subjected to greater detention after her arrival, the hirer is liable for no more demurrage than he would have been, if she had proceeded directly.

6. But if, from a deficiency of coal, she would have been subjected to delay, if she had performed her duty, the hirer will be liable, to that extent, for the demurrage actually suffered.

[Cited in Eleven Hundred Tons of Coal, 12 Fed. 188.]

7. Where, in a libel by a ship-owner, for demurrage under a charter-party, the hirer set up in defence a neglect of duty by the ship-owner, under the same contract, not by way of recoupment, but merely to repel the claim for demurrage: *Held*, that the hirer might afterwards maintain a cross libel, for damages sustained by such neglect.

[Cited in The Two Brothers, 4 Fed. 159.]

8. He might have availed himself of this claim for damages, by way of recoupment in the first suit. But if he had done so, he could not have had a decree for any excess of his damages over the claim of the libellant.

[Quoted in Kennedy v. Dodge, Case No. 7,-701.]

9. Nor could he have sustained a cross libel for such excess.

[Quoted in Kennedy v. Dodge, Case No. 7,-701; The Ciampa Emilia, 39 Fed. 127.]

10. He may elect whether to take his remedy wholly in defence, or wholly by suit.

11. Where such cross suit was instituted, and the libellant in the first suit was out of the jurisdiction, notice on his counsel and proctor in that suit, is not a sufficient service of the cross libel.

[Cited, but not followed, in The Eliza Lines, 61 Fed. 323.]

12. But the court may, in its discretion, stay proceedings in the first suit, until an appearance shall be entered, and other steps taken in the second. Under the circumstances, such stay was ordered.

[Cited, but not followed, in The Eliza Lines, 61 Fed. 323.]

In admiralty.

J. C. Dodge, for libellant.

R. H. Dana, Jr., for respondent.

SPRAGUE, District Judge. This is a libel for demurrage. On the 8th day of August, 1854, the respondent, a merchant of Boston, and the libellant, master of the brig Melazzo, executed a charter-party, by which that vessel was to go to Pictou, and there take a cargo of coal and convey it to New York. The respondent was to be allowed, at Pictou, lay days, as "customary in loading," and "the cargo was to be received as customary," and in case the vessel was longer detained, the respondent agreed to pay to the libellant demurrage, at the rate of thirty Spanish milled dollars, day by day, for every day so detained, provided such detention should happen by his default, or that of his agent.

The vessel arrived at Pictou on the sixth day of September, and was there detained, until the third day of November. It is alleged by the libellant, that this detention far exceeded the customary lay days, and for the excess he now claims demurrage, at the rate of thirty dollars a day. It appears by the evidence, that there is no custom, by which a vessel is to have a particular number of days for loading at Pictou. And the first question is, what is the meaning of the expression in the charter-party, lay days as customary for loading? It is contended by the libellants, that it means such number of days as vessels had theretofore been generally detained for cargoes, and in loading, and that this did not exceed from six to twelve. But, upon the proofs, I cannot adopt this construction. It appears that coal is the only article exported from Pictou. The mines are worked by a company, and it has been their practice to carry on their mining operations throughout the year; the coals raised in the winter, when the harbor is not acces-

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

sible to vessels, being deposited on the bank, to aid in meeting the demand of the summer and autumn. There are seven berths at which vessels are loaded, all about three miles distant from the mines. It has been the practice of the company to send the coals to the vessels daily, and to supply the demand, up to seven hundred chaldrons a day. By the established custom of the port, vessels take their turns in going to the berths, and loading, in the order of time in which they pass the light in entering the harbor. In the latter part of the summer, and during the autumn of 1854, there was a deficiency in the supply of coal by the company, owing partly to a diminution in the quantity deposited on the bank during the preceding winter, and partly to the great number of vessels seeking coal during that season. When this brig passed the light, there were a great number of vessels, which had preceded her, waiting for cargoes, and her extraordinary detention was owing to her being compelled to wait until these had been loaded, and to there being a deficiency of coal. It is contended by the respondent, that the detention in this case was occasioned solely by the custom, which compelled this vessel to wait her turn, and that he is in no way responsible for the delay occasioned by the want of coal for those that preceded her. By the terms of the charter-party, the shipper was bound to furnish a cargo, and I think, that by the true construction of that instrument, the shipper was entitled to such number of lay days as would be necessary to complete the loading of this vessel, she taking her turn according to the custom, and coal being supplied after her arrival, at the rate of seven hundred chaldrons a day, in conformity with the previous practice of the company. Such, I think, must have been the customary lay days contemplated by the parties, and if there was longer detention, for want of the usual supply of coal, to the extent of seven hundred chaldrons a day, the shipper is responsible therefor, at the rate stipulated in the charter-party. The respondent presents another ground of defence which deserves consideration. He alleges that this vessel ought to have proceeded directly, and without delay, from Boston to Pictou, but that she deviated, and remained a long time in her home port in Maine, thereby postponing her arrival at Pictou; and that, if she had reached there as early as she might and ought to have done, there would have been a smaller number of vessels to take precedence of her, and a greater daily supply of coal, and that the great detention to which she was subjected after her actual arrival, was, therefore, owing to her own fault.

In the charter-party, the vessel is stated to be lying in the harbor of Boston. It appears by the evidence, that she was in fact at Searsport, in Maine, undergoing repairs, and was detained for that purpose some twelve days. The vessel being represented in the charter-party to be then in Boston, the respondent had a right to expect that she would proceed from that port to Pictou, without any unreasonable and unusual delay, and if she did not do so, it was a violation of her duty under the contract. From the evidence, it appears that, if the vessel had been in Boston, and had sailed for Pictou, and prosecuted her voyage in the time and manner that it is usual and reasonable for such vessels to do, she would have arrived at Pictou on the 19th of August, and the respondent is entitled to be placed in as good a condition as he would have been, if she had performed her duty, and arrived at that time, and the libellant is not entitled to recover for any detention occasioned by his own fault. It is insisted, on behalf of the respondent, that there having been this deviation and delay by the libellant, he can have no claim whatever for demurrage, because it is impossible to ascertain whether there would have been any, or if any, how much detention, beyond the rightful lay days, if the libellant had used due diligence, and arrived in the proper time; but this, I think, is answered by the evidence, which is unusually full and precise. Records were kept by the company of the arrival and loading of every vessel, and of the quantity of coal furnished each day during the season, and it satisfactorily appears that, if this vessel had arrived on the 19th of August, and there had been a supply of coal, up to seven hundred chaldrons a day, she would have been loaded on the fourteenth day of September, taking her turn according to custom, but that with the supply that was actually furnished per day, she would not have been loaded until the second day of October, and thus there would have been a detention of eighteen days, for the want of the usual supply of coal, and for this the shipper must have been responsible, even if the libellant had arrived in due season; and to that extent the delay does not arise from the fault of the libellant. To illustrate this, suppose that at the time this vessel did actually arrive, there had been the same vessels in port having precedence, and the same daily supply of coal, as there were on the 19th of August, and from that time to the 2d of October, then her detention, after her arrival on the sixth day of September, would have been precisely the same, as it would have been, had she arrived on the 19th of August, and thus no part of her detention would have been owing to the fault of the libellant, and the respondent would, in this respect, have suffered nothing from his deviation. I am of opinion, therefore, that the libellant is entitled to recover for eighteen days, at the rate of $30 per day.

The respondent then moved for a stay of judgment or execution.

SPRAGUE, District Judge. This is a motion to stay further proceedings, until a hear-

ing can be had in a cross libel by Tremlett v. Nichols, upon the same charter-party. Before the hearing, a motion for a postponement was made, founded on the pendency of the cross libel. But as evidence had been taken, at great labor and expense, and the case was then ripe for hearing, and involved the same transactions upon which the second suit was mainly founded, the court ordered the hearing to proceed, with permission to the respondent to renew his motion for delay, at a future stage of the cause. That motion is now renewed. Several questions have arisen. The first relates to the service of process. Ever since the filing of the cross libel, Nichols has been out of the jurisdiction and no personal service on him has been made, but notice has been given to his proctor in the first suit. This is not sufficient service.

The libel by Tremlett v. Nichols is not merely defensive. It is not like a cross bill in equity, or a bill to enjoin a judgment, whose whole force is exhausted in repelling the claim of the other party. But it proceeds further, and claims damages upon an independent stipulation, and to a greater amount than may be decreed to the other party in the first libel. The proctor of Nichols cannot, therefore, by virtue of his retainer in the first suit, be deemed his agent to receive notice in the second. But although no service has been made upon Nichols, so as to authorize the court to proceed upon his default or contumacy, yet the court may, in its discretion, stay proceedings in the first suit, until an appearance shall be entered and other steps taken in the second. Nichols has voluntarily come within the jurisdiction, to litigate upon this charter-party with Tremlett. The latter insists that he has a claim, upon the same contract, exceeding any rightful claim of the former. Upon an adjustment of the whole voyage, nothing may be due to Nichols, and yet if the court has no power to stay proceedings, he may coerce Tremlett to pay a large sum, by a decree of this court, and leave him to seek his remedy on the same contract, in another and perhaps a foreign and remote jurisdiction.

But it is insisted that the present is not a proper case for the exercise of this power. The first objection is, that the cross libel does not present even a prima facie case, and that it is apparent that it cannot be maintained. The principal ground of claim set forth in the cross libel is that there was a wrongful deviation and delay by this vessel, in going to and remaining at Searsport, which caused her late arrival at Pictou, and postponed her arrival at New York, by which the shipper lost the benefit of a contract for the sale of the coal, and by the depreciation of the market value, so that he was obliged to sell at a much smaller price than he would have obtained, if the brig had arrived in due time. This is the same deviation and delay at Searsport, which is set forth in the supplemental answer, and has been already considered in the original suit. It is objected that the shipper cannot maintain a new suit for the same default. This objection cannot prevail. It was set up in the answer, not by way of set-off or recoupment, but merely to repel the claim of the libellant. That suit was for demurrage at Pictou, and in order to sustain it, it was necessary for the libellant to show a detention there by the fault of the respondent. The answer insisted that the detention at Pictou was caused by the previous wrongful deviation and delay by the libellant, and not through any fault of the respondent. This was the view presented by the answer, and the only extent to which it was considered by the court. The cross libel now presents a distinct and independent claim for damages occasioned by that misconduct, on the part of the shipowner, alleging that the voyage was thereby retarded, and the arrival of the vessel at New York postponed, so that he lost the market for his cargo. This claim the respondent did not present, in answer to the former suit. It may be contended that he might and ought to have set it up in defence of the first suit, and that he cannot now make it the ground of a new action. I think that he might have availed himself of it in his answer to the first suit, although this doctrine has been seriously doubted. The admiralty does not take cognizance of pleas, in set-off, no statute having given it that authority, and it has been thought by some that a distinct claim by the respondent, founded upon the violation of the contract by the libellant, is in the nature of a set-off, and so not cognizable by this court. But I am of opinion that where the counter claim is founded upon the same charter-party, the respondent may set it up in his answer, so that the damages that he has sustained may be recouped from the amount which the libellant might recover. But in such case, if the damages sustained by the respondent should exceed the just claim of the libellant, the court can give no decree for such excess; the utmost effect being to diminish or extinguish the claim of the libellant. Nor could the respondent afterwards maintain a suit for such excess. He cannot be permitted to split up his demand, and litigate the same question twice. Having once voluntarily submitted his claim for damages to the court, he must be content with such relief as the tribunal may afford him. But although the respondent may set up such claim in his answer to the first suit, yet he is not bound to do so, but may have a separate action therefor, and recover any amount of damages which he may have sustained. Similar questions have heretofore come before this court, in suits for freight,—Snow v. Carruth [Case No. 13,144],—which may exhibit the principles applicable to the present case. To a libel

for freight, the respondent may answer that some of the goods were lost by the misconduct of the carrier, and never delivered to the consignee, and that the libellant is not entitled to freight for those goods. Here, although there is an allegation of violation of duty on the part of the carrier, yet it leads only to the other allegation of the non-delivery, and is used merely to defeat the claim of the libellant, by showing that it is unfounded. No damages for the misconduct of the carrier are claimed. The respondent, in such case, by his answer might go farther, and claim compensation for the property lost, and that the value thereof should be deducted from the freight to which the libellant was entitled, for that part of the cargo which he had duly delivered.

In some of the cases which have come before me, the whole freight was earned, all the packages having been delivered, but the respondent was permitted to set up and sustain a claim for damage or deterioration of the goods, by the fault of the carrier, and the amount was deducted from the freight earned and sued for. See Snow v. Carruth [supra].

In the case now before the court, the shipper in his cross libel insists that the shipowner violated his contract, by not proceeding directly and with reasonable diligence to Pictou, by reason whereof the vessel did not arrive at her ultimate port in due season, and he was greatly damnified thereby. This claim not having been presented or litigated in the first suit, he is now precluded from pursuing it by a new libel.

It is further objected, that there has been a want of due diligence in instituting the cross suit, which should preclude the respondent from having further delay. The voyage terminated in the latter part of December, 1854. The first libel was filed in February, 1855, and the answer in March following. The cross libel was not filed until December, 1856. This is a great delay. But it does not appear that the respondent had knowledge of the deviation and stay at Searsport, prior to December, 1856. It is true, that in his original answer he states that there was deviation and delay in reaching Pictou, but he states no specific facts, and it may have been mere inference from the date of her arrival. But all the facts were known to the libellant Nichols, and instead of stating them truly, as he ought to have done, in his libel, it is therein positively alleged that the vessel, at the time of making the charter-party, was riding in the harbor of Boston, and that she "departed from said Boston with all possible dispatch for said Pictou," when in truth she was at Searsport, and there remained a long time, undergoing repairs. This positive assertion, which was not retracted until after the cross libel was filed, may well have misled the respondent, and prevented his instituting inquiry, and it is not for the libellant to say that he ought earlier to have ascertained that these assertions were false.

I shall order a stay of proceedings for the present, but not until any particular time or event. Perhaps an appearance will be entered, and such stipulations given as will render it proper for the court to proceed to a decree and execution, before a hearing in the cross libel.

Proceedings stayed until the further order of court.

[Conk. Prac. pp. 89-91, and authorities there cited; Dunn v. Clark, 8 Pet. [33 U. S.] 1.][2]

NICHOLS (UNITED STATES v.). See Case No. 15,876.

NICHOLSON (BEATAUGH v.). See Case No. 1,194.

Case No. 10,248.

NICHOLSON v. CHICAGO.

[5 Biss. 89.][1]

Circuit Court, N. D. Illinois. June, 1869.

ENTERING APPEAL NUNC PRO TUNC.

Where an appeal bond to the supreme court has been presented and approved, but no formal appeal prayed or allowed, though it was evidently the intention of the parties to appeal, and it was so understood by the court, it is competent for the court subsequently to enter an order nunc pro tunc allowing the appeal.

C. Beckwith, for the city, moved for an order nunc pro tunc amending the record to show that an appeal was prayed. Final decree was entered on the 7th of January, 1867. Appeal bond was approved Jan. 16, 1867. Counsel learned that the appeal was not of record, March 26, 1869.

S. A. Goodwin, for plaintiff [Samuel Nicholson], read affidavit of E. C. Larned, that he was present in the court room when S. A. Irwin, corporation counsel, stated to the court that the finance committee of the common council had under consideration, the matter of taking an appeal and that their action was to depend on the opinion of Judge Curtis, to whom the matter had been referred by the city; that he does not recollect that an appeal ever was prayed or allowed in said cause; that Irwin, only stated that he wished to appeal. He also cited Barrel v. Transportation Co., 3 Wall. [70 U. S.] 424, to show that the allowance of the appeal was actually necessary and that a petition presented for the filing of a bond is not the allowance of an appeal; also, Seymour v. Freer, 5 Wall. [72 U. S.] 822.

DRUMMOND, District Judge. It was understood by all the counsel, and by the court, that an appeal was asked for by the city and

[2] [From 20 Law Rep. 324.]

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

allowed by the court. That was done orally, and no formal order was entered, nor asked for, nor considered necessary. In such a case, if we can make an order nunc pro tunc, it ought to be made. I do not suppose Mr. Irwin did come in and formally ask for an appeal in so many words, but he did in reality. The court acted upon it, although the court did not direct the clerk to enter an appeal. I never could have understood that it was necessary. It is a sort of interpolation that they have made in the supreme court. At any rate, the question has never been made, and there is nothing in the statute about it.

The case cited from 3 Wall. [supra], is the first decision that has come under my observation where it was decided by the supreme court that an allowance of an appeal entered of record in the court was indispensable. It seems to me that it would be sticking to the bark to hold that this appeal was not in reality well taken. It may be true that the counsel for the city did not come to the court and formally say, "I ask for an appeal," and the court did not formally say, "The appeal is allowed," but the counsel for the city came into court and intimated to the court, and gave the court to understand, that the city intended to appeal. The court so understood it, and when the court approved of the bond the court did it upon the understanding that the city desired to take an appeal, and intended to prosecute it. That being so, it seems to me that it would be giving rather too much weight to this technical rule which the supreme court has established recently that the party must come into court and pray for an appeal, and that the court must allow it as a matter of form. I think that it would be very difficult to carry out this new rule in all cases, one of which has just been stated by the counsel for the city, where the court had adjourned. Therefore, I am prepared to enter an order, although I think, to all intents and purposes, the appeal was prayed and allowed. I will direct the entry of an order nunc pro tunc, allowing the appeal.

Case No. 10,249.

NICHOLSON v. McGUIRE.

[4 Cranch, C. C. 194.][1]

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

TRUSTS—FAILURE OF TRUSTEE TO INVEST FUNDS—INTEREST—EFFECT OF RECEIPT BY CESTUI QUE TRUST.

1. A trustee who is directed by the deed of trust to sell the property and invest the proceeds in productive funds, and fails to do it, is liable to pay interest.

2. A receipt given by a young man just arrived at full age, for a certain sum, as his share of his father's estate, is not a bar in equity to his demanding the interest and dividends upon the fund to which he was entitled by the terms of the deed of trust.

Bill in equity, claiming interest on the plaintiff's share of his father's estate in the hands of the defendant [James McGuire] under a deed of trust, by which the defendant was directed to invest the estate in productive stocks; the plaintiff [John Y. Nicholson] having, at full age, given a receipt for $1,048.74, as his share of the estate.

Mr. Hewitt, for plaintiff.
Mr. Taylor, for defendant.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). The bill in this cause states, that the plaintiff's father, in November, 1821, died, having first made a deed of trust of his whole estate to the defendant, and that among other trusts the defendant was bound to pay to the plaintiff, upon his coming of age, $1,500, and such portion of the interest of the same as should be unexpended in his support and education; and that it was made the duty of the defendant, at the death of the plaintiff's father, to sell all the property in the deed mentioned, and invest the proceeds in such stock as the defendant should deem best for the interest of the children. The deed provides that $3,000 should be paid to his daughter Mary at the death of her father; $2,500 to his son, Henry W. Nicholson, at twenty-one years of age; $1,500 to the plaintiff, as before-mentioned; and $2,350 to his son Lionel, at twenty-one; to whom also the deed gives the residue of the proceeds of the property.

The bill charges that the plaintiff was entitled to receive interest upon the $1,500 from the death of his father until he became of age. That when he arrived at the age of twenty-one the defendant paid him $1,048.74; falsely and fraudulently representing to the plaintiff that that was all he was entitled to receive. That the plaintiff, under these impressions, created by the defendant, gave him a receipt, which, he supposes, purported to be a receipt in full for the provision made for him by his father; but that he never did receive more than the $1,500. The bill then prays that the defendant may be decreed to pay him interest on the $1,500 from the death of his father till he obtained his majority, which was in the month of ——, 1829; and for general relief.

The defendant, in his answer, admits the trust as set forth in the deed; that Henry became of age on the 17th of August, 1826, and the plaintiff on the 18th of June, 1829. That Lionel will become of age on the 18th of November, 1832. That the defendant has not sold the stocks mentioned in the deed, but sold other personal property to the amount of $3,622.46 on the 15th of December, 1821; and he exhibits his account with the trust fund, and with each of the distributees. That he paid over to the executors

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

$1,233.79, to be applied by them to the payment of the debts of the plaintiff's father. That he considered the power of sale as discretionary with himself, and that he acted according to his best judgment. That he never has applied any of the trust fund to his own use. That he believed the stocks of the banks in this district to be precarious; and states other reasons for not investing the trust-fund in stock of the United States, or in stock of the Bank of the United States, or in private securities. That the widow of the plaintiff's father instituted a suit in chancery in this court to vacate the deed to the extent of her supposed distributory share, or one third part of the property conveyed, on the ground that the deed was made by her husband in his last illness, in contemplation of his death and for the avowed purpose of excluding her. The account rendered by the defendant shows that without sale of the specific stocks mentioned in the deed, the defendant had always in his hands, funds sufficient to make the payments to the distributees; and sufficient to produce the interest upon the principal sums until they became payable.

It is clear that, by the deed of trust, the plaintiff had a right to receive the dividends and interest upon his distributive share until it should be paid; and that it was the duty of the defendant to invest the fund in such stocks as would have produced such dividends and interest; and having failed to do so, he was bound to pay the interest himself; even if, as he is said to have alleged, the money had been lying idle in the bank. But it was competent for the plaintiff when he came of age to relinquish his claim for interest; and if he has done so in the present case, with a full knowledge of all the circumstances, he must be bound by his act. Upon receiving $1,048.74, on the 24th of August, 1829, he gave the following receipt: "Received, Alexandria, 24th day of August, 1829, the sum of one thousand and forty-eight dollars 74/100, which with the moneys advanced to me during my minority, is in full of fifteen hundred dollars provided for me in the trust-deed from my father to James McGuire. John Y. Nicholson. $1,048.74. Witness: A. Moore." This is not a receipt in full of all demands under the deed, but only of the $1,500 provided for him by the deed. But the deed provided more than the $1,500. It provided for the dividends and interest which should accrue upon $1,500, laid out in productive stocks. It bound the defendant to procure such stocks at all events; and the plaintiff's right to those dividends was as perfect as his right to the principal sum. When, therefore, he gave a receipt for the principal sum, it was no bar to a claim for the dividends which had accrued upon it. The $1,500, constituted a specific sum set apart for a particular purpose. It was not a debt due from the defendant for the withholding of which interest was to be given by way of damages. The dividends were as expressly given as the principal. No inference can be drawn, from such a receipt as this, that the plaintiff intended to acquit the defendant of the dividends, or interest, if he had a right to claim them under the deed. It is not, therefore, a bar in equity to the present claim. But if it had been a receipt in full of all demands, yet it appears to have been obtained under circumstances which should induce a court of equity to say, that the defendant ought not, in good conscience, to avail himself of it in bar of the present suit. The defendant was a young man just arrived at the age of twenty-one, eager to receive the provision made for him by the deed of trust, and probably ignorant of the law, and of his rights under the deed. It can hardly be supposed that he was aware that if the defendant had not laid out the fund in productive stock, agreeably to the directions of the deed, he was liable to pay interest on it to those among whom the fund was to be distributed at a future day.

There is also evidence that the defendant alleged that the trust-fund was lying dead in the Bank of Alexandria, and not used by him until drawn out for the purposes of the trust. This also tended to mislead the plaintiff. There is evidence also that from the year 1821 to 1828, the defendant was extensively engaged in the buying and selling lumber. That he received in the first year, under the deed of trust upwards of $8,000, and paid on account of the trust, not more than $1,500; yet it does not appear that he had in the bank at any one time more than $4,750.46; and in December, 1823, although he had received by his own account $10,281.80, on account of the trust-fund, and had paid on that account, not more than $5,000, his deposits in bank amounted only to $745.70. The excuse, therefore, which he alleged, for not paying interest, (namely, that the money was lying dead in the bank,) is not supported by the evidence; and a receipt in full, if obtained upon such a representation, ought not in good conscience to avail the defendant to any greater extent than to the amount actually received.

The plaintiff, in his bill, distinctly charges that the receipt was obtained under impressions, created by the defendant's falsely and fraudulently representing to the plaintiff, that the sum of $1,048.74 was all that he was entitled to receive. This allegation is not denied by the defendant's answer, and is corroborated by the testimony of Mr. Moore and Mr. White; the latter of whom proves that the defendant was advised by able counsel, as early as December, 1823, that if he did not invest the fund in productive stock, he would be liable to pay interest; and the former testifies that the defendant informed those who were to receive the fund, that it was lying dead in the bank.

Under such circumstances the court cannot say that the receipt is a bar to the plaintiff's claim for interest. If the receipt is not a bar, we think that the plaintiff has a right to claim it, inasmuch as the defendant had sufficient funds in his hands, and did not invest them as required by the terms of the deed of trust. We think the plaintiff is entitled to interest, at six per cent. per annum, on $1,500, from the expiration of a reasonable time, say six months after the death of his father, until the 24th of August, 1829, when the principal sum was paid; the amount of which can be ascertained without a reference to a master.

NICHOLSON (OSBORN v.). See Case No. 10,595.

Case No. 10,250.

NICHOLSON v. PATTON et al.

[2 Cranch, C. C. 164.] [1]

Circuit Court, District of Columbia. April Term, 1819.

CO-PARTNERSHIP—NAME OF INDIVIDUAL—PROOFS — COMPETENCY OF PARTNERS AS WITNESSES — BILLS AND NOTES—PROTEST FOR NON-ACCEPTANCE.

1. In an action against James and Robert, charging them as partners, and, as such, liable for bills drawn by James in his own name, but for the benefit of the partnership, James cannot be examined as a witness for Robert, upon an issue joined by Robert alone, although judgment should have been rendered against James by default.

2. The want of notice of non-acceptance is not excused by an understanding between the plaintiff and James that the bill should not be sent on for acceptance.

3. If the declaration aver a protest for non-acceptance, as well as for non-payment of a foreign bill, and the action be brought upon the protest for non-payment, it is not necesasry that the plaintiff should prove the averment of protest for non-acceptance.

4. In order to charge Robert upon a bill drawn by James in his own name, it is necessary to prove that James and Robert carried on business in partnership under the firm of James. Prima facie it is the sole bill of James.

Action by the payee [Henry Nicholson] against James and Robert Patton, as drawers of a foreign bill of exchange, drawn in the name of James alone, and protested for non-payment.

Mr. Taylor and Mr. Swann, for defendant Robert, offered to examine the defendant James as a witness for Robert, upon the issue joined for him, judgment having been rendered against James by default, and the same jury having been sworn to assess the damages as to James as to the same time.

Mr. E. J. Lee and Mr. Jones, contra. The general rule is, that a party cannot be a witness. The exceptions are only in cases where the judgment may be several; but here it must be joint, although the defendant, James, should confess judgment.

THE COURT (nem. con.) rejected the witness as incompetent.

THE COURT also, at the prayer of the defendant's (Robert's) counsel, instructed the jury that want of notice of non-acceptance is not excused by an understanding between the plaintiff and the defendant James, that the bill should be sent on for acceptance.

The declaration averred a protest for non-acceptance as well as for non-payment. By the Virginia statute of November 12th, 1792 (section 2), the plaintiff would be entitled to recover interest from the date of the protest for non-acceptance.

Mr. Taylor, for defendant, Robert, contended that the averment of protest for non-acceptance was material, and therefore ought to be proved, notwithstanding the decision of the supreme court of the United States in Brown v. Barry, 3 Dall. [3 U. S.] 365.

But THE COURT (CRANCH, Chief Judge, contra) said it was not necessary that the plaintiff should prove the averment.

THE COURT (THRUSTON, Circuit Judge, absent), at the prayer of the counsel for the defendant, Robert, instructed the jury that in order to charge the defendant, Robert, in this action, it was incumbent on the plaintiff to prove that James and Robert carried on business under the name and firm of James Patton; and that this bill on its face, purports to be the sole bill of James.

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

NICHOLSON v. UNITED STATES. See Case No. 3,097.

NICHOLSON (UNITED STATES v.). See Case No. 15,877.

Case No. 10,251.

NICHOLSON PAVEMENT CO. v. HATCH et al.

[4 Sawy. 692; 3 Fish. Pat. Cas. 432.] [1]

Circuit Court, D. California. Sept. 21, 1868.

EXTENT OF NICHOLSON'S CLAIM IN HIS PATENT—THE PATENT NOT INFRINGED BY THE USE OF THESE PARTS WITHOUT THE OTHER — A PAVEMENT SIMILAR IN EXTERNAL APPEARANCE NOT NECESSARILY AN INFRINGEMENT ON THE NICHOLSON PATENT.

1. Nicholson, in his patent, makes no claim to the exclusive use of blocks or of gravel and tar between or over them, or of any of the separate parts which go to make up the structure. What he claims as his invention is the combining of the foundation of the pavement with blocks, or blocks and strips of board, these being so arranged as to form cells or channels, with wooden bottoms, for the reception of broken stone or gravel and tar.

2. The patent is not infringed unless the foundation and blocks are used by the defendant in a similar combination. The use of one of them

[1] [Reported by L. S. B. Sawyer, Esq.; and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 4 Sawy. 692, and the statement is from 3 Fish. Pat. Cas. 432.]

without the other, though all the other necessary elements in the formation of the pavement are employed, violates no right of the patentee.

3. A pavement presenting an external appearance similar to that of the patentee, but in which the blocks are placed directly upon the graded earth, no boards or other foundation being interposed, is not an infringement of the Nicholson patent.

[This was an action on the case tried by the court by consent of parties, without a jury. The suit was brought to recover damages for the infringement of letters patent [No. 11,491] for an "improvement in wooden pavements," granted to Samuel Nicholson August 8, 1854, and reissued December 1, 1863 [No. 1,583; reissued August 20, 1867, No. 2,748], the exclusive right to use which within the city and county of San Francisco, California, had, by intermediate conveyances, become vested in the plaintiffs. The invention is very fully described in the opinion as well as in the claim of the original patent, which was as follows: "So combining and arranging the blocks or wooden portion of the pavement, that there may be cells or channels between them for the reception of tar and gravel, or materials of like character, each cell having a wooden bottom for the cement to rest on, whereby, when the mass of tar and gravel in each cell is pressed down by the wheels of vehicles, it shall be prevented from being forced through the cavity, and be caused to spread in lateral directions so as to maintain a firm and close joint between the adjacent blocks, and prevent water from passing down between their joints." The claim of the reissued patent is even more minute in the details of the invention. It is as follows: "The so combining and arranging the foundation or support, or its equivalent, of said wooden pavement resting on the roadway surface or bed, substantially as herein described, with said long and short blocks above described, or their equivalents, which said blocks are combined in such a manner as that partitions shall be made leaving cells or channels between them, with a wooden bottom formed by the shorter blocks some distance above the lower end of the blocks, for the reception of the broken stone or gravel and tar, or other like material, and also combined with such cells or channels filled with broken stone, gravel, and tar, or other like material, substantially as herein described, whereby the particles of broken stone or gravel are prevented from working under the lower ends of the longer blocks, and whereby water is prevented from passing from the surface of the pavement downward through the joints of said wooden blocks, and also moisture is prevented from being absorbed upward from the ground by said wooden blocks, substantially as described." The pavement constructed by the defendants [T. H. Hatch and others] is fully described in the opinion.] [2]

[2] [From 3 Fish. Pat. Cas. 432.

J. H. Saunders, W. F. Sharp, and Crittenden & Wilson, for plaintiffs.

Solomon Heydonfeldt and Joseph M. Nougues, for defendants.

FIELD, Circuit Justice. This is an action to recover damages for an alleged infringement by the defendants of a patent granted by the United States to Samuel Nicholson for an improvement in wooden pavements. A patent was originally issued to Nicholson in August, 1854. This being surrendered, a new patent to him was issued in December, 1863. The right to use the invention in the city and county of San Francisco has passed from Nicholson by various intermediate transfers to the plaintiff, a corporation created under the laws of this state.

The nature of the improvement, which the patentee claims as his invention, can only be understood from a description of the pavement and its mode of construction. The specifications accompanying the patent give such description with much fullness and detail. A brief description, however, will be sufficient for our purpose, and will exhibit the matter in dispute between the parties. The improved pavement is constructed in this wise: The earth of the roadway or street upon which the pavement is to be made is first graded. The grade is generally made in a slightly arched shape, so that the elevation at the centre of the road is a trifle higher than at the sides. The earth thus prepared is then covered with tarred paper, or lime mortar, or hydraulic cement about two inches in thickness, or with a thin flooring, upon which tar is poured.

Upon the foundation thus made, two sets of wooden blocks are placed. These blocks are cut with parallel sides from timber, about four inches square, in cross sections; those of one set are about eight inches in length, and those of the other set are about half that length. These blocks are placed end upward, and are arranged both transversely and longitudinally, so that the long and short blocks stand alternately in each direction. By this arrangement there is formed above each short block a cell or cavity, bounded by four of the large blocks. Into each of these cells a small quantity of coarse salt is poured. The cells are then filled with broken stone, or coarse, clean gravel, the whole being firmly rammed until the upper surface becomes firm and level. Mineral or vegetable tar or pitch is then poured over the whole surface of the pavement, and into the cells containing the broken stone or gravel, so as to penetrate between the pieces and cement them together. The tar permeating into the cells makes the entire mass of stone or gravel adhere firmly to the surrounding blocks, and also allows an expansion of the mass from the pressure of carriages, such expansion serving to fill up any spaces which may be formed from shrinkage of the wooden-

blocks. To prevent the blocks from being forced below one another they are sometimes connected together by wooden pins, and instead of the broken stone and tar in the cells any other suitable cementing material may be used.

Instead of the two sets of blocks described, the improved pavement is sometimes constructed entirely with long blocks and a strip of board between them. In such case, the blocks are placed side by side in rows transversely of the roadway, with a space an inch in width between them, in which the strip of board is introduced edgewise or vertically. The width of the board is about one-half the length of the blocks. These boards resting on the foundation, there is formed above them, between the blocks, long cells or grooves extending across the roadway. These cells are filled with broken stone, or gravel, and tar, as already described. It is generally, if not always, in this form that the pavement has been constructed in San Francisco.

It is in this way, as we have briefly described it, the improved pavement, which is generally called the Nicholson pavement, is made. It is a pavement of great neatness, is easily kept clean, is from its nature free from mud, offers a sure footing for horses; and by its use the noise of carriages and carts, so annoying in the busy streets of a large city, is to a great extent avoided. It is also represented by the patentee to be a durable structure, its durability being secured, in his view, by the elastic extremities of the fibres of the blocks, and by the exclusion of moisture and consequent rot from the blocks by the material employed for the foundation and the tarry covering poured over the surface.

This pavement is not the entire invention of Nicholson, nor is it so claimed by him. Wooden pavements were invented and in use in different parts of the world many years before his attention was directed to the subject. He makes no claim to the exclusive use of the blocks, or of the gravel and tar between them or over them, nor of any of the separate parts which go to make up the structure. What he claims as his invention is the combining of the foundation of the pavement with the blocks, or the long blocks and strips of board, these being arranged so as to form cells or channels with wooden bottoms for the reception of broken stone or gravel and tar, as already described, "whereby," to quote his own language, "the particles of pounded stone or gravel are prevented from working under the lower ends of the longer blocks, and whereby water is prevented from passing from the surface of the pavement downward through the joints of said wooden blocks, and also moisture is prevented from being absorbed upward from the ground by said wooden blocks."

The claim here stated is not for the invention of any of the several parts which go to make the structure, but for their combination; and the particular improvement for which the patent was solicited was the arrangement of the foundation with the blocks so as to exclude moisture from the bottom, and prevent the broken stone or gravel from working under them. The patent is not infringed unless these two parts of the structure, the foundation and blocks, are used by the defendants in a similar combination. The use of one of them without the other, though all the other necessary elements in the formation of the pavement are employed, violates no right of the patentee. A patent for a combination of two things is not, of course, a patent for a combination of the two with a third and different thing. The authorities on this subject are all one way.

In Prouty v. Ruggles, 16 Pet. [41 U. S.] 341, the patent was for the combination of certain parts of a plow, they being so arranged as to produce a certain effect. The action was for an alleged infringement. The court below instructed the jury that unless the whole combination was substantially used in the plow of the defendants, there was no violation of the plaintiff's patent, although one or more of the parts specified were used in combination by them. The jury found for the defendants, and the instruction was held correct by the supreme court: "None of the parts referred to," said Mr. Chief Justice Taney in delivering the opinion of the court, "are new, and none are claimed as new; nor is any portion of the combination less than the whole claimed as new; or stated to produce any given result. The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described; and this combination composed of all the parts mentioned in the specification, and arranged with reference to each other, and to other parts of the plow in the manner therein described, is stated to be the improvement, and is the thing patented. The use of any two of these parts only, or of two combined with a third, which is substantially different in form or in the manner of its arrangement and connection with the others, is therefore not the thing patented. It is not the same combination if it substantially differs from it in any of its parts."

In Eames v. Gadfrey, 1 Wall. [68 U. S.] 79, this case from Peters is cited with approval, and its ruling followed. In Brooks v. Fiske, 15 How. [56 U. S.] 212, the patent was for a planing machine, and the invention claimed was a combination of three elements. The machine which was alleged as an infringement, did not use all of these three; and the court stated the rule of law in such case to be, "that if a combination has, as here, three different known parts, and the result is proposed to be accomplished by the union of all the parts arranged with reference to each other, the use of two of these parts only combined with a third, which is substantially different in the manner of its arrangement

and connection with the others, is not the same combination, and no infringement." Page 219.

If we now apply these principles to the case presented for determination, the result which must follow is obvious. The pavement constructed by the defendants is termed by them the Stow pavement. In this pavement no foundation, beyond the grading of the earth, is prepared for the support of the blocks as in the Nicholson pavement. No tarred paper, nor lime mortar, nor hydraulic cement, nor flooring with or without tar, is employed. The blocks are placed in parallel rows directly upon the graded earth, which is forced into a solid and compact form by a wedge driven between the blocks. This wedge is made of a board two or three feet in length, and nearly of the width of the blocks, and is driven some inches below them. The Stow pavement presents an external appearance similar to that of the Nicholson pavement; it exhibits the same neatness; is with equal ease kept clean; furnishes the same sure footing for horses; and by its use the noise of carriages and carts is equally avoided. But in the foundation used, the resemblance ceases; in that particular there is nothing in common between them, and the special benefits ascribed by the parties to the foundation of their respective pavements are different. The exclusion of moisture from the blocks is one of the principal benefits ascribed by Nicholson to the foundation of his pavement. The defendants, on the other hand, insist that more or less moisture penetrates the blocks from above and below, and that the absence of any wooden or tarred foundation to the pavement allows it to readily escape, and thus the blocks are preserved from decay. They also assert that their pavement has many advantages over that of the Nicholson, particularly in the facility with which the pavement can be taken up and replaced when this becomes necessary, as it often does in the streets of a city, to lay down water or gas pipes, or to repair them. But all this, whether true or otherwise, is a matter which can have no bearing upon the decision of the case. On the merits of the two systems we are not called upon to pass. It is sufficient to determine the issue presented that the combination for which Nicholson obtained his patent has not been used in all its parts by the defendants. Hence, they are not guilty of infringing upon any rights held under his patent.

The decision of the circuit court of the United States for the district of Illinois, to which we have been referred, does not affect this case. That decision only determined the validity of the patent to Nicholson, and the infringement of his rights by the city of Chicago. We do not deny the validity of his patent, or the legality of the transfers to the plaintiff. We only adjudge that the patent has not been infringed by the defendants in the construction of what is termed by them the Stow pavement.

Judgment ordered for defendants.

[NOTE. For other cases involving this patent, see American Nicholson Pavement Co. v. City of Elizabeth, Case No. 311; City of Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126; American Nicholson Pavement Co. v. City of Elizabeth, Cases Nos. 309 and 312; Same v. Jenkins, 14 Wall. (81 U. S.) 452; Jenkins v. Nicolson Pavement Co., Case No. 7,273; Bigelow v. City of Louisville, Id. 1,400.]

NICKERSON, Ex parte. See Case No. 7,019.

NICKERSON (COLLINS v.). See Case No. 3,016.

Case No. 10,252.

NICKERSON v. The JOHN PERKINS. TROY v. The SPEEDWELL. MAHER v. The ACORN.

[3 Ware, 87; 19 Law Rep. 490.] [1]

District Court, D. Massachusetts. June, 1856.[2]

SALVAGE—EFFECT OF EMBEZZLEMENT BY SALVORS AND OTHER PERSONS—SLIGHT NEGLECTS — EFFECT OF POSSESSION UPON LIEN — SALVAGE SERVICE.

1. Any embezzlement of the saved property by salvors, works an absolute forfeiture of all salvage.

2. Embezzlement by other persons does not forfeit the right of innocent salvors.

3. But salvors are not only bound to strict honesty themselves, but while in proximity, are bound to take all reasonable care to prevent plunderage by others.

4. A slight neglect in this particular, will be considered in awarding the amount of salvage; and gross negligence may be followed by an entire forfeiture.

5. It is an entirely false notion of salvors, that in order to retain their lien on the property saved, they must retain the actual possession. This lien is a maritime lien that does not depend like a common-law lien, on possession.

6. A vessel was drifting in a field of broken ice, all her crew having abandoned her for the safety of their lives, and in imminent danger of coming in collision with another vessel at anchor, with one man left on board. The collision was prevented by cutting the cable, which, with the anchor, was lost. *Held*, whether it was the fault or misfortune of the vessel to have been left by her whole crew, she was bound to pay for the loss of the cable and anchor of the vessel which had a man on board; as every vessel must bear the consequences of her misfortunes, as well as her faults; and that this might be recovered as salvage. But the vessel having contributed nothing of active service towards the safety of the vessel, could claim nothing further.

7. Though the sacrifice was equally necessary to the safety of the salvor vessel, under these circumstances the sacrifice was not a case of average and contribution.

[These were libels by Nickerson against the John Perkins, Troy against the Speed-

[1] [Reported by Hon. Ashur Ware, District Judge. 19 Law Rep. 490, contains only a partial report.]

[2] [Reversed in Case No. 7,360 and Case No. 30.]

well, and Maher against the Acorn, to recover salvage compensation.]

C. G. Thomas, for libellant.

Whiting & Russel, for respondent.

WARE, District Judge [sitting for SPRAGUE, District Judge].[3] The disasters of these three vessels, which are the occasion of the present suits, happening at the same time and place, have so much in common that I have found it convenient, in order to avoid a repetition of the same circumstances, to consider them together, taking notice under the several cases, of the peculiarities belonging to each.

During the severely cold weather of the last winter, the ice formed very largely in the harbor of Boston, and along the shores of the bay, the whole way down to the extremities of Cape Cod. A large field of this ice lay off the harbor and in the Bay of Wellfleet, stretching several miles in length along the shore, and extending four or five miles into the sea. From various mischances and accidents, these three vessels, together with the Wyvern, a small fishing schooner, between the 12th and 14th or 15th, got inclosed in this large and floating field, all in the same neighborhood. When once they found themselves inclosed, it became impossible to escape. And the intense cold continuing, the frozen field continued to increase, until it extended a mile or more beyond them, into the sea. They were entirely helpless where they lay, and the extrication of them became daily more difficult. This field was not stationary, fixed, or firmly attached to the shore, but was during the whole time drifting forward and back with the wind and tide, to the distance of several miles, with the ebb and flow of each tide. Nor had it a smooth and even surface. It was in various places from time to time, broken by the swell and surging of the water under the force of the wind and tide, and one fragment thrown over and piled on another until the mass, although the ice did not form on the water more than a foot in thickness, had become, from four and five to six or seven feet thick, and all firmly cemented by the frost into a solid body. This heavy and formidable mass, as it drifted forward and back with the motion of the water, carried all the vessels inclosed within it. No anchor could have held a vessel safely to her moorings against so large and heavy a mass. If the vessel was firmly imbedded, the anchor must drag, the ice give way, or the vessel be crushed. In this situation a vessel was generally safer with her anchor up than with it down. But if the surging of the sea broke up the ice about the vessel and left her in an open lagoon, then the anchor might hold, but without contributing much to her safety. After the vessels had remained several days in this situation, driven at the pleasure of the elements with no prospect of immediate escape, and the danger increasing rather than diminishing, the crews became so uneasy and alarmed that they determined to leave for the shore, which was about four miles distant. The crew of the Wyvern, consisting of nine in all, left her Saturday, the 16th, with the exception of one man, Nickerson, who chose to remain by the vessel, rather than encounter the dangers of going on shore over the ice. Sunday, the 17th, the wind, which had been all the time fresh, increased to a gale, accompanied with a severe snow-storm, and the condition of all the vessels became one of extreme peril. About noon, the crew of the John Perkins all left her for safety, and went on board the steamer Acorn, with the intention of remaining in her the afternoon and night. She lay three-fourths of a mile or more from the Acorn. The crew of the Speedwell also came to the Acorn, she lying from her at the distance of but a few rods, and during the afternoon the men passed between the two vessels in safety, the ice being firmly frozen around them. There was a general consultation between the masters and crews of the three vessels during the afternoon, on the condition of the vessels, and to determine what, under the circumstances, it was advisable to do. And the storm not abating in its violence, it was determined to leave for the shore. About 5 o'clock, the whole of the crews of the John Perkins and Speedwell, including the masters, left, and all the crew of the Acorn, except the mate, Maher, and Troy. Captain Gibbs, of the steamer, determined at first to remain with his vessel, and he delivered his son, a boy about twelve years of age, to the care of his engineer, to take him ashore. But the boy had got but a few yards from the vessel when he became so alarmed that he refused to proceed without his father; and as it seemed that nothing could be done for the safety of the vessel if he had remained, the father can hardly be blamed for leaving her to accompany and save his child. The mate remained about an hour after the captain, and then he left; Troy and Maher followed about an hour after the mate. Such is a general outline of the facts, as they appear from all the testimony, that applies to all the cases. A large part of it was taken in the case of Nickerson's libel against the John Perkins, which was heard and argued separately. But it was agreed, in order to save the time which would be required by a diffuse reëxamination of the witnesses, that it should be imported into the other cases.

The schooner Wyvern, a fishing vessel of about eighty-one tons burthen, with a crew of nine men in all, on the 12th of February, while attempting to make Provincetown harbor, was driven by the wind into this field of ice. The crew remained in her until Sat-

[3] [From 19 Law Rep. 490.]

urday, the 16th, when all of them, except Nickerson, for their personal safety, left her for the shore. He being an elderly man, and in rather feeble health, chose to remain in the vessel, rather than encounter the danger of passing over four miles of rough and broken ice to the land. The wind, which during the whole time had been fresh, increased on Sunday, and before night rose to a gale, accompanied with a severe snow-storm from the northwest. At that time, the John Perkins lay in a northwesterly direction from her, at the distance of half a mile. During the latter part of the day, the violence of the wind broke the ice between the John Perkins and the Wyvern, so that there was an open sea, with only loose, floating cakes of ice. The Wyvern had her anchor down; but if that of the Perkins was also, the last drifted freely, and being abandoned by her crew, she was carried about in this open lagoon at the pleasure of the wind and tide, while the Wyvern's anchor held her fast. According to the account of Nickerson, the combined force of the wind and current drifted the Perkins directly down towards his vessel. When she was within about fifty feet, coming with her broadside directly on, so that if the Wyvern lay where she was, there must be an unavoidable collision, to avoid the disaster, he cut the Wyvern's cable, and she moved off in such a direction, that the Perkins floated past her, and the next morning lay at a considerable distance to the south; the ice, by the increasing cold and the subsiding of the wind, then became fast around both vessels, and they remained in the places where they were Monday morning till Wednesday, when the crews of the two vessels returned from the shore. Taking the account of Nickerson to be correct, there can be no doubt that a highly probable, if not a certain collision of the two vessels was prevented by the act of cutting the Wyvern's cable. Had it taken place under these circumstances, with but a single man to both vessels, it could not fail to have been disastrous if not fatal to both. It is for this service that the libellant claims salvage against the Perkins. There is, indeed, in the libel and in this testimony, considerable said about his keeping watch over her until her master and crew returned three or four days after. But nothing was done or could be done during that time, that contributed to her safety. She lay fixed fast in the ice, and only moved as that moved. But there is some doubt, to say the least, thrown over the correctness of Nickerson's account of these events, by the testimony of the other witnesses. Sunday, in the afternoon, the captains and crews of the John Perkins and the Speedwell were on board the steamer Acorn, lying at no great distance from the Wyvern and Perkins. These witnesses, especially Captain Gibbs, of the Acorn, carefully observed the movements of the vessels until 5 o'clock, when they left for the shore. Captain Gibbs confirms the account of Nickerson, that the Perkins drifted, so that the vessels changed their relative positions. The Perkins, according to his observation, moved southwardly, and passed the Wyvern at a considerable distance from her, and so as not to come near a collision. But the Acorn lay at a considerable distance from these vessels, from a half to three-quarters of a mile, and during the whole afternoon there was a heavy and blinding snow-storm, so that it was only at intervals when there was a little relenting of the storm that the vessels could be seen at all. One of the witnesses says that he saw her two or three times only. The most careful observations under these circumstances, could not be wholly relied on. And it is further to be observed, that the movements of the vessel witnessed by Captain Gibbs and the witnesses of the Acorn, took place in the afternoon. The drifting, by which a collision was threatened, is stated, by Nickerson, to have been in the evening; and he puts it at so late an hour, 10 or 11 o'clock, that the events could not be the same as those observed by Captain Gibbs. This supposition is, however, not free from difficulty. It is certain that the drifting of the Perkins was to the south, and Captain Gibbs says that when he left at 5 o'clock, the two vessels were nearly in the relative positions they occupied on the following Wednesday; so that if the observations made from the Acorn are entirely to be relied on, there must have been some irregular movements of the vessels to have brought them together at 10 or 11 o'clock at night. But even if those observations from the Acorn made from time to time, when the vessels could be occasionally seen through a blinding snow-storm, cannot be entirely relied on for accuracy, and making reasonable allowance for this, the two accounts supposing them to relate to the same time, are irreconcilable, and we are driven to the necessity of supposing them to relate to different times; or that the witnesses on one side or the other, have wilfully prevaricated. I am unwilling to adopt the latter part of the alternative, and rather conclude that both accounts relating to different hours, may be substantially true, a supposition which is not wholly improbable.

The claim of Nickerson to salvage must rest on his own testimony. He was the only witness to the service he performed, and, as in all salvage cases, he is admitted, from necessity, as a witness to support his own libel. His testimony is open to all the observations usually made on the credit of a voluntary witness swearing for himself with no one to contradict him, and, it was contended in the argument, to some grains of additional suspicion from what was characterized as a manifest exaggeration of the perils of the vessels introduced into his libel. The libel is drawn by the proctor, and the libellants in salvage cases being often illiterate and ignorant seamen, are not, perhaps, always answerable, in the forum of conscience, however they may

be in law, for every word that is put into the libel. There are, perhaps, in this libel, some averments which we might not expect to occur to such a man as specially important, which have somewhat the look of being the promptings of counsel, conversant with the law. The libel ought to be a plain, a clear narration of the events as they actually occurred, leaving the court to apply to them the law, and without interweaving something like the heads of an argument to support the case. These circumstances have been forcibly commented on by the counsel for the claimants, and though they may deduct something from the credit one would wish to give to the testimony, they are not enough, in my opinion, to justify the imputation of a deliberate perversion of the substantial truth. And if the libellant's story is substantially true, I think he is entitled to a salvage compensation from the John Perkins for preventing a collision of that vessel with the Wyvern. But it is contended that whatever claims the libellant might otherwise have had for salvage for his services Sunday night, it was forfeited by his embezzlement afterwards of articles from the vessel. He was on board the John Perkins several times between Sunday night and Wednesday morning, when her crew returned, and as he admits, took a quadrant and compass, and some other articles, and carried them on board the Wyvern, because, as he says, he thought they would be more safe there. If they were taken animo furandi, it would be an absolute forfeiture of all claim for salvage. Courts, from considerations of public policy, are in the habit of rewarding salvage services with a liberal hand. With this liberality, salvors must be content. Punctilious honesty is required on their part, and the courts will visit every embezzlement with the forfeiture of all salvage. The quadrant and other articles taken by the libellant, were returned to the master when he returned from the shore, nor does there appear any intention, on the part of Nickerson, of appropriating them to himself. But it is satisfactorily proved that there were a number of articles abstracted from the vessel which were not returned. And, it is also in proof, that there were a number of other persons on board of her while the crew were absent. Some articles were missing, which were not taken by Nickerson, which were not returned, particularly a mattress belonging to the mate. I am unwilling to believe that he appropriated to himself any thing that he took from the vessel. But I am not so well satisfied that he took all the care that he might, and ought to have done, to prevent plunderage by others; having, as he seems to have claimed, the exclusive right of possession. Salvors are bound, not only to scrupulous honesty themselves, but while the property is in their custody, they are justly required to employ every reasonable degree of diligence to protect it from plunderage by others. Any negligence in this respect, if not visited with an entire forfeiture of salvage, will be remembered in fixing the amount. In the present case, while I acquit Nickerson of embezzlement himself, I cannot commend his watchfulness in guarding the property against the dishonesty of others; and I regret to be obliged to take notice of it in the award I make.

With the claim of Nickerson is joined in the libel a claim of salvage by the owners of the Wyvern. I agree with the counsel for the claimants of the Perkins that, as there was nothing actually done or could be done by the Wyvern towards saving the Perkins, there can be no claim for salvage strictly, if that is considered as a compensation for active service. But I think the owners of the Wyvern are entitled to be paid for her anchor and cable. It was the cutting of her cable that prevented the collision. It is objected that the loss of the cable and anchor was a sacrifice made for the common benefit of both vessels, and that if there be any claim, it is one for contribution, and as it has been held by the supreme court (Cutler v. Reed, 7 How. [48 U. S.] 729) that the admiralty has no jurisdiction over the matter of average, that this allegation must be dismissed. This case has been likened to that of The Mazourka, decided by the circuit court of this circuit. But there is one circumstance that distinguishes it from that case. The Perkins was left without any men on board, and it was by the acts of the single man left on board the Wyvern, that the collision was avoided. In the relation of these two vessels to each other, the Perkins, being left without a keeper or guard, must be considered as in fault. This circumstance would throw on her the responsibility of a collision if it had happened, and ought, therefore, to subject her to the sacrifice by which it was avoided. It was argued that no fault can be imputed to her, because her crew had been separated from her by an overruling necessity, and there being no fault in the human agency provided for her safety, none can be imputed to the vessel. It is true that in strictness, fault, culpa, does involve the idea of a breach or neglect of duty by a voluntary agent. But in law, it may be, and is applied to inanimate objects, when there is a responsibility attached to them. It is familiarly said in cases of collision that it was occasioned by the fault of one of the vessels. The term and its legal consequences may, I think, be applied to a vessel left in a harbor or in an open roadstead, or thoroughfare, without her crew, under whatever circumstances of necessity the crew may be separated from her. If damage to another vessel is occasioned by her being thus left without a keeper, in strict propriety of language, it is rather her misfortune than her fault. But then every vessel, as well as every living agent, must bear the consequences of their own misfortunes as well as their faults, and it appears to me that the principle applies to the present case.

It may be proper before dismissing the case, to make one additional remark. The libel seems framed on the idea that salvors, by giving up the possession of the property, lose their lien upon it for salvage. This is an entirely mistaken notion. The lien of a salvor is not, like a common-law lien, at all dependent on possession. Like other maritime liens, it is founded on a jus in re, and may be enforced into whosesoever hands it comes, and if the possession is lost, the salvors may pursue their remedy against the owner by a libel in personam. The Eleanora Charlotta, 1 Hagg. Adm. 156.

The Speedwell.

Salvage Decreed on the Facts.

C. G. Thomas, for libellant.

Whiting & Russel, for respondent.

The schooner Speedwell, of Plymouth, Captain Cornish, had the misfortune to get imprisoned in this field of ice, and, after being confined there several days, was, on Sunday, the 17th of February, lying about four miles from the shore of Wellfleet, and a few rods northerly from the Acorn. During the gale and snow-storm of Sunday, about mid-day, the crew of the John Perkins left her for safety, and went on board the Acorn. There they met the crew of the Speedwell; and it was determined, after a general consultation between the crews of the three vessels, to leave for the shore. Accordingly, about five o'clock, the whole of the crews of the Speedwell and the Perkins, with all that of the Acorn, except the mate, and Maher and Troy, started for that purpose. During the day, the Speedwell and the Acorn were both firmly fixed in the ice; but in the early part of the evening, it began to break around both vessels. Their condition now became more perilous, and about an hour after the crews left, that is, about 6 o'clock, the mate of the Acorn followed them. Maher and Troy now alone remained. Near the time when the mate left—perhaps a little before—the Speedwell became, by the breaking of the ice around her, so much disengaged from the firm and solid field that she began to drift, and the wind and the current carried her directly towards the Acorn, her stern being directed towards the stern of the latter vessel. The libellants, seeing that a collision was inevitable, did what they could to diminish the danger. For that purpose, they put out a fender, so that the Speedwell, instead of striking directly on the body of the Acorn, glanced off, and was carried along parallel to her side, and thus slowly passed her side by side. Some damage, but not to a considerable amount, was done to both vessels. But for the services of the libellants, that it would have been much greater, cannot, I think, admit of doubt. And in this violent tempest, enclosed in a vast field of solid ice, and in the midst of large broken masses driven by the winds in the small open space of sea in which they lay, there was certainly no small danger that these two vessels coming in collision, with no one on board of either, might both have foundered. About an hour after the mate left, and when the Speedwell had about passed by the Acorn, with a motion carrying her further in that direction off, the wind became so threatening, that the libellants left, intending to go to the Wyvern. But in the blinding snow, and the darkness of the night, they lost their way, and returned to their own vessel. But the ice had now become so broken, that they could not get aboard, and between 8 and 9 o'clock, they set off for the shore. They reached land about 12 o'clock, saw the master and the rest of the crew, and early the next morning returned to their vessel, and remained in her until Wednesday, when the crews of all the vessels came off. They found the Speedwell had passed the Acorn, and lay at a small distance south of her, and both vessels now firmly frozen into the ice. Nothing more was or could be done by them for the benefit of the Speedwell. But for the services they performed Sunday evening, they claim, and, I think, are justly entitled to a compensation. What might have been the result if no one had been on board either vessel, cannot be known; but that what was done by the libellants essentially contributed to the safety of the vessel, it seems to me cannot be reasonably questioned.

The Acorn.

C. G. Russel, for libellant.

J. A. Abbott, for respondent.

The claim set up in the libel against the Acorn has this peculiarity, which distinguishes it from the other libels heard in connection with it. It is a claim by part of the crew for a salvage compensation for meritorious services in rescuing from danger, and saving from damage or destruction, in a time of peril, their own vessel. As a general proposition, it is undoubtedly true, that the crew cannot entitle themselves to salvage against their own vessel. They are bound by their contract to use their utmost exertions for her safety, to whatever danger she may be exposed, and their wages are the stipulated compensation, with which they agree to be content for their whole services. This is the general rule, but at the same time there are admitted exceptions. One of these is, when a seaman, from whatever misfortune happening to the vessel, has been discharged from the obligation of his contract. If he afterwards renders valuable services in saving the vessel from danger, he is treated as a stranger, and has the same rights as any other volunteer. Mason v. The Blaireau, 2 Cranch [6 U. S.] 268, is a case of this kind. Another exception, of a more equivocal character, is this; where a seaman, in a time of great peril and difficulty, in a spirit of adventurous and daring gallantry, performs services ultra above what could be fairly required from the

strict and proper obligations of his contract, though that may be still subsisting and in force. Though this exception stands quite as much on the authority of dicta occasionally thrown out by courts arguendo, as upon any express and well considered decision which I feel at liberty to quote as an authority. The whole subject I had to consider in the case of The Dawn [Case No. 3,666], where the cases are referred to, and I have seen no cause to change the opinion there expressed. Something of this kind is intimated by Lord Stowell in the case of The Neptune, where he describes a salvor as a volunteer, who proffers useful services to the ship without being under the obligation of any contract. 1 Hagg. Adm. 236. In the possible range of circumstances he thought a case might occur, in which one of the crew, without his connection with the vessel, under his contract, being legally dissolved, might, by extraordinary services, entitle himself to a salvage remuneration. Abb. Shipp. 560, 617, notes. The only question of real difficulty, I think, is whether the facts in proof constitute this a case of that kind. For it appears to me that it cannot be fairly questioned, that a valuable service was performed by the libellants in mitigating the danger and damage, if nothing more, of the collision with the Speedwell, Sunday night, after the rest of the crew had left her.

The general circumstances under which the crews of these vessels left, for the safety of their lives, and temporarily abandoned them to the mercy of the elements, have already been mentioned. But there are some peculiarities to this vessel and crew, of which it may be proper to give a more particular detail. About 5 o'clock in the evening, when the collected crews had come to a general determination to leave for the shore, Captain Gibbs spoke to one and another of his crew, and among them to the libellants, and asked them if they were going. All except the mate and Maher and Troy, determined to go. These three determined to abide the fate of the ship, and the captain determined to remain with them. After all proper precautions were taken for the temporary safety of the ship, Captain Gibbs committed his young son to the care of the engineer, and they started for the shore; and it was not until after the captain found that his son, from fear, refused to be separated from his parent, that he determined to accompany him; a determination which, under the circumstances, will hardly be blamed by any one who is a parent. The mate and the libellants, were now all who remained in the vessel; and, about an hour after, the mate, alarmed by the increasing danger, followed the rest of the crew. Maher and Troy had both been familiarized with such dangers, by twelve years' experience in the seal fisheries, off the stormy and frozen coasts of Newfoundland and Labrador. And it was probably their experience and familiarity with such scenes, that induced them to remain by the vessel, when all the rest of the crew fled for the safety of their lives; perhaps because their experience had taught them that the peril was less formidable than it appeared; perhaps because fear, which naturally exaggerates danger, wears off by familiarity with it; and it may be from both causes. But the peril at last became too formidable for their hardihood, and, about an hour after the mate, they left to seek safety in the Wyvern. Failing to find that, in the darkness of the night, and, when they returned to their own vessel, finding that by the increasing violence of the storm, the ice was so broken around it that they could not get aboard, nothing remained for them but to perish with cold on the ice or make for the shore. They succeeded in reaching it about 12 o'clock, and found the master and crew safe in the house of Captain Baker, of Wellfleet. There they remained, and the house being over-crowded with visitors, spent a sleepless night, but had the benefit of a warm fire to dry their clothes. Early in the morning, the captain and the libellants were on the look-out, and as soon as there was sufficient light, saw the vessels not far from where they had left them. There was considerable conversation in the morning, which is reported in the testimony, with respect to the measures to be adopted, which does not appear to me to be of material importance. The most material facts are, that when the master found his vessel was afloat, he spoke to the crew and said, somebody must go to her, and that if nobody else would, he should go, though he had been badly hurt in his escape over the ice the night before, and was really unfit for the attempt. The two libellants immediately proffered their services, and, according to my recollection, they were the only members of the crew who did offer. Immediately after breakfast they set out. Indeed, I think that from the beginning, they never intended to abandon the vessel, but left from necessity, intending to return in the morning if she should then be above water; of which, when they first arrived at the house in the evening, they expressed, and of which, I believe the master and all the crew felt, no inconsiderable doubt. They accordingly did go to the vessel, and remained in her until Wednesday, when the master and crew returned. In a calamity such as overtook these vessels, even if of such a nature that the master thinks it prudent and proper for the safety of life, temporarily to leave the ship, I hold it to be quite clear and free from doubt, that the crew are not thereby discharged from their contract and released from all their obligations to the vessel; if the abandonment is only temporary. When they have escaped to the shore, they are still under the command, and bound to obey the lawful orders of the captain in all that can be done for the interest and safety of the ship, so long as there is any reasonable hope of doing anything for her safety, or that of her cargo. It is only when the master has finally aban-

doned the spes recuperandi, that the crew are wholly released from the obligations of their contract. How far the master, on such occasions, may have the rightful power to select some from his crew and send them on a forlorn hope, where he is unwilling to lead himself, need not be considered, for no such case is here presented. When it was finally determined, Sunday evening, to leave the vessel, the master did not require any of his crew to remain. He left it to their choice, even while he contemplated himself to remain. That the vessel was placed in such circumstances of danger that the crew might temporarily leave her without a desertion of duty, seems to me cannot be doubted. Such was the joint and deliberate judgment of the masters and crews of these vessels on the spot, and has, at the hearing, been fairly and fully admitted. The voluntary act of these men, in remaining by the vessel in this danger, if they had been able to render no valuable service, might have deserved some notice from the owners, though perhaps a court might not feel itself authorized to award any compensation for it in the way of extra wages. But when it is connected with a valuable service rendered to the vessel which essentially contributed to her safety, if rendered under such circumstances, that the court may reward them for it, the fact of its being voluntary, ought not to diminish their reward. When the master returned, he expressed in warm terms his satisfaction with their conduct, and told them that he should recommend to his owners to allow them a compensation.

My opinion is, that the libellants voluntarily remaining by the vessel in such dangers, when all the rest of the crew left her, and when it is admitted they might have done so without any dereliction of duty, may justly be considered as an act beyond what was required by the fair and just obligations of their contract; and for the services which they rendered Sunday night, they are entitled to a reward in the nature of salvage. But that it should be equally large and liberal as would be allowed to entire strangers for a like service, seems not so clear. Notwithstanding the calamity and danger, they were not discharged from their contract and still owed service to the vessel, though not precisely that which was rendered; and I am inclined to think that the amount should be somewhat less than would be allowed to mere strangers.

Decrees.

The John Perkins: It appears that there were some articles, of no considerable value it is true, lost from this vessel. It is certainly not proved, and I am not ready to believe that Nickerson had anything to do with the embezzlement, and therefore it is not an absolute bar to his claim of salvage. But I think that he did not take all the care that he might have done to prevent plunderage by others, and that this may justly be considered in the amount of salvage to be awarded. The owners of the Wyvern, a small vessel of 81 tons burthen, and in ballast, allowed him for his services to that vessel, $500. The John Perkins was heavily laden with corn, and together with her cargo, are valued at $7,100. I allow him $600, to be charged on the vessel and cargo pro rata, according to their respective values. Value of the vessel, $4,000. Value of the cargo, $3,100.

The Speedwell: I see no fault to be found with Maher and Trey. Their conduct throughout appears to have been marked by prudence, courage, and good judgment. I allow them, against the Speedwell, valued with her cargo at $4,700, the sum of $1,000, to be equally divided between them, and charged pro rata on the vessel and cargo.

The Acorn: Against the Acorn and her cargo, valued at $20,000, the vessel to which the libellants belonged, I allow $1,000, to divide equally between them. It was strongly questioned by the claimants' counsel whether, under the circumstances in which these suits were commenced, costs ought to be allowed to libellants. With regard to the costs, my opinion on the whole is that they ought to be charged on the claimants. It is true that it is the habit of the admiralty to encourage parties to an amicable compromise, and if suits are commenced in hot haste, without allowing time for that purpose, when it may safely be done, to consider it in awarding costs. These suits were commenced somewhat precipitately; but from what has incidentally appeared at the hearing, I think that there was but little probability that a fair compromise would have been affected if more time had been allowed. The cases were also somewhat novel in their circumstances, and it would perhaps not be considered as any great violation of professional delicacy and honor, if the counsel had advised his client to take the opinion of a court, rather than accept any compromise likely to be offered.

[NOTE. The decrees in these three cases were reversed by the circuit court, and the libels dismissed, the cases of the Acorn and of the Speedwell in Case No. 30, and The John Perkins in Case No. 7,360.]

NICKERSON (LOUISIANA INS. CO. v.). See Case No. 8,539.

NICKERSON v. The MONSOON. See Case No. 9,716.

NICKERSON (POPE v.). See Case No. 11,-274.

NICKERSON (UNITED STATES v.). See Case No. 15,878.

NICKLIN (WILKINSON v.). See Case No. 17,673.

Case No. 10,253.

NICKLIN v. WYTHE et al.

[2 Sawy. 535.] [1]

Circuit Court, D. Oregon. Feb. 9, 1874.

RESULTING TRUST.

G. conveyed lots one and two in the town of Salem to W., and in consideration of such conveyance said W. and wife afterward conveyed to said G. lands belonging to said wife in exchange for said lots one and two: *Held*, that in the absence of evidence to show that the conveyance of lots one and two was made to W. with the assent of his wife there was a resulting trust in her favor, and her subsequent vendees are entitled to a decree against the heirs of W. for a conveyance of the legal title.

Bill in equity [by A. J. Nicklin against W. T. Wythe and others] to obtain the conveyance of the legal title to certain lots in Salem, Oregon.

James G. Chapman, for complainant.

A. C. Gibbs, R. Williams, and W. W. Thayer, for defendants.

SAWYER, Circuit Judge. William H. Wilson and his wife, Cloe A. Wilson, resided upon a tract of land in Marion county, Oregon, from 1844 to July 28, 1853, and in all respects performed the acts required under the act of congress of September 27, 1850, commonly called the "donation act," to entitle them to a patent from the United States. In 1862 patents accordingly issued, by which the northern half was granted by the United States to said Cloe A. Wilson, and the south half to said William H. Wilson. Said Wilson and wife laid off a portion of said land into blocks and lots, constituting a part of the city of Salem. Lots one and two, the land in controversy, are a part of the land so laid out into city lots, and are situate in the said north half of said land claim, and within the part so patented to said Cloe A. Wilson. Said Wilson and wife, by deed duly executed, conveyed said two lots to L. F. Grover. Grover subsequently conveyed, as stated in the stipulation of the parties, as follows, to wit: "That on the 13th day of February, 1856, by deed of that date, the said L. F. Grover conveyed said lots one and two (the lots in controversy) to said William H. Wilson; and in consideration of said last conveyance the said William H. Wilson and Cloe A. Wilson conveyed to said L. F. Grover lands belonging at that time to said Cloe A. Wilson, to wit, a portion of the north half of said donation land claim, which last conveyance was made by deed of date, to wit, the 16th day of February, 1856, and in exchange for the said lots one and two."

Afterward, and after the death of her husband, said Cloe A. Wilson, as stipulated, conveyed said lots for their full value to Daniel Waldo, and said title of Cloe A. Wilson and Daniel Waldo, by proper mesne conveyances, became vested in the complainants before the commencement of this suit. The defendants, other than W. T. Wythe, who is the husband of L. Bell Wythe, are children, and a portion of the heirs-at-law of said W. H. Wilson, deceased, and claim title as such.

The fact, then, is, that the conveyance of Mrs. Wilson's separate property was the consideration for the conveyance of the property in controversy by Grover to her husband, William H. Wilson. There was an exchange of property. The property exchanged, the consideration of Grover's conveyance was furnished by one party, and the conveyance taken in the name of another. There was, we think, under the authorities, a resulting trust in favor of Mrs. Wilson. Story, Eq. Jur. § 1201, and cases cited; Rider v. Kidder, 10 Ves. 360, and numerous cases cited in note, Sumner's Ed.; Finch v. Finch, 15 Ves. 50; Boyd v. McLean, 1 Johns. Ch. 582; Botsford v. Burr, 2 Johns. Ch. 405; Steere v. Steere, 5 Johns. Ch. 1.

We do not think a gift by the wife to the husband, or a conveyance in consideration of love and affection, can be properly inferred from the stipulated facts. Perhaps such might be the case had the husband's property been given in exchange for other property, and the deed for the property received had been taken by his direction in the name of his wife. But there is nothing to show that the lots in controversy were deeded to the husband by the direction or with the assent of the wife. There is no evidence on this point beyond the mere fact of the conveyances being made, the one in consideration of the other, the deeds bearing different dates.

The law protects the conveyances by the wife of her property with great solicitude. They are guarded by many provisions, in order to secure perfect freedom of action, unaffected by undue influence on the part of the husband. And especially are transactions by which the separate property of the wife is transferred to the husband jealously scrutinized, in consequence of her liability through affection, or other undue influence, to be overreached and improperly despoiled of her estate. It is in accordance with the general course of domestic transactions in this country that the husband, being the head of the family, transacts the business even of the wife. He is usually the active party. Although there is no evidence on the subject, it is not at all improbable but, on the contrary, it is highly probable, that the husband in this case attended to the business, and took the deed in return for the property of the wife, without any examination on her part as to its contents. Such would be extremely likely to be the course of the transaction. In view of the general principles of the law, its extreme solicitude in guarding the dealings between husband and wife, whereby the property of the latter becomes vested in the former, we think, at least, there ought to be some satisfactory evidence beyond the mere fact that the deed of Grover

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

was made to the husband, to indicate that the wife assented to the transaction, and intended to invest the title to her property in her husband. There should be affirmative evidence that her assent was given in some legal mode. There is nothing to justify us in adopting this view. We think there was a resulting trust in favor of the wife, and that her subsequent vendees are entitled to a decree against the defendants for a conveyance. Let a decree be entered accordingly.

[NOTE. There were several suits brought by the defendants, in this case, as heirs of W. H. Wilson, for the recovery of parts of the land conveyed to Wilson by the patent of 1862. None of these cases present the same features as does this. Wythe v. Haskell, Case No. 18,-118; Same v. Myers, Id. 18,119; Same v. Palmer, Id. 18,120; Same v. Salem, Id. 18,121; Same v. Smith, Id. 18,122.]

NICOLL (UNITED STATES v.). See Case No. 15,879.

NICOLSON PAVEMENT COMPANY (JENKINS v.). See Case No. 7,273.

Case No. 10,254.

In re NICKODEMUS.

[3 N. B. R. 230 (Quarto, 55);[1] 2 Chi. Leg. News, 49; 16 Pittsb. Leg. J. 233; 2 Am. Law T. 168; 1 Am. Law T. Rep. Bankr. 140.]

District Court, E. D. Michigan.

BANKRUPTCY—PROCEEDINGS FOUNDED UPON LIABILITY AS INDORSER—AVERMENT THAT ONE IS A MERCHANT—COMMERCIAL PAPER.

1. Liability as indorser upon a promissory note was fixed upon N., against whom the holder, as creditor, filed a petition in involuntary bankruptcy, charging the commission of certain acts of bankruptcy. *Held*, when an indorser's liability has become fixed, such liability constitutes a debt due and payable from the indorser, and may be made the foundation of involuntary as well as of voluntary proceedings in bankruptcy.

[Cited in Re Clemens, Case No. 2,877; Corbett v. Woodward, Id. 3,223.]

2. Fraudulent suspension and non-payment is necessary to be averred only when the act of bankruptcy charged is that specified in clause 9 of section 39 of the act [of 1867 (14 Stat. 536)].

3. Language that N., "being a merchant," is a sufficient averment that he is a merchant under said clause 9.

4. The term "commercial paper," as used in the bankruptcy act, denotes bills of exchange, promissory notes, negotiable bank checks, paper governed by those rules that have their origin and are established upon the customs of merchants known as the law merchant.

[Approved in Re Chandler, Case No. 2,591. Cited in Re Kenyon, 6 N. B. R. 244.]

5. To be a debtor's commercial paper within said clause 9, the debt which the paper represents must have been incurred by him in his character of banker, merchant, or trader; whether as principal or otherwise, is immaterial.

[Cited in Re Carter, Case No. 2,470.]

[1] [Reprinted from 3 N. B. R. 230 (Quarto, 55), by permission.]

In bankruptcy.

Judge Walter, for petitioner.
Alfred Russell, for debtor.

WITHEY, District Judge. Thomas P. Sheldon, a creditor, has filed his petition to have Peter Nickodemus declared a bankrupt. The debt made the foundation of the petition, is a promissory note for one thousand dollars, executed by Charles Steinberg, payable to the order of Nickodemus, thirty days after date, at the banking office of petitioner, and indorsed by the payee. The note was not paid, and steps taken which fixed Nickodemus' liability as indorser. Four distinct acts of bankruptcy are alleged: First and second are sales by Nickodemus of his property with intent to delay, defraud, and hinder creditors; third, that Nickodemus, being a merchant, has fraudulently stopped payment of his commercial paper, and has not resumed the same within fourteen days, to wit: that he fraudulently, about the 24th of February last, refused payment of the before describable note, indorsed by him, and has not paid the same within fourteen days thereafter; fourth, that in contemplation of insolvency, March 8, 1869, Peter Nickodemus made a conveyance to Jacob Nickodemus of his real and personal estate, describing it, with intent to give a preference to certain of his creditors.

Respondent appears and shows cause against the petition: first, by objections, in the nature of a demurrer, to the sufficiency of the allegations thereof; and then, by way of answer, denies the acts of bankruptcy, and demands a trial by jury. The objections to the petition are now to be disposed of.

First. It is objected that the nature of the petitioner's demand is not such as constitutes the foundation of involuntary proceedings under the bankrupt law. It is claimed that the demand must be one upon which the alleged bankrupt is bound as the principal debtor, and not as indorser or surety. This objection is not admissible, as will appear by reference to sections 11, 19, and 39 of the bankrupt act. Section 11 provides that any person "owing debts provable under this act, exceeding three hundred dollars," who files his petition for the purpose, "shall be adjudged a bankrupt." By section 19, "all debts due and payable from the bankrupt at the time of his adjudication of bankruptcy, * * * may be proved against the estate of the bankrupt." These provisions establish the right in the debtor to be adjudged a bankrupt on his petition, whenever he is "owing debts, provable under this act, exceeding three hundred dollars." What debts are provable is shown, viz.: "All debts due and payable from the bankrupt at the time of the adjudication of bankruptcy;" and section 19 further provides that where the bankrupt is bound as indorser of a note, "and his liability shall not have become absolute

until the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed." While the language just read from section 19 primarily looks to the right of a creditor to prove, as a debt against the bankrupt, an indorsed note after it has matured, but which had not at the time of the adjudication of bankruptcy, there is a clear recognition that fixed liability by indorsement of a note, is a "debt due and payable from the bankrupt," provable under the act. This being so, then, whenever absolute liability exists against an indorser at the time of filing the petition in bankruptcy. such liability may be made the foundation for voluntary proceedings. So far the law speaks of voluntary proceedings; but section 39 applies those provisions to an involuntary case. It enacts that "any person owing debts as aforesaid," who commits any of the acts of bankruptcy enumerated in this section, "shall be adjudged a bankrupt on the petition of one or more of his creditors." The language, "owing debts as aforesaid," has reference to these words of section 11, viz.: "Owing debts, provable under this act, exceeding three hundred dollars."

We adduce from the foregoing these conclusions: First. The foundation of voluntary proceedings is indebtedness due and payable under the act against the debtor. Second. Whatever debts may be proved in a voluntary, may be proved in an involuntary case. Third. Whenever an indorser's liability has become fixed, such liability constitutes a debt due and payable from the indorser, which may be made the foundation of involuntary as well as voluntary proceedings of bankruptcy.

Of course there must be shown, in an involuntary case, in addition to such indebtedness, at least one of the acts of bankruptcy enumerated in section 39. The Case of Lowenstein [Case No. 8,574] is not regarded as illustrating the point we have been considering. It is too deficient in details to give information of the point decided, if, as is claimed by respondent's counsel, this question there arose.

The second and third objections are to the first and second alleged acts of bankruptcy, viz.: disposing of property "with intent to delay, defraud, and hinder creditors," an act of bankruptcy specified in clause 5, § 39. Respondent objects for want of an averment of fraudulent non-payment of this indorsement, and want of an allegation that he was bankrupt or insolvent, or in contemplation of insolvency or bankruptcy. Both objections are overruled. Fraudulent suspension or nonpayment is necessary to be averred only when the act of bankruptcy charged is that specified in clause 9 of section 39. The fourth allegation of the petition charges an act of bankruptcy under clause 9, and avers fraudulent stoppage and non-payment.

In reference to the other of the last-mentioned objections, we remark that bankruptcy or insolvency, or contemplation of bankruptcy or insolvency, would be a necessary averment under clause 8, but is not where the act of bankruptcy is charged under clause 5, when it is sufficient to allege the transfer to have been made "with intent to hinder, defraud, or delay creditors." The respondent's counsel urged the objections we have just been considering, partly on the ground, if not entirely, that the provisions of sections 35 and 39 must be construed together and be made to harmonize. Since the amendment changing "or" to "and" in the last clause of section 39, there is discovered no conflict between these sections. Section 35 does not relate to, or affect the question—what is an act of bankruptcy? By section 39 alone, that question must be answered; whereas section 35 declares what transfers of property and what preferences are void. It is quite clear that facts which are entirely sufficient for adjudicating a debtor a bankrupt on petition of his creditor, may be and generally are, wholly insufficient to justify a decree declaring void a transfer of property, or preference given to a creditor. The reason is obvious: a transfer or preference is void only when the purchaser or preferred creditor has, at the time, reason to believe that which by section 35, or the last clause of 39, taints him with fraud in the transaction. That sections 35 and 39 are in pari materia, and to be construed together, so far as necessary to obviate any conflict in the provisions, is not questioned; but no conflict is discovered.

We now look to the fourth objection; and this raises two questions, viz.: Whether by the petition it appears that Nickodemus is a merchant, and whether the indorsed note is the commercial paper of the respondent. Clause 9, § 39, reads as follows: Any person "who, being a banker, merchant, or trader, has fraudulently stopped or suspended, and has not secured payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy." The allegation of the petition is that Nickodemus, "being a merchant, has fraudulently stopped payment of his commercial paper," etc. The paper is the note made by Steinberg and payable to Nickodemus, and by him indorsed. We regard the allegation substantially to be, that Nickodemus is a merchant, and that the indorsed note is his commercial paper, etc. The petition is in accordance with form 54, and is regarded as sufficient.

Respondent's counsel claims that the note is not commercial paper, because given for a loan of money. The note may or may not have been given for a loan of money—nothing is stated in the petition from which to determine, except what can be inferred from the copy of the note. Steinberg is the maker, the date is January 21, 1869. Respondent is payee and indorser, and it is payable at thirty days at the banking office of petitioner. This paper may have been given by the

maker to Nickodemus for the purchase of goods, and have been discounted at respondent's request by petitioner. We therefore think the allegation sufficient in both respects. Under a denial of the allegations of the petition, an issue is made, and the proofs will unfold the nature of the transaction, from which it can be determined whether Nickodemus is a merchant and whether the indorsed note is his commercial paper.

The argument of learned counsel involved the question, what is commercial paper within the purview of clause 9, section 39? The Case of Lowenstein [supra] was referred to as authority that a note given for a loan of money is not commercial paper. The facts in that case are not sufficiently stated to unfold the nature of the transaction. The count says: "The Frauenthal notes were not commercial paper; they were not given in the course of, or in connection with the business of the debtors as merchants, but were given for loans of money." We do not regard this case as deciding more than that, in order to be commercial paper of the debtor, it must be paper given in the course of, or in connection with his business as a merchant, and we fully concur with that view.

Commerce proceeds from trade, and is the exchange of one kind of property for another, whether it be by barter, or by purchase and sale. Strictly speaking, merchants and traders are engaged in commercial pursuits, bankers are not; and yet, within the purview of clause 9, the latter are regarded as subject to an act of bankruptcy by non-payment of their commercial paper. We cannot, therefore, say that only that is commercial paper, within the meaning of the bankrupt act, which grows out of and is part of a strictly commercial transaction. So to hold would involve some difficulty in determining that any paper, to which a banker is a party, is his commercial paper—he not being engaged in strictly commercial pursuits—though he may be dealing in commercial paper. Hence, we are of opinion that the term commercial paper is used in the bankrupt act to denote bills of exchange, promissory notes, and negotiable bank checks; paper governed by those rules which have their origin, and are established upon the custom of merchants in their commercial transactions, known as the law merchant. Such paper is usually denominated commercial paper, and we must presume congress used the term in its common acceptation, rather than in a more restricted sense. Under this view, we can understand how the term "his commercial paper" was applied to bankers as well as to merchants and traders.

It may be important to notice that, by the laws of Michigan, notes of the character of that set out in the petition are declared to be within the rules governing inland bills of exchange, according to the custom of merchants.

Having arrived at a solution of the question—what is commercial paper within the meaning of the bankrupt act?—there is still another question, viz.: When is it "his commercial paper?" We have already said, the allegation in this case, that it is his, the respondent's, commercial paper, is sufficient in the petition, and when denied by answer raises an issue to be tried. But inasmuch as the question last suggested is intimately connected, under clause 9, with the discussion of what is commercial paper, it may be advisable to indicate the views of the court as to that question. To be the debtor's commercial paper within clause 9, the debt which the paper represents must have been incurred by the debtor in his character of banker, merchant, or trader. This being so, it matters not whether the note, bill, or check was given for a loan of money, for goods purchased or otherwise; nor whether the debtor is liable thereon as debtor, acceptor, or indorser—whether as principal debtor or otherwise. It must be commercial paper, and the debtor must be a party thereto, with a fixed liability; and it must be a debt incurred in his character of banker, merchant, or trader. Hence, liability by such person, as a mere accommodation indorser or acceptor, would not be "his commercial paper," within the provision of clause 9, because not a debt incurred in his character of banker, merchant, or trader.

The objections are all overruled. The cause will go upon the issue docket under the general denials of the answer filed, when the facts can be fully disclosed.

That an indorser may be proceeded against in involuntary bankruptcy, see In re Clemens [Case No. 2,878]. Under the amendment of 1870, it is held to be unnecessary to aver that the bankrupt was a merchant, etc., where the act of bankruptcy is a suspension and non-resumption of commercial paper for fourteen days. In re Hercules Ins. Co. [Id. 6,402].

Case No. 10,254a.

NICKS et al. v. MATHERS.

[Hempst. 80.] [1]

Superior Court, Territory of Arkansas. Oct., 1829.

APPEAL AND ERROR—AFFIRMANCE BY DIVIDED COURT.

In a case of forcible entry and detainer, judgment affirmed on an equal division in the appellate court.

[This was a suit by John Nicks and John Rogers against Jeremiah Mathers.]

Appeal from the Crawford circuit court.

Before JOHNSON, ESKRIDGE, BATES, and TRIMBLE, JJ.

TRIMBLE, Judge. The appellants brought a suit for forcible entry and detainer before two justices of the peace. On the inquisition, the jury found for the defendant, and

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

the plaintiffs sued out a writ of certiorari; and at the November term of the Crawford circuit court, in 1827, the proceedings were set aside for irregularity, and a trial de novo awarded on the merits. At the May term of the circuit court, in 1828, the defendant moved the court to dismiss the suit, because the court had no jurisdiction to try it. This motion was sustained, and to this decision the plaintiffs excepted, and filed their bill of exceptions. The question now before this court is, ought the suit to have been dismissed? The court at the May term had no power to set aside the order for a trial de novo made at a previous term; for admitting such order to have been erroneous, yet it required the power of an appellate court to correct it, after the term had passed. But the case, having been brought before the circuit court, and the inquisition set aside, ought to have been tried on its merits, and finally disposed of there. It is therefore my opinion, that the cause ought to be remanded to that court to be tried on its merits.

ESKRIDGE, Judge. This is an appeal from the Crawford circuit court. The appellants brought a writ of forcible entry and detainer before two justices of the peace, and the finding of the jury upon the inquisition being for the defendant, the plaintiffs sued out from the Crawford circuit court, at the November term, 1827, their writ of certiorari, according to the statute. The proceedings before the justices were set aside for irregularity, and a trial de novo ordered. At the May term, 1828, the defendant moved to set aside the certiorari, on the ground that the court had not jurisdiction; which motion was sustained, and it is from this decision that the plaintiffs have appealed. The only question to be determined is, whether the circuit court, having set aside the proceedings in a case of forcible entry and detainer, brought there by certiorari, could rightfully order a trial de novo. My opinion is, that it could not. The power of the circuit court ceases the moment it has set aside the proceedings for irregularity. The statute giving the remedy of a writ of forcible entry and detainer is in derogation of the common law, is special and peculiar in its nature, and must, according to well-known rules, be strictly pursued in all its provisions. The sixth section of the act regulating the proceedings in writs of forcible entry and detainer (Geyer, Dig. 204) does not give the circuit court the power to try the case de novo. It only empowers that court to set aside the proceedings for irregularity, and nothing more. To authorize the circuit court to try the case de novo, that power must be expressly delegated by the statute, and is not to be assumed by implication or construction. The fact that the circuit court set aside the proceedings for irregularity and ordered a trial on the merits at one term, and at a subsequent one dismissed the case, cannot be considered as irregular, because the court is always open to dismiss for want of jurisdiction. This court being equally divided, however, in opinion, the judgment of the circuit court stands affirmed.

Case No. 10,255.

The NICOLAI FIRST.

[Blatchf. Pr. Cas. 354.][1]

District Court, S. D. New York.

PRIZE—BLOCKADE—CONDEMNATION.

Vessel and cargo condemned for an attempt to violate the blockade, the cargo being also mostly contraband of war, and on transportation to a port of the enemy.

In admiralty.

BETTS, District Judge. The above vessel and cargo were sent into this port, as prize of war, by the gunboat Victoria, for adjudication. A libel was filed against them, in the name of the United States, March 30, 1863. Process of attachment thereon was returned into court, April 21st thereafter, by the marshal, as duly served, and, no one appearing therein, or making claim or answer to the monition, proclamation was made, on motion of the United States attorney, conformably to the course of the procedure of the court, and the default of all persons having an interest in the prize was thereupon ordered by the court.

The only papers found in the vessel, on her capture, were a certificate of British registry of the steamer, dated at Dublin, April 23, 1860, to James Sterling, merchant of the same place on which is indorsed, at the custom-house of Nassau, N. P., by the register, a statement that, on the 12th of March, 1863, John Dennis had been appointed master of the ship; also a copy of a manifest of her cargo, but without date or signature, or note of the port of its departure or destination, or specific designation of most of the packages. On the arrival of the vessel in this port, it being proved, by the deposition of her master, that her lading consisted mostly of powder and ammunition, the court ordered the prize commissioners to have the same discharged from the vessel, and safely stored on shore. The master, the first mate and the boatswain were examined in preparatorio, upon the standing interrogatories. The testimony shows, that the vessel was laden at Liverpool, and despatched thence, in November last, with a cargo consisting chiefly of powder and ammunition, destined to Nassau, N. P. and the Confederate States, and back to Nassau. Her lading was mostly contraband of war. She was bound to Charleston or any Confederate port where she could get in. The master says that the clearance which the vessel took from England was destroyed by him at Nassau. No bills of lading were signed by the master, and none were found

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

on board of the prize. The vessel was captured March 21, 1863, off Little River, North Carolina, about a mile from the shore, trying to run the blockade. The master destroyed the clearance of the vessel. He had full knowledge of the blockade, and he was steering, when captured, towards Wilmington, North Carolina. The steamer had previously made two or three attempts to enter the port of Charleston, but was prevented from doing so by the blockading squadron.

The testimony of the witnesses is surprisingly ingenuous and distinct, and no room for doubt remains that the voyage commenced, and was prosecuted up to the capture of the vessel, with a fixed design and effort to violate the blockade of the coast, and also to transport large quantities of ammunition and military supplies to the use of the Confederate forces. It is accordingly ordered that a decree be entered for the condemnation and forfeiture of the vessel and cargo.

Case No. 10,256.

In re NICOLAS.

[8 Blatchf. 102; 13 Int. Rev. Rec. 78.] [1]

Circuit Court, S. D. New York. Dec. 29, 1870.

CIRCUIT COURTS — SOUTHERN DISTRICT OF NEW YORK—HOLDEN BY DISTRICT JUDGE FOR EASTERN DISTRICT.

Notwithstanding the provision of the act of April 10th, 1869 (16 Stat. 44), that "the circuit courts, in each circuit, shall be held by the justice of the supreme court allotted to the circuit, or by the circuit judge of the circuit, or by the district judge of the district, sitting alone, or by the justice of the supreme court and circuit judge, sitting together, in which case the justice of the supreme court shall preside, or, in the absence of either of them, by the other, (who shall preside,) and the district judge," the district judge of the Eastern district of New York, having been designated, under the act of July 29th, 1850 (9 Stat. 442), and the act of April 2d, 1852 (10 Stat. 5), to hold the circuit court for the Southern district of New York, and having been required, under the act of February 25th, 1865 (13 Stat. 438), to perform the duties of a judge in said Southern district, has authority to hold the circuit court for said Southern district.

[In the matter of Alexis Nicolas.]

Joel B. Erhardt, for petitioner.

Ambrose H. Purdy, Asst. Dist. Atty., for the United States.

WOODRUFF, Circuit Judge. The petitioner, having been tried and convicted of an offence against the laws of the United States, and remanded for sentence, and being now held in jail under such remand, applies for a writ of habeas corpus, upon the allegation of illegality in such order remanding him, in this, that the circuit court at which he was tried, in this present term, was held by the Honorable Charles L. Benedict, the judge of the district court of the United States for the Eastern district of New York.

By section 1 of the act of July 29th, 1850 (9 Stat. 442), in case of the sickness or other disability of any district judge, the circuit judge was authorized, if, in his judgment, the public interests required, to designate and appoint the district judge of any other district within the circuit, to hold the district court or circuit court, in case of the sickness or absence of the circuit judge, and discharge all the duties of the district judge, while such sickness or disability should continue. By the act of April 2d, 1852 (10 Stat. 5), the authority conferred by the aforesaid act was extended to any case and occasion where it should be made to appear to the circuit judge that the public interests, from the accumulation or urgency of judicial business in any district, required it to be done; and, in such case, it was made lawful for each of the said district judges separately to hold a district or circuit court at the same time, and discharge all the judicial duties of a district judge therein.

By the act of February 25th, 1865 (13 Stat. 438), the Eastern district of New York was created; and, by the third section, it was provided, that, in case of the inability, on account of sickness, of the district judge for the Southern district to hold any court therein, it should be the duty of the judge of the Eastern district to hold such court, and do and perform all the acts and duties of the judge of the Southern district; and, that, whenever, from pressure of public business, or other cause, it should be deemed desirable by the judge of the Southern district that the judge of the Eastern district perform the duties of a judge in the Southern district, an order to that effect might be entered, and thereupon the judge of the Eastern district should be empowered to do and perform, within the Southern district, and in the district court thereof, all the acts and duties of the district judge thereof.

Another act may also be referred to, that the state of the law on this general subject may be exhibited. By the act of August 6th, 1861 (12 Stat. 318), it was provided, that, in case of a vacancy in the office of district judge of any district, in a state in which there are two judicial districts, it shall be lawful for the district judge of the other district in said state to hold the district court or circuit court, in case of sickness or absence of the circuit judge, and discharge all the judicial duties of the district judge, so long as such vacancy shall continue.

All of these acts were passed with intent to provide for exigencies liable frequently to occur, and in which the disposal of the business in the circuit as well as the district court is hindered or prevented, or, by reason of the accumulation thereof, requires extraordinary judicial force.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 13 Int. Rev. Rec. 78, contains only a partial report.]

In pursuance of the two acts first named, Mr. Justice Nelson designated the Honorable Charles L. Benedict to hold the circuit court for the Southern district of New York, in as full and ample a manner as is authorized by the said acts; and an order of the district court for the Southern district was made, in pursuance of the act of February 25th, 1865, requiring the said Charles L. Benedict, judge of the Eastern district, to perform the duties of judge in the Southern district. Under and by virtue of these acts, and the designations aforesaid, the district judge, though appointed for the Eastern district, becomes, pro hac vice, judge of the Southern district; and, under this authority, judge Benedict has performed the duties of district judge in the district and circuit courts for the Southern district, from time to time, when his duties in the Eastern district would permit. During the early part of the present October term of the circuit court, Mr. Justice Nelson was ill and absent. For a portion of the time, the circuit judge was ill, and, during the first two weeks, was not in attendance. During those two weeks, the petitioner was tried, Judge Benedict holding the circuit court.

The single suggestion in support of the present application, is, that the act of congress (Act April 10, 1869; 16 Stat. 44), providing for the appointment of circuit judges, and prescribing their powers and duties, has repealed or abrogated the former laws on the subject, so far as to take away the power of the judge of the Eastern district to hold the circuit court in the Southern district of New York. The provision cited from the act of 1869 is, that "the circuit courts in each circuit shall be held by the justice of the supreme court allotted to the circuit, or by the circuit judge of the circuit, or by the district judge of the district, sitting alone, or by the justice of the supreme court and circuit judge, sitting together, in which case the justice of the supreme court shall preside, or, in the absence of either of them, by the other, (who shall preside,) and the district judge."

If the suggestion urged be true, then that act has, more clearly, had a sweeping effect through all the other districts throughout the United States, where the provisions of the act creating the Eastern district have no operation; and, in none of the exigencies contemplated by the statutes referred to, can a district judge hold a circuit court without the district for which he was appointed, notwithstanding vacancies, or sickness, or absence, of either or all of the judges of the circuit.

I do not think such was the intention of the law, nor its effect. Its just construction, in view of the previous legislation, and of the object of the enactment of the new statute, does not require such a result. The purpose was, to provide for the appointment of .ircuit judges, and to define their powers and jurisdiction, not to repeal the special legislation which had provided for exigencies, and had secured the continuous, regular administration of justice. In respect to such exigencies, the act of 1869 is wholly silent. True, the new appointments would render those exigencies less frequent; but they would be liable to occur, and the public interests would demand the continued remedy as truly as before. These special acts were to prevent great evils, and are not to be deemed repealed, unless the new statute very clearly requires such a construction. I think it does not, for two reasons: (1.) The section which provides that the circuit court shall be held by the justice of the supreme court allotted to the circuit, or by the circuit judge of the circuit, or by the district judge of the district, &c., was intended to introduce the new circuit judge into his proper relation and position in the circuit, and to define the relation of the other judges to him, in connection with their joint and several relation to the circuit courts of the several districts; and the import of the word "shall," in that view, is not other or more imperative than "may" would be, had that word been used; (2.) The district judge of the district, there named, indicates the officer who is clothed with the authority, and may exercise the jurisdiction and powers, and is charged with the duties, of district judge in the district, whether derived from his original appointment, or from special acts of congress then existing, and the proper order or designation which devolves on him that jurisdiction and power, and those duties. For all the purposes contemplated in the act of 1869, Judge Benedict is the district judge of the Southern district, within its intent, and meaning, though his appointment was made, in name, for the Eastern district.

Looking at the evils guarded against by the previous legislation, the nature of the exigencies provided for, the necessity of such provision, now as heretofore, the purpose of the act of 1869, and the consequences of the construction suggested, I conclude, that the power and jurisdiction of Judge Benedict to hold the circuit court, and try and remand the prisoner, as he did, are not impaired by the act of 1869.

The application must be denied.

Case No. 10,257.

NICOLAY v. ST. CLAIR COUNTY.

[3 Dill. 163.][1]

Circuit Court, W. D. Missouri. 1874.

MUNICIPAL AID TO RAILWAYS—SPECIAL CHARTERS — CONSTITUTIONAL PROVISION — DECISIONS OF STATE SUPREME COURT—BRANCH RAILROADS.

1. Where legislative power is given to a county court to subscribe on behalf of the county to

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

the stock of a railroad company, without restriction or precedent conditions, and to issue negotiable bonds in payment therefor, and the proper county court issues the bonds, reciting therein that they are issued under an order of said court made pursuant to legislative act conferring the power, a bona fide holder for value is not affected with constructive notice of facts recited in the order contrary to the recitals in the bonds.

[Cited in Harshman v. Bates County, Case No. 6,148.]

2. Legislation of Missouri as to power to municipalities to subscribe to the stock of railways, the constitutional provision of 1865, and the decisions of the supreme court of the state on the subject, reviewed, and those decisions followed and applied.

This is an action [by Albert H. Nicolay] upon coupons originally annexed to bonds issued by the county of St. Clair. The coupons are in the usual form. The following is a copy of one of the bonds, dated July 1st, 1870, from which the coupons in suit have been detached:

"United States of America. State of Missouri, County of St. Clair. County Bond. Interest ten per cent per annum, payable on the first days of January and July.

"Know all men by these presents, that the county of St. Clair, in the state of Missouri, acknowledges itself indebted and firmly bound to the Tebo and Neosho Railroad Company, to the use and in the name of the Clinton and Memphis branch of the Tebo and Neosho Railroad, in the sum of one thousand dollars, which sum the said county hereby promises to pay to the Tebo and Neosho Railroad Company or bearer, to aid in building said branch railroad, at the Bank of Commerce, in the city of New York, on the first day of July, A. D. 1882, together with interest thereon from the first day of July, 1870, at the rate of ten per cent per annum, which interest shall be payable semi-annually, on the first days of January and July of each year, on the presentation and delivery at said bank of the coupons hereto severally subjoined.

"This bond is issued under and in pursuance of an order of the county court of the county of St. Clair, in the state of Missouri, and in pursuance of and by authority of an act of the general assembly of the state of Missouri, entitled 'an act to incorporate the Tebo and Neosho Railroad Company,' approved January 16th, 1860; and of an act of the general assembly of the state of Missouri, entitled 'an act to aid in the building of branch railroads in the state of Missouri,' approved March 21st, A. D. 1868.

"In testimony whereof, the said county of St. Clair has executed this bond by the presiding justice of the county court of St. Clair county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing the seal of said court."

(The bond is duly signed and sealed.)

The petition states the legal effect of the bond and its recitals, and no question is made as to its sufficiency. Copies of the bonds are filed with the petition.

An answer is filed in denial; and also setting up as an affirmative defense facts intended to show that the county had no power to make the subscription or to issue the bonds. One reason for the alleged want of authority to issue the bonds is that they were issued without any vote of the people, as required by the constitution of the state (article 11, § 14); that the county court of St. Clair county, on January 21, 1870, without any vote of the people of the county, passed and entered of record an order "to subscribe for and take two thousand five hundred shares of the capital stock of the Clinton and Memphis branch of the Tebo and Neosho Railroad Company, each of the denomination of $100, and amounting in the aggregate to $250,000, under and by virtue of the authority in the charter of the Tebo and Neosho Railroad Company, approved January 16, 1860, and under an act of the general assembly of the state of Missouri, entitled 'an act to aid in the building of branch railroads in the state of Missouri,' approved March 21, 1868, and in accordance with the orders of the board of directors of the said Tebo and Neosho Railroad Company establishing the said branch railroad, and authorizing subscriptions to the capital stock thereof, adopted on the 6th day of June, 1870, said stock thus subscribed to be paid for by the issue of the bonds of the county, to be delivered in installments, as the work of graduation and masonry shall be let to responsible persons." The answer contains also an order of the county court, November 1, 1870, reciting that the work of graduation and masonry has been let by the Clinton and Memphis branch of the Tebo and Neosho Railroad Company, and ordering bonds for the $250,000 "to be at once signed, sealed, and delivered to said branch railroad company, or to its financial agents appointed to receive and negotiate the same."

The answer sets up and insists that the subscription was in fact made, and the bonds delivered to the Clinton and Memphis branch of the Tebo and Neosho Railroad Company, and not to the Tebo and Neosho Railroad Company; and alleges that such a subscription is unauthorized, and bonds issued therefor void.

The answer also sets up that after the order of the county court making the subscription as aforesaid, and prior to the issue of the bonds, pursuant to the statutes of Missouri, the Tebo and Neosho Railroad Company, with the assent of its stockholders, sold and conveyed all its rights, franchises, and property to the Missouri, Kansas, and Texas Railway Company (a Kansas corporation), and thereupon ceased to exist, and the county court ceased to have any authority to issue the bonds to the former company or to the branch. The answer concludes by alleging that of all the facts therein stated the plaintiff had full notice.

To the new matter in the answer the plaintiff demurs, and it was on this demurrer that the case was submitted.

Grant & Smith and Dryden & Dryden, for plaintiff.

Phillips & Vest and Nesbitt & Ferguson, for defendant.

DILLON, Circuit Judge. The bonds here in controversy were issued by the county court of St. Clair county, and recite an indebtedness on the part of the county "to the Tebo and Neosho Railroad Company, to the use and in the name of the Clinton and Memphis Branch of the Tebo and Neosho Railroad Company, in the sum of," etc., "which sum the said county hereby promises to pay to the Tebo and Neosho Railroad Company, or bearer, to aid in building said branch railroad."

The bonds also contain this recital: "This bond is issued under and in pursuance of an order of the county court of the county of St. Clair, in pursuance of and by authority of an act of the general assembly of the state of Missouri, entitled 'An act to incorporate the Tebo and Neosho Railroad Company,' approved January 16, 1860, and of an act entitled 'an act to aid in the building of branch railroads in the state of Missouri,' approved March 21, 1868."

The charter of the Tebo and Neosho Railroad Company thus referred to in the bonds, approved January 16, 1860 (Laws 1859-60, p. 402, § 6), prescribes the termini and general course of the main line of the road which it authorized this company to build, and gives to the company express authority to "extend branch railroads into and through any counties the directors may deem advisable," without any limitation whatever.

This charter (section 8) adopts and reenacts inter alia, section 14 of the charter of "the Osage and Southern Kansas Railroad Company," approved November 21, 1857 (Laws 1857, p. 59), and declares that section, with others "to be applicable to the company hereby incorporated, and all the powers therein contained are extended to the Tebo and Neosho Railroad Company."

The 14th section of the charter of the Osage and Southern Kansas Railroad Company, thus adopted, reads as follows: "Sec. 14. It shall be lawful for the county court of any county in which any part of the route of said railroad or branches may be, or any county adjacent thereto, to subscribe to the stock of the company, and, for the stock subscribed in behalf of the county, may issue the bonds of the county to raise the funds to pay the same, and to take proper steps to protect the interest and credit of the county court."

In 1865 the present constitution of the state of Missouri was adopted, containing the following: "The general assembly shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." Article 9, § 14.

At the time the constitution was framed there was a large number of charters in force specially incorporating railroad companies, and authorizing, as in the case of the Tebo and Neosho Company, the county courts of counties along their lines, or branches, or adjacent thereto, to subscribe for the stock of railroad companies, without any limitation as to amount, and without requiring a previous election or the assent of the tax-payers or people of the county. That such extraordinary powers, conferred, without limit or check, upon the small number of persons who compose the county court. would open the door to abuses, to frauds upon the officers and frauds by them, and to extravagant and unwise indebtedness, ought to have been foreseen by the legislature, although in 1860, and prior to that time, the evils which come from unlimited grants of power of this kind were not so well known as at present.

After the adoption of the constitution of 1865, the question as to the effect of the 14th section of the 11th article thereof, above quoted, upon these special charters, came before the supreme court of the state for its judgment. That court held that powers conferred in these special charters upon the county courts to subscribe without a vote of the people, were not repealed or touched by the prohibition of the constitution, its view being that the constitution did not affect existing charters, but only limited the power of the legislature in the future. This point was first decided in the Macon County Case,—State v. Macon Co. Ct. (1867) 41 Mo. 453,—and this is the settled law of the state. Chillicothe & B. R. Co. v. City of Brunswick (1869) 44 Mo. 553; Kansas City, St. J. & C. B. R. Co. v. Alderman (1871) 47 Mo. 349; State v. Sullivan Co. Ct., 51 Mo. 522; Smith v. Clark Co. (decided by the supreme court of Missouri, Nov. 3, 1873) 54 Mo. 58.

In this last case the legislation and judicial decisions of the state on the subject of municipal aid to railways is reviewed by the able judge who delivered the opinion of the court, in which, speaking of this subject, he says: "So that the provisions of the Revised Code of 1855, and the amendatory acts of 1860 and 1861, and the constitutional prohibition, and the legislative adoption of that prohibition immediately after its passage, have been held by repeated adjudications, and without any conflicting opinions of the court or any individual judge thereof, so far as the reports show, not to effect the repeal of the privilege contained in special charters."

Not only so, but the case of State v. Sullivan Co. Ct., above cited, also decides that under such a charter as the Tebo and Ne-

osho Railroad Company, the county court of a county along a branch railroad may subscribe for the stock of the company and issue bonds therefor. The subscription in this case, which was sustained by the supreme court of the state, was one by the county of Sullivan "to the St. Joseph and Iowa Railroad Company, in the name and for the use of the central branch of the St. Joseph and Iowa Railroad Company"—the same precisely as the one recited in the bonds in question issued by the county of St. Clair.

The decisions of the supreme court of the state, therefore, settle the point that, under the charter of the Tebo and Neosho Railroad Company, the county court of St. Clair county had the power to make, without any vote of the people of the county, precisely the kind of a subscription which the bonds in suit recite they did make, and to issue the bonds of the county therefor. The county court having the power to subscribe and to issue the bonds, and a valid subscription being recited in the bonds, the plaintiff can recover thereon if he purchased them bona fide for value, and without actual notice of any irregularities in the exercise of the power by the county court. The securities are authorized and made to be sold in distant places, and the supreme court of the United States has repeatedly decided that a purchaser of such bonds, while he is bound to ascertain whether the legislature has conferred the power to issue them, is not bound to ascertain whether the local officers intrusted with the execution or carrying out of the authority have properly pursued the directions or requirements of the law authorizing their issue. The cases in the supreme court are collected and stated in Dill. Mun. Corp. § 415 et seq. See, also, Kenicott v. Wayne Co., 16 Wall. [83 U. S.] 452, and Huidekoper v. Buchanan Co. [Case No. 6,847], decided here at this term.

A bona fide purchaser of one of these bonds is not bound to look into the records of the county court which made the subscription, and is not chargeable with constructive notice of their contents; and hence the fact that the order shows that the subscription by the county court of St. Clair county was not to the capital stock of the Tebo and Neosho Railroad Company, but to the stock of the "Clinton and Memphis Branch of the Tebo and Neosho Railroad Company," is no defense, provided the plaintiff is a holder of the bonds for value, without actual notice of this fact.

These views dispose of the only defense which counsel have urged in their briefs, unless actual notice to the plaintiff of the facts set forth in the orders of the county court is intended by the pleader.

If he intends to rely upon constructive notice only, the plea should be modified accordingly; and in that event the demurrer to the answer will be sustained. If he means actual notice, then the demurrer should be overruled; or at least we should consider further, whether, under the charter, or under the act of March 21, 1868 (relating to branch railroads), recited in the bond, or both, there was any power to subscribe by the county to the stock, not of the company, including the branches, but to the stock of the branch alone.

The answer was amended so as to allege actual notice, and afterwards, upon a trial, the plaintiff had judgment, and the defendant sued out a writ of error.

As to bonds issued under the branch railroad act of March 21, 1868, see Washburn v. Cass County [Case No. 17,213].

Case No. 10,258.

NICOLL v. UNITED STATES.

[1 U. S. Law Int. 24.]

Circuit Court, E. D. Pennsylvania. Nov. 22, 1829.

CONTRACTS—EXECUTION—PRIMA FACIE EVIDENCE OF CONSIDERATION.

[In an action of trespass against the United States to recover damages for seizing and detaining certain ships and cargoes,—the marshal having levied upon them as the property of a third person, indebted to the government in a large amount for duties,—plaintiff claimed the ships and cargoes under certain documentary titles derived from the debtor prior to his failure. *Held*, that the execution of the instruments conveying title to plaintiff was prima facie evidence of consideration.]

[At law. Action by F. H. Nicoll against the United States for damages for the illegal seizure and detention of certain ships and their cargoes.]

The action was an action of trespass, brought by plaintiff to recover damages of defendant for seizing and detaining certain ships, and large quantities of valuable goods, altogether valued between two and three hundred thousand dollars, alleged to be the property of the plaintiff, F. H. Nicoll; the defendant, as marshal of this district, having levied upon them as the property of Edward Thomson, who owed the United States nearly a million of dollars for duties. The defendant's justification introduced the United States as the real defendants; and they took defence accordingly as priority creditors of Edward Thomson.

The cargoes in question arrived in the United States in the year 1826, in the ships Addison, Woodrup Sims, Scattergood, and Benjamin Rush, shortly after Thomson's failure, and were instantly seized by the United States, as his property, by virtue of their right of priority, under the act of congress, in pursuance of writs issued out of this court the 13th of March, 1826, real debt $500,000. The plaintiff immediately put in his claim to the ships and cargoes, under certain documentary titles derived from Thomson prior to his failure. The United

States, not satisfied with the evidence, continued to detain the property. An agreement was finally entered into to sell the contested property, suffer the proceeds to lie in plaintiff's hands, on giving security for their investment, and try the right of property by jury trial. In pursuance of this wholesome agrement devised to preserve perishable property, the whole matter came before the court in its present shape.

The plaintiff's counsel were R. J. Ingersoll, Mr. Binney and J. Sergeant, Esqs.

The United States were represented by J. Randall and C. J. Ingersoll, Esqs.

The documentary evidence which the plaintiff offered to sustain his right of property, and the evidence of the witnesses, it would be an endless task to detail, as they were the subjects of a fortnight's examination.

On the 14th, the argument of counsel commenced, and ended the 20th, at noon. The court then adjourned, until the next morning at ten o'clock, to charge the jury.

Before WASHINGTON, Circuit Justice.

The learned judge consumed two hours on Saturday morning in the delivery of an extremely lucid and powerful charge. The prominent points adjudicated, as well as touched upon, were principally these: "That the securities or title papers presented by the plaintiff were valid and legal; that the question of consideration did not arise, the execution of the instrument being prima facie evidence of it, and perfectly good, unless disproved by the defendant; that, the title and transfer being good, the allegation of defendant that they were void, on the eight grounds urged in relation to fraud, was not law, inasmuch as no one of the grounds per se constituted a fraud in law or fact. The learned judge then went over the different points as to fraud, and proved that there was nothing in either of them. He animadverted with great severity upon the customhouse officers of 1825; said that they were not only negligent and lazy, but unfaithful; that the frauds were caused by acts of theirs, not only of omission, but of commission; and that they actually threw the shield of lawfulness over the whole transaction by furnishing Thomson with documentary proofs of fairness. As to the point that Floyd S. Bailey being an acknowledged accomplice of Thomson in the tea frauds, and the plaintiff's agent, and the plaintiff being responsible for his acts, the judge said, it was so, if Bailey was a general agent of plaintiff; but not an agent for particular purposes; which was the real fact the jury was to determine. Upon the point that the transfer to Nicoll was a full assignment of property, omitting only a trivial part, which realized to the assignees but $6,000; and, that being so, Nicoll was seized of the transferred property to the use of the United States, in the same manner as any general assignee would be, the learned judge decided that if the jury believed it was the intention of Nicoll and Thomson to execute an instrument to defraud the United States of their priority, the transfer was void, as to the preference, and Nicoll stood as assignee for the benefit of creditors; and the amount not assigned would be no alteration of the thing, if it were trivial, and merely omitted colorably, with a view to carry on the deceit with greater effect. The jury must be fully satisfied of such an intention; fraud was never to be presumed until actually proved; and the jury would of course look at the fact that Thomson still continued his mercantile transactions as usual, and did not make a general assignment until compelled."

The judge commented upon the point whether a mortgage of all property would be an assignment under the act, but gave no decision. As to the question of damages, the judge left it entirely to the jury; if they were satisfied the right of property was in the plaintiff, then the taking by the marshal was illegal, and moderate compensatory, but not vindictive, damages should be given; the verdict would be for the plaintiff, the amount of damages agreed upon, and not for the value of the property, that being already in plaintiff's hands; or for defendant.

The jury allowed the Messrs. Nicoll $220,000, all the property claimed, and damages amounting to $39,249.66.

Case No. 10,259.

NICOLL et al. v. AMERICAN INS. CO.

[3 Woodb. & M. 529.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1847.

PRINCIPAL AND AGENT—EVIDENCE OF RELATION—FIRE INSURANCE—REPRESENTATIONS TO SECURE POLICY—SURVEY—WARRANTY.

1. When no evidence exists of the written appointment of an agent, the jury must judge by testimony of his acts and the recognitions thereof by his principal, as to the extent or existence of his agency.

[Cited in Aetna Ins. Co. v. Maguire, 51 Ill. 351; Pierce v. Nashua Fire Ins. Co., 50 N. H. 302. Cited in brief in Libby v. Union Nat. Bank, 99 Ill. 627.]

2. If the agent of a fire insurance company has received two sets of representations, the last being for the present policy, the makers thereof are not bound, except by the last set.

3. If either party must suffer by the fault of the agent, it should be the principal of the agent.

[Cited in Aetna Live Stock, F. & T. Ins. Co. v. Olmstead, 21 Mich. 249.]

4. A party is not bound by representations never made for this case, and never presented as grounds for the present insurance.

5. If A, agent of a party in making representations for an insurance, reads a set made by him elsewhere, and B, agent of the other party, writes them down, and A meant to sign only a

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

true copy, and B knew this, it is very questionable whether A's principals are liable for the difference or error.

6. If the jury believe a letter was afterwards delivered to B making the necessary corrections, it was sufficient, provided the jury believe B to have been then an agent of his party to the extent of receiving such information.

7. The representations for insurance in this case are dehors the policy, and to be treated as representations and not as warranties.

8. The words "survey and description" in the printed policy refer to surveys made by some third party, and the description attached to the plan or map.

9. A warrantee or guarantee is required to the truth of these.

10. In fire insurance the representations of the insured are not to be treated as guaranties or warranties.

11. If considered as guaranties, no variation from them can exist in the smallest particular.

12. For A's representations the insured is not answerable, unless they differ in a material respect from the truth, or are departed from in a material manner.

[Cited in Phoenix Ins. Co. v. Benton, 87 Ind. 137.]

13. If representations differ materially the policy cannot be enforced.

14. If the warranty fails the policy never attaches.

15. The best test of a material variation is that it increases the risk so as to require a larger premium.

16. If answers of party as to the watch kept were ambiguous and capable of different conclusions, the other party should have asked for explanations before taking the policy.

17. If a material departure from the representations has taken place, the party cannot recover, although the fire was not caused by that departure.

18. Exceptions, if to be relied on by a bill, should be so taken and notified at the trial.

19. When taken at the trial, the court may allow them to be reduced to form afterwards and subsequently filed nunc pro tunc.

20. However immaterial to the court may be the time when the exception is made, the successful party cannot be subjected to it, except on legal principles.

This was assumpsit on a policy of insurance against fire, dated April 15th, 1846, for one year on $5,000 worth of movable machinery in a cotton factory belonging to the plaintiffs. It was situated in the county of Orange, in the state of New York, and was alleged to have been burned with all its machinery on the 10th of September, 1846, and proper proof and notice of it given to the respondents on the 12th of that month. The premium was 1¾ per cent. The policy was offered in evidence, showing further, that the whole factory and machinery were valued at $34,000, and the plaintiffs had liberty to get $19,000 insured elsewhere. It was shown that an insurance for $5,000 at a like premium had been effected at the Franklin Fire Insurance Company in Philadelphia, and at Boston for $12,000.

The chief points in dispute were these. The insurance was effected by [Leonard D.] Nicoll, agent for the plaintiffs, on application to Bigelow, agent of the defendants, in New York City. This property had been previously insured in part in a combination insurance office in New York, and after the great fire there in July, 1845, the insurance offices suffered so much, that the plaintiffs felt desirous of changing their insurance, and applied through another Mr. Nicoll to Mr. Bigelow, who acted for several offices at the eastward for that purpose. The exact day or month of the application did not appear, but Nicoll testified it was in the autumn, while Bigelow believed it was not till spring. The written representations on which the insurance was asked were prepared by Nicoll and Bigelow together, meaning they should be a copy of those which had before been made to the combination office, Nicoll reading, and Bigelow writing down as he read from that paper. The representations so prepared were forwarded by Bigelow, and Nicoll swore he was afterwards told in reply that the office was then unwilling to insure. That he again applied in April, 1846, with representations in some respects different and like those which had been made to the Franklin Insurance Office in Philadelphia, and of which he kept a copy, and that these were sent by Bigelow, and the policy now in suit returned thereon. Bigelow had no recollection of these last representations, nor of the first ones being returned, and those first ones without any date were now offered in evidence by the respondents as those on which the present policy issued. Various facts were offered in evidence, which need not be repeated, to render it probable which were the real representations made in order to obtain the insurance now in dispute. Much evidence was offered on both sides, also, to show at what hour the fire broke out, whether at nine o'clock or after eleven p. m., and whether in the dressing room where the stoves stood, or in the carding room, in which no fire was used, but the strength of it was in favor of the latest hour, and of the carding room as the place. The material difference between the two representations produced were that those offered by the respondents spoke of a watch of the lights and fires till nine p. m., as proper, without distinctly saying that one was so kept, while the other stated a watch was kept from the middle of September to the middle of March till nine p. m. The former stated, likewise, that no heat was used in warming the building, except outside in a furnace, and no stoves used inside, nor sizing made there, while the latter stated that a stove was used in the dressing room to make the sizing there. The former furthermore stated that casks filled with water were kept for safety in the different rooms, as did the latter, while the evidence was contradictory, whether they were all full at the time of the fire, though it appeared that some were, and some tanks of water also, and pipes for conducting water from a spring into each story. The plain-

tiffs proved, likewise, by their agent, that in May, 1846, being uncertain whether the representations stated a stove was then used or not in the dressing room to make sizing, addressed a letter to Bigelow as agent for the defendants, notifying him that such was the fact, and wishing him to communicate it to the office if necessary. A press copy of it was proved and produced by another person, taken at the time, and he testified that the original was delivered to Bigelow, but the latter swore he had no recollection of receiving or forwarding it to the office, and insisted he was not an agent for the respondents, or at most, was one for limited objects, not embracing this. It further appeared that the representations now produced by the respondents were not, in some of these respects, exact copies of those to the combination insurance company, as they stated the use of a stove to make size in the dressing room. There existed on the same sheet with the policy certain printed conditions, and among them one that any "survey and description" should be regarded as a warranty, and another that no insurance would be made on factories at a distance, except on written representations in answer to certain written interrogatories applicable to such property. It was also proved by the plaintiffs that fires and lights are not generally used much in factories between the middle of March and September, and that while used by them, a watch was kept till nine o'clock p. m., but not at other portions of the year.

The jury returned a verdict for the plaintiffs.

Fancher & Carpenter, for plaintiffs.

Mr. Bradley and R. W. Green, for defendants.

In the course of the trial the following rulings and instructions were given on points of law deemed material:

WOODBURY, Circuit Justice. As there is no evidence of the written appointment of Mr. Bigelow as agent of the defendants, the jury must decide on the fact and the extent of his agency by what he testifies and did, coupled with the acts of the defendants recognizing him. If the jury believe he was an agent to receive the representations to obtain insurances, and a policy is returned and delivered after two sets of representations have been delivered to him, but the last set for the present policy, the plaintiffs are not here bound except by the last set. If either party must suffer by his mistake, it must be the defendants, whose agent he is, and the plaintiffs are not to be bound in this case by representations never made for this case, and never presented to the defendants, or their agent, as the ground for the present insurance. Again, if the representations produced by the defendants do not contain all which those to the combination office did, by the mistake of the agent of the defendants in copying, and the plaintiffs meant to sign through Nicoll only a true copy, and Bigelow knew this, it is very questionable whether the plaintiffs are liable for the error or difference. But however that may be, the letter written by Nicoll in May, 1846, correcting any difference, if one existed, as to the stove and sizing being before this loss, and being actually delivered to Bigelow was a sufficient correction, if the jury believed it to have been done at the time, and that Bigelow was agent of the defendants to the extent of receiving such information.

In respect to the representations which the jury may find ought to govern, they are in this case to be treated as representations only, and not as warranties. They are dehors the policy, and not referred to in it as warranties. 1 Phil. Ins. 27; 5 Hill, 101, 188; 1 Durn. & E. [1 Term R.] 343. The condition annexed making a "survey and description" a warranty, relates to a survey made by some third person employed for that purpose and the description attached to the plan or map. To the truth of these a warranty or guaranty is required, because they are not representations made by the insured, but third persons. Representations made by the insured were not needed to be guarantied, and extend to so many matters as to be improper for warranties about all of them, and if regarded otherwise, would tend to ensnare and mislead the insured. 2 Hall, 589; Cowp. 785; Doug. 11, note. If considered warranties, they cannot be deviated from in the smallest particular, and must with exactness correspond to all details when made, whether material or immaterial. Whereas if regarded as representations, which is the character attached to these by the insured, and which is the just view looking to all interests, the insured is not answerable on account of them, unless they differ in material respects from the truth or are departed from in a material manner. Clark v. Manufacturers' Ins. Co. [Case No. 2,829], and cases there cited; 3 Kent, Comm. 282; 1 Phil. Ins. 27. If these last circumstances of misrepresentations occur, then the policy cannot be enforced, and in the former case of a warranty failing it never attaches. Clark v. Manufacturers' Ins. Co. [supra]; [Columbian Ins. Co. of Alexandria v. Lawrence] 2 Pet. [27 U. S.] 26; [Hazard v. New England Marine Ins. Co.] 8 Pet. [33 U. S.] 557; 3 Hill, 501; 8 Metc. [Mass.] 114; Dennison v. Thomaston Mut. Ins. Co., 20 Me. 125. Perhaps the best test as to the materiality of the variance is, that it increases the risk so as to require a larger premium. The rule that it must be material, and the test of its being material, that it increases the risk, is such that where the shade of difference in the risk is so slight as not to require an increased premium, perhaps it will be safe to say this is proof that the difference is not material.

One of the first great opinions of Lord

Mansfield in insurance cases was connected with the subject of representations and concealment, and the former were held by him to be sufficient, if disclosing all not generally known, not speculative, and not as a public officer required to be silent about. Carter v. Boehm, 3 Burrows, 1905. Another instruction I feel bound to give, is that if the answers of the plaintiffs as to a watch in the representations produced by the respondents, are so doubtful or ambiguous as to lead to different conclusions, the defendants should have asked for explanations before taking the insurance. Phil. Ins. 224, 232; [Livingston v. Maryland Ins. Co.] 7 Cranch [11 U. S.] 535. Or the construction most favorable to the plaintiffs is to be followed. Lord Mansfield in 3 Burrows, 1918. This construction would exonerate the plaintiffs as to a watch on the representations now offered, as they refer to keeping a watch of fires and lights, and these were not used when this loss occurred, and when they were used a watch was kept. So they would be exonerated, if the other representations were the true ones made for this policy and specified that the watch was to be kept only from the middle of September to the middle of March. In this last event, also, there was no violation of the representations as to heating the building, keeping a stove or making sizing within, and none in the event that the first representations are to govern, provided the notice was given duly in May, 1846, that a stove was in use in the dressing room to make sizing, &c.

In respect to the tanks of water and the pipes instead of the hogsheads, it is for the jury to say whether there was any substantial variance from the representations. No fraud is here set up, and consequently the law on that need not be gone into. But it must be remembered that if the real representations made for this policy have in any material point been departed from by the plaintiffs, they cannot recover, whether that departure caused the fire and loss or not. 3 Kent, Comm. 282. It would, then, be sufficient for the defendants to say that the implied if not express condition on which they engaged to be bound has not been complied with by the plaintiffs. And as insurances are matters of strict contract and good faith or fidelity to its provisions, parties cannot recover on them, however unfortunate, unless they comply with such provisions and their own representations. Certainly not unless they comply with the latter, at least in substance, or in all material respects.

The jury returned a verdict for the plaintiffs for the amount insured.

After several days had elapsed, and the court was on the eve of an adjournment, the defendants asked leave to file a bill of exceptions to some of the rulings of the court at the trial.

THE COURT stated that the exceptions, if to be relied on by a bill, should be so taken and notified at the trial. Walton v. U. S., 9 Wheat. [22 U. S.] 651; Patterson v. Philips, 1 How. (Miss.) 572; [Bradstreet v. Thomas] 4 Pet. [29 U. S.] 102. If not then taken, they cannot be settled correctly by fresh recollection, or by the observations and oaths of the by-standers, which are in some states by statute resorted to under contradictions. So the form of the bill itself is, that the exceptions were taken at the trial. Stimpson v. West Chester R. Co., 3 How. [44 U. S.] 553. When taken at the trial, the court may allow them to be reduced to form afterwards and filed at a subsequent day within a reasonable time nunc pro tunc. [Bradstreet v. Thomas] 4 Pet. [29 U. S.] 102; 3 Cow. 32; 9 Johns. 345; 2 Scam. 490; 3 Scam. 17, 24; 1 Gill, 66; 2 Tidd, Prac. 913. In this instance, as the plaintiffs may possibly have supposed, that raising questions of law at the trial was enough, without stating any exceptions in form to the ruling on them, I should be inclined to waive the latter, if the exceptions had been relied on immediately after the rulings were made, and a bill had been presented then, or time asked then to prepare one. But this not being done till several days had expired, I think it too late now. The counsel for the defendants, however, feeling anxious to obtain time now to prepare the bill and have it signed and allowed, he is at liberty to do it, stating in the bill itself the days the rulings were made, the verdict found, and this application made, so that the court above may judge whether the exception was duly taken. Both parties have rights here, and however immaterial it may be to the court when the exception is made, the plaintiffs cannot be subjected to it, except on legal principles.

The bill was accordingly prepared in that way and signed, but no writ of error brought.

Case No. 10,260.

NICOLLS v. RODGERS.

[2 Paine, 437.][1]

Circuit Court.[2]

CONTRACTS—CONSTRUCTION—LEX LOCI—LIMITATIONS—LEX FORI.

1. The nature, validity and construction of contracts are governed by the lex loci; the form of action, the course of judicial proceedings, and the time when the action must be commenced by the lex fori.

2. The statute of limitations appertains only to the remedy, and is a part of the lex fori; and the courts of the United States always apply the statute of limitations of the state where the court sits, and adopt the same rules in regard to it as prevail in the courts of the state.

[Cited in brief in Waterman v. Town of Waterloo, 69 Wis. 261, 34 N. W. 138.]

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1 [Reported by Elijah Paine, Jr., Esq.]

2 [District and date not given. 2 Paine includes cases decided between 1827 and 1840.]

3. *Held*, that an action brought in New York on an attested promissory note made in Massachusetts, was barred by the statute of limitations of the former, although it would not have been by that of the latter state.

At law.

THOMPSON, Circuit Justice. This case comes before the court on a demurrer to the replication. The fourth count in the declaration alleges, that on the 17th day of July, in the year 1811, the defendant made his promissory note, attested by one Joseph May, as a witness thereto, by which he promised to pay Pennel B. Rodgers, or order, $4,212.81, on demand, with interest. The defendant pleads the statute of limitations of the state of New York. To which the plaintiff replies that she ought not to be barred from having and maintaining her action, &c., because at the time the said note was made and delivered, the defendant and the said P. B. Rodgers were citizens of and resident in the state of Massachusetts; and that by a statute of that state, it is provided that the statute of limitations shall not extend to any note in writing attested by one or more witnesses, but that all actions upon such notes may be maintained as if the statute of limitations had never been passed; and that the defendant well knowing this, and that to the end that the said note might be exempted from all statutes of limitations, consented and directed that the said Joseph May should attest the same as a witness, &c. To this replication the defendant demurs.

The decision of this case must turn on the question, whether the matter set up in the replication relates to the nature and construction of the contract, or to the remedy sought to enforce it. The rule is well settled, that as to the meaning and intent of a contract, it must be construed according to the law of the country where it was made or is to be executed. But as to enforcing it according to the law of the country where it is sued, the lex loci applies only to the nature, validity and construction of the contract, and not to the form of the action, the course of judicial proceedings, or the time when the action must be commenced; these are governed by the lex fori,[3] and it is equally well settled that the statute of limitations is a matter appertaining to the remedy. The provisions of the statute and the form of the plea, look to the remedy only. The plea is in bar of the action, and does not operate as an extinguishment or satisfaction of the contract. It is up-

[3] The law of a place where a contract is made, or to be performed, is to govern as to the nature, validity, construction and effect of such contract; that being valid in such place, it is to be considered equally valid, and to be enforced everywhere, with the exception of cases in which the contract is immoral or unjust, or in which the enforcing it in a state would be injurious to the rights, the interest or convenience of such state or its citizens; and, on the contrary, if the contract be void, or be discharged by the law of the place where it is made or to be performed, it is to be considered as void or discharged everywhere, and to be enforced nowhere. Lodge v. Phelps, 1 Johns. Cas. 139; Smith v. Smith, 2 Johns. 235; Ruggles v. Keeler, 3 Johns. 263; Thompson v. Ketcham, 4 Johns. 285; 8 Johns. 179; Sherrill v. Hopkins, 1 Cow. 103, and several cases there cited, pages 105–109; Van Schaick v. Edwards, 2 Johns. Cas. 355. Covenant will not lie in this state on a contract to be performed in Pennsylvania, with a scrawl and word "seal" in the locus sigilii, though by the law of that state this constitutes a seal. Andrews v. Herriot, 4 Cow. 508. The form of the action relates to the remedy, and is governed by the lex loci. See note at the end of this case. Id. A sale of goods. If one lawfully, in a foreign country, sell goods in a manner, or on grounds which would not be lawful here, our courts will uphold the sale. Grant v. McLachlin, 4 Johns. 34. It seems that the validity of a notarial process of a foreign bill of exchange, depends upon the lex loci contractus; and where the latter renders a seal necessary, the protest must be under seal, or it will not be regarded as valid elsewhere. Bank of Rochester v. Gray, 2 Hill, 227. The mode of authenticating a foreign protest, so as to make it evidence, depends upon the lex fori; and it seems that in this state neither the original nor a copy can be received, unless authenticated by the official seal of the notary who made it, impressed upon some tenacious substance as required at common law. Id. An exception to this rule may, perhaps, be allowed, where the protest appears to have been made under a local law, by an officer who had no seal. Id. The rate of interest is governed by the law of the place. Fanning v. Consequa, 17 Johns. 511. So the liability of a party to negotiable paper. Hicks v. Brown, 12 Johns. 142, 143. A note void for usury in Massachusetts is so here. Van Schaick v. Edwards, 2 Johns. Cas. 355. But foreign revenue laws will not be noticed here; and, accordingly, a foreign contract, void for want of a stamp where made, will not for that reason be held void here. Ludlow v. Rensselaer, 1 Johns. 95. Nor shall the penal laws or laws of forfeiture in one's country operate upon his rights or liabilities in another. Scoville v. Canfield, 14 Johns. 338. Personal disabilities follow the person. Thus when young men, prodigals, married women, &c., of a country are considered subject to curators by the law, or unable to contract, they are to be so considered elsewhere, both in their rights and disabilities. [Hamilton v. Moore] 3 Dall. [3 U. S.] 375, 376. Thompson v. Ketcham, 8 Johns. 189. Authorities, showing that a case shall be explained, &c., by the law of the place where it is to be performed; and the rules by which we are to determine the place of performance. Ludlow v. Rensselaer, 1 Johns. 95; Smith v. Smith, 2 Johns. 235; Thompson v. Ketcham, 8 Johns. 189; Fanning v. Consequa, 17 Johns. 511; Sherrill v. Hopkins, 1 Cow. 103, 108. The discharge of or defense against a contract, in the place where it is made or to be performed, is the same everywhere. Thus, if infancy be a defense against a contract made in Jamaica, it is so here. Thompson v. Ketcham, 8 Johns. 189. It was formerly held that a discharge under an insolvent law of this state was, upon the express words of the statute, a discharge from all contracts, wherever made. Penniman v. Meigs, 9 Johns. 325. But that case has been overruled as unconstitutional by M'Millan v. M'Niel, 4 Wheat. [17 U. S.] 209, and the operation of the lex loci contractus restored in all its force. Hicks v. Hotchkiss, 7 Johns. Ch. 297, 312; Mather v. Bush, 16 Johns. 233; Sherrill v. Hopkins, 1 Cow. 103. But a statute of the United States may still give a universal effect to a discharge, without regard to the place where the contract was made. Murray v. De Rottenham, 6 Johns. Ch. 52; Harrison v. Sterry, 5 Cranch [9 U. S.] 289, and 4 Johns. 488.

on this ground that a new promise without any consideration will take the case out of the statute. And the courts of the United States always apply the statute of limitations of the state where the court sits, and adopt the same rule of construction that prevails in the state court. 2 Mass. 84; 1 Caines, 402; 8 Johns. 189, 194; [Shelby v. Guy] 11 Wheat. [24 U. S.] 365; [Ogden v. Saunders] 12 Wheat. [25 U. S.] 340, 349, 350; [Bell v. Morrison] 1 Pet. [26 U. S.] 359.

The defendant must, therefore, have judgment upon the demurrer. See Fisher v. Harnden [Case No. 4,819].

NIEHOFF (GOLSON v.). See Case No. 5,-524.

Case No. 10,261.

NIETO v. CLARK.

[Boston Courier, March 23, 1858.]

District Court, D. Massachusetts. 1858.[1]

CARRIERS—CONDUCT OF SERVANTS TOWARDS LADY PASSENGERS.

This was a libel by Manuel Nieto, ex-steward, against William B. Clark, master of the bark Evangeline, to recover wages, as per shipping articles, at $25, the libellant having shipped as steward for a voyage to Valparaiso and other ports in the Pacific, and back to Boston, but was discharged at Talcahuana. The libellant claimed wages for the whole voyage, about $250. The respondent tendered to the libellant, when he discharged him, $70, or the amount due to him at that time, and that sum was also tendered to him here, and then paid into court after the libel had been commenced. To the libel itself the respondent answered, that Nieto at Talcahuana entered the stateroom of a lady passenger in the night time, and conducted himself in a grossly indecent manner; that she reported his behavior to the respondent, and declared that she would not stay in the vessel if Nieto was not discharged; and that he therefore did discharge him.

In giving his decision, SPRAGUE, District Judge, said there were several disingenuous suppressions of facts on the part of the libellant, and he held that the respondent was fully justified in dismissing him. Libel dismissed.

F. W. Sanger, for libellant.

J. H. Prince, for respondent.

[Nowhere more fully reported; opinion not now accessible.

[See Orne v. Townsend, Case No. 10,583; Whitton v. The Commerce, Id. 17,604; Atkyns v. Burrows, Id. 618; The Nimrod, Id. 10,267.]

[1] [Affirmed in Case No. 10,262.]

Case No. 10,262.

NIETO v. CLARK.

[1 Cliff. 145;[1] 16 Leg. Int. 358.]

Circuit Court, D. Massachusetts. Oct., 1858.[2]

CARRIERS — INDECENT CONDUCT OF SEAMAN TOWARDS LADY PASSENGER—DISCHARGE IN FOREIGN PORT.

1. Where a seaman had attempted a rape upon a female passenger in a foreign port, and the injured party refused to remain on board, and demanded the return of her passage-money unless the offender was dismissed, the master was justified in the immediate discharge of the seaman.

2. Discharges in a foreign port, without the express approval of the American consul, when one is present, or without the consent of the seaman, are not favored in the acts of congress or the courts of the United States, and in such cases the burden is upon the master to show the reasons of the discharge, and to prove to the satisfaction of the court that they were just and reasonable.

3. The contract of all passengers entitles them to respectful treatment from those in charge of the vessel, and, in respect to female passengers, includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest approach.

[Cited in Pendleton v. Kinsley, Case No. 10,-922.]

[Cited in Bass v. Chicago & N. W. Ry. Co., 36 Wis. 460; Batton v. South & N. A. R. Co., 77 Ala. 591; Bryant v. Rich, 106 Mass. 189. Cited in brief in Chicago & E. R. Co. v. Flexman, 103 Ill. 548. Cited in Craker v. Chicago & N. W. Ry. Co., 36 Wis. 668, 672; Dwinelle v. New York Cent. & H. R. R. Co., 120 N. Y. 126, 24 N. E. 319; Goddard v. Grand Trunk Ry. Co., 57 Me. 217; Louisville & N. R. Co. v. Ballard, 85 Ky. 311, 3 S. W. 530; Sira v. Wabash Ry. Co., 115 Mo. 136, 21 S. W. 906; Spohn v. Missouri Pac. Ry. Co., 87 Mo. 78; Stewart v. Brooklyn & C. R. Co., 90 N. Y. 591.]

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

On the 29th of October, 1859, the libellant [Manuel Nieto] shipped as steward on board the bark Evangeline, of which the respondent [William R. Clark] was master, for a voyage to Valparaiso and other ports in the Pacific Ocean, and back to Boston. At Valparaiso a lady engaged a passage to the United States. While the vessel was lying at Talcahuano, Chili, the libellant, in the nighttime entered the lady's state-room, attempted a rape, and behaved with indecency in the lady's presence. Upon complaint to the respondent, the libellant was immediately discharged, and put ashore. Upon a representation of the case to the American consul at Talcahuano, the respondent was advised to pay the steward his wages, and the amount was therefore tendered him, but refused. Shortly after his discharge the libellant shipped on board the Osprey and returned to Boston, when the libel was brought, claiming wages, damages, and expenses to the amount

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

[2] [Affirming Case No. 10,261.]

of two hundred and twenty-six dollars seventeen cents. After the answer was filed, upon motion of the libellant praying that the respondent might be directed to pay into court any sum he relied on as a tender, an equal sum to that offered at Talcahuano was paid over to the libellant. The libel was dismissed without costs, in the district court. [Case No. 10,261.]

F. W. Sanger, for libellant.
J. H. Prince, for respondent.

CLIFFORD, Circuit Justice. All the evidence of the libellant's misconduct arises from his own confession to the mate of the Evangeline, who accompanied him on shore at the time he was discharged. His testimony is to the effect that, while they were going on shore, he asked the libellant why he went into the state-room of the lady, and that the libellant replied that it was because he wanted to get clear of the ship. Both question and answer clearly indicate that he had full knowledge of the complaint made against him, and they also warrant the conclusion that his misconduct was well known to the crew, and that the order of the master in sending him on shore was acknowledged by himself to be just and proper. Had he been ignorant of the charge, he would have inquired what was meant by the question; and if he had been innocent of the assault upon the lady, he would have denied the accusation. Nothing of this kind was done. On the contrary, his answer is significant of the fact that he was fully apprised of the accusation as set forth in the answer, and that his misconduct was too well known to admit of concealment or denial. After his discharge, and while the Evangeline lay in the harbor of Talcahuano, the libellant came on board, and again stated to the mate that he was glad he was clear of the ship, and made no complaint that he had been improperly or unjustly sent on shore. These conversations took place about the time of his discharge or shortly after, while the recollection of the occurrence was fresh in his memory, and being unaccompanied by any protestation of innocence, or any complaint that he had been falsely accused or harshly treated, afford a very strong ground of presumption that he was entirely conscious of the truth of the charge as set forth in the answer, and that he fully acquiesced in the justice of the order of the master dismissing him from the ship on that account.

Masters cannot lawfully discharge seamen in a foreign port before the complete fulfilment of their mutual obligations, without just and valid reasons. 3 Kent, Comm. (9th Ed.) 253; Curt. Merch. Seam. 148; The Exeter, 2 C. Rob. Adm. 261; Hutchinson v. Coombs, [Case No. 6,955]. First offences, unless of an aggravated character, are not in general regarded as sufficient to justify the master in ordering a seaman to be discharged, and repentance and offer of amends, even in case of aggravated offences not amounting to a disqualification, or which do not render the delinquent unfit to be retained, ought to entitle him to a restoration to his situation. Theft, quarrelling, and disobedience of orders are the only enumerated causes in some of the continental codes for which seamen may be discharged in a foreign port without their consent, and all appear to concur in the general doctrine, that such harsh measures cannot be justified in law, unless it be for such gross or persistent misconduct as shows that the delinquent is disqualified for his situation, or unfit on that account to be retained. Offences, such as quarrelling, or disobedience of orders, or even minor thefts, vary so much in the degree of guilt to be attached to the delinquent, as is shown from experience, that any arbitrary specification of cases has not proved to be either just or satisfactory. Consequently, no such rules have ever been acknowledged in the jurisprudence of England or of the United States. Seamen may be discharged for aggravated offences, or for such gross and persistent misconduct as shows them to be disqualified to perform the obligations of their contract. Accordingly, the laws of the United States do not assign any specific offences for which a seaman may in all cases be discharged, but allows the master to dismiss him, as before remarked, for offences of an aggravated character, and for such gross and persistent violation of his duty and the regulations of the ship as show that he is radically disqualified for his situation and unfit to be retained, leaving the justification of the master in all cases to depend upon the character or aggravation of the offence, and the degree and perverseness of the seaman's misconduct. Discharges in a foreign port, without the express approval of the American consul, when one is present, or without the consent of the seaman, are not favored in the acts of congress or by the courts of the United States; and in all such cases the burden of proof is upon the master to show the reasons of the discharge, and it is incumbent upon him to prove to the satisfaction of the court that they were clearly just and reasonable. As a general rule, the marine law requires the master to receive back a seaman when he has thus discharged him, if he repents and seasonably offers to return to his duty and make satisfaction; and if the master, under such circumstances, refuses to restore him, or if the seaman has been unduly discharged, he may follow the ship and recover his wages for the voyage and the expenses of his return. Masters are made subject to fine and imprisonment, by the tenth section of the act of the 3d of March, 1825 [4 Stat. 117], if, without justifiable cause, they maliciously force any officer or mariner on shore when abroad, or leave him behind in any foreign port or place, or refuse to bring home those they carried out, who are in a condition and willing to return. All of these regulations are for the benefit of sea-

men, and were designed to prevent their discharge in foreign ports, without their consent. Notwithstanding these regulations and prohibitions, seamen may be discharged at their own request, if granted in good faith at the time the request is made. Applying these principles to the present case, it is obvious that the prayer of the libel cannot be granted.

According to the testimony, as already stated, the libellant had been guilty of a gross outrage upon a lady who had taken passage in the vessel to the United States. His misconduct is confessed, and it would seem was publicly known to those belonging to the vessel. After what had occurred, it could hardly be expected that she would consent to remain on board unless the offender was discharged. To an unoffending female thus circumstanced his presence would be painful, and she might find it very inconvenient on board a merchant vessel to seclude herself at all times of the day from those parts of the vessel necessarily frequented by those in charge of the vessel. She was accompanied by her brother; and it would be unreasonable to hold that the master was obliged to allow his passengers to leave the ship, to refund their passage-money, in order to retain the libellant. Whatever loss or inconvenience he suffered, arising out of his discharge, was the direct consequence of his own misconduct towards the lady passenger, and was in no sense the result of any unjust or illegal decision of the master. Passengers are under obligation to conform to the reasonable regulations of the vessel, and to a certain extent owe obedience to the commands of the master, as the necessary consequence of the relation they bear to the ship during the voyage; and they are also entitled to respectful treatment from the master and other officers in charge of the vessel, and may well claim to be exempt from insult and personal violence from the crew. They do not contract merely for ship room and the right to personal existence, but for suitable food, comforts, and necessaries, and for protection against personal rudeness from all those in charge of the vessel, and every wanton interference with their persons. Chamberlain v. Chandler [Case No. 2,575].

In respect to female passengers, the contract proceeds yet further, and includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach. An offence toward an innocent and unoffending female, such as is described in the answer, and substantially admitted in the proofs, must be considered as one of great aggravation; and, in view of the embarrassments likely to ensue from such an outrage, when committed on board a merchant vessel, in a distant sea, especially in case the injured party refuse to remain on board, unless the offender was dismissed, might well be regarded as disqualifying the libellant for his situation, and as rendering him unfit to be retained in his capacity as steward. It occurred in the night-time, during the absence of the master, and, in view of all the circumstances disclosed in the testimony, afforded a just and legal ground for the discharge of the libellant.

Having come to this conclusion, the result is, that the decree of the district court must be affirmed with costs.

Case No. 10,263.

Ex parte NIGHTINGALE.

[1 N. Y. Leg. Obs. 8.]

District Court, S. D. New York. Sept. 4, 1842.

ASSIGNMENT FOR BENEFIT OF CREDITORS—INJUNCTION TO RESTRAIN ASSIGNEES FROM ACTING UNDER ASSIGNMENT.

1. An injunction will not be granted to restrain assignees of the estate and effects of the debtor against whom an adverse decree is sought to restrain them from acting under the assignment, although it is alleged that such assignment is fraudulent and void under the act of congress; it is only in cases of actual danger to the property of the bankrupt, and not against its possible waste or misapplication, that the court will interfere by injunction.

2. But the court will protect the assets of a bankrupt when his individual assignee is irresponsible, or where he is charged with wasting them.

In this case an application for an adverse decree in bankruptcy against Peter Booth had been made by John Nightingale, and it appeared that on or about the 31st day of May last, Booth, being in insolvent circumstances, had made an assignment of his estate and effects to one Henry I. Ennis and Duncan M'Ewing, and it was alleged that under such assignment certain creditors of said Booth had been preferred, and that such assignment was in other respects fraudulent and void under the act of congress establishing a uniform system of bankruptcy; it also appeared, that the petitioning creditor was apprehensive that the assignees between the time of filing the petition for a decree, and the time for showing cause, would proceed to sell the property and effects of Booth, and distribute the proceeds among the creditors preferred.

Mr. Fessenden this day moved for an injunction against the assignees of Booth, to restrain their acting under the assignment, upon an affidavit detailing the above circumstances.

BETTS, District Judge. This application cannot be sustained; the court will award an injunction to protect the assets of a bankrupt when his individual assignee is charged with wasting them, or it appearing that such assignee is wholly irresponsible; so where there are facts to show the probability of the assets being withdrawn or concealed when the decree of bankruptcy should be rendered; it does not however appear in this case that there is any danger of loss or misapplication

of the effects, and it is not the course of the court to allow an injunction, merely on the apprehension of a creditor that the property might be dissipated or put out of the general assignment. The court interferes with this high process only in the case of actual and imminent danger to the property of the bankrupt, and not as a mere preventive against its possible waste or misapplication. Injunction refused.

NIGHTINGALE v. ELLIOT. See Case No. 10,264.

Case No. 10,264.

NIGHTINGALE et al. v. OREGON CENT. RY. CO. et al.

[2 Sawy. 338; 17 Int. Rev. Rec. 61, 93; 5 Chi. Leg. News, 243; 4 Leg. Op. 622; 5 Leg. Gaz. 61.] [1]

Circuit Court, D. Oregon. Jan. 27, 1873.

ATTORNEY HAS EXCLUSIVE CONTROL OF SUIT—COUNSEL—AUTHORITY OF—PRINTED SIGNATURE.

1. The attorney of a party has the exclusive control of the conduct and management of a suit, and neither the party nor his agent or attorney in fact has authority to sign a stipulation for a continuance.

2. Counsel in a suit is not authorized to represent his client except in the argument or hearing before the court.

3. A printed name of counsel is not his signature.

This was a motion made by plaintiffs' counsel, E. D. Shattuck, with whom was W. H. Effinger, on December 13, 1872, to set aside an order theretofore made, continuing this cause until April 25, 1873, upon the ground that the stipulation therefor was signed on behalf of said plaintiffs [John Nightingale and others], without authority.

William H. Effinger, for plaintiffs.
Joseph N. Dolph, for defendants.

DEADY, District Judge. The following facts are proven:

I. That on May 26, 1871, the plaintiffs commenced this suit by David Logan, their solicitor, and E. D. Shattuck, their counsel; and that at the end of the complaint, which is in print, the names of J. B. Felton and W. H. Patterson are printed as "of counsel for complainant;" and that neither said Felton nor Patterson, were then, or since, attorneys or counsellors of this court; but were, on May 29, 1871, by order of this court, allowed to appear as counsel therein for plaintiffs in this suit.

II. That on November 30, 1872, while the cause was pending upon exceptions to the complaint for impertinence, a stipulation for a continuance until April 25, 1873, theretofore signed, in San Francisco, by said Felton and Patterson, as attorneys for plaintiffs, was filed by the attorney for defendants, upon which stipulation, and on motion of said defendants' attorney, the order for continuance was then and there granted, without notice to said Logan or Shattuck.

III. That prior to the commencement of the suit, it was agreed between plaintiff Elliott and said Felton, that the latter would furnish the sum of $20,000 to prosecute this suit, and should receive therefor 33⅓ per centum of whatever sum might be recovered therein; and that afterward, and soon after the commencement of this suit, said Elliott, at the special instance and request of said Felton, assigned to him, for the use of himself and said Patterson, 48-100 of the cause of suit, in consideration that F. and P. would furnish remainder of said $20,000, and give their professional service and attention in the conduct and maintenance of this suit; and that said F. and P. have not furnished the remainder of said $20,000, nor rendered any professional service in and about said suit, since the commencement thereof.

Upon this state of facts, the motion to set aside the order must be allowed. Neither Felton nor Patterson, being attorneys or counsellors of this court, had any authority to sign the stipulation. The order admitting them, as a matter of comity, to appear as counsel in the case, only authorized them to represent the plaintiff before the court in the argument or hearing of the same, and not in the written proceedings or out of court. Nor does the fact that their names are printed on the complaint as "of counsel for the complainant" affect the matter one way or the other. These printed names are not their signatures. Besides, not being counsellors of this court, they were not authorized to sign the complaint as counsel. Again, an attorney who appears only as counsel in a case, is not authorized to sign a stipulation for a continuance, even if he be an attorney and counsellor of the court in which the suit is pending. The conduct of a suit, except in a matter arising in the argument or hearing before the court, is exclusively under the control of the attorney.

Counsel for defendants seek to avoid the force of these conclusions, by maintaining that it appears from the facts that F. and P. are interested in the subject matter of the suit, and therefore are entitled to control it, and that in any event, having undertaken to carry on and prosecute this suit, they are the attorneys in fact or agents of the plaintiff for that purpose, and therefore had authority to sign the stipulation.

The parties on the record, or their attorneys, are the only ones which the court can recognize as having power to continue or discontinue the suit. Whatever interest F. and P. may have in the event of the suit, or the subject matter of it, as between them and the plaintiffs, so far as this motion and the conduct of the suit is concerned, they are strangers to the proceeding.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 5 Leg. Gaz. 61, contains only a partial report.]

Upon the second proposition counsel for plaintiffs insist that it appears from the evidence that F. and P. have abandoned their contract with the plaintiffs, and refused to perform the same, and therefore they are no longer, if ever, attorneys in fact or agents of the plaintiffs.

From the view I take of the matter it is not necessary to decide this question. Section 35 of the judiciary act (1 Stat. 92) provides that: "In all the courts of the United States the parties may plead and manage their own cases personally, or by the assistance of such counsel or attorneys at law, as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein."

When, in this court, a party does not choose to manage his cause personally, as permitted by this section, he can only do so by an attorney thereof. He cannot appoint an agent not an attorney of this court, and authorize such agent to represent him in the suit. But when a party makes his choice and selects an attorney of this court to conduct and manage his case, the attorney stands in his place. Until such attorney is changed or discharged, he has the exclusive control of the conduct and management of the suit. He cannot give a release or discharge the cause of action. But he has exclusive control of the remedy, and may continue or discontinue it. Gaillard v. Smart, 6 Cow. 385; Kellogg v. Gilbert, 10 Johns. 220. His client cannot control him in the due and orderly conduct of the suit. Anon., 1 Wend. 108.

Such being the legal effect of the plaintiffs' selecting Messrs. Logan and Shattuck to bring and manage this suit, and represent them therein before this court, it follows that Elliot could not authorize F. and P. to sign this stipulation for a continuance, or otherwise control the conduct thereof, because he no longer had power to do so himself. If a client cannot control his attorney in the conduct of a suit, he certainly cannot constitute or authorize an agent to do so.

It matters not, then, what the true relation is between the plaintiffs and F. and P.; they not being parties to this suit or attorneys therein, had no authority to sign the stipulation for a continuance. The order for continuance, based thereon, is set aside.

Case No. 10,265.

NIGHTINGALE v. SHELDON et al.

[5 Mason, 336.] [1]

Circuit Court, D. Rhode Island. June Term, 1829.

WILLS — CONSTRUCTION — DEVISE TO CHILDREN SUBJECT TO WIFE'S LIFE ESTATE.

1. The testator devised all his estate to his wife for life; if she died before his son J. arrived of age, then to his daughter A. until J. came of age; at that time the estate to be divided among his three children equally in fee, or to the survivors of them, if either should die leaving no issue. If all his children should die and leave no issue, and his wife should survive them, then to her in fee. *Held*, that the devise might be construed, (subject to the wife's life estate,) either as a devise to all the children in fee absolutely, on J.'s arrival of age, even though the wife was then living, and if they all died before that period without issue then to his wife in fee; or as a devise of the estate to the children in fee determinable on their dying in her lifetime without leaving issue, and in that event an executory devise over to her fee. But if neither construction could be adopted, then, as all the children died in the wife's lifetime, but two of them left issue who survived her, the estate in the event must be considered as intestate estate undisposed of by the will, inasmuch as the devise over to the wife could not take effect.

[2. Cited in Hull v. Holloway, 58 Conn. 215, 20 Atl. 447; and, in brief, in Morris v. Potter, 10 R. I. 61,—to the point that the real objects of the testator are to be accomplished so far as they can be consistently with the principles of law.]

Ejectment for certain land in Providence, R. I. The cause was submitted to the court upon a statement of facts, agreed by the parties, in substance as follows: Edward Spaulding, in July, 1785, made his will, and after providing for the payment of his just debts and funeral expenses, devised as follows: "The residue, &c., the real as well as personal interest, I give and bequeath unto my beloved wife, Audery Spaulding, for and during her natural life, to be improved for her benefit, and providing for my children, relying on her goodness and discretion in that particular, as she may think proper. In case my said wife A. S. should not live to see my youngest son, John Spaulding, arrive to the age of 21 years, in that case I give and bequeath the all and full of every part and parcel of such of my estate as may be left by my said wife unto my daughter, Amy Sheldon, to be by her improved, and as a home for my said son, John Spaulding, as an equivalent for my said son's bringing up, till he arrives to the age of 21 years; at which time my will is, that all my then estate, real as well as personal, shall be divided amongst my children, Amy, Edward, and John, equally, share and share alike, to them and their heirs for ever, or to the surviving children, in case of death to either of them leaving no issue. Further, should it so happen, that all my said children should die and leave no issue, and my wife survive them, then and in that particular my will and desire is, that the estate aforesaid be and remain hers, in fee simple to dispose of at her will and pleasure." The three children survived the testator. John arrived at 21 years of age, and died afterwards intestate and without issue in 1822, before the death of the wife of the testator. His daughter Amy and her brother Edward died leaving issue, after John arrived at 21 years of age, and before his death. Upon this state of facts, the principal question argued at the bar was, what estate John took under the will of his father, and at what time that estate was to vest. The plaintiff

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

[Elizabeth Nightingale] contended, that he took an estate in fee simple in remainder after the death of the wife of the testator, which vested in him, either at the death of the testator, or at farthest on his arrival at 21 years of age; and that the devise over had, in the event, wholly failed. The defendants [Edward S. Sheldon and others] contended, that the estate was not to vest until the death of the wife of the testator, and then was to vest in such of the children or their issue as should survive the wife; and that John having died in the lifetime of the wife without issue, he took nothing, and the whole vested in the issue of his brother and sister, who survived the wife.

Mr. Pratt and Thomas Burgess, for defendants.

The construction to be given to a will depends upon, and is governed by, the obvious intention of the testator, and this intention must be collected from the whole will taken together, ex visceribus testamenti. 4 Cruise, Dig. 172-174. And we contend, that, from the obvious intention of the testator, Edward Spaulding, collected from the whole of his will, the following points may be deduced, and are fully established. (1) That the will gives the estate in controversy to Audery Spaulding, wife of the testator, absolutely during the term of her natural life, for her use and for the benefit of the testator's family. (2) That if the said Audery Spaulding should die before John T. Spaulding arrived at the age of 21 years, then Amy Sheldon, daughter of the testator, was to take the same estate for the same purposes for which the widow, Audery Spaulding, held it, to wit, for the bringing up of John until he arrived to the age of 21 years, and in this event, to wit, the death of the widow before John arrived to the age of 21 years, the estate was to be divided at the time that John attained the age of 21 years. But this event, to wit, the death of the widow during the minority, or even the life of John, never happened. (3) That while the widow lived no division was to take place on John's arriving to the age of 21 years, nor was the fee in remainder in the estate to vest absolutely, at that particular time, in any persons in being, but the estate was to remain entire in the improvement of the widow until her death and that the persons, in whom the fee in remainder should absolutely vest, were to depend on who of the children or their issues should be alive at the decease of the widow; and (4) that if none of the children of the testator or their issue survived the widow, then she was to take the remainder in the estate in fee simple absolute, but that if any of the children or their issue did survive the widow, then they were to take the remainder in fee simple absolute, and that the person or persons capable of taking the remainder in fee simple absolute could not be determined until the decease of the widow, or until she survived all the children and their issue. These points, we say, are fully substantiated by the manifest intention of the testator collected from the will. And it appears by the agreed statement of facts in this case, that the widow, Audery Spaulding, survived all the children of the testator, and John died leaving no issue and that, at the widow's death, the defendants and the issue of Edward Spaulding, son of the testator, under whom the defendants claim part of the estate by purchase, were the only surviving issue of the children of the testator, and consequently, at that time, to wit, at the death of the widow, the remainder in fee in the estate in controversy, vested in them entire, as an absolute estate in fee simple.

Let us suppose, that John, under the will, as the plaintiff's counsel suggests, took a fee simple, subject to be defeated upon the happening of a future contingency. From the whole language in the will, what was this contingency which was to defeat his estate? It clearly was not, as the plaintiff's counsel supposes, the happening of the death of John before he arrived at the age of 21 years, for it is very apparent from the whole will, that the testator did not contemplate any alteration in the character of the estate so long as the widow and any of the children and their issue were living, and that John was not entitled even to a division of the estate when he arrived at the age of 21 years, unless the widow had died previous, but the widow being alive at the time John arrived to the age of 21 years, there was no more alteration in the character of the estate, at that time, under the will, than there was at any other period of John's life before or after that time. But the manifest contingency in this will, which was to defeat the estate of John, was the happening of his death in the lifetime of the widow, which contingency did happen, and thereby defeated the estate of John. The sound and well settled rule of law relative to the construction of wills, is, in the first place, to endeavour by a minute examination of all the provisions of the will, to ascertain, if possible, the true intention of the testator, that the same may be carried into effect; and, in the language of Mr. Cruise, "the intention of the testator must be collected from the whole will, so as to leave the mind quite satisfied about what the testator meant." It is true, however, that the construction, if consistent with the other parts of the will, ought, in the language of the same author, to be such, that the intent of the testator may be rendered consistent with the rules of law; but the same author further adds, "that the technical words are presumed to be used in the sense which the law has appropriated to them, unless the contrary appears; but when the intention of the testator is plain, it will be allowed to control the legal operation of the words, however technical." 4 Cruise, Dig. 171, 172.

The plaintiff's counsel suggests, that all the

devises over after the life estate of the widow are void, being limited upon contingencies, which not having happened, the devises over failed, and the remainder vested in the heirs at law by descent, by which it is presumed we are to understand, that the remainder over to the children, Amy, Edward, and John, was not to take effect, except upon the happening of this contingency, to wit, the death of Audrey Spaulding, the widow, before John arrived to the age of 21 years, and the argument of the plaintiff's counsel, if rightly understood, is, that the testator did not intend, and in fact did not by his will give, the remainder of his estate to his three children, Amy, Edward, and John, and to the survivors of them in case of death of either of them, leaving no issue, unless the widow should die before John arrived to the age of 21 years. In answer to this we contend, that the testator did not intend, that the remainder over to his children should depend upon a contingency which must have appeared altogether unimportant in his mind, to wit, the death of the widow before John arrived to the age of 21 years, but that the fair and obvious intention of the testator was to give the remainder over, at all events, to such of his children and their issue as should survive the widow, let her death happen when it might, but that in case she should die before John arrived to the age of 21 years, then in that case the estate was to be improved by Amy Sheldon for the bringing up of John until he arrived to the age of 21 years, and then to be divided among such of the children as survived the widow, and the issue of such of them as might be dead, share and share alike. And it is not only very natural, but also very evident from the will, that the testator had in view two several periods of time when he might wish to have the remainder in his estate divided among his children and their issue; the one was on the arrival of John at the age of 21 years, in case the widow should at that time be dead, the other was on the death of the widow at any time after John's arrival at the age of 21 years; and the testator clearly states the manner in which his estate was to be divided, in case the widow died before John arrived to the age of 21 years, for he says it "shall be divided amongst my children, Amy, Edward, and John equally, share and share alike, to them and to their heirs forever, or to the surviving children in case of death to either of them leaving no issue;" and in the same breath he further says, that, "should it so happen, that all my said children should die and leave no issue and my wife survive them, then in that particular my will and desire is, that the estate aforesaid be and remain hers in fee simple to dispose of at her will and pleasure," by which it is clearly to be inferred, that the testator intended, that, in case the widow did not survive all the children and their issue, at her death the estate should be divided in the same manner as he had directed in case a division should take place on John's arrival at the age of 21 years, and that the time when the remainder was absolutely to vest, so far as it related to the persons who were to take it, was altogether unimportant in the mind of the testator, and he having declared, in one instance, the persons who should take the remainder, to wit, his three children, or the surviving children, in case of the death of either of them leaving no issue, and then immediately proceeding to say, that, in case his wife should survive all his children and their issue, then the remainder should vest in her; the converse of the proposition is, and the clear intention of the testator was, that in case his wife did not survive all his children and their issue, that the remainder should absolutely vest in and be divided among his surviving children (to wit, the children that should survive his wife, and the issue of such of them as might be dead), share and share alike; the word surviving, as used in the will, is a relative term, and clearly has reference to those children who might survive the widow. The view which we have now taken in relation to the remainder over, is supported by analogy, in reference to other expressions and contingencies in the will; for let us suppose, that the widow had died before John arrived to the age of 21 years, and that Edward, one of the children, had also died before that time, leaving issue, and when John arrived to the age of 21 years, the estate must be divided. And now by the will among whom is it to be divided? We think it would not even be contended by the counsel for the plaintiff, but that, in a case like this, the estate would have been divided between John and Amy, and the issue of Edward, who was dead, and yet it will appear, by comparing the expressions in the will, that the testator, in the supposed case, did not give a share of the remainder to the issue of Edward, in case of a division when John arrived to the age of 21 years, with any more perspicuity than he gave the remainder to his children who should survive his wife, and to the issue of such as should be dead, in case she died after John arrived to the age of 21 years. For in the supposed case the testator orders his estate to be divided amongst his three children, Amy, Edward, and John, or the surviving children, in case of the death of either of them, leaving no issue; by which expression it is also apparent, that the testator intended, in case of a division, that the remainder should be divided among such of his children as survived the widow and the issue of such as were dead, share and share alike. But according to the construction contended for by the counsel for the plaintiff, it might with equal propriety be said, in the supposed case, that the contingency had never happened, to wit, the death of either of the children, leaving no issue; for although Edward is supposed to be dead, yet he has left issue, and therefore that the remainder over would be void, being limited upon a contingency which

had never happened, and consequently, in the supposed case, neither the issue of Edward nor the surviving children could have taken any estate by the will. But such a construction, we think, would be doing violence to the manifest intention of the testator.

In conclusion we contend, that it was the manifest intention of the testator, as collected from all the several provisions of his will, not to die intestate as to the remainder of his estate, but that his wife should have the improvement of his estate so long as she lived, and that the fee in remainder did not vest absolutely, but only conditionally, if at all, in any persons, so long as both the widow and any of the children of the testator or their issue were living, and that at the widow's death, the fee in remainder should vest absolutely in such of the children as survived her, and the issue of those that might be dead, share and share alike, but in case it should happen that the widow should survive all the children and their issue, that at the death of the longest liver of them, the remainder over should vest absolutely in her; but that so long as both the widow and any of the children of the testator or their issue were living, the remainder in fee could not vest absolutely, but, if at all, only conditionally, in any persons, and that during such time the person or persons in whom the remainder in fee would ultimately and absolutely vest, could not be known; and that the widow having survived all the children of the testator, and the defendants, and the children of Edward Spaulding, the son, under whom the defendants claim title to a part of the estate in controversy, by purchase, since the death of the widow, being the only issue alive at the death of the widow, the fee in remainder at her death vested absolutely in them, and now belongs to the defendants in fee simple.

Tillinghast & Searle, for plaintiff.

That the intention of the testator is to be regarded in the construction of his will, no doubt can be entertained, and that every part of the will may be examined and recurred to, to ascertain it, is equally true. But that intention is not to be sought in vague conjectures, but from the application of the sober and settled rules of the common law. By the will it is perfectly clear that Audery, the testator's widow, took nothing but a life estate. For as the contingency upon which the fee was devised to her, viz. her surviving all her children and their lawful issue, never happened, no estate beyond her life estate, was ever intended to vest or ever did vest in her. The widow having survived the minority of her son John, who also lived to be over twenty-one years of age, the special devise to the daughter, in the event of the mother's death during that minority, is out of the case, except as it may aid us in the construction of the will, as to the disposition of the fee. It is also very clear that the testator did not intend that his estate should pass into the actual possession of his children during the life of his widow. But this consideration can give us no aid in deciding the title to the fee. For although the right of possession may be in one person, yet the fee may be in another; the question of right of possession and right of property may be totally distinct and independent, arising from the same or a different grant, according to the circumstances of each particular case. The devise of a life estate to the mother, therefore, affords no rule by which the title to the fee simple is to be ascertained. And although it would not be determined until the close of the widow's life, in whom the fee would ultimately and absolutely vest, yet that affords no objection to an argument against the fee having previously vested in some person liable to be divested by the occurrence of some subsequent event. A fee may be limited upon a fee, and be good as an executory devise. In the case in question, therefore, the fee of the testator's estate may have vested, and, as we contend, did vest, in his children, subject to be defeated by matter subsequent, which, however, never happened, and therefore left an absolute fee simple in those children and their lawful heirs and assigns. The fee of this estate vested, by virtue of the will, in the children of the testator, immediately upon his death, or at farthest immediately upon John's arriving at the period of his majority. It is manifest beyond all doubt, that the testator intended to dispose of all his estate, and it is equally manifest that he intended his children should take it equally. By the will the testator devised all his estate to his wife during her life, and if she should die during John's minority, he devises his property to his daughter Amy, to enable her to educate John until he arrived at the age of twenty-one years. At which time (John's majority) his will is, that all his estate not then expended in the support &c. of the family, shall be divided amongst his three children, their heirs, &c. equally, or the survivors, if any be dead without issue. The remotest period after the testator's death, at which the fee was to vest in his devisees, was John's arrival at full age. The expression in the will, at which time, is not confined to the sentence, or either branch of the sentence, next preceding it, but extends to, and rides over, the whole clause, and definitely fixes the period of vesting. And this is consistent, also, with the life estate of the widow. The fee could vest in the children, subject to her life estate, and the word divided is satisfied with this construction.

It is contended, on the other side, however, that John's title depended on his surviving his mother, and as he died first, he never had any interest in the estate. How that position can be maintained is not easy to be

conceived. By the will it is demonstrable, that she took nothing which was given to John, from the mere fact of her having survived him. The devise over to her was upon the sole condition, that she survived all the testator's children, and all their lawful issues. If all the testator's children and all their children except one had died, living the mother, she would have taken nothing. The devise is not to be taken distributively; she does not take the share of one dying without issue in her life time, but all must die, and the issue of all must die, before the devise over to her takes effect. The whole family of children and grand-children must be extinct, before the title of the survivors is extinct. The widow, not having survived the whole family, took no fee in the estate, and whatever estate John took prior to his death, was not lost or impaired by his mother's surviving him. It is further contended on the other side, that by the will the estate is devised to the testator's children, and their issue, who survived the mother. But there is not a single expression in the will indicating such an intention, nor a single rule of law which supports such an interpretation. The devise to the widow is on condition that she survives all her children and their issue. And the legal inference, say the defendants' counsel, is, that all the estate is devised to her survivors; a deduction both illegal and illogical, and, as we contend, refuted by the whole tenor of the will, and every rule of construction known to the law. It by no means follows, that because the fee was given to the widow upon a contingency that never happened, any of the children therefore are to be disinherited. The fee of the estate in remainder was undoubtedly in all the children during the mother's life. Has it been divested? Has the testator declared, that if John died, living the mother, his share should go to the surviving brother and sister? Is not his intention most manifest, that his children should have his estate equally, after John's attaining his majority? Is there an intimation that that intention is changed, or that the title should be changed, except in one event only, viz. the mother's surviving all her children and their issue? Why should John be disinherited after he reached the years of manhood? The estate is not devised in tail to the grandchildren of the testator, but in fee to his children. Edward and Amy, who had children, took a fee, and could dispose of that fee. Why should not John, after his majority? There might be some reason for limiting his title to his arrival at full age, but then the reason ceases, and all subsequent limitations are odious to the law, and are not to be sustained by loose conjectures of the testator's intentions. Suppose the testator had by his will merely devised a life estate to his wife, and provided that if she survived all her children and their issue, she should take the estate in fee, and said nothing more; can it be pretended that the surviving children only would have taken? Would not the fee have vested equally in all the children, immediately on the testator's death, to be divested from all or any of them, by the mother's surviving them all and their issue? Would not the law pronounce, that all the children took and had a right to hold against all the world, until their mother succeeded at once to all their rights by virtue of the will? And yet the supposed case is far less cogent in favor of the children, than the case in question; for in that case, the intention that the children should take it is by inference only, and in this case the intention of the testator is manifest, that his then children should take in fee the remainder of his estate equally.

The argument of the defendants' counsel supposes, that if Edward had died, leaving issue, that his issue would have taken under this devise to the children, though not expressly named. And hence he infers, that the estate goes to the children and their issue, who survived the mother. That Edward's issue would have taken, let him die when he would, is to us indubitable. The devise to Edward, Amy, and John, of the testator's estate, is to them, their heirs and assigns for ever, and no doubt vested a remainder in fee in them, subject to the sole contingencies of an entire failure of all the children and their issue, prior to the death of the mother, and to Edward's dying without issue during the minority of John. Subject to these events, Edward could dispose of his share of the estate by deed or will, and his children would inherit it, on his death. And the subsequent part of the same devise, in which he gives the share of the child dying without issue, confirms this construction. That clause in the devise, while it shows that the issue of Edward would take, does not enlarge, but restrains the devise from an absolute vested remainder, subject only to the mother's survivorship, to a further contingency, of his dying without issue, prior to John's majority. If, therefore, Edward had died before or after John's majority, and had left issue, he would have died seised of a vested remainder, defeasible only by the mother's surviving all her children and their issue; and Edward's issue would have taken their father's share, as his heirs, unless he had otherwise disposed of it, and would have holden it, subject only to their grandmother's surviving them, their uncle, aunt, and their issue. But in the contingent devise of the fee to the widow, we look in vain for a provision of this kind, or for any language which will sustain the construction of the defendants' counsel. By that devise, it is simply provided, that the mother shall take the fee if she survives all her children and their issue, but it does not provide that the children who survive her alone, and the is-

sue of those deceased, shall take. And no such provision was necessary, the remainder in fee having been previously disposed of. And yet if such had been the testator's intention, we should have found some expression indicative of that intention. If we are correct in our exposition of this will, John had a legal interest in the mortgaged premises, and the plaintiff's title is valid. If we are incorrect in our exposition, then we hold it to be perfectly clear, that nothing beyond a life estate to the widow was legally devised. The contingent devise of the fee to her never took effect, and it has, we contend, been fully shown, that there is no devise to the survivors of the widow, as insisted on by the other side. Unless, therefore, the children of the testator took a vested remainder, as before stated, there is no disposition of the fee, and as to that fee the devisor died intestate. In that case it is perfectly clear, that the estate descended equally to his three children, and that John took one third, which is covered by the mortgage.

Upon the whole it is submitted, that John, at the time of the mortgage, had a vested legal interest in the mortgaged premises, which was not divested by any subsequent event, and that the plaintiff is entitled to the judgment of the court, for possession of the same.

STORY, Circuit Justice. In the construction of wills the cardinal rule is, to follow the intention of the testator, as it is to be collected from the whole provisions of the particular will. If the testator uses words, which have received a technical sense, that sense is presumed to be his own, unless a different meaning is fairly deducible from the context. In that event, the technical sense will bend to the apparent intention. If there are two intentions on the face of the will, one of which is general and consistent with the rules of law; and another special and inconsistent with the rules of law, the latter yields to the former, and if necessary to give effect to the will, may be rejected altogether. The struggle in all such cases is to accomplish the real objects of the testator, so far as they can be accomplished, consistently with the principles of law; but in no case to exceed his intention fairly deducible from the very words of the will.

The interpretation of the present will is certainly not unattended with difficulty; though I confess, that until I had examined the ingenious arguments urged at the bar, I had not supposed, that there was so much matter for controversy. The testator manifestly intended to dispose of his whole estate, real and personal. After providing for the payment of his debts and funeral charges, he bequeaths the residue to his wife, during her life, "to be improved for her benefit, and providing for his children, relying," as he says, "on her goodness and discretion in that particular, as she may think proper." In case his wife should not live to see his youngest son, John Spaulding, arrive to the age of 21 years, he bequeathed the same estate to his daughter Amy, to be by her improved and as a home for his son John, as an equivalent for his said son's bringing up, till he arrives to the age of 21 years. Then follows this clause: "At which time my will is, that all my then estate, real as well as personal, shall be divided amongst all my children, Amy, Edward, and John, equally, share and share alike, to them and their heirs for ever, or to the surviving children, in case of death to either of them, leaving no issue." Now it is clear, that the estate to his daughter, Amy, was to take effect only upon the contingency, that his wife died during John's minority. And the question first meeting us in the cause is, whether the remainder of the clause is dependent upon that event, or whether it applies to the whole of the preceding provisions of the will, and rides over all of them. In other words, is the estate to be divided when John arrives of age, although the wife is then living; or is it to be divided only in case of her death before that period? The former is the construction contended for by the plaintiff; the latter is contended for by the defendants. If the defendants' construction is adopted, then if the will had stopped here, there would plainly be no devise whatsoever of the remainder after the wife's death, in the events which have happened. We shall presently see, whether the devise over to her helps the defect. But supposing this to be the only clause, which contains any devise to the children, the latter will take nothing under the will, unless this clause is construed to apply to a division of the whole estate (subject to the wife's life estate) on John's arriving at 21 years of age. One doubt arising upon this construction is, that the clause applies as well to personal as real estate; and it may be asked, how could the personal estate be divided during the wife's life, without interfering with her right of enjoyment? Perhaps this objection is not in its own nature insuperable. Testators do not ordinarily distinguish between personal and real estate, and generally suppose them susceptible of the same modifications as to enjoyment and right. It is farther objected, that the clause is found in immediate connexion with a provision for the daughter, Amy, during John's minority, and naturally flows from that. But that again is not decisive; for the testator may still have contemplated the same event (i. e. John's arrival at age) as the period, at which his devises to his children should vest absolutely in them. It is asked, on the other side, and with great force, why the testator should not be presumed to intend a present vested interest in remainder in his children when they were all of age and capable of making a suitable division for their benefit, rather than to postpone all their

interest upon the contingency of their surviving his wife, and by such postponement lead to a preference of unborn issues over his own children? There is much weight in this suggestion. And it acquires additional force, if upon any other construction, the children are, by the terms of the will, left unprovided for, in case the wife should survive John's coming of age. It would be strange, that the testator should so solicitously provide for a division of his estate among his children, if his wife died during John's minority, and yet should leave them unprovided for, if she survived that period, notwithstanding her estate was limited to her own life. To argue such an intention, would be to suppose great want of forethought, or great capriciousness of purpose in the testator.

Let us see, then, whether the subsequent words of the will afford any light to aid us in the proper construction. They are as follows: "Further, should it so happen that all my said children should die, and leave no issue, and my wife survive them, then and in that particular my will and desire is, that the estate aforesaid be and remain hers in fee simple, to dispose of at her will and pleasure." The event never happened. She did survive all the children; but she did not survive their issue. So that the devise over never took effect to enlarge her life estate into a fee. Either, therefore, the remainder is intestate property, divisible among the heirs, and of course John took one third; or the will has operated as an effectual devise of it to the children or their issue. Now this clause does not purport on its face to make any devise whatsoever to the children. It is simply limited to a devise over to the wife, on their dying without leaving issue, in her lifetime. It presupposes that the children had taken the estate by some antecedent provision. If we suppose, that the prior clause, for the division of the estate on John's arriving at 21, was intended to apply generally, there would be no difficulty in reconciling this devise over with such an intention in either of two ways. In the first place, the devise over might be construed to be limited to the case of all the children dying without leaving issue, before John's arrival at age, in which case if any of the children or their issue should survive John's arrival at age, they would take an absolute fee. Or, in the second place, it might be construed to extend to the case of all the children dying without issue, at any time during the life of the wife, and then it would be an executory devise over, after a conditional fee in the children, determinable on that event; and in this view, it would have become absolute by the non-occurrence of the fact, which was to determine it. The clause itself is susceptible of either construction; and so construed, there is no interference with any express intention of the testator. But the defendants contend, (and it is vital to their success in the cause, that they should contend,) that the will completely disposed of the whole estate, and that it contains a devise to such of the children only, or their issue, as should survive the wife, in fee, and that such survivorship is indispensable to their title, and forms the contingency, on which it is to vest. Now, how is this construction made out? There is no clause in the will, expressly making such a provision. The whole argument of the defendant's counsel rests on the ground, that the clause respecting the division of the estate is inapplicable to it. It must then be deduced, if at all, by implication from the terms of the devise over to the wife, in the event of her surviving the children and their issue. But the terms of that devise are just as well satisfied by supposing the testator to have given all his children a vested fee, determinable upon her surviving them and their issue, as by supposing a contingent fee to them, to vest upon the happening of the same event. If, therefore, the case stands equal, how can the court raise any such estate by implication, unless upon the most arbitrary conjecture? But does it stand equal? In the first place, the law generally leans against creating contingent estates, when the words of the will may be satisfied by considering them vested. In the next place, in order to arrive at this conclusion, we must suppose an intention in the testator to deprive his immediate offspring of all present fixed interest in his estate, (however important such an interest might be to their comfort,) when it is plain from other parts of his will, that they were all objects of his affection and bounty. We must suppose, that he deliberately intended to give them a mere contingent interest, and for this purpose to postpone them, as the event might be, and indeed was, in favor of unborn issue, towards whom he could not be presumed to feel any peculiar affection. Such an intention is neither natural nor wise; and a court must go very far in making presumptions, to justify itself in deducing it from such general words. I confess myself not bold enough to undertake it. The prior devise of a life estate to the wife, certainly affords no argument to support it; for that merely points to the order, in which the property is to be enjoyed in possession, and not to the period when it shall vest in right. Let us suppose for a moment the intermediate devise (as to the division of the estate on John's arrival at 21,) struck out of the will, as a view most favorable to the defendants; how then would the case stand? There would be a devise to the wife for life, and a devise over to her in fee, in case she should survive all the children and their issue. That is the very form, which the words of the will must assume, as the defendants' argument connects them. Now, we see at once, that is no devise whatsoever in terms to the children. And yet,

no one can read the words without feeling, that they are the primary objects of his bounty, after the wife's life estate is spent. If after the devise to his wife for life, the testator had added the words, "and after her death the remainder to my three children and their heirs," and then the devise over had followed, could there be a legal doubt, that the court, upon acknowledged and settled principles, must have construed the remainder immediately to have vested in the children upon the testator's death, subject to be defeated by the executory devise over taking effect? I presume not. If the court were driven to give a construction to the will upon the two clauses above-mentioned, drawn into such connexion, and to create an estate by implication in the children, I confess I know not what words more appropriate, or more exact to express such implication, could be used. But it would be sufficient for the present case to say, that the construction, which the defendants wish the court to give to the words of the will, is not in its own nature more probable, or more consistent with any ascertained intention of the testator, than that before suggested.

If it were necessary to decide the case upon the very form of the provisions in the will. my present judgment is, that one of two constructions ought to be adopted. 1st. That the clause as to the division of the estate, on John's arrival at 21, should be construed to apply as well to the case of the wife being then alive, as of her being then dead; and in this view the devise over ought to be restrained to all the children's dying during John's minority, without leaving issue. Or, 2dly, putting that clause aside, that the children should be deemed to take a vested estate in fee in remainder after the wife's life estate, with an executory devise over to the wife, if she survived them and their issue. Upon either construction the plaintiff would be entitled to recover. But if these constructions are to be rejected, as not fully supported by any reasonable implication upon the terms of the will, I am most clearly of opinion, that the construction set up by the defendants is indefensible in point of law, and rests upon a far more unsatisfactory and infirm foundation. The consequence, then, must be, from the very doubt of the testator's intention, and from the omission to provide for the case, which has happened, that the estate must be deemed intestate; and then the plaintiff is entitled to recover the one third, which was John's distributable share.

In either view my opinion is, that upon the facts agreed, judgment ought to be entered for the plaintiff. The district judge concurs in this opinion, and therefore judgment must be entered for the plaintiff for one third of the demanded premises.

NIHOLS (UNITED STATES v.). See Case No. 15,880.

NILES (ROSE v.). See Case No. 12,050.

Case No. 10,266.

NIMICK et al. v. MUTUAL LIFE INS. CO.

[10 Am. Law Reg. (N. S.) 101; 3 Brewst. 502; 18 Pittsb. Leg. J. 164; 3 Pittsb. Rep. 293; 1 Bigelow, Ins. Rep. 689.]

Circuit Court, W. D. Pennsylvania. Jan. 11, 1871.

LIFE INSURANCE—SUICIDE OF INSURED—INSANITY.

[1. Insanity being an exceptional condition of mind, the legal presumption is that every one is of sound mind until the contrary is proved by sufficient affirmative evidence.

[2. Under a policy conditioned to be void in case the assured should "die by his own hand," there can be no recovery in case of suicide, if the assured, at the time of committing the act which resulted in death, had sufficient powers of mind and reason to understand the physical nature and consequences of such act, irrespective of the question whether he was capable of understanding its moral nature and quality. Following Dean v. American Mut. Life Ins. Co., 4 Allen, 98.]

[Cited in brief in Mutual Life Ins. Co. v. Terry, 15 Wall. (82 U. S.) 586.]

[Cited in Van Zandt v. Mutual Benefit Life Ins. Co., 55 N. Y. 177.]

This was an action upon a policy of life insurance [by Alexander Nimick and others against the Mutual Life Insurance Company.]

John Barton, J. H. Bailey, and W. C. Chalfant, for plaintiff, cited Breasted v. Farmers' Loan & Trust Co., 4 Hill, 73, 8 N. Y. 299; Estabrook v. Union Mut. Life Ins. Co., 54 Me. 224; St. Louis Mut. Life Ins. Co. v. Graves [6 Bush, 268], Ct. App. Ky.; and 1 Phil. Ins. §§ 896, 1162.

Geo. Shiras, Jr., J. M. Stoner, and Mr. Patterson, for defendants, cited Borradaile v. Hunter, 5 Man. & G. 639; Clift v. Schwabe, 3 C. B. 437; Dean v. American Mut. Life Ins. Co., 4 Allen, 96.

McKENNAN, Circuit Judge (charging jury). This suit is brought by the assignees of H. C. Benham to recover from the Mutual Benefit Life Insurance Company the sum of $5000, which it agreed to pay at the death of Benham, upon certain conditions, set forth in the policy of insurance on which the suit is founded. The defendants, by their plea, admit all the essential facts alleged in the declaration, and they are, therefore to be assumed as fully proved, and the plaintiff's right primarily to recover as established. But this admission is covered with an averment that the assured "died by his own hand." Upon this ground the plaintiff's recovery is resisted. This allegation is denied by the plaintiffs, and they further reply that Benham, at the time of his death, was of unsound mind. Evidence has been produced on both sides touching the manner of Benham's death, and his mental condition at the time. Of the sufficiency of this you are to judge, under the instructions presently to be given. Upon the party who affirms an essential fact devolves the burden of proving it. It is incumbent on the defendants, then, to

convince you that the assured was the wilful destroyer of his own life. On the proof of this the defence must stand or fall. So, if this fact is satisfactorily shown, it is the duty of plaintiffs to make out the allegation that the assured was insane. Insanity is an exceptional condition of the mind, and the legal presumption, therefore, is that every one is of sound mind until the contrary is proved by sufficient affirmative evidence.

You will then inquire, in the first place, as to the manner in which the assured came to his death. Did he take his own life, or was it taken by others? Was his death voluntary or accidental? If you find that it resulted from his own act you will then consider the state of his mind, as it affected the exercise of his will, and a comprehension of the physical consequences of the act, aside from its moral character. I do not deem it at all pertinent to the practical solution of the question to invite a discriminating scrutiny of the opinions of the excellent professional gentlemen who have differed so widely in judgment upon the same statement of facts as to the sanity of the assured. It would furnish you no assistance in reaching a conclusion within the range which the law prescribes as the limit of your inquiry. How far it is necessary or proper for you to go in this direction, I proceed to state more fully, in answer to the points submitted by the counsel on both sides. The provision in the policy is in these words: "Or in case he shall die by his own hand * * * this policy shall be void, null, and of no effect." Literally interpreted, these words import death under all circumstances caused by the act of the assured, whether intentional or accidental. Some relaxation of their strict sense, however, is required by the nature of the contract, to effectuate the intention and object of the parties, but no qualification of them, not necessary to this end, is warrantable. They are intended to protect the insurer against the consequence of the physical act of the assured. They refer distinctly to the physical agency by which death may be caused; only by implication, quite speculative, to the moral sensibility of the agent. Their sense, then, is entirely satisfied by expounding them as describing an act of the assured resulting in his death, as an intended consequence of it, irrespective of his understanding of its moral nature.

Adopting the language of Erskine, J., in Borradaile v. Hunter, 5 Man. & G. 639, "It seems to me that the only qualification that a liberal interpretation of the words, with reference to the nature of the contract, requires, is that the act of self-destruction should be the wilful act of a man having, at the time, sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having, at the time, a purpose and intention to cause his own death by that act; and that the question whether, at the time, he was capable of understanding and appreciating the moral nature and quality of his purpose is not relevant to the inquiry further than as it might illustrate the extent of his capacity to understand the physical character of the act itself;" and also the words of Bigelow, C. J., delivering the unanimous judgment of the supreme court of Massachusetts in Dean v. American Mut. Life Ins. Co., 4 Allen 98: "Applying, then, the first and leading rule by which the construction of a contract is regulated and governed, we are to inquire what is a reasonable interpretation of this clause, according to the interest of the parties. It certainly is very difficult to maintain the proposition that, where parties reduce their contract to writing, and put their stipulations into clear and unambiguous language, they intended to agree to anything different from that which is plainly expressed by the terms used. It is, however, to be assumed that every part of a contract is to be construed with reference to the subject-matter to which it relates, and with such limitations and qualifications of general words and phrases as properly arise and grow out of the nature of the agreement in which they are found. Giving full force and effect to this rule of interpretation, we are unable to see that there is anything unreasonable or inconsistent with the general purpose which the parties had in view in making and accepting the policy, in a clause which excepts from the risks assumed thereby, the death of the assured by his own hand, irrespective of the condition of his mind as affecting his moral and legal responsibility at the time the act of self-destruction was consummated. Every insurer, in assuming a risk, imposes certain restrictions and conditions upon his liability. Nothing is more common than the insertion in policies of insurance of exceptions by which certain kinds or classes of hazards are taken out of the general risk which the insurer is willing to incur. Especially is this true in regard to losses which may arise or grow out of an act of the party insured. Such exceptions are founded on the reasonable assumption that the hazard is increased when the insurance extends to the consequences which may flow from the acts of the person who is to receive a benefit to himself or confer one on others by the happening of a loss within the terms of the policy. Where a party secures a policy on his life, payable to his wife or children, he contemplates that, in the event of his death, the sum insured will inure directly to their benefit. So far as a desire to provide, in that contingency, for the welfare and comfort of those dependent upon him can operate on his mind, he is open to the temptation of a motive to accelerate a claim for a loss under the policy by an act of self-destruction. Against the increase of the risk arising from such a cause, it is one of the objects of the proviso in question to protect the insurers. Although the assured can derive no pecuniary

advantage to himself by hastening his own death, he may have a motive to take his own life, and thus to create a claim under the policy in order to confer a benefit on those who, in the event of his death, will be entitled to receive the sum insured on his life. Unless, then, we can say that such a motive cannot act on a mind diseased, we cannot restrict the words of proviso so as to except from the risk covered by the policy only the case of criminal suicide, where the assured was in a condition to be held legally and morally responsible for its acts. It certainly would be contrary to experience to affirm that an insane person cannot be influenced and governed in his actions by the ordinary motives which operate on the human mind. Doubtless there may be cases of delirium or having madness where the body acts only from frenzy or blind impulse, as there are cases of idiocy or the decay of mental power, in which it acts only from the promptings of the lowest animal instincts. But in the great majority of cases where reason has lost its legitimate control, and the power of exercising a sound and healthy volition is lost, the mind still retains sufficient power to supply motives and exert a direct and essential control over their actions. In such cases the effect of the disease often is to give undue prominence to surrounding circumstances and events, and, by exaggerating their immediate effects or future consequences, to furnish incitement to acts of violence and folly. A person may be insane, entirely incapable of distinguishing between right and wrong, and without any just sense of moral responsibility, and yet retain sufficient powers of mind and reason to act with premeditation, to understand and contemplate the nature and consequence of his own conduct, and to intend the results which his acts are calculated to produce. Insanity does not necessarily operate to deprive its subjects of their hopes and fears, or the other mental emotions which agitate and influence the minds of persons in the full possession of their faculties. On the contrary, its effect often is to stimulate certain powers to extraordinary and unhealthy action, and thus to overwhelm and destroy the due influence and control of the reason and judgment. Take an illustration: A man may labor under the insane delusion that he is coming to want, and that those who look to him for support will be subjected to the ills of extreme poverty. The natural effect of this species of insanity is to create great mental depression, under the influence of which the sufferer, with a view to avoid the evils and distress which he imagines to be impending over himself and those dependent upon him for support, is impelled to destroy his own life. In such a case suicide is the wilful and voluntary act of a person who understands its nature, and intends by it to accomplish the result of self-destruction. He may have acted from an insane impulse which prevented him from appreciating the moral consequences of suicide; but nevertheless may have fully comprehended the physical effect of the means which he used to take his own life, and the consequences which might ensue to others from the suicidal act. It is against risks of this nature—the destruction of life by the voluntary and intentional act of the party assured—that the exception in the proviso is intended to protect the insurers. The moral responsibility for the act does not affect the nature of the hazard. The object is to guard against loss arising from a particular mode of death. The causa causans, the motive or influence which guided or controlled the will of the party in committing the act, are immaterial as affecting the risk which the insurers intended to except from the policy. This view is entirely consistent with the nature of the contract. It is the ordinary case of an exception of a risk which would otherwise fall within the general terms of the policy. These comprehended death by disease, either of the body or brain, from whatever cause arising. The proviso exempts the insurers from liability when life is destroyed by the act of the party insured, although it may be distinctly traced as the result of a diseased mind. It may well be that insurers would be willing to assume the risk of the results flowing from all diseases of the body, producing death by the operation of physical causes, and yet deem it expedient to avoid the hazards of mental disorder, in its effects upon the will of the assured, whether it originated in bodily disease or arose from external circumstances, or was produced by a want of moral and religious principle."

I have appropriated so much of these opinions because they could not be abridged without impairing the completeness of the argument presented by them with so much force and clearness. They declare what is now, upon the fullest discussion and consideration, and after repeated decisions, the settled law of England, and of one of the most respectable judicial tribunals in the United States. I am not unmindful that there is some diversity of adjudication in reference to this question; but, in my judgment, the weight of authority, as well as of reason and argument, is decidedly in favor of the construction adopted. We must not forget that we are dealing with a contract, reduced to writing, and founded upon the assent of both parties to it. It is our imperative duty, then, to expound and enforce it as the parties themselves have made and declared it to be, not as we might think it ought to have been made. If you are not satisfied, by the evidence, that Horace C. Benham came to his death by his own hand, you will find for the plaintiffs the amount claimed by them in this suit. If, however, you believe from the evidence that he committed self-destruction, that he intended to destroy his life, and comprehended the physical nature and consequences

of his act, the plaintiffs are not entitled to recover, and your verdict should be for the defendant.

The jury found a verdict for plaintiffs for $5,440.

NIMMO (BELL v.). See Case No. 1,258.

NIMMON (BELL v.). See Case No. 1,259.

Case No. 10,267.

The NIMROD.

[1 Ware (9) 1.][1]

District Court, D. Maine. Sept. Term, 1822.

SEAMEN—JETTISON OF CARGO WITHOUT AUTHORITY—DISCHARGE IN FOREIGN PORT—JUSTIFICATION—WAGES—RIGHT TO BE CURED—MEDICINE CHEST.

1. The crew of a vessel are not authorized to make a jettison of any part of the cargo, in a case of distress, without the order of the master.

[Cited in Jay v. Almy, Case No. 7,236.]

2. If the master alleges, as a justification for dismissing a man in a foreign country, that he was a dangerous man, he must show that the danger of bringing him back would be such as might reasonably affect the mind of a man of ordinary firmness.

[Cited in Jay v. Almy, Case No. 7,236; Jordan v. Williams, Id. 7,528; Tingle, v. Tucker, Id. 14,057; Worth v. The Lioness No. 2, 3 Fed. 925.]

3. If a seaman is discharged abroad, without sufficient cause, he will be entitled to wages until the termination of his voyage.

[Cited in Jay v. Almy, Case No. 7,236; The Paul Revere, 10 Fed. 158.]

4. If the master punishes the misconduct of a seaman, by imprisonment, he cannot deduct from his wages the prison expenses.

5. A seaman falling sick during the voyage, is, by the general maritime law, entitled to be cured at the expense of the vessel.

[Cited in The Ben Flint, Case No. 1,299; Longstreet v. The R. R. Springer, 4 Fed. 672.]

6. The act of congress of July 20, 1790 [1 Stat. 134], exempts the vessel from the charges for medical advice and attendance, provided there is a medicine chest on board, with suitable medicines and directions for using them. But before the owner can claim the exemption, he must prove that such a medicine chest was provided.

This was a suit for mariner's wages. The respondent, in his answer, relied upon a defensive allegation, asserting that the wages of the libellant were forfeited by misconduct on his part, and also claimed to deduct from his wages certain hospital and prison expenses, incurred during the voyage.

C. S. Daveis, for libellant.

N. Kinsman, for respondent.

WARE, District Judge. The libellant shipped, in this case, on board the Nimrod, at Portland, March 1, 1822, for a voyage to Guadaloupe, or one or more ports in the West Indies, and back to her port of discharge in the United States, and thence to Portland, for wages at the rate of thirteen dollars a month. Soon after the Nimrod left Portland, she sprang aleak, and continued leaking more or less until her arrival off Bermuda. The wind being ahead, so that she could not make a harbor there, as the master [Alden] intended, she bore away for the West Indies. A day or two after this, the weather having become boisterous, and the leak increasing, the master called a council of the crew, and it was determined, for the common safety, to throw over a part of the deck-load. The master directed the crew to save of the deck-load a house frame and some hoop poles. The jettison was made according to the master's direction, and a small leak was found and stopped. Thus far every thing appears to have been done regularly, and to the master's satisfaction. But the principal leak was not discovered, and another consultation was held to determine what further should be done, at which it was resolved to throw over the rest of the deck-load. It is not quite certain whether the master was, or was not, present at this consultation. One witness says that he was, and assented to the determination of the crew; another says that he was not; but all the witnesses agree that about this time he went below, and continued below the whole or nearly the whole time that the crew were employed in throwing over the rest of the deck-load. When he returned on deck, he appeared to be much dissatisfied with what had been done; and from the whole testimony, though in part contradictory, and otherwise not very clear, it seems probable that at the time of the second consultation he was below, or at any rate, that he did not voluntarily consent to the sacrifice of the residue of the deck-load. After the second jettison the principal leak was found and stopped, and the brig arrived in safety at Point Petre. There the crew signed a protest against the vessel as unseaworthy. A survey was called, and she was decided to be seaworthy, with repairs.

The misconduct of Jane, in connection with the rest of the crew, in the business of the second jettison, as well as in the protest, are relied upon as working a forfeiture of all claim for wages. I can see no ground for inflicting a forfeiture of wages, on account of the protest. If seamen wantonly and maliciously make a protest against a vessel and this occasions expense to the owner, he may be entitled to indemnify himself by making a deduction from their wages. But I know of no authority for visiting such an act by an absolute forfeiture of wages, by way of penalty, without reference to the amount of damages it may have occasioned the owner. In the present case, however, it does not appear that the protest was malicious or wanton on the part of the seamen. It is certain that the vessel leaked

[1] [Reported by Hon. Ashur Ware, District Judge.]

badly on the outward passage. Part of the cargo, on account of the bad state of the vessel, and tempestuous weather, was, on the admission of the master, necessarily sacrificed for the common safety, and it cannot be deemed a very unreasonable act on the part of the seamen to insist that the vessel should be examined, before they trusted their lives in it in the return voyage. The survey also proves that repairs were necessary to render her seaworthy. The protest, therefore, so far from furnishing grounds for inflicting a forfeiture, will not, in my opinion, justify a deduction from the wages of the crew. The other charge is of a more grave character, and deserves a more careful examination. In times of peril, the seamen are bound to exert themselves to the utmost of their strength to save the ship and cargo, and they cannot excuse themselves from this obligation because the ship proves, in the course of the voyage, to be unseaworthy. It is, indeed, the duty of the owners to provide a ship that is fit to encounter the perils of the voyage, and if it discovered before sailing that she is not so, the seamen will be justified in refusing to go in her. But it is not unusual for vessels apparently staunch and strong to prove otherwise, after getting to sea, and being tried by rough weather, from some defect which may have escaped notice, without imputing any culpable neglect to the owners. In such a case, the seamen will not be heard in justifying themselves for the sacrifice of any part of the cargo, except in a case of extreme and overruling necessity, by saying that it is the owner's fault, whose duty it was to see that the vessel was tight, staunch, and strong, and fit to encounter the perils of the voyage. They are bound, in such cases, to use their utmost exertions to save the cargo, as well as the ship, and bring them safely into port. And it is in these cases of danger, that a prompt, ready, and cheerful obedience to the orders of the master, is peculiarly a duty on their part.

Now it is charged that at this time the crew were disobedient and mutinous, and that the master was compelled, by a regard for his personal safety, to give up, in some measure, the command of the ship to the mate and crew; that it was in consequence of this disorderly conduct approaching to mutiny, that a part of the deck-load was lost, which might have been saved if the crew had been obedient and done their duty faithfully. If this charge were sustained by the evidence, and it were shown that Jane was an active party in this mutinous conduct, it might be a just cause for inflicting the penalty of a forfeiture of all wages antecedently earned The difficulty of the respondent's case is, that the evidence does not support the statement, in the strong terms in which it is made. In point of fact, no act of disobedience is proved, nor any acts on the part of the crew from which it can be inferred that any exercise of authority on the part of the master would be attended with personal danger, or that if he had remained on deck he might not have retained the entire control and command of his ship, and have saved a part of his deck-load, provided the condition of the vessel and the state of the weather had been such as to render it practicable. The fact of his leaving the deck at that critical time, furnishes an apology for some irregularity on the part of the crew. Indeed, for the libellant, the broad ground is assumed that the crew is authorized, without the consent of the master, to thow over a deck-load, if, in their judgment, the safety of the vessel requires it. I cannot assent to this doctrine in the unqualified terms in which it has been urged at the bar. The only authority relied upon in support of it is Jac. Sea Laws, bk. 4, p. 345, c. 2. He says that "the crew of a vessel, for the common safety, have a right to throw over a part of the lading. This," he adds, "can only be done after a previous consultation, if time and circumstances permit; and the master, if he differ from the crew, has nevertheless a vote." If the sense of the author is preserved in the translation, he seems to support the position of the counsel in its full extent. The only authority which he refers to in support of the doctrine is Emerigon. Now, if we turn to Emerigon, we shall find that, so far from supporting this doctrine, he expressly repudiates it. Valin, in his commentary on the Marine Ordinance (article 15, tit. "Capitaine"), says, that in case of jettison, the master is bound to follow the advice of the crew, or the principal persons of the crew, and that if he acts against it, he will render himself responsible for any damage that may ensue in consequence. Emerigon, commenting on the words of Valin, says that "this doctrine does not appear to be correct. This is not a case in which votes are to be counted and not weighed. The captain is master. He is obliged to consult them, (the text of the ordinance requires it,) but he is not obliged blindly to follow their advice if, in the circumstances, it appears to be bad." Traite Des Assur. c. 12, § 4. And Valin, who had expressed this opinion in the first part of his commentary, returns to the sounder opinion of Emerigon when he comes to treat particularly of jettison. Livre 3, tit. 8, arts. 1, 2. The old marine ordinances are very minute and particular in their directions on this subject. When a jettison becomes necessary for the common safety, they require that the merchants, who in those times generally went with their goods, first be consulted. This also seems to have been required by the Rhodian law. De Jactu, Dig. 14, 2, 2, 1. If they consent, the sacrifice may be made. But if they object, the master may appeal to the crew, or to the principal persons of the crew, and if they agree with him, the

jettison may be made without the consent of the merchants. Jus Navale Rhodiorum, c. 9, 38; Laws of Oleron, arts. 8, 9; Laws of Wisbuy, arts. 29, 21, 38; Consulat de la Mer. c. 99; Vinnius in Peckium, p. 195, note a; Kuricke, Com. in Jus. Marit. Hans. p. 770, tit. 8, § 1; Quaest. Illust. 32, p. 895; Loccenius, de Jur. Marit. lib. 1, cap. 7, §§ 1, 2. This is also the principle adopted by the French law. Ordinance de la Marine, liv. 3, tit. 2, arts. 1, 2; Code de Commerce, art. 410.

Undoubtedly the master, before proceeding to throw overboard any part of his cargo, is bound in common prudence, if the case is such as will admit of deliberation, to consult with the most skilful and experienced men of the ship's company, and to allow to their advice all the consideration it merits. But the law gives him the authority, and imposes on him the obligation for the government of the ship. It presumes that his judgment is superior to that of others of the ship's company, and when he consults them, their opinions are, in the language of Emerigon, rather to be weighed than counted. The advice of his crew alone would not, I apprehend, excuse him for a sacrifice which was clearly uncalled for by the danger; nor would it, if he acted against it, render him responsible for a sacrifice which was manifestly required for the common safety. To justify himself, he must prove the necessity, and this will excuse him, whether he follow the advice of the crew or not. This is the doctrine of Emerigon, and is most conformable to the general principles of the maritime law, which attributes to the master the sole authority for the government of the ship, subject to his liability to answer for any abuse of his power, and imposes upon him the sole responsibility. It belongs, then to the master, to determine when a necessity arises for sacrificing part of the cargo for the preservation of the rest. As a general principle the crew have no authority to do this without his orders. What they might be justified in doing in extreme cases, such as were put at the argument, it is unnecessary to decide until those cases occur. The rules of law are not founded on extreme cases, but on common experience—the usual and ordinary course of things. But it is said that this case itself is anomalous, and that the master in going below, and leaving the deck at that time of danger, must be supposed to have left the mate and crew an authority to act according to their own discretion in the emergency of the case. There is certainly great weight in the observation, unless he left because he was intimidated by the mutinous and disorderly conduct of the crew, and from a reasonable fear of personal injury. Though enough appears to show that there was not the best discipline in the ship, and perhaps not entire subordination, I see nothing in the evidence that threatened any personal danger to the master; and in my opinion, this retirement of the master from the immediate command on deck, does throw upon him the burden of proving that the sacrifice was wanton and unnecessary, before he can insist on a forfeiture, or claim a deduction to be made from the wages of the seamen, on account of the loss. But the evidence certainly does not tend to show that the sacrifice was wanton. It is admitted by the master that the vessel made so much water that it was necessary to throw over part of the deck-load. After that was done, a small leak was found and stopped. But the weather continued boisterous, and the principal leak remained. The vessel continued to make so much water that the men were kept the principal part of the time at the pumps. Whether it would have been in their power to keep her afloat and carry her safe into port, cannot be known, because the attempt was not made, but the facts are such as to repel the presumption of a wanton sacrifice of the deck-load.

Jane continued on board the Nimrod, after her arrival at Guadaloupe, was sent by the master to the hospital, and for a subsequent alleged offence was imprisoned on shore. The day before the brig sailed on her return voyage, he was taken out of prison by the order of the master, and discharged, he having first engaged Capt. Eaton, of the schooner Monroe, to take him to Portland. The cause assigned by the master for his discharge is, that the crew on the outward passage had been mutinous and refractory, and that he considered it unsafe to return with the same crew. He applied to the American commercial agent, by whose order two of his crew, Tolman and Seaton, were sent home in another vessel. He applied to him also for an order to send home Jane, but he being a foreigner, the agent declined to interfere. If the conduct of the crew had been turbulent and mutinous to that degree as to excite in the mind of the master reasonable fears for his personal safety, this would undoubtedly be a valid reason for their discharge. But it would be a valid cause for the discharge of the guilty only, and not of the innocent; of those who were the cause of the danger, and not of those from whom nothing was to be apprehended. It may at first seem harsh to say that the master, who has most at stake, shall not be permitted to exercise his own judgment in a case of this kind, without control. But there are two parties to the contract, and the seamen have their rights as well as the master. If the simple allegation of the master, that a seaman was a dangerous man, was sufficient to justify his discharge, it would always be in the power of a master to punish a seaman, on any occasion, for imaginary as well as real faults. When he assigns, in a court of justice, this as a reason for setting aside the obligation of a contract, it is the duty of the court to look into the grounds of

his apprehension. It is not the vain fear, hominis cujusdam meticulosi, that will justify the master in dissolving the contract. It must be such a fear as may be supposed to affect the mind of a man of ordinary firmness. Had, then, the conduct of Jane been so distinguished for insubordination and violence as to furnish reasonable apprehension of danger from him, if he returned in the same vessel? It is here to be remarked, that sailors, from the nature of their employment, somewhat peculiar, acquire habits that are somewhat peculiar. Their occupation exposes them to hardships and privations, and accustoms them to dangers; and while it trains them up to habits of intrepid courage, generates also those faults of character which are apt to be associated with fearlessness of personal danger in minds somewhat rude and undisciplined by education, roughness and impetuosity of manners, and hasty and choleric tempers. We must take them as they are, and compound for their bad by their good qualities. It would be unreasonable to expect from men bred on the stormy element, upon which they live, that subdued and respectful tone of manners that persons in a similar rank in life exhibit, who are daily accustomed to witness the restraint and decorum of manners that prevail in a very different kind of society. They are subject to the orders of the master, and are bound to observe a respectful deportment. But they are engaged in a rude and troubled service, and masters do not always very scrupulously measure the words in which their commands are given, and if orders are sometimes given in an overcharged manner, it is not surprising if the answers should have something of the same coloring. Public policy, as well as strict justice, requires that these defects of temper and manners, which naturally, if not necessarily, arise out of the circumstances of their life, should be looked upon with indulgence, and that every hasty word or imprudent act should not be seized upon as a pretext for inflicting forfeitures. But at the same time, when a disposition of undoubted malignity, and a spirit of dangerous insubordination appears, it should be repressed with exemplary severity. And this is the spirit of the maritime law, founded on the ancient and immemorial usages of the sea. Mutiny is punished with death, but very disorderly conduct, not a great deal short of mutiny, when it proceeds from the effervescence of sudden passion, and does not proceed from a disposition radically depraved and corrupt, is easily forgiven on repentance, a return to duty, and tender of amends. The spirit of the law is accommodated to the character of the sailor, facilis irasci tamen ut placabilis esset. Thorn v. White [Case No. 13,989]; Relf v. The Maria [Id. 11,692]; The Exeter, 2 C. Rob. Adm. 261; Black v. The Louisiana [Case No. 1,461]; Dixon v. The Cyrus [Id. 3,930].

Admitting that there was as much insubordination in the crew as is alleged, and it is certain that there was considerable, Jane, although he may not have been free from blame, is clearly shown not to be one of the most turbulent. The testimony distinctly points out Tolman and Seaton as being the two most disorderly spirits, and it is evident that from them the principal, if not the whole of the trouble arose. It is from them that the threatening language is heard, and they appear to be the prominent actors in all the difficulties that arose; and they seem silently to have acquiesced in the justice of their discharge, for they make no claim for wages. Jane, on the other hand, was at this time laboring under indisposition; he was excused by the master from the most laborious part of his duty, and by his order was, on the arrival of the vessel at Guadaloupe, sent to the hospital as an invalid. He is not to be made responsible for the misdeeds of others. Looking at the whole evidence, my opinion is, that a justifiable cause for his discharge is not made out. If a mariner is discharged without just cause, he may follow the ship home, and recover full wages to the prosperous termination of the voyage. Laws of Oleron, art. 12; Laws of Wisbuy, art. 25; Consulat de la Mer. c. 267; Whitton v. The Commerce [Case No. 17,604].

Two charges are claimed by the master to be deducted from the libellant's wages. The first is the prison charges, while he was, by the master's procurement, confined on shore. The master has an undoubted right, for the purpose of maintaining order and discipline on board his ship, to punish the misconduct of the seamen in a proper manner. Whether he is authorized, for this purpose, to imprison them in foreign jails, except in very peculiar cases, is at least a matter of doubt. If a seaman has committed a crime of too aggravated a character for the master to punish, he will be justified in securing him in jail until he can be sent home for trial; and perhaps in other cases, when a seaman exhibits a temper particularly ungovernable, he may be authorized to resort to such means for subduing his obstinacy, and reducing him to obedience. But if he chooses to punish a seaman by imprisonment in a foreign jail, he cannot inflict a second punishment by charging the prison expenses upon the seaman. 1 Pet. Adm. 175, 176, note. This deduction is therefore disallowed. The other charge, for which the master claims to make a deduction from the wages of the libellant, is the expenses paid for him during his sickness in the hospital. By the general maritime law, if a seaman falls sick during the voyage, he is to be cured at the expense of the vessel. Laws of Oleron, art. 7; Laws of Wisbuy, art. 19; Laws of the Hanse Towns, art. 45; Swift v. The Happy Return [Case No. 13,697]. The law of the United States for the government of seamen in the merchant service has modified the general law in one particular. Act of July 20, 1790, c. 29, § 8. By that act the vessel is exempted

from the charge for medical advice, rendered to a sick or disabled seaman, when there is on board a medicine chest, properly supplied with medicines, and with proper directions for using them. But the statute speaks only of medical advice, and leaves all the other expenses of sickness to fall, where the maritime law had placed them, upon the vessel. If the seaman is put on shore, the expenses of boarding and nursing are still to be borne by the vessel, nor is it exempted from the charge for medical advice, except by a compliance with the statute. To entitle themselves to this exemption, the owners must prove that a medicine chest was on board, furnished with suitable medicines. When a party is relieved from a charge or liability imposed by the general principles of law, upon a condition which is to be performed by himself, he must prove the performance of the condition before he can claim the immunity. In the present case, no evidence is offered to show that there was any medicine chest on board, and this is a fact which cannot be presumed without proof. Consequently, as the owners cannot pretend to claim the exemption under the statute, the court is left to apply to the case the general rule.

NIMROD, The (WOOD v.). See Case No. 17,959.

Case No. 10,268.

In re NIMS et al.

[10 Ben. 53; 18 N. B. R. 91; 26 Pittsb. Leg. J. 11.] [1]

District Court, N. D. New York. July, 1878. [2]

BANKRUPTCY — DISTRIBUTION OF ASSETS — JOINT CREDITORS AND PARTNERSHIP CREDITORS.

N. and L. were partners under the name of N. & Co., and as such contracted debts and failed without assets. Thereafter they began business again as partners under the name of "N., Agent." They contracted debts and failed, leaving assets, which came into the hands of an assignee in banruptcy, but were insufficient to pay the debts contracted under the name of "N., Agent:" *Held*, that the creditors of N. & Co. were entitled to share in the assets equally with the creditors of "N., Agent."

[Cited in Re Vetterlein, 44 Fed. 62.]

[In the matter of Ozias L. Nims and David Long, bankrupts.]

Sherman S. Rogers, for creditors.
William H. Greene, for assignee.

WALLACE, District Judge. The bankrupts were formerly partners under the firm name of "O. L. Nims & Co.," and as such contracted debts and failed without assets. Shortly thereafter, they commenced business again as partners, under the firm name of "O. L. Nims, Agent," and as such, contracted debts and failed, leaving assets which are now in the hands of their assignee in bankruptcy for distribution. The assignee insists that the creditors of O. L. Nims & Co. are not entitled to share with the creditors of O. L. Nims, Agent, in the assets of the latter firm, such assets being insufficient to pay the creditors of O. L. Nims, Agent, in full.

I am of opinion that the creditors of each firm are to share ratably in all the joint assets of the bankrupts, and that neither section 5121 of the Revised Statutes, nor the rule of equitable distribution, which that section is intended to adopt, precludes the creditors of the bankrupts jointly from resorting to any joint assets of the bankrupts which may exist. The language of section 5121 does not in terms prescribe the rule of distribution when debts are proved against the bankrupts jointly which are not partnership debts; but it deals only with the mode of distribution as between partnership creditors and creditors of the partners separately; and where the rights of these classes of creditors are involved, applies the equitable rule that the joint property shall be first applied to pay the joint debts and the separate property the separate debts of the partners respectively.

The creditors of O. L. Nims & Co. are no more creditors of the bankrupts separately than are the creditors of O. L. Nims, Agent. Both classes are joint creditors. The creditors of O. L. Nims, Agent, can resort to the separate property of the bankrupts, as fully as the creditors of O. L. Nims & Co. can; why should not the latter be permitted to resort equally with the former to any joint assets?

The case may be considered as though the bankrupts had been carrying on business together, in two distinct firms, at the same time, in which they were the only partners. If that were the case, could it be maintained that the property of each firm should be kept distinct and appropriated first to the payment of the debts of that firm, or would the assets of both constitute a common fund for the payment of all the joint debts? Neither the language of the bankrupt act nor any principle of equity, or any rule of administration in bankruptcy of which I am aware, requires the assets of each concern to be marshalled so that the debts of each shall be paid from the assets of each, respectively.

The principles of distribution in equity have their origin in the rights of the creditors at law. At law, the creditors of the firm may resort in the first instance to the separate as well as to the joint property of the parties, while the separate creditors of a partner cannot resort effectually to the joint property, because upon an execution they can reach only the interest of the partner and are thus obliged to invoke the aid of a court of equity, to ascertain it through an accounting, in which case the creditors of the firm must first be satisfied, and thus obtain a priority

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 26 Pittsb. Leg. J. 11, contains only a partial report.]

[2] [Reversed in Case No. 10,269.]

as to the joint assets. But suppose an execution to be levied in favor of a creditor against all the members of the firm, upon a joint debt, but not on a partnership debt; here the sale would carry the title of all the partners, and the creditors would not be under the necessity of having an accounting, or invoking the assistance of a court of equity. There would thus appear to be a solid distinction between the rights of a creditor of all the partners, and those of one or more partners, in the joint property, as respects the partnership creditors; and the case would not arise for the application of the equitable rule which postpones the separate creditor to the partnership creditor in the joint assets.

Courts of bankruptcy marshal assets on equitable rules, and these rules give to creditors all their legal rights when the enforcement of these rights does not conflict with any equitable principles. The rights at law of creditors of the partners jointly are equal to those of the creditors of the partnership, and no equitable rule is violated if both classes are placed upon an equal footing. Chief Justice Marshall, in speaking of the English rules for marshalling the joint and separate estates in bankruptcy, says: "The rules which we find laid down by the chancellor for marshalling the respective funds, are to be considered merely equitable restraints on the legal rights of parties, obliging them to exercise those rights in such manner as not to do injustice to others." Tucker v. Oxley, 5 Cranch [9 U. S.] 35. If the rules of distribution originated in the presumption that a partnership debt was incurred for the benefit of the partnership, and that the property consists in whole or in part of what has been obtained from creditors, and is therefore considered as a primary fund for the payment of such debts, there would be strong reason in favor of the position now taken by the assignee; but after a very careful reading of the books, I am unable to find any case in this country or in England which advances this view, except the dictum in Forsyth v. Woods, 11 Wall. [78 U. S.] 486. That this is not the foundation of the rule which gives partnership creditors priority over separate creditors as to joint property, seems to be indicated by the cases which postpone the partnership creditors when there has been a conversion of joint into separate property. It is well-settled that partners may, during the continuance of the partnership, by agreement, convert joint into separate estate, or vice versa. This conversion determines the character of the property, for the purposes of its distribution in bankruptcy. Collyer, Partn. § 881, etc. Accordingly, when one partner without fraud sells out to the other, the property becomes separate property, and the creditors of the firm are postponed to the separate creditors of the purchasing partner. If the rule of distribution is founded on the theory that the fund which is derived from the creditors is primarily the fund for their payment, and the law, therefore, appropriates it to them, it could not be permitted that the debtors themselves, by agreement, should defeat this result.

I have not overlooked the English bankruptcy cases, which permit proof between estates where several partners are in bankruptcy, some of whom formed a distinct firm, carrying on a distinct trade from that of the general partnership, and the articles of one trade were furnished by one firm to the other (Story, Partn. § 394), by which an appropriation of the assets of each firm to its debts is worked out. In these cases the debts were not the debts of all the partners jointly, nor were the assets those of all the partners; and the result reached was precisely that which would be obtained by applying the joint assets to the joint debts of the several individuals.

My conclusion, therefore, is, that the joint creditors of the partners are entitled to share equally with the partnership creditors, in the partnership assets; in other words, that joint creditors share equally in joint assets, whether their debts are partnership debts or not.

[Subsequently the assignee presented a petition to the circuit court, praying that the order of this court be reviewed. The petition was granted, and the order of the district court reversed. Case No. 10,269.]

Case No. 10,269.

In re NIMS et al.

[16 Blatchf. 439.][1]

Circuit Court, N. D. New York. June 27, 1879.[2]

BANKRUPTCY—DISTRIBUTION OF ASSETS.

N. and L. were copartners under the name of N. & Co. They dissolved, owing debts and having no assets. Subsequently, they formed a new partnership, under the name of N., Agent, and failed, and were adjudged bankrupts, having firm assets. A creditor of N. & Co. claimed to prove against the firm of N., Agent, a debt due by the firm of N. & Co.: *Held*, that he was not entitled to share in the assets of the firm of N., Agent, being excluded therefrom by the provisions of section 5121 of the Revised Statutes of the United States.

[Cited in Re Vetterlein, 44 Fed. 62.]

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

In bankruptcy.

William H. Greene, for assignee in bankruptcy.

Sherman S. Rogers, opposed.

BLATCHFORD, Circuit Judge. On the 23d of August, 1875, Henry T. Buell made proof in bankruptcy against the two bankrupts, setting forth that they were, before the filing of the petition in bankruptcy, in-

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

[2] [Reversing Case No. 10,268.]

debted to him in the sum of $26,962.07, and interest thereon from July 1st, 1871, "upon a certain promissory note made by them, the said bankrupts, by the description of O. L. Nims & Co., dated June 29th, 1871, for that amount and interest as aforesaid, and payable to the order of Buell and Whitney, on demand, after date, at the office of H. T. Buell & Co., in the city of New York." The proof set forth that said note "was given in consideration of moneys advanced by the said Buell and Whitney to the said firm of O. L. Nims & Co., and of commissions earned and services performed by said Buell and Whitney for said firm." In October, 1875, the assignee in bankruptcy applied to the register in charge for an order expunging said proof of debt. The following statement of facts was agreed upon by the assignee and Buell: "The assignee having applied, in this proceeding, for a re-examination of the claim preferred by Henry T. Buell, the following are the facts conceded in regard thereto, with the proof of debt: First. Prior to May 13th, 1871, Ozias L. Nims and David Long were copartners under the firm name of O. L. Nims & Co. They then dissolved, Nims doing no business and Long going into partnership with L. M. Evans, under the name of Evans & Long. When O. L. Nims & Co. dissolved they owed debts and had no assets. Second. August 12th, 1871, Nims and Long formed a new partnership, (neither contributing any money or assets,) under the name of O. L. Nims, Agent. Third. O. L. Nims, Agent, failed, were adjudicated bankrupts in these proceedings and made assets. The funds in the assignee's hands subject to dividend were realized from the assets of the last firm. No other objection is made to the proof of debt of said Henry T. Buell, except such as may be deduced from the foregoing facts. The issue is: Is Buell entitled to share in a dividend equally with the creditors of O. L. Nims, Agent, or shall the whole fund be distributed to the creditors of the firm of O. L. Nims, Agent, to the exclusion of the creditors of the firm of O. L. Nims & Co.?" The register made an order disallowing the claim and expunging it from the list of claims on the assignee's record in the case. Thereupon Buell presented a petition to the district court, praying that said order of the register be vacated, and that said proof of debt be restored and declared entitled to share in the dividends of the assets mentioned in said statement of facts. On a hearing, the district court, on the 18th of June, 1878, made an order, that the said determination and order of said register be overruled, vacated and set aside, and that said claim be established as a valid claim against the assets in the hands of said assignee, and entitled to dividend accordingly, and that said assignee pay the costs and expenses of the re-examination of said claim, to be taxed by said register. The assignee now presents a petition to this court, reciting the foregoing proceedings, setting forth that said order of the district court is erroneous, in that it appears that said Buell "was not a creditor of the firm of O. L. Nims, Agent, composed of said bankrupts, and against whom the proceedings in bankruptcy were commenced and the said adjudication had, and to whose specific creditors said assets belong," and praying that said order of the district court be reviewed by this court.

The district court held that the creditors of the firm of O. L. Nims & Co. and the creditors of the firm of O. L. Nims, Agent, are entitled to share ratably in all the joint assets of the bankrupts, and that neither section 5121 of the Revised Statutes, nor the rule of equitable distribution which that section is intended to adopt, precludes the creditors of the bankrupt jointly from resorting to any joint assets of the bankrupts which may exist. [Case No. 10,268.]

The provisions of section 5121 of the Revised Statutes are as follows: "Where two or more persons who are partners in trade are adjudged bankrupt, either on the petition of such partners or of any one of them, or on the petition of any creditor of the partners, a warrant shall issue, in the manner provided by this title, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted. All the creditors of the company and the separate creditors of each partner may prove their respective debts. The assignee shall be chosen by the creditors of the company. He shall keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof; and, after deducting out of the whole amount received by the assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors; and, if there is any balance of the joint stock, after payment of the joint debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts. The certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone. In all other respects the proceedings against partners shall be conducted in like manner

as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case." The rule of distribution prescribed by this section is very distinct. It is arbitrary, like many other provisions of the bankruptcy statute, but it must be followed, and cannot be made to yield to any supposed equities in favor of any other rule of distribution. Nims and Long, partners in trade, have been adjudged bankrupt. When the bankruptcy proceedings were instituted, they were partners in trade under the name of O. L. Nims, Agent, and not under the name of O. L. Nims & Co. They had partnership assets as O. L. Nims, Agent, and no partnership assets as O. L. Nims & Co. Their joint stock and property, taken under the warrant, was their joint stock and property as O. L. Nims, Agent, that is, the joint stock and property of the copartnership of O. L. Nims, Agent. No other joint stock or property could be taken, under the warrant as joint stock or property. If there was any joint property, not the property of the copartnership of O. L. Nims, Agent, the separate interest of each of the joint owners in such property could be taken as his separate estate, under the warrant, but such joint property could not be taken as the joint property of the copartnership of O. L. Nims, Agent. The creditors of the copartnership of O. L. Nims, Agent, and the separate creditors of each of the partners, are alone declared to be authorized to prove debts. Creditors of the two bankrupts jointly, as to matters not arising out of the copartnership of O. L. Nims, Agent, are not creditors of that copartnership. As all partnership debts are, in equity, deemed joint and several, the creditors of the copartnership of O. L. Nims & Co. are separate creditors of each of the partners. The section directs that the assignee be chosen by the creditors of the copartnership, that is, creditors of O. L. Nims, Agent, by that copartnership name. The assignee is directed to keep an account of the joint stock or property of the copartnership of O. L. Nims, Agent, and not an account of property owned by the two partners jointly, which is not the property of such copartnership by that name. He is also directed to keep an account of the separate estate of each of the two partners; and the interest of each of them in joint property which is not the property of the copartnership of O. L. Nims, Agent, by that name, is separate estate. The statute further directs that the proceeds of the joint stock or property of the copartnership of O. L. Nims, Agent, shall be appropriated to pay the creditors of that copartnership. All the assets in this case are the proceeds of the joint property of such copartnership. They cannot go to pay the creditors of the copartnership of O. L. Nims & Co. The creditors of the copartnership of O. L. Nims & Co. are not creditors of the copartnership of O. L. Nims, Agent. It is only when there shall be a balance of the joint stock of the copartnership of O. L. Nims, Agent, after paying the joint debts of such copartnership, that such balance can be divided among the separate estates of the two bankrupts, so as to be applied to pay their separate debts as members of the copartnership of O. L. Nims & Co.

It is suggested, that the language of section 5121 does not in terms prescribe the rule of distribution when debts are proved against the bankrupts jointly, which are not partnership debts, but that that section deals only with the mode of distribution as between partnership creditors and creditors of the partners separately, and, where the rights of those classes of creditors are involved, applies the equitable rule, that the joint property shall be first applied to pay the joint debts, and the separate property to pay the separate debts of the partners respectively; that the creditors of O. L. Nims & Co. are no more creditors of the bankrupts separately than are the creditors of O. L. Nims, Agent; that both classes are joint creditors; and that, as the creditors of O. L. Nims, Agent, can resort to the separate property of the bankrupts as fully as the creditors of O. L. Nims & Co. can, the latter ought to be permitted to resort, equally with the former, to any joint assets. The answer to this suggestion is, that debts against the bankrupts jointly, as members of the firm of O. L. Nims & Co., are debts against each partner separately, and that, if there be debts against them jointly which are not debts against them severally, and are not debts of the copartnership of O. L. Nims, Agent, such latter debts are outside of the provisions of section 5121. This does not authorize the court to treat as debts of the copartnership of O. L. Nims, Agent, debts which are not debts of the copartnership of O. L. Nims, Agent.

In Forsyth v. Woods, 11 Wall. [78 U. S.] 484, the supreme court had under consideration section 36 of the bankruptcy act of March 2, 1867 (14 Stat. 534), the provisions of which are those found in section 5121 of the Revised Statutes. In referring to those provisions, the court, through Mr. Justice Strong, says: "It is not certain that a promise by a partnership and a promise by the individual partners collectively have the same effect. If a firm be composed of two persons associated for the conduct of a particular branch of business, it can hardly be maintained that the joint contract of the two partners, made in their individual names, respecting a matter that has no connection with the firm business, creates a liability of the firm, as such. The partnership is a distinct thing from the partners themselves, and it would seem that debts of the firm are different in character from other joint debts of the partners. If it is not so,

the rule that sets apart the property of a partnership exclusively, in the first instance, for the payment of its debts, may be of little value. That rule presumes that a partnership debt was incurred for the benefit of the partnership, and that its property consists, in whole or in part, of what has been obtained from its creditors. The reason of the rule fails when a debt or liability has not been incurred for the firm as such, even though all the persons who compose the firm may be parties to the contract." The rule thus referred to by the court is the arbitrary rule of the bankruptcy statute of the United States. The district judge, in his decision in the district court, says, that, after a very careful reading of the books, he is unable to find any case in this country or in England, except the case of Forsyth v. Woods [supra], which advances the view thus advanced in that case. He adds: "That this is not the foundation of the rule which gives partnership creditors priority over separate creditors as to the joint property, seems to be indicated by the cases which postpone the partnership creditors when there has been a conversion of joint into separate property. It is well settled, that partners may, during the continuance of the partnership, by agreement, convert joint into separate estate, or vice versa. This conversion determines the character of the property for the purposes of its distribution in bankruptcy. Accordingly, when one partner, without fraud, sells out to the other, the property becomes separate property, and the creditors of the firm are postponed to the separate creditors of the purchasing partner. If the rule of distribution is founded on the theory that the fund which is derived from the creditors is primarily the fund for their payment, and the law therefore appropriates it to them, it could not be permitted that the debtors themselves, by agreement, should defeat this result." The remarks of Mr. Justice Strong, in Forsyth v. Woods, are not understood to go any further than to say, that, under the bankruptcy statute, if there are partnership debts and partnership assets, it will be presumed that such assets were obtained from the partnership creditors, so that, if such assets remain to be administered in bankruptcy, they shall be applied first to pay debts of the partnership. This rule of distribution is a statutory one, and applies only to partnership assets which remain such to be administered in bankruptcy. There was never any statute in England, in terms like our statute, during the time the English decisions referred to were made. Those decisions proceeded on a general equitable idea, that creditors of joint debtors who were in fact partners should be allowed to share in the assets of the partnership, although not creditors of the partnership, or in respect to any matter growing out of or connected with the partnership. Hence, the decisions in England, of which the case of Hoare v. Oriental Bank Corp., 2 App. Cas. 589, is a recent instance, holding that a joint debt, not shown to have been incurred as a partnership transaction, and as arising out of partnership business, could be proved against the partnership estate, where the partners were the joint debtors. In this last case, it was suggested as a ground for allowing the proof, that the creditor could, before the insolvency, have sued the debtors composing the partnership, jointly, upon the obligation held by him, and, upon recovering judgment, have taken out execution against the partnership assets. But there was no such controlling statutory rule as the one of our statute. The provisions of our bankruptcy statute, in the matter in hand, are like those of the Massachusetts insolvency law of 1838, c. 163, § 21. Under that law, it was held, in Ex parte Weston, 12 Metc. 1, that only partnership debts could come against partnership assets. See, also, Somerset Potters Works v. Minot, 10 Cush. 592.

It follows, that the order under review must be reversed and vacated, with costs.

The same decision is made in the Case of Blackmar.

NINE BALES OF COTTON (SEWELL v.). See Case No. 12,683.

NINE CASES (UNITED STATES v.). See Case No. 15,880a.

NINE HUNDRED AND FIVE PACKAGES OF TOBACCO (UNITED STATES ex rel. AMES v.). See Case No. 15,881.

Case No. 10,270.

NINE HUNDRED AND FORTY-EIGHT PIECES OF LUMBER.

[7 Ben. 389.][1]

District Court, E. D. New York. July, 1874.

CHARTER PARTY—SUBSTITUTED FREIGHT.

1. A vessel was chartered to carry timber and lumber, not less than half of which was to be "resawn." The cargo furnished was not half "resawn," but in great part "rough edged." It was received on board by the master under protest, as not conforming to the charter; and he inserted in the bill of lading given for the cargo a provision for payment of freight, "as per charter party with additional claim as per protest." A libel was filed on behalf of the vessel against the lumber to recover the amount due from the charterer under the charter, which contained a clause binding the cargo to its performance. *Held*, that, taking together the charter party, protest and bill of lading, it was clear that the rough-edged lumber was to be transported as freight, and that it was meant that the vessel should realize as much for freight as if the charter had been strictly complied with by furnishing the specified proportion of resawn lumber;

2. Whether the action were treated as one to recover freight substituted for that specified in

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

the charter, or to recover damages for violation of the charter, the admiralty would enforce the lien of the vessel upon the cargo.

This was a libel filed by the owner of a vessel against her cargo, to recover an amount claimed to be due under a charter. The court decreed in favor of the libellant and the question of damages was referred to a commissioner, who reported in favor of the libellant the full amount claimed by him. The respondent excepted to the report.

Scudder & Carter, for libellant.
E. D. McCarthy, for respondent.

BENEDICT, District Judge. The charter provides for a cargo of yellow pine timber, hewn on four sides, and resawed yellow pine lumber, not less than one-half of resawed. The cargo tendered to the ship consisted partly of yellow pine timber, and a great part of rough-edged timber, instead of at least one-half resawn. This cargo was received under protest, made and extended, as not conforming to the charter party; and, in the bills of lading given by the master, the proviso for a delivery was, "on paying freight as per charter party, with additional claim as per protest." The charter party contained the usual clause binding the merchandise to be laden on board to the true and faithful performance of the agreement. Under this state of facts, the question arises, whether the ship has a lien upon the cargo actually shipped for a sum equal to what the freight would have amounted to, had the resawed timber, stipulated for in the charter party, been shipped, instead of the rough-edged timber which was shipped.

The charter provides no rate of freight for rough-edged timber; and the bill of lading fixes no rate of freight, except by the above provisions referring to the charter and protest. Looking at these documents together, the charter, the protest, and the bill of lading, it appears quite clear that the understanding of the parties was, that this rough-edged timber should be transported on freight, and should pay as freight a sum sufficient to bring the earnings of the vessel for the voyage up to the total freight which would have been realized had the charter been strictly complied with. It is not a case of dead freight, but of substituted freight, transported, nevertheless, under a contract to pay freight upon its delivery, the amount of which, although not stated, was to be calculated on the termination of the voyage by a reference to the original charter. Such a contract, if no more than an agreement, upon delivery of the cargo, to pay damages for the violation of the charter, then unliquidated, presents no difficulty. A court of admiralty can enforce, without embarrassment or injustice, a lien for such damages, and such a proceeding is common in the admiralty.

The report should, therefore, be confirmed, and a decree entered for the sum reported, with costs.

Case No. 10,271.

NINE HUNDRED AND SEVENTY-NINE BOXES OF SUGAR.

[7 Ben. 242.] [1]

District Court, E. D. New York. March, 1874.

BILL OF LADING AND CHARTER PARTY—FREIGHT—SIGNATURE UNDER PROTEST—PRACTICE—POSSESSION.

1. A vessel was chartered to bring a cargo of sugar and molasses, from Havana to New York, at specified rates of freight. No provision for bills of lading specifying a different rate of freight was embodied in it. The cargo was agreed by the charter to be bound for the faithful performance of the agreements contained in it. At Havana a modification, agreed upon between the captain of the ship and the agents of the charterers, was indorsed on the charter, in which a lump sum of $3,828 was specified as freight. Under this agreement, 979 boxes of sugar were shipped. Some days after its shipment the charterers' agents required the master to sign bills of lading for the sugar, providing for its delivery at New York, to order, on payment of freight at the rate of one dollar a box, and making no reference to the charter party. The master, insisting that this was not according to agreement, signed the bills of lading, but wrote before his signature, the words "Signed under protest." The shippers indorsed and delivered these bills of lading to P. & Co. who indorsed and delivered them to Y. & Co. at New York, who, on the arrival of the vessel at New York, tendered to the master the $979, and demanded the sugars. The master refused to deliver them, except on payment of the full balance of the charter money. Y. & Co. then filed a libel against the sugar and the master of the vessel, praying that the sugar might be seized under the process, and by a decree of the court delivered to them. On this libel process was issued as in a cause of possession, and the property was taken into the custody of the marshal, and thereafter, on consent of the parties, delivered to the libellants on their giving a stipulation in the sum of $4,000, which, it was agreed, was to be considered as in the place and stead of sugar to that value held in custody by the marshal. No question was raised as to the regularity of the practice, and both parties agreed that the claimants should have a decree that the libellants pay the amount of their stipulation into court, for the benefit of the claimants, in case the court should determine that the ship owner had a lien on the sugar for the amount due under the charter party. *Held*, that no opinion would be expressed as to the regularity of the practice, and the question of law would be determined as desired by the parties.

2. The ship owner had a lien on the sugar, for the unpaid balance of charter money.

3. The libellants were put on inquiry by the words written on the bills of lading by the master, and were not therefore bona fide holders of them without notice.

4. A decree would be made, that the stipulators for value pay the amount of their stipulation into court, for the benefit of the claimants, and that the libel be dismissed, and a decree rendered against the libellants for costs.

In admiralty.

Scudder & Carter, for libellants.
J. N. Whiting, for claimants.

BENEDICT, District Judge. The mode of procedure adopted to bring before the court

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

the question in dispute between these parties is unusual, and may as well be here stated, although no point has been made before me in respect thereto. The libel is filed by Henry J. Youngs & Co., consignees and holders of a bill of lading for 979 boxes of sugar, being the cargo of the bark Tantivy, against this merchandise and the master of the bark, who has upon a demand by the libellants refused to deliver the merchandise, except on payment of a balance of charter money, for which it is claimed the cargo is holden by virtue of a charter party.

The prayer of the libel is that the merchandise may be taken by the process of the court, and by a decree of this court delivered to the consignees and holders of the bill of lading. Upon this libel process was issued as in a cause of possession, and the property, having been taken into custody by the marshal, was thereafter upon consent delivered to the libellants, upon their filing a stipulation for value in the sum of $4,000 which, it is agreed, is to be considered as in the place and stead of so much of the sugar as would be of that value, had the same been held in custody by the marshal. Thereupon the master and owners of the ship, having duly claimed the property, filed their answer, setting up the facts upon which they base their right to hold the cargo for the unpaid balance of the charter money, and denying that they were bound to deliver the cargo upon the tender of the freight named in the bill of lading, as charged by the libellant in his libel. Upon these pleadings, the cause has been brought to hearing, both parties consenting that the claimants are entitled to a decree requiring the libellants to pay into the registry for the benefit of the claimants, and in conformity with the terms of the stipulation for value, the amount of the stipulation in case this court shall adjudge the ship owners to have a lien upon the cargo for that amount due under the charter party.

As to the propriety of this method of procedure, I am not required to express any opinion, no question being made in respect thereto. Whether open to technical objections or not, it seems to have accomplished what both parties have desired, namely: a delivering of the cargo to the owners thereof, upon their giving security for the freight pending the determination by a court of the amount of freight due.

I proceed, therefore, to determine the question which the parties have thus sought to present. The facts, upon which my determination is to be made, are admitted to be correctly stated in the answer, upon which, without other evidence on either side, the cause has been submitted.

It appears, then that the bark Tantivy was chartered in New York by Messrs. Duncan and Poey, for a voyage from New York to Havana via Norfolk and back. The charter party contained among other, the following provisions: "The party of the second part doth engage to provide and furnish to the said vessel at Norfolk, a full and complete cargo of shooks and hoops, or other ordinary lawful merchandise, and in Cuba a full and complete cargo of sugar and molasses in hhds., with ten per cent. small stowage under deck, and to pay to the said party of the first part, or agent, for the use of the vessel during the voyage, outward cargo freight free, for which charterers are to pay all the vessel's foreign port charges, pilotage, lighterage and consul fees. For homeward cargo delivered, as follows, viz.: Sugar under deck, $7 per hhd.; molasses under deck, $4.75 per 110 gals., gross gauge of the casks. Charter money payable upon the proper discharge of the cargo at port of final discharge." The following clause is also to be found in the charter party: "To the true and faithful performance of all and every of the foregoing agreements, we the said parties do hereby bind ourselves, our heirs, executors, administrators and assigns, and also the said vessel, freight, tackle and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of estimated amount of this charter."

Under this charter party the vessel carried an outward cargo to Havana, where the charterers were represented by Messrs. Pardo Infante & Co., their agents. There, some difficulty preventing the shipment of the homeward cargo according to the charter party, a modification of the charter party was agreed on between the master and Pardo Infante & Co., the agents of the charterers, and written on the charter party as follows: "The agents for the charterers and master of ship Tantivy hereby agree that the vessel shall take a cargo of sugar in hhds. or boxes, the charterers to settle for same at port of destination, say New York or Philadelphia, touching at Delaware Breakwater for orders, for the lump sum of thirty-eight hundred and twenty-eight dollars, in United States currency, without prejudice to the other conditions of said charter party. St. James Carey. Havana, 4th July, 1872. To Pardo Infante & Co."

The validity of this modification has not been disputed here, and under the charter party so modified, the 979 boxes of sugar in question were laden on board the vessel. Some ten days after the sugar had been thus laden on board the ship, Messrs. Pardo Infante & Co. required the master of the ship to sign a bill of lading stating a shipment of the 979 boxes of sugar to be delivered at New York, unto order, on paying freight for the said goods, one dollar per box, and containing no allusion to the charter party or to any other rate of freight. This bill of lading the master, while protesting that it did not contain the contract under which the sugar had been shipped and was to be carried, did sign, but he prefixed to his signature the words, "Signed under protest." The bark then proceeded to New York, where, upon arrival and readiness to deliver the sugar,

these libellants, who had become holders of the bill of lading above referred to, by an indorsement thereupon from Pardo Infante & Co., to Messrs. J. Pollido & Co., and from Pollido & Co. to them, tendered to the master $979, the freight mentioned in the bill of lading, and demanded the sugars. The master, thereupon, on the navigable waters of the United States, refused to deliver the sugars except upon the payment of a much larger sum, to wit: the balance of the charter money due according to the terms of the charter party, as modified in Havana. Upon this demand and refusal, the present action was instituted, and upon these facts I am asked to determine whether this cargo is holden for the unpaid balance of the charter money, or should have been delivered to the consignee on payment of the freight mentioned in the bill of lading.

In determining this question of law, I remark that the bark was not a general but a chartered ship. The charter party contains no provision for any bills of lading at a different rate of freight than that named in the charter party, nor for the transporting of any cargo except such as the charterers should furnish. Of the existence of this charter and of its terms, Pardo Infante & Co. knew. In fact, acting as agents of the charterers, they made the modification of the charter party which fixed the freight the cargo was to pay. With this knowledge, and acting as agents of the charterers, they shipped the sugars in question under the provisions of the charter party, and not under any such contract as that stated in the bill of lading. As between them or their principals, the charterers and the ship owner, therefore, the cargo, upon its shipment, became charged with a lien for whatever might become due under the charter party, upon the performance of the voyage for which the charter party provided. No other agreement was ever made for the transporting of this cargo, it being as well known to Pardo Infante & Co., as to the master, that no such contract as that stated in the bill of lading had been agreed to when the cargo was laden on board or afterwards, but that the real contract under which the cargo had been shipped was to be found in the charter party as modified.

There is no room, therefore, to contend that the terms of the bill of lading must fix the amount due the owners of the ship upon this cargo unless upon the ground that the ship owners are estopped by the act of the master in signing the bill of lading to deny the contract which the bill of lading states.

It appears sufficient for this case, to say they are not so estopped because the holders of such a bill of lading as here shown cannot be said to be bona fide holders without notice, but, on the contrary, are chargeable with notice of the fact that the bill of lading does not contain the contract under which these sugars were shipped. For this was no clean bill of lading. It contained the words "Signed under protest," boldly and prominently placed above the master's signature. These words are unusual and calculated to attract attention. They convey, in themselves, the idea that the bill of lading is not true, and has never been assented to by the master, and they are sufficient to put any party to whom the bill of lading should be offered upon inquiry. They "suggest inquiry." They "cast a shade upon the transaction." Story, Prom. Notes, § 197. They "ought to have excited the suspicion of a prudent and careful man." Chit. Bills, pp. 278, 279. Being sufficient to put the party on inquiry, they constitute notice of any fact which inquiries prosecuted with due diligence would have disclosed. The Plough Boy, 1 Gall. 41, [Case No. 11,230]. Such a bill of lading conveyed the knowledge that the master of the ship claimed that the contract was incorrectly stated in the bill of lading, and the holders are presumed to have ascertained the grounds of that claim, or to have been guilty of a degree of negligence equally fatal to the claim to be bona fide holders without notice. Knowledge of the charter party and of the shipment of the goods under it, with which, under this bill of lading the holders are chargeable, deprives the libellants of any right to claim the goods upon payment of the freight named in the bill of lading. 1 Pars. Mar. Law, p. 241. To entitle them to the goods, they must pay the balance due according to the charter party, for which, by the express terms of the charter party, the ship owner has a lien upon the cargo.

Accordingly, in pursuance of the stipulation and consent given in this case, a decree must be entered directing that the stipulators for value pay into the registry of the court for the benefit of the claimants, and in discharge of the claimants' lien upon the cargo in question, the amount of the stipulation for value; and therefore, the libel will be dismissed and a decree entered in favor of the claimants for their costs to be taxed.

NINE HUNDRED AND TEN BALES OF COTTON (UNITED STATES v.). See Case No. 15,882.

Case No. 10,272.

NINE HUNDRED AND TWENTY-EIGHT BARRELS OF SALT.

[2 Biss. 319;[1] 2 Chi. Leg. News, 317.]

District Court, N. D. Illinois. June, 1870.

GENERAL AVERAGE—DUTY OF CARRIER AS TO VESSEL.

1. A common carrier by water is bound to provide a safe and sea-worthy ship, in all respects fitted to carry her cargo through the ordinary perils of navigation, and the failure of so essential a portion of the mechanism as the rudder, in a gale of no extraordinary violence, is

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

sufficient evidence that the vessel was unseaworthy in this regard.

2. The injury to the rudder being fairly chargeable to the common perils of the sea, the carrier is not protected by the exceptions in his bill of lading, and cannot charge the consequences against the cargo.

3. Having reached a harbor of safety, and it being practicable for him to gain a neighboring harbor of repair, the expense of towing the ship to her destination, incurred by the master, cannot be charged pro rata against the cargo.

4. To compel the cargo to contribute to the towage, it must be shown that this was the only reasonable alternative left to the master, and the soundness of his judgment may be questioned by the owners of the cargo.

In admiralty. Libel [by Lyon] for general average by the owner of the schooner Emu.

Rae & Mitchell, for libellant.
Waite & Clarke, for respondent.

BLODGETT, District Judge. This is a libel upon substantially the following facts, as set up in the libel and shown by the proofs. The schooner Emu, on or about the 10th of September, 1866, took on board at the port of Oswego 2,330 barrels of salt, for the Salt Company of Onondaga, to be carried to the port of Chicago at a freight charge of forty-two cents per barrel. On or about the 20th of said month said schooner encountered a heavy gale of wind while on Lake Huron, and when about thirty miles from Mackinaw her officers found that her rudder-post was split so that she could not be steered by her rudder, but by taking down the mainsail they were enabled to run into the port of Mackinaw in four hours. Here the captain sent his mate on shore to ascertain whether repairs could be made at that place so as to enable them to proceed on their voyage, and on being told that there were no ship carpenters at that place, he engaged the steam tug Leviathan to tow the schooner, with her said cargo on board, to her port of destination, and on her arrival here the libellants made this claim of general average against the schooner, cargo and freight, for the expense of said towage. The whole bill amounting to $1,715, being at the rate of $300 per day for five and one-half days for the tug; $50 for use of hawser, and $15 for the expenses of making the average.

The evidence shows that very little time was taken by the officers of the schooner to make inquiries as to whether the necessary repairs could be made at Mackinaw; that there were workmen at that point of sufficient skill either to put in a new rudder-post, or to have banded or repaired the old one, and that more thorough inquiry would have disclosed this fact. It is also shown by the proof that the port of Sheboygan, or Duncan harbor, seventeen miles from Mackinaw, was an entirely safe harbor, with mechanics who could have made said repairs, and plenty of available material for the purpose of such repairs; also that there were ample and safe docks and warehouses, where said cargo could have been unloaded and stored until another vessel could have been obtained.

It is contended on the part of the libellants that Mackinaw was not a port of repair, nor a safe port of refuge in all winds, and that the captain being the agent of the ship and cargo, his action in the premises is binding upon all, and cannot be questioned, except for fraud.

The respondents resist the claim and insist: First, that the injury sustained by the schooner was not caused by the unavoidable perils of the sea, but was occasioned by the unseaworthy condition of the vessel. Second, the cargo had ceased to be at risk and in danger at the time the expense for towing was incurred, the vessel having made a safe port where the cargo could have been unloaded and safely stored until sent forward by another vessel. Third, that the rudder could have been repaired at Mackinaw with very little delay, and the vessel would have been safe in the harbor of Mackinaw while awaiting such repairs. Fourth, that even if they could not have made the repairs at Mackinaw, they could have found every reasonable facility for doing so at Sheboygan or Duncan harbor, only seventeen miles distant from the port of Mackinaw.

As to the question of fact involved in the first point, the evidence does not show that the gale was so violent as to have necessarily or probably broken or disabled the rudder-post of the vessel, if it had been sound and in good condition. The captain, in his deposition, says it was "blowing hard," when they found she did not answer her helm, and an examination disclosed the fact that the rudder-post was split. They took down the mainsail and worked into Mackinaw, then thirty miles distant, in four hours. This shows conclusively to my mind that the vessel did not become disabled by an unavoidable peril of the sea, but that, on the contrary, her rudder-post gave out from sheer insufficiency to withstand the ordinary vicissitudes of such a voyage as the vessel was then engaged upon.

A common carrier by water is bound by law to provide a safe and sea-worthy ship, in all respects fitted to carry her cargo in safety through the ordinary perils of navigation, and the failure of so essential a portion of the mechanism by which the vessel was navigated as occurred in this case, in a gale of no extraordinary violence, is sufficient evidence to my mind that the vessel was unseaworthy in this regard. If, then, this injury to the rudder is fairly chargeable to the ordinary perils of the sea, and not to those of an extraordinary nature, the carrier will not be protected by the exception in his bill of lading, but must bear the damages consequent upon the accident himself. His first duty is to provide a safe, stanch and sea-worthy vessel, and if he has not done so the consequences of that failure cannot be charged against the cargo, because it was the negligence of the carrier, and not an overruling Providence,

that placed the cargo in peril. The burden, then, is upon the carrier to show that the disabling of the vessel was not the result of his own negligence, before he can call upon the cargo for contribution; and I am clearly of opinion that the proof in this case fails to make out any such state of facts on the part of the libellants.

But even if this point is not well taken, the proof shows that the vessel, with her cargo on board, arrived safely in the harbor of Mackinaw, and although there is some conflict of evidence as to whether she could have been repaired there, no doubt is left by the evidence that she could have been repaired at Sheboygan or Duncan harbor, only seventeen miles distant, to which place she could have been worked by her sails, as she had already been thirty miles, or she might have been towed there by the tug she employed to tow her to Chicago. Instead of doing this, and apparently without making any inquiry or discussing the feasibility of any other expedient than that which he adopted, the master of the vessel resorted to the extraordinary measure of employing a tug at $300 per day to tow his vessel the remainder of his uncompleted voyage, about two-thirds having been accomplished.

It is true that, in a certain qualified sense, the master of the vessel is the agent of both ship and cargo, but it is a novel doctrine to assert that he is an agent whose conduct can in no case be questioned, and from whose decision there is no appeal. Primarily, his allegiance is to the ship, and his agency confined to such acts of discretion as are devolved upon him by the owners of his vessel, and it would be a truly dangerous doctrine to hold that the owners of the cargo could not question the soundness of his judgment in a matter where they were interested against the carrier.

Here suitable or even casual inquiry among the residents of Mackinaw, would have disclosed the fact that he could repair his vessel at Sheboygan harbor. But he made no inquiries, nor is there any evidence that he caused any to be made. He did not even go on shore himself. He only sent his mate ashore, who made some inquiries, very slight, and occupying only a few minutes of time, and being told there were no ship carpenters there, he at once engaged the tug to tow the vessel to Chicago, the captain ratifying this action of the mate. Here is an expense for towage of upwards of $1,700, which might by due inquiry and exertion have been avoided by the master of the vessel, and this court is asked to enforce a pro rata of this, amounting to nearly $500, against the cargo. It seems to me the conduct of the master is indefensible in this regard. He seems to have made, practically, no effort to repair his vessel, but engaged the tug without considering any other means by which the damage could have been repaired, and his vessel forwarded on her voyage in the usual way. The circumstances in which he was placed then did not, in my view of the case, justify the extraordinary expenditure incurred. The vessel could have been repaired either at Mackinaw or at Sheboygan harbor, and the master had no right to resort to the expensive alternative of employing a tug at the expense of the cargo, to complete the voyage.

The evidence fails to show that the incurring of this large bill for towage was the only reasonable alternative open to the master of the vessel, and this the libellants must do before they can sustain this case. At the time the tug was chartered neither the vessel nor cargo were in peril. They had made a safe harbor of refuge, at least, and reasonable time should have been taken to fully canvass the situation, and decide upon the best course to pursue after full consideration and inquiry. It is not one of those mistakes of judgment made under stress of imminent peril, but the towing seems to have been resorted to more for the purpose of saving time to the vessel than for that of saving a jeopardized ship and cargo. The repairs were not of so intricate or radical a nature as to require the ship to go into dry dock, nor the services of highly skilled workmen. Most experienced seamen know enough of carpentering and the use of tools to have repaired this rudder-post, and the chief peril of the ship seems to have been that of loss of time by the delay requisite to make the needed repairs, whereby another trip that season might be lost, rather than any such immediate danger to ship and cargo as justifies the sacrifice of part for the benefit of all.

Claim for freight allowed; contribution disallowed.

NOTE. A carrier is bound to provide a vessel tight and stanch and properly furnished for her voyage. Abb. Shipp. (5th Am. Ed.) 417–419; Lyon v. Mells, 5 East, 428; Putnam v. Wood, 3 Mass. 481; Kimball v. Tucker, 10 Mass. 192; Goodridge v. Lord, Id. 483; Bell v. Reed, 4 Bin. 127; Clark v. Richards, 1 Conn. 54. Every freight contract by a carrier by river implies that his boat is river worthy at the time, and it is incumbent on him to show that his boat is capable of performing it. McClintock v. Lary, 23 Ark. 215. For a full discussion of the law of general average and contribution, see 1 Pars. Shipp. & Adm. p. 338, and sequitur. In Backhouse v. Sneed, 1 Murphy (N. C.) 173, the rudder was broken by the force of the sea, and the cargo, in consequence, lost. The rudder had the appearance of soundness, but proved to be internally rotten, though its rottenness was unknown to the owner. *Held*, the carrier liable. Where the master in good faith incurs great expense in securing the safety of both ship and cargo, the cargo is liable to contribution, without reference to the question whether the expense might have been lessened had the cargo been separated from the vessel: Goodwillie v. McCarthy, 45 Ill. 187. The master has no power to bind the vessel for a contract to tow a disabled vessel from one port to another. Kimball v. The Dispatch [Case No. 7,773].

NINE HUNDRED BASKETS OF CHAMPAGNE (UNITED STATES v.). See Case No. 15,883.

NINE PACKAGES OF LINEN (UNITED STATES v.). See Case No. 15,884.

Case No. 10,273.

NINE THOUSAND SIX HUNDRED AND EIGHTY-ONE DRY OX HIDES.

[6 Ben. 199; 7 Am. Law Rev. 576; 16 Int. Rev. Rec. 166.] [1]

District Court, E. D. New York. Oct., 1872.

FREIGHT—WEIGHT BY INVOICE—EXPENSE OF WEIGHING—COSTS.

1. The owner of a bark filed a libel against her cargo of hides to recover freight. The hides were shipped in Buenos Ayres, to be delivered at New York on payment of freight at so much per pound. They arrived in good order, and were tendered to the consignee, to be delivered on payment of $1,515 79, freight. This amount was arrived at by taking the weight stated in the invoice and entry presented by the consignee at the custom house on his entry of the goods. The bill of lading did not state any weight. As the consignee refused to pay the amount claimed, the owner of the ship filed a libel against the hides to recover the freight, and the consignee gave a stipulation for value, and took them. On the trial, the consignee proved an actual weighing of the hides after they were delivered, in accordance with which the freight would be $1,417 01: *Held*, that, in the absence of a statement of weights in the bill of lading, the ship was entitled to freight only on the weight delivered, and that the weight stated in the invoice and entry was not conclusive on the consignee;

2. The ship is bound to weigh the cargo, whenever a weighing is necessary to enable her to compute her freight;

[Cited in Henderson v. Three Hundred Tons of Iron Ore, 38 Fed. 39.]

3. The ship was entitled to a decree for the amount of freight calculated on the weight proved to have been actually delivered, viz., $1,417 01.

4. And it appearing that the answer admitted that freight was due, but that the amount admitted to be due was not tendered or paid into court: *Held*, that the libellants were entitled to costs.

In admiralty.

Beebe, Donohue & Cooke, for libellants.
Wakeman & Latting, for claimants.

BENEDICT, District Judge. The facts out of which the present controversy arose are not in dispute. Garden B. Perry shipped on board the bark Ada Gray, then lying at Buenos Ayres, a quantity of hides, to be transported thence to the port of New York.

The hides were taken on board by number, and not by weight, and a bill of lading was given which acknowledged the receipt on board of 9,681 dry ox and cow hides and 478 dry kip skins, to be delivered at New York to Brown Bros. & Co., or their assigns, "he or they paying freight for the said hides and kips, five-eighths of a cent, United States gold, per pound, with five per cent. primage and average accustomed."

The voyage was duly performed, and the hides arrived in New York in like good order and condition as shipped, and their delivery was tendered to the proper consignees upon payment of the sum of $1,515.79, as freight and primage. This amount was arrived at by taking for a basis of calculation 230,977 lbs., the weight shown in the invoice and entry of the hides presented by the consignees at the custom house, and according to which they paid the duties.

The right of the ship to demand freight so calculated was disputed by the consignee, who insisted that the proper mode of calculation was to take the weight of the hides landed, as ascertained by an actual weighing. The freight, when so calculated, they offered to pay on receiving the cargo. In order to obviate the difficulty, which thus arose in the discharging of the ship, this action in rem against the hides was instituted by the owners of the ship, to enforce a lien for the amount of freight as calculated by them. The consignees intervened, and, upon giving a stipulation for value in a sufficient amount, received the hides. They then joined issue with the libellant, and the dispute is thus before this court for its determination. The rights of the parties in the premises do not appear to me to be in doubt.

"The net quantity," says McLachlan (page 392), "ascertained by the queen's scales or bushel at the port of delivery, is the measure of freight payable by the merchant." The contract of a bill of lading like the present, is that the freight is to be paid on the quantity shipped, carried and delivered. Gibson v. Sturge, 10 Exch. 621. See German, Merc. Law, book 5, pt. 5, art. 621. It is upon this understanding of the contract expressed in a bill of lading that, when living animals are to be transported, and some die, freight is paid only on those which arrive. Howland v. The Lavinia [Case No. 6,797]. So also the weight of sugars and of molasses at delivery, which is always less than the weight shipped, determines the amount of freight. Abb. Shipp. 430.

The usage of this port, as shown by the evidence, conforms to this understanding of the contract, for it is proved not to be customary to pay freight on hides by the invoice weight, but according to the weight delivered, as the same may be agreed on, or ascertained by weighing. Furthermore, in this instance, the cargo was shipped by number and to be delivered by number. It does not appear to have been weighed when shipped, and no statement of weight is made in the bill of lading, although the freight was agreed to be paid by weight, and although such a statement made in the bill of lading would doubtless have furnished the basis for the calculation of freight. German, Merc. Law, art. 658, bk. 5, pt. 5. This omission to ascertain the weight at the shipment warrants the inference, that the parties understood that the weight at delivery would determine the amount of the freight.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 7 Am. Law Rev. 576, contains only a partial report.]

Unless, then, the weight by which the duties were paid, and to which the shipowner resorted for the basis of his calculation of the freight, was the correct weight of hides delivered, the position taken by the libellant cannot be upheld.

It is, indeed, true, that in many countries the weight of cargo, by which duties are paid, is the weight upon which freight is calculated. But I think it will be found that in such cases there is an actual weighing required by law, and made by officials according to law. The custom house weight in such cases is therefore the actual weight delivered, as legally ascertained. But here there is no such ascertainment of the actual weight. The sworn statement of the consignee, coupled with the invoice, furnishes the basis upon which duties are paid; and if, in a suit for freight, the action of the consignee in respect to the duties be competent evidence, as an admission, to show the weight of hides landed, it is not conclusive.

In this action, therefore, the actual weight of hides landed is open to be shown. Accordingly, it has been made to appear by an actual weighing of the hides, which the consignee caused to be made after his receipt of the cargo, and when there is no reason to suppose that any change in weight had occurred, that the weight of hides delivered was 224,002 lbs. instead of 230,977 lbs. From which it results that the freight and primage due on delivery of the hides was $1,417.01 instead of the $1,515.17, which the shipowner had demanded.

A further question has been discussed in this cause, and that is, upon whom rests the obligation to weigh the cargo, under a bill of lading like the present? My opinion is that, in the absence of an agreement to the contrary, the ship is bound to weigh the cargo whenever a weighing is necessary to enable her to compute the amount of her freight. "The person who wants to ascertain the quantity must pay the expense of weighing." Willis, J., Coulthurst v. Sweet, L. R. 1 C. P. 654. See, also, The Treasurer [Case No. 14,159]. The same rule appears to prevail upon the continent of Europe. Thus it was adjudged by the tribunal of commerce of Havre, in 1861, that when the freight can only be determined by weighing the cargo, the shipmaster must bear the expense. Recueil de Jurisprudence Commerciale Maritime du Havre, 1861, pt. 1, p. 135. On the contrary, when a weighing is not necessary for a determination of the freight, as is the case when the freight is made payable by the weight given in the bill of lading, the expenses of weighing are adjudged to be borne by the owner of the goods. Judgment of Tribunal of Nantes, 1863, note 64, p. 60. See Caumont, Traité Affraitement, 252; also, Traité Fret, 89. There remains to indicate the proper decree to be made in this action, under the views of the law above expressed. The prayer of the consignee is that the libel be dismissed with costs, upon the payment of the freight by the consignee. But I am of the opinion that the right to recover the freight, if imperfect at the commencement of the action, may be considered to have become perfect upon the subsequent receipt by the consignee of the whole number of hides in good order; and inasmuch as by giving the stipulation for value, a stipulation was substituted for the property, the interest of the shipowner in the cargo should be considered as transferred to the proceeds of the stipulation. The libellants should therefore take a decree directing their freight, conceded to be due them, to be paid out of the proceeds of the stipulation. Such a practice renders a proceeding like the present very convenient in cases of dispute in regard to freight, as it enables the consignee to receive his cargo promptly without paying a demand which he deems illegal, and enables the shipowner to obtain a security for his freight which, while it fully protects his rights, saves risk and expenses in regard to the cargo. The decree will therefore be in favor of the libellant for the sum of $1,417.01, gold, with interest from the time of landing the cargo, less, however, the taxed costs of the claimants in this action.

Clearly the libellants are not entitled to costs, for they wholly fail to maintain the position taken by them. On the other hand they should pay costs, because, if the cargo had not been bonded, a dismissal of the libel with costs would have been the result of the action; and the claimants should not suffer by reason of having substituted a stipulation in place of the property, as that course was equally for the advantage of the libellants and the claimants.

The case was afterwards opened for further evidence bearing on the question of costs, on which the following opinion was rendered:

BENEDICT, District Judge. This case having been opened for further testimony bearing upon the question of costs, and it now appearing that before the filing of the libel the merchandise in question had passed into the control of the claimants, and it also appearing that the answer of the claimants admits that freight was due at the filing of the libel, and it also appearing that the amount of such freight, when ascertained, was not paid into court pursuant to the rules of court, it is therefore ordered that the decree in this case be for the amount of freight heretofore found due, namely, $1,417.01, gold, with interest, and that the libellants recover also their costs of this action, to be taxed.

NINE TRUNKS (UNITED STATES v.). See Cases Nos. 15,885 and 15,886.

NINETTA, The (KNOX v.). See Case No. 7,912.

NINETY DEMIJOHNS AGUADIENTE (UNITED STATES v.). See Case No. 15,-887.

Case No. 10,274.

NINETY-FIVE BALES OF PAPER v. UNITED STATES.

[1 Paine, 149.] [1]

Circuit Court, S. D. New York. April Term, 1820.

CUSTOMS DUTIES—WHAT IS COST AT PLACE OF EXPORTATION.

A manufacturer, living in an inland town of a foreign country, might, under the collection law of 1799 [1 Stat. 627], and before the act of the 20th of April, 1818 [3 Stat. 458], invoice any article manufactured by him, and exported to the United States, at the actual cost of the raw material, and the price or value of the labour employed in its manufacture, adding the expense of transportation to the sea-port, whence it was shipped. This is the cost at the place of exportation, within the meaning of the law.

This was an appeal from a sentence of condemnation in the district court of the Southern district of New-York.

The libel stated that ninety-five bales of paper were, on the 28th day of November, 1817, imported in several ships from France into the United States, and entered at the custom-house in New-York, but were not invoiced according to the actual cost at the place of exportation. Collection Law, § 66. The claimants, Victor Martin and Michael Gosselin, alleged, in defence, that the paper was manufactured by them at their paper mills at Vire, France, and was thence by them transported to their house or place of deposit at Paris, with the intention of exporting the same to the United States. That the transportation was afterwards continued to Havre, where the paper was shipped to New-York. That the invoice was made out at a fair estimate of the actual cost of the paper to the claimants, at the place whence they departed with it in France, with the intention of exporting it, which they insisted was the place of exportation contemplated by law; and that the entry was not made with any intention of defrauding the revenue.

H. Wheaton and W. A. Seely, for appellants.

J. Fisk, D. A. and C. Baldwin, for respondents.

LIVINGSTON, Circuit Justice. This property is libelled for not being invoiced according to the actual cost thereof, at the place of exportation, with design to evade the duties thereupon, or on some part thereof. The libellants contend, that if the court be satisfied that these goods have not been entered at the custom-house, agreeably to their actual cost or value at Havre, which was the port of exportation, a condemnation must follow, notwithstanding it may appear that the price at which they were entered may have corresponded with the actual cost of the article to the manufacturers, who, in this case, were the importers.

The court is by no means satisfied that this is the true meaning of the collection act, and is rather inclined to think, that a manufacturer, living in an inland town, may invoice any article imported by him into the United States, at the actual cost of the raw material, and the price or value of the labour employed in its manufacture, if to this be added the expense of transportation to the sea-port; for that is the cost to him at the place of exportation. But without adverting to some expressions in the very section under which this merchandise is libelled, and to others which are to be found in other parts of the act, in favour of this interpretation, it is sufficient, in examining a case where no forfeiture can attach, unless there existed a design to evade the duties, and where some ambiguity of construction exists, for the court to know, that the officers who have been intrusted with the execution of the law, have understood it in this way, and have never interfered with a practice, coeval probably with the establishment of our collection system. That this is the case, appears not only from the testimony in the cause, coming from a source not liable to mistake, but also from a report of the secretary of the treasury, made to the house of representatives on the 17th of January, 1818, in which this course is expressly noticed, and a remedy pointed out, which was ingrafted into the act on the subject, which passed the 20th of April, 1818. This remedy was, that the oath, in addition to what was then required by law, should state that the invoices produced did exhibit the true and correct value of the article in the state of manufacture, in which the goods then were. Surely no such alteration were necesssary, unless the provisions of the then existing law were deemed inadequate to suppress a practice which was thought to bear hard upon the fair American importer. But be this as it may, the court is clearly of opinion, that a continued practice of this kind, and which it was thought that nothing but a new law could put an end to, entirely exonerates the claimants in this case from all design to evade the duties on their goods, if the price at which they were entered be not less than what they actually cost the importers, at their factory in France, adding thereto the expense of transporation to Havre.

The court will now proceed to examine whether, under this rule, the claimants are entitled to a restitution of the articles libelled. There is a great body of testimony, and if not contradictory, calculated at least to throw some obscurity on the subject. The goods being proceeded against, on an allegation of their being entered at an under-value at the custom-house, it became

[1] [Reported by Elijah Paine, Jr., Esq.]

the duty of the importers to show what their cost was; and if the witnesses produced by them were men, who from their situation in life, and opportunities of information, were able to form a correct opinion, and testified in their favour, a case for restitution would be made out, unless the effect of such proof were got rid of, by contrary testimony arising from an equal or greater number of witnesses, and against whose capacity of forming a correct judgment no objection could be made. In such case it might become necessary to inquire into the character of the respective witnesses, in order to settle to whom the greater credit was due. Keeping this rule in sight, which seems to be too reasonable to be called in question, let us now look at the testimony, or at such parts as may be material; for into every case of this kind there will necessarily be obtruded a great deal of irrelevant matter, calculated sometimes to excite a little suspicion, but very unsafe to govern a decision in opposition to positive and clear testimony on the immediate and important points of the cause. As preliminary to the review of the testimony, which will not be long, the court observes, that it is satisfied that the claimants were the manufacturers of this paper, with an exception of a very small part, if of any, and that the invoices handed to Hicks, Jenkins & Co. were made out, no matter when, or from what materials, for the purpose either of selling the article better in this market—a species of imposition of daily practice, or that they were fabricated or got up for the sole purpose of inducing those gentlemen to make a greater advance on the paper than they would have done if invoices expressing the true value of the commodity had been exhibited. It may also be remarked here, that until these last invoices were carried to the custom-house, no suspicion appears to have been entertained there, and yet one would imagine that the collector, or some other officer, would, from former entries of paper, have acquired a sufficient knowledge of its value to form an opinion, whether that in question was entered at too low a price, without the aid of the invoice received from Hicks, Jenkins & Co.

The evidence as to the real value of the paper consists,—1st. Of the answer of the claimants, in which they swear positively, that it was invoiced according to the real and bona fide estimate of the actual cost thereof to them at the place whence they departed with the said paper, in France, with the intention of exporting the same. It may be said, that no great reliance can be placed on the oath of the claimants. It is true that, unless corroborated by other testimony, their declaration would form no ground for restitution; but there can be no harm in adverting to the oaths of two respectable merchants, especially if it shall appear that their declarations correspond with those of the principal witnesses, who testify to the same fact. Among these are Berrard and La Rue; the former was chosen as an appraiser, by the claimants, and the latter by the collector. It is not possible for testimony to be more in point, or to be drawn from sources better entitled to full and entire credit. The estimate of the former, who had been eight years in the country, is not made from any vague conjectures founded on the price of the article in a foreign market, but from what he actually paid for it, at the place where this paper was manufactured, including the profit of the manufacturer. It is a mistake to suppose that Berrard intended in his valuation to give the actual cost of the paper. He says, it is true, that the claimants desired him to state the fabric prices, and not those at which the article sold for in trade, and that this would make a difference; but it is very evident that he was governed not by this suggestion, but that his appraisement was founded on the price paid by himself, which included the profit of the manufacturer. Mr. La Rue, who was chosen by the collector, differs a little from Berrard; the latter estimates the different kinds of paper at 6, 8, and 10 francs; the former at 7, 9, and 10 francs; but we are informed, on the examination of this gentleman, why he put a higher value on the paper than Mr. Berrard. He tells us, that he was imposed upon in some paper which he imported, which was charged to him higher than the price at which, he afterwards found it might have been purchased in France. Mr. La Rue also states, that he was not governed in his appraisement by the circumstance of the claimants being manufacturers, but by the prices paid by himself. A witness from Paterson, whose name I have not on my minutes, who appears very intelligent, and intimately acquainted with this kind of business, confirms the testimony of these two gentlemen. To this proof, which makes out a very clear case for the claimants, there is opposed not a single witness who is either an importer or a manufacturer of this article, but some who deal in it, and have no other opportunity of forming a judgment of its first cost in France, than by reference to the prices which it bears in this market. This, to say the least, would be a very unsafe way of arriving at the truth, not to say a very improper way, when a better and more satisfactory criterion has been afforded to the court. There is reason too to believe, that the expenses on paper after it leaves the factory in France, are considerably greater than we find them in the testimony of these witnesses. Respectable then as these gentlemen may be, and undoubtedly are, their testimony ought not to be put in competition with those who, from their situation, must be supposed much more competent than themselves to form a correct estimate.

On this part of the case, no difference of opinion exists between the district and this court. That court did not condemn the property because it believed that the goods could not have been manufactured at Vire for the price at which they were invoiced, but because they should have been entered at the price at which they have usually been sold. On this point, as applicable to the question now before us, this court thinks the sentence of the district court erroneous, and therefore it is reversed, and the property ordered to be restored to the claimants.

NINETY-FIVE BARRELS OF DISTILLED SPIRITS (UNITED STATES v.). See Cases Nos. 15,888-15,890.

NINETY-FIVE BOXES (UNITED STATES v.). See Case No. 15,891.

NINETY-TWO BARRELS OF RECTIFIED SPIRITS (UNITED STATES v.). See Case No. 15,892.

Case No. 10,275.

NINETY-TWO BARRELS OF SPIRITS.

[5 Ben. 323.] [1]

District Court, N. D. New York. Sept., 1871.

INTERNAL REVENUE SEIZURE — CERTIFICATE OF PROBABLE CAUSE—JURISDICTION.

Property was seized by a collector of internal revenue on September 26, 1867, and was next day released to the claimant on a bond given under the 48th section of the internal revenue act of June 30, 1864 (13 Stat. 238). On October 10, 1867, an information was filed against the property. On October 22d, the collector made a new seizure of such of the property first seized as could be found in the possession of the claimant. No information was filed on that seizure. The circuit court, on a writ of error, decided that the first seizure was abandoned, and the claimant was entitled to judgment. The collector then applied to this court for a certificate of probable cause. *Held*, that the application must be denied for want of jurisdiction.

At law.

HALL, District Judge. This is a motion for a certificate of probable cause. The property against which the information was filed was seized on the 26th day of September, 1867. The next day the property was released to the claimant upon a bond supposed to have been executed in pursuance of the provisions of the 48th section of the internal revenue act of June 30, 1864. On the 10th day of the succeeding month the information in this case was filed, the government officers then having in their possession no part of the property seized, nor anything representing it but the bond so executed. On the 22d October, 1867, the collector who made the first seizure, having concluded that the taking of the bond and the release of the property was unauthorized and irregular, made a new seizure, or reseizure, of such of the property first seized as could be found, and of other property then found in the possession of the claimant. No information founded upon the second seizure has ever been filed; and the circuit court of this district has decided, upon a writ of error to this court, that the first seizure was abandoned, and that the claimant was entitled to judgment. [Case No. 15,892.]

The seizing officer now, at the first term of this court after the judgment of the circuit court was announced, moves for a certificate of probable cause for the seizure of the claimant's property, to protect himself against a suit commenced against him by the claimant.

The motion must be denied. There has been no information, and of course no trial, founded upon the seizure in October, and a certificate of probable cause, if granted in this suit, would afford no protection in a suit for damages resulting from such seizure. The circuit court having decided that the first seizure was abandoned, and the jurisdiction of this court to try and determine the question of forfeiture, and of probable cause for the seizure, depending upon the question whether there was a valid and subsisting seizure at the time the information was filed, a certificate of probable cause for that seizure must also be denied for want of jurisdiction.

The motion is therefore denied, but without costs.

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

Case No. 10,276.

The NINEVEH.

[1 Lowell, 400.] [1]

Circuit Court, D. Massachusetts. 1869.

ARBITRATION AND AWARD — COLLISION CASES — SUBMISSION — DAMAGES — AWARD BY TWO OF THREE REFEREES — AGREEMENT TO REFER BEFORE ANSWER FILED.

1. A submission to three referees does not authorize an award by two only.

2. An award in a case of collision which decides the liability, but not the damages, is not valid, because not final.

3. Where such an award had been rendered under a rule to three arbitrators, and one of the three refused to act further, the award and rule were set aside.

4. Where an agreement to refer was made before answer filed, the claimant should have leave to answer without terms, after the rule is set aside. An answer was not necessary while the case was before the arbitrators, unless ordered by them.

This was a cause of collision by the master of the Aurora against the Nineveh for damage received in Massachusetts Bay. The libel was filed March 20, 1868, and a claim was duly filed and the vessel released on bail. On the twenty-fifth of March, before answer filed, the parties agreed to refer the cause to three arbitrators, and a rule of court was taken out the next day which followed ex-

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

actly the stipulation of the parties, and referred the cause to the three without express power to the majority to decide the dispute if the whole should be unable to agree. The arbitrators met and heard the parties, and signed an award that all damages, costs, and expenses should be divided, and be paid by the owners of the two vessels equally, and that in case they should not agree on the amount, the claims should be submitted to the referees who would pass upon and establish the same by a supplementary award. The parties could not agree upon the damages and one of the referees refusing to act further, the two who remained proceeded to assess the damages, but made no award, and asked the instructions of the court in the premises. The libellants now moved that the award, so far as made, may be accepted, and the case be recommitted to the two to find the damages. And the claimants moved to have the award and rule set aside, and that they have leave to file their answer and proceed as usual.

F. C. Loring, for libellants.

J. C. Dodge, for claimants.

LOWELL, District Judge. It is well settled that a submission to three, without more, does not authorize an award by two only. Towne v. Jaquith, 6 Mass. 46; Green v. Miller, 6 Johns. 39; Dalling v. Matchett, Willes, 215. It makes no difference in this respect that the submission is made a rule of court, because the rule is founded upon and must strictly follow the agreement of the parties. It follows that I cannot recommit the report for further action by the remaining arbitrators.

It is equally clear that the award which has been made cannot be accepted. It does not decide the rights of the parties, but is in its nature and on its face a mere preliminary finding,—what we should call an interlocutory decree,—and amounts only to an order or direction to the parties to do certain acts and prepare certain evidence before the next hearing. In legal language, it is not final. The question of damages forms an essential part of the submission, and both parties are entitled to the judgment of their chosen tribunal upon it, as much so as upon the preliminary point of the responsibility of the respective parties.

For these reasons I must order that the rule of reference be vacated, and that the claimants file their answer within a reasonable time. The objection that they ought to have answered sooner cannot prevail, because the agreement to refer, which was filed very early in the case, took away the necessity for an answer, and left the referees to be the judges of what should be required in the way of pleadings, and it is not until the rule is set aside that an answer is needed or could properly have been received. It must of course, be filed without terms. Order accordingly.

Case No. 10,277.

The NIPHON'S CREW.

[1 Brunner, Col. Cas. 577;[1] 13 Law Rep. 266.]

Circuit Court, D. Massachusetts. Oct. Term, 1849.

SEAMEN—WAGES—WHEN EARNED—SALVAGE.

The crew of a ship abandoned at sea, and set fire to by order of the master, who were upon monthly wages, cannot recover wages up to the time of abandonment, although the vessel, freight, and earnings be fully insured, and certain articles (for which the crew received a compensation in the nature of salvage) were saved.

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

This cause comes up by appeal from the decree of the judge of the district court dismissing the libel. The suit was in personam for seamen's wages against the owners of the ship Niphon. The libelants were mariners of said ship, on a voyage from the Sandwich Islands to Nantucket, on monthly wages. The vessel sailed on the 5th August, and was adandoned at sea on the 13th January, off the coast of the United States, on account of a dangerous leak caused by perils of the sea, and was set fire to by order of the master. The crew were taken off by another ship and brought into port, bringing with them the chronometer, certain charts, the compasses, certain sails, and the boat. The owners had a full insurance on the vessel, her freight and earnings. The libelants, eight in number, claim wages to the amount of $50.15 each, being up to the time of abandoning the vessel. The respondents, the owners of the vessel, appeared and gave stipulation, and agreed to submit the question to the court upon the argument of the counsel for the libelants, the libel being taken pro confesso, and the following additional facts being agreed; viz., the chronometer and charts were sold for fifty dollars, of which the libelants have received their share. The other articles saved are retained by the owners of the vessel that took off the crew, who claim them as a gift from the master of the Niphon, and for salvage.

The district court, after a hearing, dismissed the libel, and an appeal was taken thence to this court.

Richard H. Dana, Jr., for libelants.

[2][To disembarrass the case, we will, at first treat it as one of total loss of ship, cargo and freight, by foundering at sea, the crew performing duty faithfully, but able to save nothing. Are the owners personally liable for wages? The general principle applicable to contracts for labor, is that compensation follows the faithful performance of duty. If wages are not due here, it is owing to an exception peculiar to the seaman's contract for wages. Judge Ware, in

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

[2] [From 13 Law Rep. 266.]

The Dawn [Case No. 3,666], says, "Upon the common principles of the contract of hiring service and labor, the title of the laborer to his reward depends on the faithful performance of the service for which he is engaged, and is not liable to be defeated by the accidents of fortune." So, Judge Sprague, in The Massasoit [Id. 9,260]. We are here met with the maxim, "Freight is the mother of wages." There is nothing in jurisprudence more remarkable than the history of this maxim, its uncertain origin, its precarious life, and its lingering but certain death. It is not found in the codes of commentaries of continental Europe, nor did it originate in the admiralty courts or treatises of England or America. It is first discovered in the English common-law reports, among obiter dicta, though even there it has never been decided that the converse of the maxim is true, viz., that where there is no freight there can be no wages. When the early editions of Abbott on Shipping were published, there had been no decision to that effect (Abb. Shipp. [3d Ed.] p. 435), and Lord Stowell, in deciding the case of The Neptune (1 Hagg. Adm. 232), says, "It by no means follows, universally, e converso, that where no freight is due, no wages are due." The English common-law cases turned chiefly on the wording of the contracts, which were almost always so contrived by the masters and owners, as to make the wages depend upon the safe arrival of the vessel at specific ports. Appleby v. Dods, 8 East, 300; Cutter v. Powell, 6 Term R. 320; Hernaman v. Bawden, 3 Burrows, 1844. In the American cases there is a good deal of confusion, arising from a mistaken deference to this maxim. Judge Kent held that wages were lost with freight, and where cargo only was saved by the seaman, and no freight was due, he considers that they are to have salvage and not wages. Dunnett v. Tomhagen, 3 Johns. 156; 3 Kent, Comm. 195. Judge Peters, on the other hand, in the case of Weeks v. The Catherina Maria [Case No. 17,351], gave wages, as such, when the vessel and freight were lost, but the crew saved portions of the cargo. Obliged to admit that the crew had no lien on the cargo for wages, where no freight was due, he puts the case on the ground of contract services entitling them to the contract compensation. And again, in the case of Giles v. The Cynthia [Id. 5,424], he speaks of seamen as entitled to wages out of the "vessel or cargo saved," though freight is lost, provided they did their duty in saving as much as possible. In the case of Taylor v. The Cato [Id. 13,786], however, he says that "freight and wages are lost by the wreck," and that the seaman, by doing his duty by saving vessel and cargo, "in a new character, as a salvor, regains a rightful claim to wages." He distinctly states the rule to be that cargo as well as vessel are pledged for this new species of salvage wages, lest the crew should neglect the cargo; but he cites no authority for the distinction. Judge Hopkinson, in the Sophia [Id. 65], where the cargo and freight were lost, and portions of the wreck were saved by the crew, gave wages, eo nomine; but he said that the wreck dissolved the contract, yet that if materials of the vessel are saved by the meritorious exertions of the crew, the claim for wages is revived. So in the case of The Hercules [Id. 1,762] he gave wages as such.

[Judge STORY, in The Saratoga [Id. 12,-355], said, obiter, that in the case of freight lost and materials of the vessel saved, the crew had wages, as such, and not salvage. He afterwards had occasion to examine the question more fully, in the case of The Two Catherines [Case No. 14,288.] In that case the cargo and freight were lost, and materials of the vessel saved by the exertions of the crew. Judge Story unfortunately deferred to the supposed rule, and held that wages as such could not be given, but gave wages in the nature of salvage, saying, however, that "if the question were entirely new, it might, perhaps, be more consistent with the principle of the rule, that the earnings of wages shall depend on the earning of freight, to hold that the case of shipwreck constituted an exception from the rule, and that the claim to wages was fully supported by the maritime policy on which the rule itself rests."

[The question first arose in England, in the case of The Neptune, 1 Hagg. Adm. 227, before Lord Stowell. In that case the cargo and freight were totally lost, and materials of the vessel saved by the crew. After full arguments, this learned judge, better acquainted, probably, with the ancient and modern civil and maritime law than any judge who has presided in admiralty in England, in an elaborate opinion, decided that wages as such were due. He holds that the seaman is obliged by his contract to save and guard the wreck, and is to receive wages not for these particular services in saving, but for having fulfilled his contract. He says, "In performing that duty he assumes no new character, he only discharged a portion of that covenanted allegiance to the vessel, which he contemplated and pledged himself to give in the very formation of that contract which gave him his title to the stipulated wages." Judge Story afterwards approved of this doctrine, and says, in a note to Abbott on Shipping (page 752, Ed. 1846), with reference to The Two Catherines [supra], "The court then thought that the rule upon the authorities had not been construed as liable to such an exception, and therefore put the allowance of wages in cases of shipwreck on the grounds of a qualified salvage." See, also, Pitman v. Hooper [Case No. 11,185.]

[The next case was that of The Massasoit [Id. 9,260], in this district. That case

was precisely like The Neptune, except that the materials of the wreck were not, in point of fact, saved by the crew. The wreck occurred in winter, under distressing circumstances, and for two days the seamen were unable to perform any salvage services, and the wreck was taken in charge by agents of the underwriters. Judge Sprague sustained the doctrine of The Neptune, and held that it was enough if the crew were willing to aid in saving and guarding the materials, being prevented by sickness, or by the act of the owners in procuring other aid and dispensing with their services.

[The next case was that of The Reliance, 2 W. Rob. Adm. 119. There was a total loss of cargo and freight, and the vessel perished, and the crew in her. The suit was brought by the administratrix of a deceased seaman against the owners personally. The counsel for the defense distinguished the case from that of The Neptune, by the fact that no part of the vessel was saved. The learned judge admitted the distinction, but shows clearly that Lord Stowell did not put the case of The Neptune on the ground of salvage services, but of faithful performance of contract. He states that portions of the wreck of the Reliance were saved by strangers, and had come into the owner's hands, but were not, and could not have been, saved by the crew. He decreed wages to the time of the death.

[The rule which made wages depend on the earning of freight may now be considered as overthrown. In the case of The Neptune, materials of the vessel were saved by the efforts of the crew. In the case of The Massasoit [supra], materials of the vessel were saved, but not by the crew, they, however, being ready to do all in their power; and the proceeding was in rem, to enforce a lien. In the case of The Reliance, not only was the saving of materials done by strangers, on a foreign coast, but the crew perished before salvage services could be rendered. These decisions bring the rule precisely to the case now in hearing, except that (as we have assumed) no materials are saved. Is then the fact of the accidental saving of a few materials by strangers, the vessel being specifically destroyed, and the enterprise entirely defeated, essential to the personal obligation of the contract on the owners? It may be remarked, that there is nothing in the language of the court, nor in the decision, in either The Reliance or The Neptune, indicating that the fact of salvage being made is essential. On the contrary, the reasoning is all such as would make the contract mutually obligatory, whether materials were saved or not. In the case of The Reliance it cannot be supposed, for a moment, that the liability of the London owner to the representative of the deceased seaman, depended on the fact that a stranger on the French coast picked up a few dollars' worth of old iron, or a spar, accidentally thrown ashore, perhaps days after the crew had perished. The reasoning in the case of The Massasoit would extend over this case, but, as the proceeding was in rem, the personal liability was not considered. Let us, then, examine the only proposition which can prevent our recovery. It is this: If a vessel is destroyed, freight and cargo lost, and the enterprise defeated, yet seamen are entitled to wages for the voyage if they have performed their duty, although they have saved nothing, provided some portion of the wreck happens to be saved by other means. No one will pretend that such a rule is founded in natural justice. No case can be found in any book where it has been laid down; nor is it in the code of any nation, ancient or modern. Neither is it founded on any sound rule of policy. The reason given for the supposed rule of freight was, in the words of Judge Ware, to "make the right [to wages] dependent on the successful issue of the enterprise, for which the men are hired;" and of Judge Sprague, "to unite the interest of the mariner with that of the owner." It will be found, too, on examining the codes of European nations, that, wherever they have introduced this exception to the law of hiring, it has been in such a way as to identify the interest of the seaman with that of the employer, depriving him of wages if the enterprise failed. Wherever they have refused wages, they have also dissolved the contract; and whenever they have given compensation from the wreck, it has been in consequence of salvage services actually performed by the seamen.

[In order to gain all the light possible on the subject, I have examined carefully that treasury of the maritime laws of all ages and nations, Pardessus' Lois Maritimes, and a careful reading of this work shows how little foundation there is in history for this odious exception. There is no trace of a rule making seamen's wages dependent upon the success of the voyage, in the laws of the Rhodians, or of the Roman or Greek empires, nor in the codes adopted by the Crusaders for the government of their conquered countries in the East. It is not to be found in any of the Italian commonwealths whose commerce filled the world in the Middle Ages. That universally received standard of maritime law, the Consolato del Mare, shows no trace of it. Judge Ware, in the case of The Dawn [Case No. 3,666], says, "No trace of such a principle is to be found in the Roman law, nor in the maritime legislation of the Eastern empire, nor in that ancient compilation which goes under the name of the 'Rhodian Laws.' It owes its origin to the necessities and peculiar hazards which maritime commerce had to encounter in the Middle Ages, when to the danger of the winds and waves were added the more formidable dangers of piracy and robbery." The laws of Spain (Ordonnance Maritime de 1340, art. 17; 5 Pard. 357) provide that in case of wreck the seamen shall

aid without loss of time, saving the ship, furniture, cargo and merchandise on board. "Dans ce cas, les matelots et autres employés doivent recevoir leur loyers, jusq'au moment ou le patron leur dira de cesser leurs fonctions." But if they shall desert, and not aid in saving ship and cargo, "nonseulement le temps qu'ils auront servi ne leur sera pas compté, mais encore ils devront rende ce qu'ils auront reçu pour avances ou paye." It also provides that any seaman who shall refuse to aid in saving shall be imprisoned until he pays his advanced wages. The laws of the Hanse towns are as explicit as those of Spain. The Recés de 1434, art. 3 (2 Pard. 474), treating of wreck, provides as follows: "The seamen are bound (seront tenus) not to leave the master without his permission, but to aid in saving the ship and cargo, and to remain by him so long as he furnishes them support, and for their labor they shall receive a just salvage compensation, according to the circumstances, as well as their wages and venture, conformably to the law of the sea,—"un juste salaire de sauvetage, suivent les circonstances, ainsi que leurs gages et portées conformément au droit de la mer." The next ordinance of the Hanse towns, that of 1591 (2 Pard. 520, art. 45), repeats the obligation of the seamen to remain and aid in saving both vessel and cargo, for which it provides they are to receive a proper compensation; but if the master has no money, he shall return them to the place where they shipped, if they wish to follow him. If they do not assist, he is not bound to pay them their wages, nor any other compensation; as translated by Pardessus, "il sera dispensé de leur payer leurs gages ni aucum autre salaire." The Ordinance of 1614, tit. 4, art. 29 (2 Pard. 543), is to the same effect, except that it adds imprisonment in case of failure to aid in saving. In the same ordinance (title 9, art. 5), there is a provision which is somewhat doubtful. It is as follows: "If enough of the wreck is saved to pay the wages of the crew, the master shall be bound to pay them in full." As there is nowhere in the laws of the Hanse towns an intimation that wreck forfeits the wages, but on the contrary (supra, Reces de 1434, art. 3), and the obligation to labor is clear, we must suppose that this provision relates to the right the crew have to be discharged and paid off on the spot, when their services are no longer needed, provided the master has the means of doing it; and does not imply that the owners or merchants, or even the master, are absolved from their obligation to pay finally. It is like the provisions of the Hamburg Code of 1497, art. 21, that when a master sends home a seaman, without fault on his part, he shall pay him half his wages. See, also, Ord. Phil. II. below. The law of the Netherlands is explained by the ordinance of Phil. II., in 1563 (4 Pard. 84), art. 12. In case of wreck, "The seamen are bound to aid the master in saving the cargo, to the best of their ability. In which case, and in any other, the master is bound to pay them on the spot, if he has money, what he owes them for their wages, and shall also pay them, on account of the merchandise saved, a reasonable salvage compensation. If he has not money enough to make this payment, he shall send them to the place where the ship belongs." The law of Genoa, decree of 1441 (4 Pard. 519), cc. 94, 99, makes it the duty of seamen to labor after as well as before the wreck, and obliges the master to pay them double their contract wages while they are employed in salvage services. The law of the States of the Church, Statutes D'Urban, rub. 33 (5 Pard. 144) inflicts the punishment of banishment and loss of a hand upon a sailor who deserts his ship in time of wreck, and makes it his duty to labor in salvage, "aider au sauvetage," for fifteen days, if required. The "Us et Coutumes D'Olonne," pt. 1, art. 22 (6 Pard. 553), after requiring the seamen to remain and labor, require the master, when he dismisses them, to give them a written discharge, "in order that they may prove to the owners of the ship that they did not leave without permission."

[The following are believed to be all the passages relating to this subject in the laws of Hamburg, Lubec, West Capelle, Wysburg, Riga, and Denmark. In examining these passages, the court will be struck with certain facts. It is nowhere stated, in terms, that the contract is dissolved or that wages are lost by the wreck. Nor is the contrary stated. But, in this silence, which way should the presumption be? Can there be a question that it should be in favor of the general principle, rather than of the exception, especially when the exception is contrary to natural equity, and admitted to have had no place in the laws of earlier days, and of other great commercial nations of the same day? It will be observed, too, that these codes distinguish between wages and salvage and recognize no principle like that of wages in the nature of salvage. Where salvage is given, it is irrespective of prior earnings, but is given for actual salvage services, pro opere et labore, according to the circumstances of each case. And no distinction seems to be made between vessel and cargo, as respects either the duty of the crew to save, or their right to wages, or the allowance of salvage. Hamburg: Decree of 1603 (3 Pard. 385), tit. 17, art. 1. In case of wreck the crew are bound to aid in saving cargo and materials, receiving an equitable compensation; if they refuse their assistance, the master shall pay them neither their wages, nor any thing else; "le patron ne leur paiera ni loyers ni rien autre chose." The same article is found in the decree of 1497. Lubec: Third Code (published by Brokers) art. 295 (3 Pard. 418). "In case of wreck the seamen are bound to aid the merchant in saving his cargo, as much as is in their power, and they shall receive a just compensation; provided, that if

they cannot agree with the master and merchant, it shall be decided in the first Hanseatic town at which they arrive, or at the first place in which there is a chamber of commerce, and they shall be paid, each according to his desert, by the master and merchant present at the wreck. He who has not labored in salvage shall receive nothing." Ditto, art. 305 (3 Pard. 422), inflicts a punishment of two months' imprisonment on any seaman who refuses to assist in saving from the wreck; and branding, with three months' imprisonment, for the second offence. The Ordinance of 1542, art. 24 (3 Pard. 431), inflicts the penalty of death. Ordinance 1586, tit. 3, art. 3 (3 Pard. 444). "In case of wreck, the master and crew are bound to aid, to the best of their ability, to save the goods of the freighter, who shall be bound to pay them equitably for their labor, according to the advice of arbitrators. But if the freighter and the crew cannot agree upon the amount of the compensation, it shall be decided at the first Hanse town at which they arrive, or the first place where there is a chamber of commerce; and each one shall be paid according to his desert. Whoever has not labored, shall receive nothing, and in addition thereto his wages shall be forfeited." West Capelle: Judgment 3 (1 Pard. 372). "If a ship is wrecked in any country whatever, the crew are bound to save and guard the cargo to the best of their ability. If they have assisted the master, to the best of their ability, in saving the cargo, he is bound to pay them ('shuldig hen loon te geven,' which Pardessus translates, 'est tenu de leur payer salaire'), and if he has not the money to pay them, he must take them home. If they do not aid, he owes them nothing, and they lose their wages, as the ship is lost." Riga: Statute of 1672, tit. 5, art. 1 (3 Pard. 522). In case of wreck, "the crew are bound to aid (in saving the cargo), on pain of losing their wages; and they shall have a reasonable compensation for their labor in making salvage." Denmark: Code, Fred. II. (1561) art. 24 (3 Pard. 250). "In case of wreck, the master and crew are bound to save the ship and her furniture, as well as the cargo, and compensation shall be made them by the decision of arbitrators. On the other hand, the freight of the cargo saved, as well as the wages of the crew, should be paid pro rata itineris, according to the decision of arbitrators. The seaman who will not aid in saving ship, furniture and cargo, shall lose his wages, even the advance which he has received, and he shall be regarded by all seamen as infamous." Ditto, art. 52 (3 Pard. 259), establishes the rule that in case of partial loss of cargo, the crew shall not receive their entire wages, but according to the amount of cargo saved, in the proportion of the freight which the master receives. The Code of Christian V. (1683) c. 3, art. 1 (3 Pard. 288), is the same with that of Fred. II., cited above. But the same Code, c. 4, § 8 (3 Pard. 298), enacts that "if the cargo and materials of the vessel saved, deducting charges of salvage, is not sufficient to pay the wages of the crew, they shall demand nothing farther." Wysburg: Laws of, art. 17 (1 Pard. 471). "In case of wreck, the crew are bound to save the cargo to the best of their ability. If they aid the master in saving, he owes them their wages. If he has no money, he may pledge the cargo saved, to return them to their own country. If they do not aid him in saving, he owes them nothing, and they lose their wages." Some editors add, "in the same manner as the ship is lost." It will be seen that none of these codes give any countenance to the doctrine that, in case of wreck, seamen are to get no wages, except from the materials of the vessel. And the only code which seems to make the wages depend upon the amount saved, that of Denmark, subjects the cargo to the lien for wages which has never been done in this country, and it denied the principle of Pitman v. Hooper, that wages in full are to be given, if sufficient freight is earned to pay them.

[The law of Sweden (Statute of Wysburg, A. D. 1254, c. 12; 3 Pard. 120) established the rule that if half freight or less was earned, in case of wreck, the seamen should receive half wages; if more than half freight, whole wages. A later statute, that of Car. XI. (1667) pt. 5, c. 2 (3 Pard. 170), is the first we have yet seen which establishes the rule of obtaining wages only from the materials of the vessel. "When the ship and cargo are totally lost, the master and crew can demand nothing of what is due them. But if they save materials to the amount of their wages, they shall be paid in full."

[There is no question that the law of France establishes, by positive enactment, the exception we contend against. The ordinance of 1681, lib. 3, tit. 4, art. 8 (4 Pard. 365), enacts, "En cas de prise, bris et naufrage avec perte entiere du vaisseau et des merchandises, les matelots ne pourront pretendre aucuns loyers, et ne seront neantmoins tenus de restituer ce qui leur aura este avance." Article 9 enacts, "If any part of the vessel is saved, the seamen engaged for the month or voyage, shall be paid their wages earned from the materials they have saved, and if cargo only is saved, they shall be paid their wages by the master, in the proportion of the freight which he receives. And in whatever way they are hired, they shall, in addition, be paid by the day, for their labor in saving the materials." The French Code follows the ordinance of Louis XIV. See volume 18, p. 278, art. 259 et seq. The French commentators have consistently held that the wreck dissolves the contract, and that the seamen are not bound to labor in saving vessel or cargo. 1 Valin, Comm. p. 704; 2 Poth. Cont. p. 230. And the French carry this system of attaching contracts to the vessel, and exonerating owners, so far that they exempt the

owners from personal liability to material men, if the ship perishes on the voyage home. French Code, lib. 2, tit. 8, "Des Proprietaires," art. 1; Emerig. Ins. tom. 2, p. 458. Article 3 of the Laws of Oleron has been cited by the French writers as containing the principle of their code. The passage is as follows: "Lorsqu'un navaire perit en quelque lieu que ce soit, les matelots sont tenus de sauver le plus qu'ils pourront des debris et du chargement. Et s'ils y aident, le patron doit leur payer un salaire raisonable, et le frais de conduite dans leurs pays, autant que le valueur des choses sauves peut suffire, et s'il n'a pas assez d'argent, il peut mettre les objects sauves en gage pour se procurer de quoi les ramener en leur pays. Si les matelots refusent de travailler au sauvetage, il ne leur est rien du, et au contraire, quand le navire se perd, ils perdent aussi leur loyers." The meaning of this passage is matter of inference. The French writers, trained under their code, have inferred that the wages were lost at all events by the wreck, and have construed the latter clause as only referring to the known rule. And the French writers have been the chief sources of information to our own jurists. But when we consider that such a rule did not exist at all in early times, nor in the Mediterranean, nor among nations following the Roman law, and when we remember the great influence these nations exerted on the maritime law of the North at the time the rules of Oleron were compiled, we should rather infer that the latter clause in this section was a specific recital that wages are forfeited for refusal to continue the performance of duty after wreck, in pursuance of the general principle of forfeiture for gross violations of duty. It is clear that Sir Wm. Scott, in the case of The Neptune, either did not give this section the French construction, or did not think it, if so construed, applicable or binding in England at the present time. Mr. Curtis, also, in his work on the Rights and Duties of Merchant Seamen, does not consider the construction as clear. Curtis, Rights & Duties, 284.

[Having thus examined these foreign codes, let us see what result is obtained from them. The French code makes the wreck, with destruction of the enterprise, a dissolution of the contract. The seaman is entitled to day's wages as a salvor, and his lien upon the materials of the vessel for antecedent wages is reserved to him. This code, except so far as it is followed by that of Charles XI. of Sweden, and to some extent by that of Denmark, stands alone. All the other codes insist on the obligation of the seaman to continue his labor, doubtless under the direction of the master, and for the benefit of vessel and cargo alike. The French code allows him to follow his lien on the materials of the vessel if he pleases since he has no lien on the cargo. It is a significant fact, also that the two codes which adopt this exception are the only codes which in terms continue to the seaman his lien on the wreck of the vessel for antecedent wages. Not that the lien did not exist under the other codes, but because it was needless to provide for its continuance when the contract remained entire. The French principle is not adopted either in America or England (see The Neptune, The Massasoit, and The Reliance [supra]); on the contrary, the seamen are held bound to labor under their contract; and now the declaratory act of 7 & 8 Vict. c. 112, gives wages to the time of the wreck, if the crew continue faithfully the performance of their duty. See, also, 1 Colonial Ord. Mass. 1668, p. 721, § 29. "And, in case of suffering shipwreck, the mariners are, without dispute, upon getting on shore, to do their utmost endeavors to save the ship or vessel, tackle and apparel, as also the merchant's goods, as much as may, out of which they shall have a meet compensation for their hazard and pains; and any upon conviction of negligence herein shall be punished." If bound to labor under their contract, it must be under the direction of the master, and for the preservation of cargo and vessel alike, or for either alone, at the master's option. They may be compelled for the benefit of the owners, to sacrifice their lien on the materials, and to labor for the cargo alone, on which they have no lien, or at most only to the extent of freight that may be due upon it. If such is the obligation of the seaman, why is it not mutual? The owner is surely bound to furnish him food and lodging while he is laboring, and why not wages? If the contract is binding on the seaman to the extent above stated, and not binding on the owner as to compensation, it presents a most extraordinary anomaly. The French have involved themselves in no such inconsistency. There is no evidence of it in other European systems. The cases of The Neptune and The Reliance were both proceedings in personam, as we understand the reports; and, if not, the owners are required to pay on the ground of contract, and not of salvage in their possession. The whole reasoning of the court would exclude any such illogical and unjust exception.

[The idea that the contract is binding upon the seamen, but that they have no claim for wages, except their lien on the materials of the vessel (an idea which has not taken the shape of a decision since the case of The Neptune), arises from not discriminating properly among the codes and systems of Europe. The European systems have been treated as a whole, and a rule found in the French code has been joined with principles and analogies from the laws of other nations, to which it is inapplicable, and a confused, inconsistent, and unjust composition made up. The publication of the work of Pardessus has thrown a new light upon the maritime systems of Europe, and shown them to have been quite variant. If we follow the French rule, we should follow it throughout; and, if we follow the general rule, we must not introduce

the French exceptions. But, supposing this rule, which we contend against, was more general than we have supposed, during the Middle Ages, there are reasons why it should not be followed now. In those periods, voyages were short, ports of discharge frequent, and the wages at stake small. Now, vessels go round the world, and when they near the home port, the wages at stake are large. Then, the crew were partners in the enterprise, and had a voice in the control of the vessel and choice of the master, and often an interest in the freight. The court is familiar with those rules which require the master to consult the crew before going to sea, or making jettison, or abandoning the wreck. Now, the crew are merely hired laborers, and have no voice in the control of the vessel. The reasons of public policy now are against the rule, as shown by the court in the case of The Massasoit. It may be said that the obligation of the owner, in the case of The Reliance, rests on the ground of his having received the proceeds of the wreck saved. It will be observed that the court did not put the obligation on that ground, although there was an opportunity to do so, but on the ground of contract. And there was no allegation to that effect in the libel. Nor does it appear that the net salvage was sufficient to pay the wages, nor was any provision made for others of the crew who might claim out of the same fund; nor any allusion to the apportionment of the fund. We would not lightly suppose the court to adopt so anomalous a position as this; sustaining, first a one-sided contract, all obligation and no compensation, and then reviving it by the accident of net salvage from the vessel, coming through the hands of a stranger. But chiefly we insist that no authority can be found for the position, that while seamen are bound to labor in salvage, under their original contract, and as part thereof, for vessel and cargo, either or both at the master's option, they have no claim for wages but in consequence of their lien on the materials of the vessel saved. No decision and no code has yet combined these principles. It will be observed, too, that if the claim for wages rests solely on the subsistence of their lien on the vessel, it should, on principle, exist as to all materials saved, whether by themselves or others, or saved by accident; but the two codes above referred to, those of Louis XIV. and Car. XI. the only ones that establish this rule in terms, both restrict the lien to materials which the seamen have themselves saved; showing that it is rather an arbitrary and local rule of policy, than the recognition of a general principle.

[The only American cases that need be noticed, before closing this branch of the argument, are Lewis v. The Elizabeth and Jane [Case No. 8,321], and The Dawn [supra]. The former case was decided before The Neptune, and the learned judge, like Judge Story in The Two Catherines, supposed the rule to be that wages depended upon the earning freight; or, as he stated it, that "wages are dependent on the successful termination of the voyage;" "any misfortune that destroys the voyage, puts an end to the claim for wages. The contract is dissolved. The connection of the crew with the ship is at an end. The property is derelict," &c.; and again, "wages are dependent on the safe delivery of the thing." It is enough to say that this doctrine is overruled by the later cases. It will be observed, too, that the learned judge had not then access to the collection of European codes since made by Pardessus, and relied chiefly on the French code and the French construction of the rules of Oleron; yet even from that point of sight, he admits the confused and unsatisfactory state of the law. The case of The Dawn was decided after The Neptune, but before The Massasoit and The Reliance. In that case the wages were paid to the time of the wreck, and the only question was whether salvage could be given in addition to wages. The learned judge takes up, obiter, the general question of wages in case of wreck, and while he yields the groundwork of his decision in the Elizabeth and Jane, to the authority of The Neptune, yet he seems to retain all that The Neptune does not necessarily overthrow. We can only say that, had the point been before him for decision, we have no doubt he would have gone more fully into the considerations of policy that govern the question, and examined more minutely the European codes on that point. As it is, it is evident that he repeats so much of the old doctrine as was not then overturned, and does not sufficiently consider the position in which the connection of the two systems, the new piece in the old garment, leaves the entire fabric.

[We have, thus far, assumed this to be a case of total loss. But it appears that a boat, chronometer, compass, and some charts were saved by the crew, and brought into port. Their services and duty, therefore, continued after the wreck. There is no doubt, upon the principle of The Massasoit and The Reliance, that the crew were bound to guard these relics, and deliver them in safety to the owners; and, in performing this duty, they were under the master's control. The contract and its obligations survived the wreck. But, if the seamen have wages only on the ground of materials which have come into the owners' hands, it is to be observed that the fund is not exhausted. These libellants have received only their share of the $50 obtained from the sale of the chronometer and charts. Are they not entitled, as first claimants, to exhaust the fund? Moreover, there is property to the value of $100 in the hands of the owners of the ship which took off the crew, who make a claim upon it as a gift from the master, and for salvage. If the master has given it away, should not the owners make it good to the crew? If it is held for salvage,

must not the owners discharge the claim, and pay at least the net to the crew? In this case the master ordered the crew to leave and set fire to the ship. This shows the hardship of continuing the authority of the master, yet leaving to the seaman only his lien. If there is such a rule, the crew had a right, if they chose, to stay by the ship. At least, on the principle of lien, they would be entitled to enforce their lien if the vessel had been brought in by others, and their leaving was compulsory. The act of the master cut them off from both these chances of saving their wages. The owners have also, in this case, an insurance on vessel, cargo, and freight. I am aware it was formerly held that this could not inure to the benefit of the crew. But this doctrine was on the hypothesis that the wages were attached to the success of the enterprise. If this rule is abandoned, and the principle is adopted, that the owners are liable for wages after wreck, in consequence of proceeds of the wreck received, why should not this include insurance on vessel and freight? In either case, it is the fact that the owner has a fund to pay from, that makes him liable, and in either case the owner may resist payment by showing that the seaman did not faithfully perform his duty at the time of the wreck. But the reason of public policy, which forbids seamen from insuring their own wages, still subsists, for the master and owners cannot then be parties to resist the claim for wages, to show misconduct or negligence, or to make offsets. In the present state of the law, then, we submit that, while seamen should not be permitted to make an independent insurance of their wages, yet, if the owners have insured vessel or freight, meritorious seamen should be paid their wages out of that fund.][2]

WOODBURY, Circuit Justice. In this case, as no freight has been earned, it is well known that the general rule is, no wages are to be paid. Moll. 245; 1 Sid. 228; 2 Show. 291; 3 Salk. 23; 3 Hagg. Adm. 96. But there are various exceptions to this as a general rule, and the chief inquiry is, whether, on the facts of the present case, it can be brought within any of those exceptions. The important principle on which the rule rests shows the ground of most of the exceptions. It rests on the idea that if a cargo be on board to be carried safely and saved in peril, the crew should be induced to use all possible exertion to save it, by making their wages in such a case depend on its being actually preserved, and thus freight earned on it. Hence originates the quaint maxim that "freight is the mother of wages." Some have incautiously added, it is "the only mother of wages." If it was the only one there is no ground whatever for the present libel, as it is not pretended here that any freight whatever was earned.

What, then, are the other sources or reasons for wages beside earning freight? They seem to me to rest on service performed, and an inability to earn freight, in consequence of some wrong or neglect by the owner or his agents. In such cases the owner should not take advantage of his own misfeasance or nonfeasance; and the sailor performing his whole duty, so far as regards his own exertions, and successfully, should be compensated.

A brief retrospect of some of the exceptions to the general rule will show whether the present case can be brought within the principles which govern them; and also whether any of them go further than I have suggested, and, as is contended here for the libellants, make the owners liable for wages on the contract of hiring and ordinary service alone, without reference to the conduct of the owner, or the saving of any part of the freight or vessel when in peril. Among the exceptions where wages are allowed, though no freight is earned, is where no cargo is put on board so that freight might be earned. Not earning it, then, is the neglect or fault of the owner; and consequently such a case constitutes one of the exceptions to the general rule. See cases, post, and Edw. Adm. 118, 119; Curt. Merch. Seam. 271, 284, 287; Laws Wisbuy, art. 17; 3 Hagg. Adm. 202; 2 Hagg. Adm. 158. This rests not merely on the original contract as the mother of wages, but on the service and freight not earned by the misconduct or act of the owner, and of which he is estopped to take any advantage. It would be making the exception the general rule to hold the contract in all cases to be the mother of wages, unless you considered it an implied portion of every contract of this kind, that it should be so performed when a cargo was on board as to earn freight. Then the contract might well be regarded as the general source of wages, and still the same result follow as if freight was so regarded. As an exception, owing to carelessness of the owners, or the case at times coming within the general rule of some freight earned, they are personally liable for wages when the vessel and cargo have been condemned, and their proceeds restored at some subsequent period Sheppard v. Taylor, 5 Pet. [30 U. S.] 699, 711. No matter whether the vessel and cargo are restored, or their proceeds, after condemnation as the lien which before existed for wages "reattaches to the thing, and to whatever is substituted for it." [Sheppard v. Taylor] 5 Pet. [30 U. S.] 710; Pitman v. Hooper [Case No. 11,185].

In several other classes of cases, though no freight is actually earned, this circumstance is attributable to the owners, rather than the crew, and then the latter are not to bear the loss of wages. They may then be recovered of the owners, if, for instance, the latter are guilty of a wrongful deviation from their

2 [From 13 Law Rep. 266.]

contract or voyage before the loss, or guilty of a contraband trade, or of driving the crew away by cruelty, or engaging, without their previous knowledge and consent, in any illegal voyage; or by running in debt, and subjecting the ship to payment of it. 1 Hagg. Adm. 238; [Sheppard v. Taylor] 5 Pet. [30 U. S.] 687; Edw. Adm. 122; The Malta, 2 Hagg. Adm. 158; The Saratoga [Case No. 12,355]. In short, wages are payable whenever freight is lost by the fault or fraud of the master or owner. 3 Kent, Comm. 187; Hoyt v. Wildfire, 3 Johns. 518; The Malta; Wolf v. The Oder [Case No. 18,027]; Cowen, 158. But here, as a cargo was on board, and it was here impossible to earn freight, and there was no interposition or neglect, or other misconduct by the owners to prevent the carrying of freight, the general rule applies in full force not to pay wages without it. And no statute exists here making an exception; and no exception by adjudged cases has been referred to or can be found which reaches the circumstances of the present case, unless a part of the vessel was saved by the exertions of these libellants, so as to entitle them to wages in the nature of salvage.

Having considered the established exceptions to the general rule, and seen that none of them, or the principles of them, apply to the present case, I will now proceed to the inquiry, how, on principle or precedent, the saving of a part of the vessel can entitle a crew to recover wages, though freight was entirely lost by the loss of the cargo on board, and though no misbehavior or neglect occurred on the part of the owners to produce the loss. There has been, to be sure, in modern times, an increased tendency to allow wages, but it should be when it can be done without weakening the principle that takes the lead in and governs this subject. Thus, if wages are due because part freight has been received, or earned, or part of the cargo has been saved, so as to earn some freight, however small, full wages must be paid. Pitman v. Hooper [supra]; 3 Hagg. Adm. 199; 2 W. Rob. Adm. 52. Some cases seem to hold (The Reliance [2 W. Rob. Adm. 120]; 3 Hagg. Adm. 19, 58) that the owner is, in case of part of the cargo saved, not only liable, but that the seamen may proceed against the cargo itself. This last is very doubtful, however, unless the cargo was owned by the person who owned the vessel. Again, where in a round voyage freight has been earned out, and not back, the law is indulgent so as to pay wages out of it; and such is the rule also when freight has been separately earned to intermediate ports, at which the vessel touches on her way out or home. 3 Hagg. Adm. 201; 1 Hagg. Adm. 232. Or, at times, it is allowed to the last port of discharge, and half the time running there. Thompson v. Faucett [Case No. 13,954]; Pitman v. Hooper [supra], and cases cited; The Juliana, 2 Dod. 504; Abb. Shipp. 749; Bronde v. Haven [Id. 1,924]; Curt. Merch. Seam. 267; The Two Catherines [Case No. 14,288]; 3 Greenl. Ev. 1; 1 Keb. 831; 3 Salk. 23. All clauses to the contrary in the shipping articles are likewise considered void, from regard to the confiding sailor, so much the ward of a court of admiralty. 2 Dod. 504; 3 Kent, Comm. 6, 194, 195; 6 Wm. IV. c. 19, § 5; Edw. Adm. 119; Pitman v. Hooper [supra].

In some countries, by statute, the law has of late been expressly altered, and wages required to be paid, though the cargo and ship be lost, and no freight earned, if a certificate be obtained from an officer that the crew did their duty faithfully to save the vessel and cargo. Edw. Adm. 123; 7 & 8 Vict., c. 112, § 17. But here no such statute exists, though one might not be unjust, where the weather-beaten sailor proves true to duty to the last, and more especially if the owner has, as here, insured his freight. Having no such statute here, our power to consider it so, standing with or without insurance of freight, is too questionable for justifying the adoption of such a course without legislative sanction after the pursuit of a different course for ages. In The Lady Durham, 3 Hagg. Adm. 201, Sir. John Nicoll refused to do it, unwilling, as he said, "to violate a principle and rule of law, whatever may be the hardship on the seamen." The court there declined to pay wages out of the insurance of freight by the owner, where freight was not earned, nor prevented by the owners.

How can the saving of a part of the vessel change any of these principles? The wages were not stipulated to depend on that, nor did the ancient usage make them depend on that, when it was the cargo or freight saved or secured, which was to secure wages, and not the ship. To be sure, when wages were earned by earning freight, or failing to earn it only by the neglect or fault of the master, the crew could resort to the vessel, even to the last nail or plank, for payment. Relf v. The Maria, [Case No. 11,692], note; 7 Taunt. 319; The Saratoga [supra]; Edw. Adm. 121, 128; The Neptune, 1 Hagg. Adm. 233–239. So they could resort to the freight when obtained, as a fund liable to them, and so to the owners who employed them, if wages are earned. But the lien or remedy does not usually extend to the cargo itself, neither to the cargo or its proceeds, as they belong usually to a different person. The Riby Grove, 2 W. Rob. Adm. 59, 713; Edw. Adm. 119. See Act. Cong. July 20, 1790 [1 Stat. 131]; The Lady Durham, 3 Hagg. Adm. 200. And if the cargo be owned by the owners of the vessel, and it is safely carried to its place of destination, freight is virtually earned, though not eo nomine, and wages are justly due within the principle of the general rule. 3 Kent. Comm. 149. But the vessel, as a security and a remedy for wages otherwise due, and not as a mother or cause of wages, if

saved, is also looked to in all countries. Curt. Merch. Seam. 313; The Eastern Star [Case No. 4,254]. The error seems to me to have been, in some cases, to regard the vessel, when saved in part or in whole, as giving a title to wages; when it is freight earned, or prevented by the owner from being earned, which consummates the title, and the vessel saved furnishes merely some additional security for payment, and in some cases means of rewarding exertion by salvage. Thus, in modern times, if only a small portion of the ship be saved in a shipwreck, it has been subjected towards the claims of the crew in the form of salvage, though no freight was earned. Curt. Merch. Seam. 287; 3 Kent, Comm. 196; The Two Catherines [supra]; The Saratoga [supra.] But in such case the crew must have continued by the wreck, and contributed to save it; and the allowance is not on the old contract or hiring, but on this new service. Lewis v. Elizabeth and Jane [Case No. 8,321]; Adams v. The Sophia [supra]; The Reliance, 2 W. Rob. Adm. 121. Sometimes it is treated or talked of as a receiver of wages in consequence of greatfidelity, though no freight is earned, but this seems a misnomer. It is merely salvage and not wages; but whether paid as salvage or wages it does not extend beyond the value of what is saved. The Neptune, 1 Hagg. Adm. 237; 3 Mass. 563; 7 L. R. 532; The Dawn [supra].

It was held in the case of Taylor v. The Cato [Case No. 13,786,] that the crew may recover an equivalent for wages from a vessel saved by them, like salvage, and not go to the owner for it, but to the rem. If all is lost seamen lose all, salvage as well as wages. But if a part of the ship is saved by the crew, they, as a sort of partners, have the first lien on it for salvage. Relf v. The Maria [supra]; The Mary, 1 Caines, 180 [Farrel v. M'Clea] 1 Dall. [1 U. S.] 392; The Nathaniel Hooper [Case No. 10,032]. The books speak of attaching this claim to the last plank saved. But this may at times be figurative, and not the small things of which lex non curat. It should mean to embrace something of value towards payment, which must therefore be beyond mere costs and charges. Figurative or not, however, it appears better on principle if not precedent, to treat the claim as salvage, where no wages have, by the general rule, or any of its established exceptions, been earned. The precedents on this point accord with this principle. And though some of them speak of wages as well as of salvage, yet they all agree in not extending the amount allowed beyond the value of what is saved, which is the rule in salvage and not in wages. In Frothingham v. Prince, 3 Mass. 563, it was held that if enough of the ship was saved to equal the wages, they should be paid, though no freight had been earned. As this case cited no precedents, and gave no reasons, it would not, standing alone, be entitled to much weight. Accordingly, in The Saratoga [supra], it was considered that the decision was an anomaly so far as regards wages, and could only be sustained as an allowance for salvage exertions, equal in amount and value to the wages.

Afterwards, however, in England and this country, much caution has been given to this doctrine, as to wages or salvage. In The Neptune, 1 Hagg. Adm. 239, the court allowed wages to be recovered to the extent of the value of that part of the vessel saved, but no further. 3 Hagg. Adm. 202. Some cases in the courts of the United States have since gone quite to the same extent. Two Catherines [supra]; Pitman v. Hooper [supra]. See Bronde v. Haven [supra] and The Easter Star [supra], also. Yet in all these the exception must probably rest on the fact of the property being saved by the exertion of the crew, and not saved by others, and not claimed justly by others as salvage. See cases before cited. The case of The Reliance, 2 W. Rob. Adm. 123, is supposed by the libelants to have gone further, and to have held that if a part of the vessel was saved by the others. the crew had a remedy against it or the owners for wages. But though the court there seemed very favorable to the claim made by a widow of one of the crew, and when her husband had been lost in the exercise of efforts to save this very vessel; yet they do not seem inclined to go beyond the previous case of The Neptune, in 1 Hagg. Adm. And the conclusion was rested on the fact that the deceased did in truth contribute by his exertions before his death to save a part of the vessel, though others afterwards added their exertions, and thus finished the work of saving something.

In the present case no part of the vessel itself was saved, and no special exertion shown to stop a leak which had broken out. But the crew thereupon abandoned her, and were taken off by another vessel. The other vessel took with them from the wreck a chronometer and certain charts, which have beeen sold since, and the proceeds given to the libelants; but some compasses, sails, and a boat were taken off at the same time by the other vessel, and retained and claimed for salvage as well as a gift from the master. Considering that these articles were saved entirely by the exertions of another vessel and crew, who are entitled to salvage, and that the captain acquiesced in their taking and keeping them on that account, and that their small value of one hundred dollars would scarcely pay the cost and expenses of libeling them, it is difficult to discover any equitable or legal claim on them by the plaintiffs.

On all these considerations, cases, and facts, then, the conclusion seems safest, to which the court below arrived, dismissing the libel, and the decree there must consequently be affirmed.

NIPOTI ACCAME, The (HIGBEE v.). See Case No. 6,465.

NISEN (HALVERSON v.). See Case No. 5,970.

NISSLEY (UNITED STATES v.). See Case No. 15,893.

Case No. 10,278.

NISSON v. WESSELS.

[5 Ben. 483.][1]

District Court, E. D. New York. Jan., 1872.

MASTER'S WAGES—MISCONDUCT.

An owner of a vessel, who was sued by her master for a balance of wages, set up as a defence misconduct of the master in taking the vessel into the port of San Andros, W. I., without instructions, and neglecting to repair her while there. It appeared that the owner's written instructions did not direct the master to go to San Andros, but did direct him to secure all the cargo he could, of a certain debtor of the owner, and that it was representations of such debtor which induced the master to go to that port. It also appeared that the owner's letter to him, written after news of his arrival at San Andros, made no complaint. It appeared, also, that a survey was held at San Andros, which pronounced the vessel unseaworthy, and that the master waited for instructions from his owner before selling her, and that, after his return to New York, the owner gave him a letter of recommendation as an honest and sober man. *Held*, that the charge of misconduct was not made out, and that the master was entitled to the balance of his wages.

[This was a libel by Nicholas Nisson against Gerhardt Wessels for the recovery of unpaid wages.]

A. Nash, for libellant.

J. K. Hill, for respondent.

BENEDICT, District Judge. This action is brought by the master of the schooner Anna against the owner of that vessel, to recover a balance of wages. There is no dispute as to the rate of wages, or as to the time of service, or as to the sums paid by the defendant to the libellant on account of his wages. The defence rests upon certain allegations of misconduct and unfaithfulness on the part of the libellant in the performance of his duties, whereby the owner claims to have sustained a loss exceeding the amount of wages unpaid. One of these charges is that the master put into the port of San Andros without instructions so to do. And it is true that the written instructions do not direct the master to go to San Andros. The master swears that he had verbal instructions which permitted that course, but, whether he did or not have such instructions, upon the evidence in the case respecting the nature of the business in which the vessel was engaged, and the direction to the master to secure all the cargo he could of the debtor, whose representations caused him to go to San Andros, together with the condition of the vessel, I do not think the master can be considered to have violated any instruction, or been guilty of any error in going into San Andros.

The letter of the owner in reply to the master's letter which informed him of the arrival of the vessel at San Andros, contains no suggestion of misconduct in this particular. Another ground of complaint is that the master neglected to repair his vessel at San Andros, and remained there some three months. But it is clear that he could not have repaired her with any propriety, situated as he was in such a place. Nor was he in any condition to attempt to complete his voyage. The vessel was wholly unseaworthy, and was found so by the survey held at San Andros. The master, was, therefore, justified in not attempting to reach New York with his vessel and cargo at that season of the year. The vessel was not insured, as the owner carefully informed him, and he was warranted in waiting for instructions before selling her, which instructions he had reasonable ground to believe he would receive much sooner than he did. The fact that the vessel did finally succeed in reaching New York in the month of July with seventy logs of mahogany in, does not go far to show that the master was neglectful of his duty in not attempting to come on to the coast in such a vessel with a full cargo in the month of February.

Furthermore, all the charges of misconduct now made are rendered open to suspicion by the fact that after the master arrived here, and with the knowledge of all the circumstances, the defendant gave him a written recommendation as having proved himself an honest and sober man, after a service in his employ for about two years.

Looking at the whole case, therefore, I am unable to discover why the master is not entitled to his wages, the unpaid balance of which appears to be $379. He must be charged with any sums which he received from the sale of the cargo which may be unaccounted for, and as the accounts were not gone into with much minuteness on the hearing before me, a reference may be had, if the defendant desires it, to examine with more care into the disposition of these proceeds.

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

Case No. 10,279.

The NIVETO.

[7 Ben. 69.] [1]

District Court, E. D. New York. Nov., 1873.

SEAMEN—WAGES—SECURITY FOR COSTS—SHIPPING COMMISSIONER.

A libel was filed by a seaman for balance of wages due and clothing destroyed. The claimant moved that he be required to file security for costs, showing by an affidavit of the United States shipping commissioner that a receipt in full for the wages had been given before such commissioner by the seaman. *Held*, that the creation of the office of shipping commissioner gives courts of admiralty greater assurance than formerly that the just demands of the seaman have been discharged in any settlement made before the commissioner; and that the rule, allowing a seaman to libel without giving security, must be modified in cases where the seaman has been paid off before the shipping commissioner.

In admiralty.

BENEDICT, District Judge. This is a motion to compel a seaman to give security for costs in an action brought to recover a balance of wages and the value of some clothes, alleged to have been appropriated or destroyed by the master. The motion is based, among other things, upon the affidavit of the United States shipping commissioner, which shows that the seaman was paid his wages, and his receipt in full was taken, before the shipping commissioner in his official capacity.

It has hitherto been usual to relieve seamen from the requirement to give security for costs, for the reason that to compel security from a seaman is in effect to compel him to abandon a suit, often made necessary to relieve him from attempts to defraud. The creation of the office of shipping commissioner, and the designation of an official before whom the payment of wages may be made, full explanation given, and misrepresentation thus prevented, gives to the courts of admiralty, in cases where wages are claimed to have been so paid, a greater assurance that the just demands of the seaman have been recognized and discharged, in any settlement made with him, than they have been able to derive from receipts taken by a private shipping master or by the master of the ship.

It seems, therefore, proper to modify the rule with regard to security for costs in cases where the seaman has been paid off before the shipping commissioner. In this case, therefore, I shall direct that the seaman give security for costs, and that all proceedings in the action be stayed until such security be given. I shall, however, give leave to apply to vacate this order at a future day, if so advised, because the application was not made until the seaman had departed on a voyage from which he has not yet returned, and therefore his affidavit could not be presented to me; and because the shipping commissioner does not say in his affidavit that the claim for the clothing was settled before him, or that no claim for lost clothing was then made by the seaman.

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

Case No. 10,280.

NIXDORFF v. WELLS.

[4 Cranch, C. C. 350.] [1]

Circuit Court, District of Columbia. Nov. Term, 1833.

LANDLORD AND TENANT—DOUBLE RENT FOR HOLDING OVER—SPECIFIC TERM OF LEASE.

1. To enable a landlord to recover double rent for holding over, the lease must be for a specific term.

2. A renting at $60 a year, payable monthly, is not for a specific term, and will not authorize a judgment for double rent.

[This was a suit by Barbara Nixdorff against Richard Wells.]

Appeal from a justice of the peace, who gave judgment for $10, being double rent for a month, the tenant having held over after the first year, under a demise at $60 a year, payable monthly.

Mr. Marbury, for appellee. No time for notice to quit is mentioned when the lease will expire by its own limitation. Woodf. Landl. & Ten. 163. A renting at $60 a year, payable monthly, is a renting for one year and no more.

Mr. Redin, contra. It was a general hiring at $60 a year, not for any limited period. The Case of Gordon in this court, at the last term [unreported], was a specific lease for one year only, and notice to quit was not necessary to recover double rent.

THE COURT (nem. con.) was of opinion that the renting was not clearly shown to be for a specific term, but only at the rate of $60 a year, leaving the term uncertain; and that double rent could not be recovered. Judgment reversed, with costs.

NIXON (PACKER v.). See Case No. 10,653.

NIXON (PARKER v.). See Case No. 10,744.

NIXON (POOLE v.). See Case No. 11,270.

NIXON (UNION PAPER-BAG CO.). See Case No. 14,386.

NIXON (UNION PAPER-BAG MACHINE CO. v.). See Case No. 14,391.

NIXON (YOUOUA v.). See Cases Nos. 18,189 and 18,190.

NOAH (UNITED STATES v.). See Case No. 15,894.

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

Case No. 10,281.

In re NOAKES.

[1 N. B. R. (1873) 592 (Quarto, 164);[1] Bankr. Ct. Rep. 162.]

District Court, D. Maryland.

BANKRUPTCY—PROPERTY NOT BELONGING TO BANKRUPT TAKEN BY ASSIGNEE—RETURN—COSTS—EXEMPTION UNDER STATE LAW.

1. If the assignees are satisfied that property taken by them did not belong to the bankrupt they should return it without delay: if, however, they are in doubt, the claimant must seek redress by the appropriate remedy in the courts of the state.

[Criticised in Re Vogel, Case No. 16,983.]

[Cited in Leighton v. Harwood, 111 Mass. 72.]

2. The costs will be paid according to the discretion of the court.

3. If the bankrupt should select, under the state law, one hundred dollars' worth of property in real estate, he may receive in addition thereto furniture and other necessaries of the value of five hundred dollars, but the allowance of this amount would vest in the sound discretion of the assignee.

In this case Register Hurley certified that in the due course of such proceedings the following questions, pertinent to the same, arose, and were stated and agreed to by W. P. Maulsby, Esq., attorney for assignees, and A. D. Merrick, Esq., attorney for the bankrupt [Thomas Noakes]: First. "Where the assignees have taken property found in possession of the bankrupt belonging to other parties, how are the real owners to recover it, and before what tribunal?" Second. "Are the assignees bound to set apart five hundred dollars to the bankrupt, and one hundred dollars under the state exemption, or is it optional with them to give what they please to him?"

The facts in this case are: The assignees found in the possession of the bankrupt, property belonging to other parties, and seized the same, and are now holding the property as assets of the bankrupt. The assignees have valued the property set apart at a very high figure, and have set apart to him property belonging to other persons. The register was of the opinion that the parties claiming ownership should sue out a writ of replevin in the Washington county circuit court, when the value of the property claimed amounts to one hundred dollars; under that amount, before a justice of the peace. To the second question, they are to look at the condition of the bankrupt, and act accordingly, so far as relates to the five hundred dollar clause. The other exemptions named in the law must be rigidly enforced.

GILES, District Judge. The following questions have been certified to me by the register in this case: First. "Where the assignees have taken property found in the possession of the bankrupt belonging to other parties, how are the real owners to recover it, and before what tribunal?" Second. "Are the assignees bound to set apart five hundred dollars to the bankrupt, and one hundred dollars under the state exemption, or is it optional to give what they please to him?" As to the first question: If the assignees are satisfied that property taken by them did not belong to the bankrupt, they should return it without delay to the owners. If they believe such property claimed by others is the property of the bankrupt, the claimant must seek redress by the appropriate remedy in the courts of the state, and if successful, and the assignees are condemned to pay the costs of such proceeding, it will rest with the court, upon the settlement of the assignee's accounts, to allow or reject the amount of such costs. This will depend upon the court's opinion of the action of the assignees as to whether, under the circumstances, they were right in taking, and holding on to, said property.

As to the second question, in reference to the exemption clause in the bankrupt act [of 1867 (14 Stat. 517)], there is some difficulty. I construe this clause as follows: First. The wearing apparel of the bankrupt, with that of his wife and children, is exempt. Second. The necessary household and kitchen furniture, and such other articles of the bankrupt as the said assignee shall designate and set apart, but not to exceed the sum of five hundred dollars. The assignee exercises his discretion in this matter, subject to the final decision of the court, if an exception be taken. The law of this state does not exempt one hundred dollars in money, but one hundred dollars' worth of property, either real or personal, to be selected by the bankrupt, and the value ascertained by appraisement duly made by three appraisers summoned and sworn by the officers, &c. (I suppose in a bankrupt case by the register), and also wearing apparel, books, and tools of mechanics, but not books kept for sale. I suppose the assignee should first ascertain what is exempt under the state law. The wearing apparel is exempt by both laws, the bankrupt and the state. Next, by the state law, the bankrupt's private library and his tools as a mechanic are exempt; and lastly, such real and personal property as he may select, not exceeding in value one hundred dollars. Then, by the bankrupt act, the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the assignee shall designate and set apart; as to these he exercises his discretion, as I have shown, but altogether (furniture and other articles) not to exceed in value the sum of five hundred dollars. Now, if the bankrupt under the state exemption has selected his furniture, or a part thereof, the same being exempt under the bankrupt law, there can be no second allowance for the same in any way. If the bankrupt, under the state law, should

[1] [Reprinted from 1 N. B. R. 592 (Quarto, 164), by permission.]

select his one hundred dollars' worth of property in real estate, then it might happen that he might receive in addition thereto furniture and other necessaries of the value of five hundred dollars, but this amount would rest, as I have said, in the sound discretion of the assignee.

The clerk will certify these answers to B. F. M. Hurley, Esq., the register in this case.

Case No. 10,282.

In re NOBLE.

[3 Ben. 332;[1] 3 N. B. R. 96 (Quarto, 25).]

District Court, S. D. New York. June 13, 1869.

FIRST MEETING OF CREDITORS—CONTESTED VOTES—POWER OF REGISTER.

Where, at the first meeting of the creditors of a bankrupt, one creditor objected to the reception of the votes of other creditors, offering to prove that their votes had been influenced by the bankrupt, and were collusive and fraudulent, *held*, that the register had no power, without the special order of the court, to inquire into the right of creditors to vote, save for the purpose of postponing the proof of claims until an assignee should be chosen.

[Cited in Re Herrman, Case No. 6,426; Re Bininger, Id. 1,421; Re Hunt, Id. 6,884.]

At the first meeting of creditors in these proceedings, while the vote for the election of an assignee was proceeding, the counsel for a portion of the creditors objected to the receiving of the votes of several of the creditors, offering to prove that their votes had been influenced and procured by the bankrupt [George W. Noble], acting in his own interest, and that such votes were, therefore, collusive and fraudulent. The register declined to hear such proof, holding that he had no power, without the special order of the court, to inquire into the right of creditors to vote, save for the purpose of postponing the proof of claims until an assignee should be chosen pursuant to the provisions of the twenty-third section of the act [of 1867 (14 Stat. 528)]. The register certified the question to the court, with his opinion, as follows: "Pursuant to the 19th rule of this court, I beg to submit, that the act does not expressly require the register to take such proceeding. As a matter of practice, it would involve the parties, in some cases, in very great labor, and put them to much expense, in taking testimony of the character here offered. Besides, it would often greatly postpone the choice of an assignee, and that perhaps to the detriment of the assets of the bankrupt. Unless in case of strong probability, made out and sustained by affidavits, it would seem that such labor and expense ought not to be imposed. Such a charge is easily made, and is with difficulty rebutted. It is already a standing rule, that, in case the register shall be satisfied that any reason exists why an assignee, elected or appointed, should not be approved by the judge, he shall state such reason fully, in submitting the question for approval. I think this a sufficient safeguard against evils of this character."

BLATCHFORD, District Judge. The decision of the register was correct, and his views, above expressed, are approved.

[The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

[Where there are doubts as to the validity of debts, or the right of the party offering to prove them, then the register may postpone the proof of such debts until after the election of an assignee. In re Stevens [Case No. 13,391]; In re Jaycox [Id. 7,240]; In re Lake Superior Ship C., R. & I. Co. [Id. 7,997]. When a new election will be ordered. Haas [Id. 5,884]; In re John & Martin Pfromm [Id. 11,061].[2]

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

[2] [From 3 N. B. R. 96 (Quarto, 25).]

NOBLE (PETTILON v.). See Case No. 11,044.

NOBLE (STRONG v.). See Case No. 13,543.

NOBLE (UNITED STATES v.). See Case No. 15,895.

NOBLE (WARFORD v.). See Case No. 17,175.

NOBLE, The ROBERT. See Case No. 11,894.

NOBLE, The R. P. See Cases Nos. 9,639 and 9,640.

Case No. 10,283.

NOBLET et al. v. OHIO & M. R. CO.

[1 Cin. Law Bul. 346.]

Circuit Court, S. D. Ohio. Oct. Term, 1876.

SERVICE OF WRIT—NAME OF CORPORATION—RETURN—AMENDMENT.

Where service is made upon the proper party, the writ, return and bill may be amended as to the name by which the defendant was sued. So *held* where the bill described the defendant as the "Ohio & Mississippi Railroad Co.," when it should have been the "Ohio & Mississippi Railway Company."

[This was a motion by Samuel Noblet and others in a suit against the Ohio & Mississippi Railway Company.]

I. Moore, for plaintiff.

N. A. Jordan, for defendant.

SWING, District Judge. The bill filed in this case describes the defendant as the Ohio & Mississippi Railroad Co., and the defendants answer in that name. The complainant has since discovered that the Ohio & Mississippi Railroad Company, prior to the bringing of this suit, had been reorganized and its name changed from that of the Ohio & Mississippi Railroad Co., to that of the Ohio & Mississippi Railway Company; that the ser-

vice was in fact made upon the proper officer of the Ohio & Mississippi Railway Co.; and the complainant now moves the court for leave to amend the bill by inserting the true name of the corporation, and also to amend the writ and return of the marshal. The power of amendment by the federal courts is now very extensive, and looking at the statute and course of decisions, we think the amendments asked are within the power of the court. In Todd's Practice it is laid down that the declaration may be amended, even after the plea in abatement for misnomer. 1 Todd, Prac. 697. In the case of the corporation of Georgetown v. Beatty [Case No. 5,344], the plaintiff had leave to amend the writ and declaration by stating the plaintiffs to be "Mayor, recorder, alderman and common council of Georgetown," instead of the "Corporation of Georgetown," and there are numerous cases in which a corporation has been sued by a wrong name, that the plaintiff has been permitted to correct the mistake by an amendment of the writ. Burnham v. Savings Bank, 5 N. H. 573; Bullard v. Nantucket Bank, 5 Mass. 99; Sherman v. Connecticut River Bridge Co., 11 Mass. 338. The motion to amend is therefore granted, upon payment of costs.

NOBLOM (U. S. v.). See Case No. 15,896.

Case No. 10,284.

NOE v. PRENTICE et al.

[3 Betts, C. C. MS. 56.]

Circuit Court, S. D. New York. May 25, 1844.

PATENTS FOR INVENTIONS — INFRINGEMENT — INJUNCTION—ABANDONMENT.

[1. Letters patent No. 3,188 were issued July 20, 1843, to Charles L. Noe, for an alleged discovery in making hats or caps of horsehair braid, "by sewing the edges of the braid together with horsehair." The only novelty in the invention was the use of horsehair in sewing, instead of cotton or silk thread, theretofore used. *Held* that, in a suit for infringing this patent, an injunction would not be granted in the first instance, especially as the patent had been very recently taken out, and never quietly enjoyed by the plaintiff.]

[2. 9 Laws Bior. & D. 1019, 1020, § 7 (5 Stat. 354), provides that every purchaser of a newly-invented device prior to the application of the inventor for a patent shall have the right to use and vend the specific device without liability to the inventor, "and no patent shall be held to be invalid for reason of such purchase * * * except on proof of abandonment of such invention to the public; or that such purchase * * * has been for more than two years prior to such application for a patent." *Held*, that this act applies to purchases from persons other than the inventor, and does not affect existing decisions as to what acts done by the inventor will bar his right to a patent.]

[This was a bill in equity by Charles L. Noe against John H. Prentice and Archibald T. Finn for infringement of a patent. Heard on motion for injunction.]

BETTS, District Judge. This is an application for an injunction, founded upon a patent granted July 20, 1843, on an application filed November 18, 1842. There is some confusion in the proofs as to the time the first application to the patent office was really made, or how far it comported in substance and principle with that on which the patent was founded. Assuming it to be proved that the application was within two years after the plaintiff's discovery, various objections to the allowance of an injunction are raised by the answers of the defendants, only two of which will now be particularly noticed: First, that the patent cannot be maintained, if the discovery be useful, because it is not original and new with the plaintiff. Second, that, if he be the first and original discoverer, he has lost the right of appropriating it by patent, by having previously dedicated its use to the public.

The plaintiff's specific claim is for his discovery in making hats or caps of horsehair braid "by sewing the edges of the braid together with horsehair," and, if maintained, it must be upon the ground that using horsehair to sew with in place of thread, cotton, silk, or any other of the materials before known and used for the purpose, is a patentable discovery.

It has long been considered an elementary doctrine in respect to patent rights, that some new manufactured thing, or a new method or process of manufacture, must be discovered, or mechanical skill and ingenuity be employed in producing a new result, to lay the foundation for a patent, and that the mere substitution of one method for another in making a known article is insufficient to support one. Godson, 68; Philip, 102, 104, 106; Barn. & Ald. 560; Woodcock v. Parker [Case No. 17,971]. A series of instances referred to in the notes of a recent English work would seem to raise a doubt whether this distinction is now adhered to, on the decision of patent causes in England. Webster, Law & Practice of Letters Patent, 11, 47, and notes. The question may perhaps be open for consideration on a trial at law, or on hearing in equity upon the merits, but I should not regard these new suggestions as sufficient authority to authorize an injunction in behalf of a patent so recently taken out as the present one, and never quietly enjoyed by the plaintiff. Horsehair braid, it is proved, was a known material, and the evidence would tend to show that it had been used for making caps and hats, by sewing the edges of the braid together, before the plaintiff's discovery. If not, his patent does not secure that manufacture. It is to be construed as if everything in relation to the process was well known, other than his method of taking the hair itself, in its natural or prepared state (the patent does not define which), and using that as the sewing material. This new use of a well-known ma-

terial, in a process also well known, though before effected by a different material, will not, in my opinion, justify awarding an injunction, in the first instance, to protect the discovery. Godson, 185, 186.

The second objection is one of wider interest, and involving the construction of a recent and important act of congress in respect to patented inventions. The rule declared by the solemn adjudications of our courts has been understood to be that if an inventor make sale of the article discovered, before the grant of a patent, the patent will be thereby rendered void. Mellus v. Silsbee [Case No. 9,404]; [Pennock v. Dialogue] 2 Pet. [27 U. S.] 1. So his acquiescence in the known public use of his invention, prior to his patent, will be an abandonment of his right as first discoverer. [Shaw v. Cooper] 7 Pet. [32 U. S.] 292. In this case the proofs are clear that the plaintiff, a considerable period prior to his application for a patent, placed his manufactured article, with others, for sale at different and public places. This was, however, within two years of the time he presented his application to the patent office, and the question is whether the act of congress of 1839 protects the right of the patentee, notwithstanding such public sale, and which, as the law previously stood, would have been an abandonment of his right. [McClurg v. Kingsland] 1 How. [42 U. S.] 202. The act relied upon enacts, "That every person or corporation who has or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held to be invalid by reason of such purchase, sale or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale or prior use, has been for more than two years prior to such application for a patent." 9 Laws [Bior. & D.] 1019, 1020, § 7 [5 Stat. 354].

The defendants contend that a public sale of the article invented, by the inventor, is that abandonment referred to by congress in this section, and which the act intended to leave to its effect and consequences, as the law had before stood. The plaintiff insists that he is protected by the statute, notwithstanding the sale of his invention, if not made more than two years previous to his application for a patent. I am disinclined, on this summary motion, to assert a definite opinion as to the construction of this enactment, and think it advisable to leave that question open for farther consideration on a trial at law, on the first hearing of this cause. But I am constrained to say that my impression is strong that congress do not, by the provision, intend to protect sales made by the discoverer or inventor himself. The first branch of the enacting clause is manifestly designed for the benefit and protection of the purchaser, not of the inventor. If the purchase is made of the inventor, no statute would be necessary to protect the purchaser against his action or claim by means of a patent or otherwise, whether the vendor retained in his own use, or again sold to others, the subject of his purchase. But it would be otherwise in respect to purchases made of third persons without the license or assent of the discoverer or future patentee. The language of the act applies fitly to such a case only, and I am not aware of any exigency in its terms or spirit demanding a construction more comprehensive. The exception in the section is framed for the benefit of the patentee, and that goes no farther than to secure his rights notwithstanding such sales between third parties, if they have not continued over two years, or unless he is proved to have abandoned his right. Congress does not define what facts shall constitute an abandonment; it undoubtedly declares, by implication, that acquiescing in sales by others for less than two years shall not be regarded an abandonment by the patentee, but leaves, according to my impression, his own acts and assent to have against him every operation and consequence given them by the then existing law. The case of McClurg v. Kingsland, in the supreme court, I think, assumes this interpretation of the statute. 1 How. [42 U. S.] 202. The specific question was on the first clause, and whether the evidence in the case did not protect the immediate defendants in the use of the plaintiff's discovery. But the court very significantly intimate that the license of the plaintiff to the defendants to use his discovery prior to his patent rendered his patent void.

Without placing my decision upon this point of the case, for reasons already sufficiently declared, I should deny the injunction prayed for. The plaintiff, in a case so circumstanced as this, ought to be required to establish his right at law before receiving the extraordinary aid of an injunction. It has not been the usual practice in this court to order issues at law, although it may probably be competent to the court to do so. Godson, 187. We rather leave it as a condition for the plaintiff that he proceed to a final hearing on his bill and the answer and proofs, or bring his suit at law within a reasonable time, or that his bill be dismissed, with costs. No order in relation to costs is made in this stage of the case, but the order is that the plaintiff bring his action at law to establish the validity of his patent, or have a final hearing upon the merits of the cause at the next term of the court; otherwise the defendants be then at liberty to move the dismissal of the bill.

Case No. 10,284a.

NOE v. PRENTICE et al.

[4 Betts, C. C. MS. 34.]

Circuit Court, E. D. New York. Feb. 22, 1845.

PATENTS FOR INVENTIONS—PLEADING—QUESTIONS RAISED BY DEMURRER—IMPROVEMENT IN MAKING HATS—SPECIFICATION—PLEADING—VENUE.

[1. In an action for damages for infringement of a patent for an improvement in the process of manufacture of hats and bonnets from braid, the claim being for such improvement "in sewing the edges together with horsehair," the question of the patentability of the use of horsehair for that purpose cannot be raised on demurrer to a declaration setting out such patent and claim, since the claim may comprehend as well the process of manufacture by uniting the edges of the braid as the doing it with that particular material.]

[2. A declaration in an action for infringement.of a patent is not demurrable because ambiguous in setting out a claim which may be construed to include one or both of two inventions, if there is nothing in the pleadings to show that the patentee is not entitled to claim both.]

[3. An improvement in the process of manufacturing hats or bonnets from horsehair braid, by which the manufacture is rendered light, beautiful, durable, and easy to be cleaned or altered, is a patentable invention.]

[4. It is not necessary that the specification of a patent for an improvement in the manufacture of hats or bonnets, applicable to all forms and sizes thereof, should describe the construction of the original hat or bonnet.]

[5. An averment that letters patent were issued to the patentee under the seal of the patent office of the United States, and signed by the secretary of state and countersigned by the commissioner of patents, is sufficient, without averring that such letters patent were issued in the name of the United States, or that they were recorded, together with the specifications.]

[6. It is not necessary, in an action for infringement of a patent, for the plaintiff to negative, in his declaration, the public use of the invention, or that the manufacture was on sale with the patentee's consent.]

[7. A declaration, in an action for infringement of a patent, which avers only that the defendant "put on sale and offered for sale and sold or contracted to sell" the patented articles, while the only acts forbidden by the statute are making, using, and selling such articles, is bad, on demurrer, since it does not positively allege any violation of the statute.]

[8. Where, in a local action, two out of three counts in the declaration duly laid a proper venue, and from the matter of the third count it appeared that the acts complained of must have been committed in the same place, *held*, on demurrer for want of venue, that the venue of the margin would be considered that of the third count.]

[This was a bill in equity by Charles L. Noe against John H. Prentice and Archibold L. Finn for an injunction to restrain the infringement of a patent. Heard on demurrer.]

BETTS, District Judge. When this cause was before the court on a motion for an injunction, a strong intimation was expressed that, upon the facts appearing on the depositions and the specification construed in connection with those facts, the patent could not be upheld, but a final decision was deferred on the point until a trial should be had at law, or the cause be brought to hearing on pleadings and proofs. [Case No. 10,284.]

An action was immediately thereafter instituted at law, and the defendants demurred to the declaration, suggesting various insufficiencies in its frame, but designing thereby, probably, more especially to bring to decision the question of whether the subject-matter claimed to have been invented or discovered is patentable. But this end cannot be reached by this demurrer. Neither the specification nor the declaration place the plaintiff's right on the particular discovery the defendants suppose their claim limited to,—that is, to sewing the edges of the braid together with horsehair,—and then the summary or claim is, "in sewing the edges together with horsehair." It is manifest that this claim, in its terms, may comprehend as well the manufacture in uniting the edges of braid as the method of doing it with the particular material horsehair. It is not, then, purely a question of law for the decision of the court, on the face of the patent, but there is involved in it the matter of fact whether the mode of manufacture by uniting the edges of braid is new and useful. Nor can an objection lie that a claim thus possibly double in its operation is ambiguous, and therefore faulty and invalid, because nothing is disclosed by the pleadings showing that the patentee is not entitled to claim both methods.

THE COURT is instructed by the proceedings in the equity cause that such is not the fact, but the knowledge cannot be invoked to help the demurrer, nor does the evidence received on the hearing preclude the plaintiff proving on the trial of this cause that he is truly the inventor of both particulars. Nor, if the testimony on trial should show that the plaintiff can set up no discovery to that part of the manufacture consisting in connecting the edges of braid, does it necessarily follow that the court would rule the specification ambiguous, because then the limited meaning of the claim, of which the language is susceptible, might, in view of the facts in proof, be held to be its true import and interpretation. This, however, is unessential, because there is now before the court on the pleadings nothing to show that the plaintiff's claim ought to be restricted to the use of horsehair as the sewing material, or that it is broader than his discovery if it also embraces the uniting the braid by its edges. It must accordingly be left to the construction of the court on the specification, in connection with the facts to be proved, and may result in instructions to the jury directly adverse to the validity of the patent if they find the plaintiff is not the inventor of the uniting of edges of braid together by

sewing; yet such instruction would not be merely matter of law, depending on the construction of the specification, but would be blended with a supposed state of facts, and it cannot, accordingly, be anticipated here, so as to affect the decision of the point raised by the demurrer.

Another objection to the validity of the patent is that it does not set forth the invention of any new or useful art, machine, manufacture, or composition of matter, or any new or useful improvement thereon. I can perceive no foundation for this objection. A hat or bonnet is unquestionably a manufacture. It is something made by the hands of man. 8 Durn. & E. [8 Term R.] 99. The specification alleges that the article is manufactured of horsehair braided by machinery, and claims for the plaintiff a new and useful improvement in the process of manufacturing, in uniting the edges of such braid by sewing with horsehair, thus, as asserted, rendering the manufacture light, beautiful, durable, and easy to be cleaned and altered. These are all unquestionably patenable, either original or by way of improvement. Gods. Pat. 58, 74; Phil. Pat. 78, 116; Act Cong. 1836, § 6 [5 Stat. 117]. The assertion of novelty and utility and invention is broad enough on the part of the plaintiff, and it is matter of evidence, not of law, to determine whether the averments are true.

Another ground of general demurrer is that the specification does not describe the construction of the original hat or bonnet, so that the nature or value of the alleged improvement cannot be known or ascertained. The rule applicable to specifications for improvements is that things in use and well known need not be specifically described (Phil. Pat. 238); and it is not a question of law, but solely of fact, whether by the reference to ladies' or gentlemen's hats or caps a known article of manufacture is designated. The improvement is not limited to any particular form or dimension of hats or caps, but is to be applied in every construction of those articles, whatever may be their fashion or color. No aid is accordingly afforded to the clear understanding of the patented improvement by a description of the forms of hats to which it may be applied. From the nature of the case this would lead to the specification of every possible variation of form to which the article is susceptible, and render a schedule oppressively prolix, without aiding in the slightest manner the clearer understanding of the subject. It may also be remarked in this place that the criticism that in the specification and declaration the words are sometimes used in the collective, "hats or caps," thereby leading to uncertainty and ambiguity, cannot, at all events, avail on demurrer, for it is not matter of law, but of evidence, whether "hats and caps" of this kind of manufacture are things different or the same. For aught the court can know judicially, both appellations would be appropriate to either article, and, in common use, may be applied indifferently.

Most of the other exceptions to the declaration are strictly and severely matters of form; in most instances, if they succeed, compelling corrections of the pleadings in a way not to vary or introduce any substantial averment on which the plaintiff's right rests, or afford any new issue or better ground of defence to the defendants. The defendants can accordingly have no advantage of such technicalities, if faulty on the part of the plaintiff, except in so far as the same are set down and expresssed as causes of demurrer [2 Bior. & D. Laws] p. 70, § 32 [1 Stat. 91]. Such, for instance, are the first, fourth, fifth, and twelfth points made by the defendants. Other objections, either specifically pointed out by the demurrer or supposed to be maintainable under the general demurrer, are to the first count, that it is not alleged that the patent was issued in the name of the United States or was recorded together with the specification and that the declaration does not negative the public use of the discovery, or that the manufacture was on sale with the consent or allowance of the plaintiff, at the time of his application for the patent. The averment is that letters patent were issued to Noe in due form of law under the seal of the patent office of the United States signed by the secretary of state and countersigned by the commissioner of patents, whereby is secured to the patentee, &c.

It is never requisite to state in pleading an intendment of law. 1 Chit. Pl. 226. The law will always presume that public functionaries, especially of a high grade, execute their duties in conformity to law, and, when an official act within their competency to do is averred to have been performed by them, it will be presumed to have been rightfully done. [Cutting v. Myers, Case No. 3,520]; [Philadelphia & T. R. R. Co. v. Stimpson] 14 Pet. [39 U. S.] 458, 459. The 5th section of the act of 1836 directs that the patent shall be issued in the name of the United States, and shall be recorded, together with specifications, &c. An averment that a patent was issued implies that the prerequisites of the law were first all complied with, and it is unnecessary to allege them specifically, and this rule would excuse averring the nonexistence of things at the time which might prevent the issuing of the patent. But, as a general rule of pleading, it is unnecessary for a plaintiff to negative in his declaration those matters which bar his action. They are parts of the defendant's case, and it belongs to him to state them. 1 Chit. Pl. 228. The exceptions to this rule will be found on examination not to affect the principle governing cases of this character. I accordingly consider the first count of the declaration sufficient in law, and that the demurrer thereto must be overruled.

The demurrer to the second count I think well taken, although it turns solely upon the use of a disjunction, instead of a conjunction, of the pleading. The declaration charges the infringement to be that the defendants "put on sale and offered for sale and sold or contracted to sell" 500 hats or bonnets, &c. Under the 14th section of the act, an action lies for damages for making, using, or selling the patented invention. No other of the acts charged in this count is an infringement of the patent right, except that of selling the articles, and that is not averred to have been done. The defendants are charged to have sold or contracted to sell. If the averment had been that the defendants sold and contracted to sell, the count would have been good, although the latter particular was badly pleaded, because there was a right of action positively set forth in respect to the other particular. 2 Saund. Pl. & Ev. 379; 1 Saund. Pl. & Ev. 430. And the same rule would be applicable if both branches of the alternative allegations had been infringements, as if the declaration charged that the defendant sold or used the plaintiff's invention, for both would be material and traversable facts. At most, as either would afford a ground of action, it would only be cause for special demurrer that the declaration did not discriminate with certainty which offence had been committed.

The third count is demurred to for want of a venue. It alleges the infringement by the defendants, without specifying any place where it was committed. Such place must appear on the face of the declaration in local actions, or it will be good ground of demurrer or nonsuit at trial. 6 Com. Dig. tit. "Pleader," 20; 1 Chit. Pl. 279. The omission in this case was palpably a mere clerical mistake, as in both the preceding counts the charge is direct that the violation was committed within the district; and, the right of action of the assignee, the assignment being for this place only, being local, it is not to be supposed the pleader had in view any infringement committed out of the district. Had the reference been to the district or place aforesaid, then it is admitted that upon the authorities the venue in the margin shall be regarded as that of the count, when none is laid in the latter, even though no reference is made to the margin. 9 Johns. 81; 3 Hen. & M. 312; 8 Bing. 355; 1 Maule & S. 508, C. P.

I shall, upon the strength of these authorities, overrule the demurrer to the third count also.

Costs are to be apportioned, the defendants recovering costs on their demurrer to the second count and the plaintiff recovering his costs against the defendants on the demurrer to the other two counts.

NOE (PRENTICE v.). See Case No. 11,382.

Case No. 10,285.

NOE v. UNITED STATES.

[Hoff. Land Cas. 162.] [1]

District Court, D. California. June Term, 1856. [2]

LAND GRANT IN CALIFORNIA.

Entitled to confirmation under the ruling of the supreme court in Fremont's Case [17 How. (58 U. S.) 542.]

Claim for five leagues of land in Yolo county, rejected by the board, and appealed by the claimant [James Noé].

Calhoun Benham, for appellant.

William Blanding, U. S. Atty., for appellees.

HOFFMAN, District Judge. It appears by the title papers produced in this case, that on the tenth of May, 1841, Robert Elwell presented a petition to Governor Alvarado for a tract of land on the Sacramento river. The petitioner set forth that for sixteen years he had been a resident of the country, and had a numerous family. He also stated that the various political changes in the country had impaired his capital, part of which had been furnished to the different governors, as his excellency was aware. The petitioner further alludes to his services in the militia, for which he never received any pay, owing to the scarcity of funds in the national exchequer. He therefore begs that his excellency, not forgetting the duty of generously recompensing the services of faithful subordinates, and also "the necessity of giving an impulse to the progress of agriculture in the country," and supported as he was by the colonization laws which so fully authorized him to make concessions of land, might grant him the tract solicited. On the margin of this petition the governor writes: "In consideration of the services and merits herein mentioned, I grant him (the petitioner) the land he requests, with the understanding that he shall abide by the reports that must be asked for as to whether the land has been granted for the benefit of some private individual, pueblo or corporation, with all the rest that may be deemed convenient, so soon as he shall accompany the plan which will head the formation of the expediente." This petition and marginal decree appear to have remained in the possession of the petitioner, nor were any further steps taken by him to obtain a more formal title. He states, however, in his deposition, that a plan was furnished to the governor such as was deemed sufficient, but the expediente which it was to "head" is not produced from the archives. No efforts of any kind appear to have been made by the petitioner to settle upon or occupy his land, and the title papers seem to have remained in

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Reversed in 23 How. (64 U. S.) 312.]

his possession until 1852, when he sold to the present claimant. In explanation of his failure to occupy the land, the grantee states that he was prevented from doing so at the time of the grant by the danger from the Indians, and afterwards by the disturbances in the country. José Castro, a native Californian of some distinction, and who has held the offices of governor, prefect and commandant general of the territory, deposes that from 1841 until the change of government the whole region of country above Sutter's Fort, or New Helvetia, was not in a situation to be settled upon by individual grantees, owing to the hostility of the Indians. The government rarely sent any troops to maintain settlements, and only for short times and few in number, during the period from 1841 to the change of government. Nathan Coombs, whose deposition was taken in this court, and who has resided in the country since 1843, testifies that from that year, when he first knew the land, the Indians in the neighborhood were hostile to the whites. That near the head of the island there was a rancheria, and the Indians were very numerous. That a company from Oregon, of which he was a member, had a fight with a large body of them, from five hundred to one thousand strong, and that during the same season Captain Sutter with a party of men also had an engagement with them. The above comprises all the evidence offered in excuse or explanation of the omission of the grantee to fulfill the conditions of his grant.

The first question that arises under this state of facts is, did the marginal decree of the governor convey to the petitioner "a present and immediate interest, either legal or equitable, in the land?" The form of the grant is entirely unusual. The marginal decrees of the governors were in ordinary cases but references for information, and the expedientes usually contain the petition, the diseño, the marginal order of reference, the reports of the officers, and the order or decree of concession by the governor—the latter generally commencing with the words "Vista la peticion." The documento or final title was then made out in conformity with the order of concession. In this were expressed the conditions of the grant, its extent, etc., and it was delivered to the party interested as his title deed. A copy, however, was usually attached to the other documents above enumerated, forming the expediente on file in the archives; but the copy was frequently not signed, it being thought sufficient if the title paper delivered to the party was properly authenticated. The title paper was usually signed by the governor and secretary. The expediente, when thus completed, was transmitted to the assembly for their action, and if the grant was approved, a certificate of the fact was given to the grantee. I have met with no case where these forms were not substantially complied with when grants under the colonization laws were made. In the case at bar, the only document relied on as a grant is the order or decree written on the margin of the petition. Undoubtedly the governor uses words of grant—"I grant him the land which he requests"—but the condition or qualification annexed, that the petitioner should abide by the reports, etc., clearly shows that the governor did not intend his marginal decree to operate as a definitive concession of the land. In the case of Arguello v. U. S. [18 How. (59 U. S.) 539], decided at the last term of the supreme court, the court, in speaking of the order of concession in that case, (which was the decree already alluded to, beginning with the words—"Vista la peticion," and which was certainly a more formal decree than the marginal order in the present case) say: "By the fourth section, the governor, being thus informed, may 'accede or not' to the petition. This was done in two ways; sometimes he expressed his consent by merely writing the word concedido at the bottom of the expediente; at other times with more formality. * * * It is intended merely to show that the governor has acceded to the request of the applicant, and as an order for the patent or definitive title to be drawn out for execution. * * * It has none of the characteristics of a definitive grant." But the marginal decree in this case cannot even be regarded as an order for the definitive grant to be made out. For the governor clearly intimates that reports are to be received, the diseño to be furnished, and the expediente to be formed, before the final title issued. The marginal order must, I think, be taken merely as showing that the governor has acceded to the petitioner's request, and agrees to grant him the land if the reports, etc., should be favorable. But it is to be observed that the information required by the governor was only as to whether the land was the property of any one else, and the absolute terms of the order itself, as well as the language of the qualification added to it, perhaps justify us in considering it as a positive promise to grant the land to the petitioner in consideration of his just claims upon the government, provided it should turn out that the land was vacant. The right thus acquired by the petitioner was an equitable claim upon the government to have his title perfected, and had he gone on to occupy and improve his land, and had he been found at the acquisition of the country in the possession and enjoyment of it, the United States would have been clearly bound to respect his rights. But so far as the evidence discloses, the petitioner never went upon the land during the existence of the former government. The causes of his omission to do so, as shown by the evidence, were the usual ones of Indian hostilities and political disturbances. No testimony has been taken to show that the obstacles to a settlement might have been overcome; nor has it been made to appear to the court, on behalf

of the United States, that any one demanded the land. Compelled as we are to be governed by the evidence in each particular, we must accept facts as true which are established by the uncontradicted testimony of unimpeached witnesses. It would seem clear then, from the testimony, that from the time of the grant until the American occupation, the settlement of the land was impracticable. The omission to occupy cannot, therefore, raise any presumption of a voluntary abandonment by the grantee. That such a delay would not probably have forfeited the land under the Mexican laws and usages, unless some other person was ready to appropriate the lands and thus carry out the policy of the government, was intimated by the supreme court in the Case of Fremont. More especially would the grantee be entitled to indulgence where the grant was "not made merely to carry out the colonization laws, but in consideration of previous public services."

The circumstance which suggests most strongly the idea that the grantee did in truth abandon all thought of profiting by his grant, is his omission to make further application for the usual and formal title. I have endeavored correctly to estimate the force which should be given to this consideration. It has seemed to me that it would perhaps be going too far to infer such an intention from the grantee's omission in this particular. As to his acts and declarations from the time of the grant until the conveyance to the present claimant, we are wholly uninformed. Whether he continued to assert his rights to the land, and whether those rights were recognized by the government, we are ignorant. And in the absence of proof we are perhaps justified in supposing that he considered his right to the land sufficiently secured by the title he had received, particularly as the causes which prevented a settlement by him would also deter others from applying for the land. But admitting that the explanation of the grantee's delay in this case is sufficient, within the rule laid down in Fremont's Case [17 How. (58 U. S.) 542], to repel the idea of a voluntary abandonment and consequent forfeiture, it is to be remembered that the grant in this case was not like that to Alvarado, a definitive or final title with conditions subsequent annexed. It was but an inchoate or imperfect grant, and as has been shown, cannot be regarded as a grant under the colonization laws passing final title to the land.

The inquiry in this case would therefore seem to be, not as in Fremont's Case [supra], whether the omission to perform conditions subsequent had forfeited an estate vested in the grantee by a formal and definitive grant, but whether he is in equity entitled to a completion and perfection of the inchoate title or equitable right he received from the former government. Under the Mexican colonization laws the strongest claim he could urge would be the fact that he had, by settling upon and improving the land, given the only consideration for the grant their laws or policy required. But in this case he can found his claim upon no such consideration; and though he may not be deemed to have voluntarily abandoned his grant, yet he can allege nothing done by him subsequent to it, or on the faith of it, which strengthens his equitable claim either upon this or the former government. If then this grant had been solely on consideration of future settlement and occupation, it seems to me that it should be rejected. But it appears that the petitioner had other claims, not merely on the bounty but on the justice of the Mexican government. In his petition he appeals to the governor's knowledge of the fact that he had impaired his capital by furnishing money to different governors, and that he had faithfully served in the militia without receiving pay, owing to the scarcity of funds in the national exchequer. He asks for the grant as a recompense for his services, as well as because it would be in accordance with the policy of the colonization laws. The governor, in acceding to the petition, expressly says that he does so "in consideration of the services and merits herein mentioned;" and by the testimony of Alvarado himself, taken in this court, it appears that the petitioner was actually a creditor to the government for advances made by him, as well as entitled to its consideration for his patriotic services. In the Case of Fremont the supreme court say: "Although this cannot be regarded as a money consideration, making the transaction a purchase from the government, yet it is the acknowledgment of a just and equitable claim; and when the grant was made on that consideration, the title in a court of equity ought to be as firm and valid as if it had been purchased with money on the same condition." But in that case the consideration alluded to was the patriotic services of the petitioner, and they are only referred to in the grant as entitling his application to a "preference" over other applications for favorable consideration. But in the case at bar the petitioner had not only faithfully served the country, but appears to have been a creditor for advances made by him and pay due to him as a soldier. The observations of the supreme court apply, therefore, with great force to the present case. If then the petitioner cannot be deemed to have voluntarily abandoned his grant, it has seemed to me that the equitable right he acquired, on the considerations mentioned, ought to be respected, although he has failed to furnish the other consideration of settlement and occupation, upon which in general Mexican grants were made. It can hardly be doubted that, as testified by Alvarado, the former government would have felt itself bound to perfect a title promised to him by the governor under such circumstances; and that the grant by the latter of the land, provided it was vacant, would, had the petitioner subsequently applied for the

formal title, have been treated as giving him a right to have it issued. That equitable obligation is as binding on the conscience of this as of the former government, and it has, after much consideration, appeared to me that the claim should be confirmed.

The counsel for the claimant has urgently pressed upon the court that the grant in this case was not made under the colonization law of 1824, and the regulations of 1828, but under the law of April 4, 1837. 1 Rockwell, 627. But this view cannot be supported. That law, even if it were ever carried into effect in California, merely authorizes "the government with the consent of the council," to give effect to the colonization of the lands of the republic, by means of sale or mortgage —"applying the amount to the redemption of the national debt," etc. This evidently confers the authority on the supreme government, and we accordingly find that a decree was made by the supreme government in virtue of the authority conferred by the law of the fourth of April, by which a national consolidated stock was created, and 100,000,000 acres of land, in various departments, pledged to secure it. In case the land so pledged should be sold, it was provided that the sale should be at the rate, at least, of four acres to the pound; and the purchase money was to be paid by the purchaser to government agents in London, to be used by them for the redemption of the stock. It is evident that the grant in the case at bar was not a purchase under this law. The petition itself repels such an idea, for the petitioner refers to the colonization laws, and their intention and policy, as giving authority and furnishing a proper inducement to the grant. It is clear that this grant was a concession under the colonization laws—not a sale under the law of 1837. The land is described in the petition as situated in the "waste part of the Sacramento frontier, about eighteen leagues from the establishment of Don Aug. Sutter. This land is bounded by the Sacramento river like an island, and is indicated by a hill on the bank of the river, which there divides itself into arms east and west, and contains five square leagues, more or less, agreeably to the plan which I shall present as soon as circumstances shall permit me so to do." The governor granted the petitioner the land he requested. The diseño has not been produced, although the grantee testifies that it was furnished.

It nowhere appears from the evidence what quantity of land is embraced within the limits of the island mentioned by the petitioner. The grant could not, however, by law, have been for a greater quantity than eleven leagues. The tract is described in the petition as "bounded by the Sacramento river like an island," and the governor in his marginal decree grants "the land solicited." The subject of the grant would therefore seem to be the island mentioned; and we think the claim should be confirmed to the land included within its limits, provided that they do not embrace more than the quantity of eleven leagues. It is stated by counsel that the quantity of land included in the island is somewhat more than six leagues. The petitioner represents it as five leagues, more or less. This is perhaps as close an approximation to the real quantity as often occurred under the loose and inaccurate ideas of the extent of land formed by the former inhabitants of this country; and as the governor, we think, intended to give the island, and as no deception seems to have been practiced upon him, the claim should be sustained for the whole land which the petitioner intended to solicit, and the governor to grant.

[NOTE. There was an application on behalf of the United States for an appeal in this case. The case was subsequently heard upon objections to the application, which objections were overruled and the appeal granted. Case No. 10,286. Upon the appeal in the supreme court the decree of the district court was reversed, and order entered that upon the case being remanded the petition of the plaintiff be dismissed. 23 How. (64 U. S.) 312.]

Case No. 10,286.

NOE v. UNITED STATES.

[Hoff. Land Cas. 242.] [1]

District Court, D. California. June Term, 1857.

APPEAL—AFTER EXPIRATION OF TERM.

An appeal will be granted on application made after the expiration of the term at which the decree was rendered; the objection that the court has no power in the premises being one that should be determined by the supreme court.

[This was a suit by James Noé, claiming the island of Sacramento, at the first hearing of which the claim was sustained. Case No. 10,285.] Heard on application for an order granting an appeal in behalf of the United States.

P. Della Torre, U. S. Atty., for the order.
Calhoun Benham, against it.

HOFFMAN, District Judge. An appeal is asked for in this case by the district attorney. The application is opposed on the ground that the court has no power to grant an appeal after the expiration of the term at which the decree has been rendered. The question raised is important, for it is understood that there are several cases in which decrees were rendered during the last term, and in which no appeal was taken during that term. By the act of 1851 [9 Stat. 633], no period is expressly mentioned within which the appeal must be taken. The language of the tenth section is: "The district court shall proceed to render judgment, and shall, on the application of the party against whom judgment is rendered, grant an appeal to the supreme

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court." It is contended that the word "appeal" imports ex vi termini a proceeding taken sedente curiâ, or during the session of the court at which the decree appealed from is rendered. It was early decided by the supreme court that the term "appeal," in the judiciary act of 1789 [1 Stat. 73], must be understood in its technical sense, expressive of the civil law mode of removing a cause to a higher tribunal, and not in its popular sense as descriptive of appellate jurisdiction, without regard to the manner in which the cause is transmitted to that jurisdiction. [U. S. v. Goodwin] 7 Cranch [11 U. S.] 108, 387; [Gelston v. Hoyt] 3 Wheat. [15 U. S.] 246. The term "appeal" is undoubtedly used in the same sense in the act of 1851, and denotes the civil law mode of transferring a cause to a superior tribunal for a retrial of the matters of fact as well as of law, as distinguished from a writ of error by which errors in matters of law were alone submitted for revision. The question then arises, whether an "appeal," according to the import of the term in the civil law as it is used in the proceedings of the courts in England and the United States, whose practice is based upon the rules of the civil law, or as used in the acts of congress, necessarily denotes a proceeding to be taken in open court, and during the term at which the decree appealed from is rendered. By the Roman law, up to the time of Justinian, appeals viva voce were allowable on the day the sentence was pronounced. Cod. de Appell. 7, 62, 14; Dig. 49, 1, 2. A little more time was given for an appeal in writing. According to Ulpian (Dig. 49, 1, 2, § 11), two days were allowed to one acting in his own cause, three days to one acting in a representative capacity, such as tutor, curator, &c. But various impediments or excuses were received to mitigate the rigor of this prescription. Justinian in his twenty-third novel (cap. 1), after alluding to the evils of this short and double period, enacts that in all cases a delay of ten days should be given, to be computed from the reading of the sentence. Such appears to have been the law of Spain, though the time was subsequently restricted to five days. Nov. Recop. lib. 11, tit. 20, law 1. By the practice of the ecclesiastical and admiralty courts in England, appeals from a definitive sentence may be either "apud acta" at the time of the sentence, viva voce, in presence of the judge, or in scriptis, reduced to writing, within ten (or in the ecclesiastical courts fifteen) days before a notary. In appeals from the high court of chancery to the house of lords, the first step is a notice of appeal; the next, a petition of appeal, which is presented to the lords, and on which a summons issues to the respondent. These petitions of appeal are by statute limited to five years. By the acts of congress, appeals are made subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error. These rules were decided by the supreme court in the case of The San Pedro, 2 Wheat. [15 U. S.] 132, to be those contained in the twenty-second and twenty-third sections of the act of 1789, and they relate to the time within which a writ of error may be brought—when it shall operate as a supersedeas—the citation to the adverse party—the security, &c. All these regulations are, in the opinion of the supreme court, applicable to appeals under the act of 1803 [2 Stat. 244], and are to be substantially observed. In analogy, then, to the practice in writs of error, a copy of the appeal is served upon the adverse party by lodging it in the clerk's office, and a citation is served upon him as required by the twenty-second and twenty-third sections of the act of 1789. The supreme court have recognized, however, the practice of taking an appeal in open court, or entering it during the session of the court at which the decree appealed from is pronounced. In such case the personal citation is held not to be indispensable. Riley v. Lamar, 2 Cranch [6 U. S.] 344. And perhaps the service of the notice of appeal would be held to be unnecessary for the same reason. It thus appears that although originally appeals may have been taken in open court, yet by the practice of all courts proceeding according to the forms of civil law the appeal may be taken out of court in different modes prescribed by law or by the rules of court. That the time within which they are to be taken is in like manner expressly limited, but it in no case refers to the terms of the court pronouncing the decree—the distinction between term time and vacation being, so far as I am informed, wholly unknown to the civil law. Although the mode of appealing "in scriptis," or before a notary, is not admissible in our practice, yet another mode of effecting the same object by a proceeding out of court is authorized by statute; and we have seen that in the ecclesiastical and admiralty courts of England that manner of taking appeals is still allowed. There would seem, therefore, no ground for the idea that an appeal means, ex vi termini, a proceeding in open court to be taken of necessity during the term at which the decree is pronounced. Two decisions of Judge Story have been cited by the counsel for the claimants in support of this position: Norton v. Rich [Case No. 10,352], and The New England [Id. 10,151]. It appears to me that those cases corroborate the views above expressed.

The judiciary act of 1789 directed that appeals from the district court should be taken to the "next circuit court." It provided no mode of taking the appeals. The case was therefore supposed by Judge Story to be untouched by statute. Whether the provisions of the act of 1803 do not apply to appeals from the district to the circuit court as well as to those from the latter to the supreme court, may admit of doubt. The provisions of the act of 1803 do not seem to have been brought to the notice of Judge Story. But

assuming that the law makes no provision whatever on the subject, except to allow the naked right of appeal to the next circuit court, the case presented to Judge Story does not materially differ from that submitted to this court. If, therefore, the word "appeal" necessarily imparted a proceeding sedente curia and viva voce, he would have determined that no appeal could be taken in any other manner. But such is not his decision. On the contrary, he states that the district courts may require the appeals to be taken either sedente curia and before an adjournment sine die, or afterwards, within a fixed time, in the clerk's office. As in the Massachusetts district no rules as to appeals had been established, but the uniform course from the earliest period had been to take appeals in open court before the adjournment, this practice was considered equivalent to a rule, and obligatory upon all parties. The case of The New England, so far as it relates to the point under discussion, affirms the decision of Norton v. Rich [supra], and avowedly proceeds on its authority. It is evident that in these cases appeals were required to be taken sedente curiâ and before adjournment, solely because the rules of court, or a long continued and uniform practice equivalent to a rule, had so provided; and not because the right of appeal conferred by statute imported such a proceeding and none other. Had such been Judge Story's construction of the term, he would not have admitted the power of the court to enlarge or abridge the right. The one hundred and fifty-second rule of the district court for the Southern district of New York, affirms the same principle. That rule provides that appeals may be entered within ten days from the time of rendering the decree. "A brief notice in writing, to the clerk and opposite proctor, that the party appeals in the cause, shall be a sufficient entry of the appeal, without any petition to the court for leave to enter the same." Under this rule, appeals are entered in the clerk's office within the time limited, but wholly without regard to the adjournment of the court; and the practice of taking an appeal in open court at any time before its adjournment has fallen into disuse, if, indeed, it be any longer admissible. I think it clear that the term "appeal," according to the practice of all the courts proceeding according to the forms of the civil law, has no such meaning as that attributed to it in the argument. But even if this were doubtful, the question would still arise, whether congress intended to use it in the act of 1851 in any such limited and doubtful sense. Had the intention of congress been to prescribe a period shorter than that allowed by the general laws regulating appeals, some limitation would probably have been fixed as in the acts of 1824 and 1828, by the first of which twelve months and by the second four months were allowed. They would hardly have left the limitation to be inferred from the use of the word "appeal" in a sense different from that in which it is elsewhere used in legislation, and when the period thus allowed would vary from six months to a few moments, depending upon whether the decree was rendered at the beginning or the end of the term. It seems far more probable that congress used the term as it is known in the acts of congress, and as importing a proceeding to be taken within five years from the date of the decree. Such a limitation would no doubt be applied should the case arise, and very possibly the court, in the absence of express regulations on the subject, would be authorized to fix by its rules a reasonable period within which the appeal is to be taken, as has been done by the district courts sitting in admiralty in cases of appeal to the circuit court, which are in like manner unprovided for by statute. No such rules have, however, been established by this court, the practice having been to grant the appeal whenever moved for. The objection we have considered has only recently been raised, and if suffered to prevail would operate as a surprise upon the United States, as well as upon claimants who, in ignorance of any such implied limitation on the right of appeal, have omitted to move for it before the expiration of the term at which the decree was rendered. For the reasons above stated, we think the objection cannot be sustained. It may be observed in conclusion, that the question presented is in its own nature more fit for the consideration of the superior tribunal to which an appeal is sought, than for that of the inferior court from which an appeal is taken. A preliminary motion to dismiss the appeal as irregularly taken may be made before the supreme court, and the question finally determined; whereas, a refusal by this court to allow the appeal would involve the delay of a mandamus to this court, until the return of which the decision of the point would necessarily be deferred.

Case No. 10,287.

NOELL et al. v. MITCHELL.

[4 Biss. 346.] [1]

Circuit Court, D. Indiana. May, 1869.

JURISDICTION—CITIZENSHIP.

The defendant executed a note to S. Strous or order. Strous indorsed it in blank, and then redelivered it to the defendant, who thereupon delivered it to the plaintiffs. The declaration averred that it was an accommodation note, and that Strous never had any interest in it. *Held*, that, under the 11th section of the judiciary act [1 Stat. 78], the court has no jurisdiction of the case unless it appear by an averment in the declaration that Strous, as well as the plaintiffs, is a citizen of a state other than Indiana. But the rule is otherwise as to foreign bills of exchange, bills and notes payable to

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

bearer, and suits by indorsees against their immediate indorsers.

[Cited in Cooper v. Thompson, Case No. 3,-202.]

[This was an action by Louis Noell and others against Jacob Mitchell. The case is heard on demurrer to declaration.]

Porter, Harrison & Fishback, for plaintiffs.

W. J. Hammond, for defendant.

McDONALD, District Judge. This action is assumpsit on a promissory note. There is a demurrer to the declaration, which raises a question of the jurisdiction of this court to entertain the action. The declaration avers that the plaintiffs are citizens of New York, and that the defendant is a citizen of Indiana. The declaration charges that the defendant, by his note, promised to pay to the order of one Samuel Strous two thousand nine hundred and eighty-eight dollars and eighty-eight cents; that Strous indorsed the note in blank, and delivered the same thus indorsed to one Max Glazer, a citizen of New York; that Glazer thereupon delivered the note to the plaintiffs; and that "said Strous indorsed said note for the accommodation of the defendant, and never had any title to said note or property therein."

From these averments in the declaration, it is plain that the plaintiffs claim to derive title to the note through Strous and by virtue of his said blank indorsement. But it does not state the citizenship of the indorser. By the 11th section of the judiciary act, no national court shall have "cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. 79.

The only question, then, is this: From anything stated in the declaration, could Strous, the payee of this note, have maintained an action on it in this court against the maker, if he had never indorsed it? It is certain that he could not. There are two reasons why he could not. First, the declaration avers that he had no interest in the note; and, secondly, the declaration does not aver that Strous is a citizen of a state other than Indiana. This is so plain that no extended remarks need be made to support it.

Under the 11th section of the judiciary act, it is well settled that in the suits in the national courts by assignees of choses in action, such as notes, inland bills, &c., the declaration must allege the citizenship of all assignors through whom the plaintiff derives his title, as well as the citizenship of the plaintiff and defendant.

To the foregoing rule there are two exceptions; or rather there are two classes of cases not embraced by the 11th section of the judiciary act. The first are foreign bills of exchange. These the section in question expressly excludes from its operation. The second are notes and inland bills made payable to bearer. The reason of this exception is that the holder of such paper does not take it by assignment within the meaning of the section in question; but, in contemplation of law, he takes it directly from the party who, on the face of the paper, promises to pay the bearer; and as the plaintiff is the bearer, the promise is made directly to him, and he does not derive his title through an indorsement. Bullard v. Bell [Case No. 2,121]; Bank of Kentucky v. Wister, 2 Pet. [27 U. S.] 318.

Nor is the case of an indorsee suing his immediate indorser within the operation of the section under consideration. For he does not sue on the note or bill, but on the indorsement. Young v. Bryan, 6 Wheat. [19 U. S.] 146; Mollan v. Torrence, 9 Wheat. [22 U. S.] 537. But as the case at bar falls within the general rule, and is not saved by any exception to it, the demurrer must be sustained.

NOTE. That notes payable to bearer are within the above exception to the 11th section, consult, also, Wood v. Dummer [Case No. 17,-944]; Bonnafee v. Williams, 3 How. [44 U. S.] 574. Nor is a bail-bond, for it is but an incident to the original suit. Bobyshall v. Oppenheimer [Case No. 1,592]. Nor a judgment recovered in a state court, though the original cause of action was a negotiable instrument on which the federal court would not have taken jurisdiction. Dexter v. Smith [Id. 3,866]. The prohibition as to suits to recover the contents of any promissory notes or chose in action does not apply to an action of replevin to recover the instrument itself. Deshler v. Dodge, 16 How. [57 U. S.] 622; Clarke v. City of Janesville [Case No. 2,854]. An executor or administrator is not an assignee, within the meaning of the prohibition. Mayer v. Foulkrod [Id. 9,341]. Nor is an indorsee, as against his immediate indorser. Evans v. Gee, 11 Pet. [36 U. S.] 80; Keary v. Farmers' & Merchants' Bank of Memphis, 16 Pet. [41 U. S.] 89; Campbell v. Jordan [Case No. 2,362]. In an action by an assignee against a remote endorser, he must show that the intermediate endorser could have maintained an action in the circuit court. Fry v. Rousseau [Id. 5,141]; Mollan v. Torrance, 9 Wheat. [22 U. S.] 537; Campbell v. Jordan [supra]. In a suit by an assignee, the pleadings must show that his assignor could have maintained an action in the circuit court. Rogers v. Linn [Case No. 12,015]. And in an action by the endorsee against the maker the citizenship of the payee must be set forth, in order to sustain the jurisdiction. Turner v. Bank of North America, 4 Dall. [4 U. S.] 8. And, under the general issue, the burden of proof is upon the plaintiff to show that his assignor might have sustained his action in the federal court. Bradley v. Rhines' Adm'rs, 8 Wall. [75 U. S.] 393.

Case No. 10,288.

In re NOESEN.

[6 Biss. 443; 12 N. B. R. 422; 7 Chi. Leg. News, 419; 1 N. Y. Wkly. Dig. 125; 2 Cent. Law J. 570; 7 Leg. Gaz. 297.][1]

District Court, E. D. Wisconsin. Sept., 1875.

BANKRUPTCY—LIMITATIONS—PROVABLE DEBT.

In Wisconsin, a demand barred by the statute of limitations is not provable against the estate of a bankrupt.

[Cited in Nicholas v. Murray, Case No. 10,-223.]

[In the matter of Theodore Noesen, a bankrupt.]

G. W. Foster, for petitioning creditors.

E. S. Turner, for bankrupt.

DYER, District Judge. The single question here presented is, whether a claim barred by the statute of limitations of the state of Wisconsin, is provable in bankruptcy. The question arises upon a contest between the petitioning creditors and the debtor, the latter seeking to defeat the petition on the ground that one-fourth in number and one-third in amount of creditors holding provable debts against him have not joined in the petition. To support this claim he interposes demands against himself in favor of his father-in-law, on their face barred by the statute of limitations.

The bankrupt act [of 1867 (14 Stat. 517)] provides that a petition for adjudication must be made by one or more of the debtor's creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under the act amounts to at least one-third of the debts so provable. Is a demand barred by the statute of limitations of this state, a debt owing by the bankrupt and provable under the act?

In England the question has been put at rest by adjudications, that a debt, the recovery of which by action may be defeated by a plea of the statute of limitations, cannot be proved in bankruptcy. Ex parte Dewdney, 15 Ves. 479; [In re Clendening, 9 Ir. Eq. (N. S.) 284; 1 Christ. Bankr. 221].[2]

Four cases are reported in volume 1 of National Bankruptcy Register Reports, which I proceed to notice. In Re Kingsley [Case No. 7,819], one of the questions was whether a debt barred by the statute of limitations of the state of Massachusetts, where the bankrupt then resided, and where the proceedings were had, but not barred by the statute of limitations of Vermont, where the creditors resided and where both parties resided when the contracts were made, could be proved against his estate in bankruptcy. Upon a full discussion of the question, Judge Lowell decides that a debt barred by the statute of limitations of the state where the bankrupt resides, cannot be proved against his estate in bankruptcy. The decision is made to rest upon the English authorities, and upon the principle that statutes of limitations are remedial, and that after the lapse of the statutory period for bringing actions, payment must be presumed. It must, however, be observed, that in this case the question was, whether the claim could be proved, not whether it was provable. Judge Lowell says: "There can be no doubt that this is a provable debt, and that it will be discharged by the certificate if the bankrupt obtains one. All debts which by their nature are provable, are discharged, whether they in fact could be proved or not. * * * Because this debt is provable, it does not follow that it can be proved. The question is whether it is a debt at all. * * * Applying the law of the forum, I find as a presumption of law, that this provable debt has been paid." Thus a distinction is taken between a provable debt and a debt which, though provable cannot be proved. So that it will be seen this case is not an authority fully applicable to the question we have here, for the point here is. Is such a debt provable?

In Re Hardin [Case No. 6,048], Judge Fox, following Judge Lowell, holds that a debt barred by the statute of limitations of Maine, where the bankrupt resided, could not be proved against his estate in bankruptcy by a creditor resident in another state. He says: "I have no doubt that for the purposes of the discharge, these demands are to be considered as provable debts, and that if the bankrupt obtains his discharge, he will be protected against them, that his discharge will operate against them. Such demands are of a provable character, but are no longer 'due and payable' within the meaning of the act, because the law of the forum designated by congress for the adjudication of the matter, presumes they are paid, and a paid demand no longer exists as a provable legal cause of action against the debtor."

In Re Shepard [Case No. 12,753], Judge Hall, adopting the view of Judge Blatchford, in a case which will be next noticed, holds that a debt barred by the statute of limitations of the state in which the bankrupt resides, may still be proven against his estate in bankruptcy. The principles he invokes are, that a debt against which the statute of limitations has run, is still a debt; that the operation of the statute does not extinguish the debt, but only affects the remedy, and that statutes of limitations have no effect beyond the territorial limits of the state enacting them.

In Re Ray [Case No. 11,589], Judge Blatchford gives to the question an elaborate examination. Conceding the rule in England to be as stated, he makes a distinction between the English statute of limitations and the statutes of limitation in the American states. He says: "The English bankruptcy law is co-extensive as to territorial operation with

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 1 N. Y. Wkly. Dig. 125, contains only a partial report.]

[2] [From 12 N. B. R. 422.]

the English statute of limitations. The bankrupt act of the United States operates in all the states as well as in New York. Under these circumstances, I think," he says, "that a debt, to be barred by limitation so as not to be provable under the bankrupt act as not being due and payable, must be shown to be barred throughout the United States." Referring to the statute of limitations of New York as applicable to simple contracts, and which is identical in language with the Wisconsin statute, Judge Blatchford holds it to be a statute affecting the remedy only and not the contract, and says it could never be "invoked as a bar to an action in another state" on the contract. He says further in his opinion, that "a complaint setting out a cause of action which appears to have accrued more than six years before the action was commenced, is not objectionable on its face or open to a demurrer. The defense of the limitation must be set up by answer. If it is not so set up, it is waived." Recognizing the distinction between a law which extinguishes the contract as the result of limitation, and a law which simply limits the time within which an action may be commenced upon the contract, and holding that a law of the latter character cannot be invoked as a bar to an action on it in any other country, he construes the statute of New York as not barring the debt and as not affecting the contract, but as merely reaching to the remedy, and so concluding that a debt is provable in bankruptcy unless barred throughout the United States.

Thus it will be seen from these decisions that the question turns upon the point as to whether the effect of the statute is to destroy the contract and extinguish the liability, or merely to affect the remedy on the contract. Without considering the distinction taken by Judge Blatchford on the English decisions, upon which he concludes that a debt must be barred throughout the United States so as to make it a debt not provable under the bankrupt act by reason of limitation, it is sufficient to say that the courts of this state place upon the statute of limitations a construction radically different from that given by Judge Blatchford. To illustrate: Although the statute of Wisconsin, like the statute in New York, requires that the defense of the statute of limitations must be set up by answer, the supreme court of this state have held, that where it appears upon the face of the complaint that the plaintiff's claim is barred by the statute, the objection may be taken by demurrer, and that in such case the demurrer is an answer within the meaning of the statute. Howell v. Howell, 15 Wis. 55. See, also, New Jersey v. New York, 6 Pet. [31 U. S.] 323.

Further the supreme court of this state have held in Brown v. Parker, 28 Wis. 22, that the lapse of time fixed by the statute of limitations of this state, as to parties residing therein, does not merely affect the remedy, but extinguishes the right, and that this applies to contract debts as well as to the title to property. This is a very strong case, and one in which Justice Dixon elaborately reviews the law on the question, holding that under the statute the debt by lapse of time becomes a nullity, and as if no debt or promise had ever existed. The result of this decision upon the facts of the case was, that where a note made in this state, of which the maker and holder were residents, had been barred, and the debt thus extinguished (by the law of this state as interpreted by its courts), and the note was then sued upon in a court of Illinois, the defense upon the lex loci contractus, if set up there, would have been good, and a judgment upon such note entered in Illinois by confession upon warrant of attorney, was relieved against. The principle that, as to parties residing in this state, the statute of limitations does not affect the remedy only, but directly extinguishes the right after the statutory period has elapsed, was also settled in this state in Sprecker v. Wakeley, 11 Wis. 432, and Knox v. Cleveland, 13 Wis. 245. Now, it is a settled principle that the lex fori must prevail as to statutes of limitation. "The federal courts sitting within the respective states, regard their statutes of limitation, and give them the interpretation and effect which they receive in the courts of the state." In re Cornwall [Case No. 3,250]; Shelby v. Grey, 11 Wheat. [24 U. S.] 361; McClung v. Silliman, 3 Pet. [28 U. S.] 270; Green v. Neal's Lessee, 6 Pet. [31 U. S.] 291; Ross v. Duval, 13 Pet. [38 U. S.] 45. Giving to the statute of limitations of this state the interpretation placed upon it by the courts of the state, I must hold that as the parties are residents of this state, the demands in question, being barred by the statute, are extinguished, and are therefore not provable claims against the estate of the bankrupt. They are as if they had never existed.

The views I have expressed are, I think, strongly sustained by Judge Woodruff in Re Cornwall [supra].

NOTE. The statute of limitation is in Wisconsin a bar to the recovery of any dividend paid more than six years previous to the commencement of the suit; the statute commences to run when the misapplication is made. Main v. Mills [Case No. 8,974].

[Contra, BLODGETT, District Judge in Re Reed [Id. 11,635], held that the defense of the statute of limitations should be allowed to the claim of a creditor seeking to prove his debt in bankruptcy, wherever that defense might have been made in a suit in the state where the debtor resides.][3]

[3] [7 Chi. Leg. News, 419.]

Case No. 10,289.

In re NOLAN.

[8 Ben. 559.][1]

District Court, E. D. New York. Nov., 1876.

INJUNCTION—RECEIVER—SUPPLEMENTAL PROCEEDINGS—JUDGE'S MEMORANDUM.

Where supplemental proceedings had been commenced in a state court prior to the filing of a petition in bankruptcy by the judgment debtor N., and a memorandum had been made by the judge, before whom the proceedings were pending, of the appointment of a receiver, but no formal appointment had been made and no order filed and recorded, as required by the 298th section of the Code of Procedure: *Held*, that, as such express provisions of the Code had not been complied with, the proceedings in the state court had not divested the bankrupt of his property to vest it in the receiver, and further proceedings in the state court, after the adjudication of bankruptcy, looking to such a vesting of his property, could not be permitted.

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

E. G. Davis, for bankrupt.

BENEDICT, District Judge. This is an application on behalf of a judgment creditor of the bankrupt for the modification of an injunction issued from this court to restrain the continuing of proceedings in the state court, so as to permit the continuing of proceedings supplemental, commenced in the state court prior to the filing of the petition in bankruptcy.

The application is based upon the ground that in the supplemental proceedings referred to, a receiver had been appointed by the state court who had become vested with the property and effects of the judgment debtor, prior to the filing of the petition in bankruptcy. The facts as I understand them fail to furnish ground for this application. While it appears that proceedings supplemental were commenced in the state court, and prior to the filing of the petition in bankruptcy, the memorandum was made thereon: "Edward Daily appointed receiver, bond in penalty of $500.00," by the judge before whom the proceedings were pending, no formal appointment of the receiver was made, nor any order whatever filed and recorded as required by section 298 of the Code, prior to the commencement of the bankruptcy proceedings.

The same section of the Code declares that "the receiver shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order as aforesaid." No such order having been filed and recorded, the receiver had not become vested with the debtor's property; and consequently it is the duty of this court, where the proceeding is for the benefit of all the creditors, to restrain the further prosecution of the supplemental proceedings instituted in the state court. Without, then, considering the question of the right of a receiver appointed by a state court to recover by suit, property of a bankrupt, after an adjudication of bankruptcy, as to which see In re Whipple [Case No. 17,512], I must continue the present injunction, upon the ground that, in this instance, according to the express provision of the Code, the bankrupt had not been divested of his property or effects by the proceedings in the state court prior to the adjudication in bankruptcy, and that further proceedings in the state court subsequent to an adjudication, looking to the vesting a receiver of that court with such property, cannot therefore be permitted. The motion to modify the injunction is therefore denied.

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

NOLAN v. The UNION. See Case No. 14,345.

NOLAND (BAUGH v.). See Case No. 1,114.

NOLAND (FOOTE v.). See Case No. 4,915.

NOLTON (UNITED STATES v.). See Case No. 15,897.

Case No. 10,290.

NONES v. EDSALL.

[1 Wall. Jr. 189.][1]

Circuit Court, D. New Jersey. April, 1848.

CONGRESS—RIGHT OF MEMBER TO CONTINUANCE OF SUIT DURING SESSION.

Attendance upon congress, as a member of that body, does not confer such "privilege," as to entitle a party to have a postponement of his suit as a matter of right; though the court may grant a postponement under particular circumstances (and did grant it in this case), in its discretion, and upon terms. The dictum in Geyer's Lessee v. Irwin, 4 Dall. [4 U. S.] 107, is not law.

This case being set down for trial at the present term of this court, the counsel of the defendant moved for a continuance, claiming it as a matter of right, and assigning for cause—what was admitted to be the fact—that the defendant is a member of congress, and at this time in attendance upon congress at Washington City. It appeared also that the defendant was sick at Washington, and had been unable to subpoena his witnesses or prepare his cause for trial. In asking a continuance, the counsel of the defendant relied on a case in the supreme court of Pennsylvania, A. D. 1790,—Geyer's Lessee v. Irwin, 4 Dall. [4 U. S.] 107,—where Mr. Lewis, producing an affidavit of a just defence, moved to set aside a judgment, which had been entered some time before, in a case on the trial list, against a member of the general assembly of the state; assigning as ground, principally, that the defendant was a member of that body attending his public duty at Philadelphia at the time when the judgment was entered. The counsel of the party, it appeared, however, had been present, and without claiming privilege had confessed judg-

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

ment rather than go to trial without proofs; and it was on that account that the court refused to open judgment. The omission to claim privilege at the proper time, says the court, "amounts to a waiver, by which the party is forever concluded." But no doubt was entertained by the court, if the privilege had been claimed at the proper time—when the case was called—that the cause should have been continued. "A member of the general assembly," says the court, "is undoubtedly privileged from arrest, summons, citation or other civil process during his attendance on the public business confided to him. And we think that upon principle, his suits cannot be forced to a trial and decision while the session of the legislature continues."

GRIER, Circuit Justice. We cannot allow you to continue this case as a matter of right, on your claim of privilege. The opinion expressed by the supreme court of Pennsylvania in the case cited, has been considered rather as a dictum than a decision; and we do not think it founded on correct principle, or supported by precedent. Members of congress are privileged from arrest both on judicial and mesne process, and from the service of a summons or other civil process while in attendance on their public duties. Indeed, it was at one time doubted whether this privilege from arrest extended to judicial or final process. Starrett's Case, 1 Dall. [1 U. S.] 356.

But though that is now conceded, because an arrest would interfere with his public duties, yet none of the reasons on which this privilege is allowed, can extend it to the right to continue a cause pending in court. We cannot allow it propter dignitatem, alone, unless as a matter of comity, which would require the consent of the opposite party. Assuming the fiction of law to be a practical truth, that a member of congress cannot absent himself from his duties unless to the detriment of the public, yet it does not necessarily follow, that if this trial proceed the defendant need be compelled to neglect his public duties. In contemplation of law he is already in court by his counsel; and his personal attendance is not required at the trial either in theory or in practice. We all know that causes are tried in this and every other civil court, almost daily without the presence of the parties. Any other person may be employed to subpoena witnesses, and if the attorney be properly instructed in this case, the presence of his client on the trial is of little importance. Hence, it is well settled that the sickness of a party is, of itself, no sufficient reason for postponing the trial of a cause. If a physical inability to attend court be not a sufficient reason for postponing a cause, it is not easy to perceive why a factitious or fictitious inability should be vested with any higher privilege.

We are not willing, therefore, to concede to the defendant a continuance of this case, when claimed as a matter of privilege and right; but we are disposed to grant it, in the exercise of our discretion, and for the reasons urged, on condition of payment of the costs of the term. Continuance granted.

Case No. 10,291.

In re NOOMAN et al.

[3 N. B. R. 267 (Quarto, 63).] [1]

District Court, D. Massachusetts. 1869.

BANKRUPTCY—OBJECTION TO DISCHARGE BY CREDITORS—MUTILATED ACCOUNTS.

1. Creditors objecting to discharge of bankrupt must prove their allegations.

2. The mutilation of a book of accounts by bankrupt may be explained.

[In the matter of Nooman & Connolly, bankrupts.]

J. G. Abbott and B. Dean, for creditors.

J. D. Ball, for bankrupts.

LOWELL, District Judge. The specifications in opposition to the discharge of these bankrupt partners, involve only questions of fact. The allegations are that they have concealed a part of their assets, and have concealed and multilated one of their books of account. The burden of proof is on the objecting creditors, and I am not satisfied that they have sustained it. The books appear to show a profit in the business, and if it was profitable and the stock is worth its cost, the assets ought to be much larger than they are; but it may be that the goods depreciated during the eight months between the last account of stock and the bankruptcy; the bankrupts swear that they did depreciate, and there is no evidence to the contrary. It was argued, with a good deal of plausibility, that very few persons could be made out to be bankrupts by the mere inspection of the books.

The evidence shows a mutilation of one of the books, but it seems that all the outstanding accounts which it contained were transferred to another book, and there is no evidence that any fraud was done to the creditors by the change, but on the contrary there is proof tending to show that the accounts were all collected as far as collectible. There was evidence that the bankrupts, whose business was to manufacture clothing for sale, ready made, changed their mode of doing business not long before the bankruptcy, by taking their cloth on consignment, as they called it, which I understand to be that they agreed with the wholesale houses that the property in the goods should not pass until they were paid for. They would have then an equitable title in the goods to the extent of the payments, and this title they should have disclosed to their assignee, and if it were shown that they

[1] [Reprinted by permission.]

had willfully failed to do this it might bar their discharge. But I do not understand that any such allegation is made or proved. It was said at the hearing, and there is nothing in the case to refute the assertion, that although these goods do not appear on the schedules, yet that the assignee was informed of the facts concerning them, and made such disposition as was proper of the bankrupts' interest in this part of their property. Discharge granted.

NOON (SEARS v.). See Case No. 12,590.

Case No. 10,292.

In re NOONAN.

[3 Biss. 491;[1] 10 N. B. R. 330; 5 Chi. Leg. News, 557; 30 Leg. Int. 425; 21 Pittsb. Leg. J. 73.]

Circuit Court, E. D. Wisconsin. April Term, 1873.

BANKRUPTCY—PARTNER CAN FILE PETITION EVEN AFTER RECEIVER APPOINTED—NO ACT OF BANKRUPTCY NECESSARY—JURISDICTION NOT ARRESTED BY DISSOLUTION.

1. The bankrupt court has jurisdiction of a petition by one partner to have the firm declared bankrupts, even though proceedings are pending in a state court to wind up the partnership, and a receiver had been appointed who had taken possession of the assets.

[Cited in Re Hathorn, Case No. 6,214; Re Gorham, Id. 5,624.]

2. Such a petition being voluntary as to him, it is not necessary that there should be an act of bankruptcy alleged.

[Cited in Re Gorham, Case No. 5,624.]

3. A dissolution by the act of all or any of the partners does not put an end to the power of the bankrupt court.

4. So long as any unfinished business, debts, credits, or assets remain, the bankrupt court has jurisdiction, a proper case being made.

[Cited in Re Johnston, 17 Fed. 72.]

[Cited in Corey v. Perry, 67 Me. 144.]

[5. Approved in Hudgins v. Lane, Case No. 6,827. Cited in Re Webb, Id. 17,317, to the point that a discharge granted to one partner in his separate bankruptcy does not release him from his joint or partnership debts.]

[In review of the action of the district court of the United States for the Eastern district of Wisconsin.]

In bankruptcy.

Josiah A. Noonan and Peter McNab were partners prior to June 2d, 1870. On that day proceedings were commenced by McNab in the state court to put an end to the partnership, and for an account. The state court appointed a receiver, who took charge of the assets of the firm. These proceedings were still pending when, on the 29th of October, 1872, Noonan filed a petition in the district court of the United States, claiming the benefit of the bankrupt law [of 1867 (14 Stat. 517)] for himself, and also alleging that the partnership was insolvent, asking that it be declared bankrupt. McNab refused to join in these proceedings in bankruptcy, and made a motion in the district court to dismiss the petition on the ground that the partnership was at an end, and because the assets of the firm were in the hands of the receiver, and the court had no right to adjudicate as to the partnership. The motion was overruled, and the court proceeded to try the issue of bankruptcy; the jury rendered a verdict that the partnership was insolvent. Thereupon McNab filed this petition for review. No point was made in this court as to the authority of the court to review the ruling of the district court on the petition.

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

Orton & Winkler, for petitioner in review, cited the following authorities: T. Pars. Partn. 470; Story, Partn. §§ 310, 311; Noonan v. McNab, 30 Wis. 277; section 36, Bankrupt Law [14 Stat. 534]; and order 18; Bump, Bankr. 54; In re Crockett [Case No. 3,402]; In re Winkens [Id. 17, 875]; In re Hartough [Id. 6,164]; In re Downing [Id. 4,044]; In re Abbe [Id. 4]; In re Freeman [Id. 5,082]; In re Clark [Id. 2,798]; Sedgwick v. Place [Id. 12,622]; Alden v. Boston R. Co. [Id. 152]; Clark v. Bininger, 38 How. Prac. 341; 39 How. Prac. 363.

Wm. P. Lynde and Jason Downer, contra, cited In re Clark [Case No. 2,798]; In re Independent Ins. Co. [Id. 7,017]; In re Safe-Deposit & Savings Inst. [Id. 12, 211]; In re Bininger [Id. 1,420]; Bump, Bankr. (5th Ed.) 497, 498.

DRUMMOND, Circuit Judge. The only question in the case is whether, after proceedings are commenced in a state court, by one of the partners, to put an end to the partnership and for an account, and the property is in the hands of a receiver, it is competent for another member of the firm to file a petition in bankruptcy for himself and for the firm.

It is insisted on the part of the petitioner in this court, that the partnership has been dissolved, that all the assets are in the hands of a receiver of the state court, and that the district court had no jurisdiction of the case as against McNab. The authorities were fully considered by the counsel, on the argument in this court, and it must be admitted that some of them, perhaps most of them, have assumed that the thirty-sixth section of the bankrupt act, when it speaks of the adjudication of bankruptcy as to partners, refers to them as existing partners, and that it does not mean a case where the partnership has been dissolved, and the assets are in the hands of a third person, either with the consent of the partners or by the act of a court of competent jurisdiction. But my opinion is that this view of the law which has been taken by some of the judges is entirely too narrow.

I do not think that is the true construction

of the thirty-sixth section of the bankrupt law. Undoubtedly there is something in the language which at first might be supposed to lead naturally to such a conclusion. But when we consider it more fully, we must admit that it is not susceptible of such a construction.

The language is: "Where two or more persons who are partners in trade, shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue," etc. It is to be observed that it does not point out, in distinct terms, what is to be the course of the proceedings in the case of a petition where partners are concerned, but it speaks of it as a fact accomplished, and by necessary implication that it can be done in the way here pointed out.

It refers to the adjudication of the bankruptcy of partners as being on the petition of the partners themselves, or one of them, or by a creditor of the partners. It uses the present tense, it is true, but too much force, I think, has been given to this language, "Who are partners in trade." I consider it as meaning nothing more than if it had said, where two or more persons, partners in trade, shall be adjudged bankrupt, etc. It certainly could not have been the meaning that the partners, by a mere act of their own, as by a voluntary dissolution at the instance of all or of one, could deprive a creditor of the right of putting the firm into bankruptcy. Neither could it have been the meaning that a creditor should be deprived of that right if the partners had transferred all their assets to an assignee by a voluntary act of their own.

That would be a very easy way of avoiding the effects of the bankrupt law. I understand this language to mean that whenever, looking at the partnership either present or past, it is within the province of the bankrupt law to bring the debts of the partnership or its credits or assets within the control of the bankrupt court, there can be an adjudication of bankruptcy against the firm. In other words, that for the purpose of the bankrupt law they are partners, and that the bankrupt court has authority to settle up the partnership.

The courts which have held that this language applies to a present existing partnership alone, have to admit that the mere dissolution of the firm by the joint act of the partners, or by the act of one, does not put an end to the power of the bankrupt court.

They have declared that if there are any assets of the firm, although the partnership may have been dissolved, that gives authority to the bankrupt court to proceed and wind up the affairs of the partnership.

But it may be one of the very questions in the case whether or not there are partnership assets, and this question the bankrupt court will have a right to determine.

It may be if there is nothing of the firm remaining, no business transactions, and neither debts, credits nor assets, and the firm is dissolved, that there is nothing for the bankrupt court to operate upon; but as long as there is any unfinished business on the part of the firm, debts, or credits, or assets of any kind, it seems to me that, upon a proper case made, it is the province of the bankrupt court to settle it and that it is the right either of the partners themselves, or of one of them, or of a creditor, to go into the bankrupt court for that purpose.

There certainly could not be any doubt but that the partners, by a voluntary act, could come into the court and obtain a decree in bankruptcy against themselves, even though there might have been a formal dissolution of the firm, provided there was any business, debts or credits of the partnership remaining, and thus be discharged from their debts. And if they together have the right to do it, why has not one of them the same right?

The language is just as applicable to one as to all the partners, or to the creditors of the firm; indeed the authorities referred to concede this. And it is difficult to see how any member of a firm can be released from his personal liability as such without the court substantially looking into all the transactions of the firm and settling up its affairs. A man cannot be discharged from his liabilities as a member of a firm unless the debts and assets of the firm are considered and adjudicated upon by the court.

It is to be observed that this court is not now called on to decide what is to be the effect of this petition in bankruptcy by one member of the firm upon the property of the firm in the hands of the receiver.

The real question is whether one of the members of the firm is prevented from calling the partnership into court and having it declared bankrupt, because of these proceedings in the state court. I hold that he is not.

It perhaps may be illustrated further. Where the petition is voluntarily filed by the members of the firm, of course there could in one sense be no adjudication of a subsisting firm, as the petition, when filed by all the partners, is an act of bankruptcy, as the statute declares, and consequently works a dissolution of the partnership.

I can, therefore, have no doubt that the decision of the court below was correct on this point, and that the proceedings in the state court did not prevent the court from taking jurisdiction, not only of Noonan, but of McNab, as a member of the firm of Noonan & McNab. To hold otherwise, would be to put it in the power of any member of a firm, at any time, to prevent the affairs of the firm from being settled up in the bankrupt court, where it had committed an act of bankruptcy. But it is not necessary, in such a case as this, that there should be an act of bankruptcy alleged. This partakes of the mixed nature of a voluntary and an involun-

tary proceeding. It is a petition by a member of the firm, and voluntary as to him, but involuntary as to the other member of the firm. Order of the district court, refusing to dismiss the petition, affirmed.

Case No. 10,293.

Ex parte NORCROSS.

[1 N. Y. Leg. Obs. 100; 5 Law Rep. 124; 1 Pa. Law J. 135.][1]

District Court, D. Maine. March, 1842.

BANKRUPTCY OF PARTNER — DISSOLUTION — ASSIGNEE AND SOLVENT PARTNER TENANTS IN COMMON—PARTNERSHIP ACCOUNTS.

1. Where a decree of bankruptcy is awarded against a member of a firm, the partnership is thereby dissolved, and the partnership effects are vested in the assignee and the solvent partner as tenants in common.

[Cited in Amsinck v. Bean, 22 Wall. (89 U. S.) 403.]

[Cited in Talcott v. Dudley, 4 Scam. 436.]

2. It is not necessary where one of the firm petitions for a separate decree, to set forth the partnership accounts in detail. They may be taken before a commissioner. But the petitioner should set forth what proportion or share of the partnership property he claims to be entitled to.

This was an application for a separate decree in bankruptcy by Nicholas G. Norcross, who had been carrying on business in partnership with one Fisk, under the firm of "Fisk & Norcross." Objections were filed, and it was insisted that the petitioner was bound to set forth in his schedule an account of the partnership property, and what part or proportion he was entitled to therein, in order that the assignee might take possession thereof; that having failed so to do he had not complied with the provisions of the statute, nor the rules of the court. It was admitted that Fisk, his partner, was in solvent circumstances, and that there was no ground for supposing the partnership property was in danger, or was likely to be wasted.

WARE, District Judge. It is not necessary for the petitioner to enumerate in his schedule the particulars of the partnership effects. The decree of bankruptcy operates as a dissolution of the partnership, and the assignee becomes tenant in common with the solvent partner. The joint tenancy is destroyed. Between tenants in common of chattels, it is generally true that each owner is equally entitled to the possession, and one tenant in common cannot maintain trespass or trover against the other for dispossessing him, though for the loss or destruction of the whole chattel trespass will lie. 2 Kent, Comm. 350, 351, note. But it is otherwise in the case of a tenancy in common supervening on the dissolution of a partnership, by the death or bankruptcy of one of the partners. In this case the joint property remains in the hands of the surviving or solvent partner, clothed with a trust to be applied by him to the discharge of the partnership obligations, and to account to the representatives of the deceased, or of the bankrupt partner, for his share of the surplus. He can enter into no new partnership engagement, but his whole authority is limited to the settling and closing the partnership concerns. 3 Kent, Comm. 59. Story, Partn. §§ 1, 328, 341, 407. The right of the assignee is not, therefore, to the possession of the partnership effects, but to an account and to the bankrupt's share of the surplus, after the debts of the firm are paid. And it would seem that ordinarily he had no right to interfere with the administration of the effects of the firm. If there is any danger of a waste or mis-application of the common funds, he may call for an injunction and the appointment of a receiver, or the court might direct him to take the administration into his own hands. Story, Partn. § 344. Indeed, in the absence of the solvent partner, the rule is said to be that the assignee shall take the joint property and deal with it as the partner himself ought to have dealt with it, paying the joint debts and applying the surplus according to the equities subsisting between the partners themselves. Barker v. Goodair, 11 Ves. 85, 86. If the administration of the effects is to be with the solvent partner, subject to an account, it seems to me to be unnecessary to enumerate in detail those effects in the schedule. It will be more convenient to do that hereafter, when, in the subsequent proceedings in bankruptcy, the matter goes before a commissioner to take the account. This seems to me to be the most convenient rule, and in most cases will be most beneficial for all parties. At the same time, it is perhaps not easy to state precisely to what extent the power of the solvent partner over the joint property is affected by the bankruptcy of his co-partner. Eden Bankr. 252, 264. Brickwood v. Miller, 3 Mer. 279. But the petitioner has only stated generally in his schedule, his interest in the partnership property, without stating what his proportion is. In that respect it is defective.

The schedule was afterwards amended in this particular, and on a subsequent day a decree passed.

[1] [1 Pa. Law J. 135, contains only a partial report.]

NORCROSS (BROOKS v.). See Case No. 1,957.

Case No. 10,294.

NORCROSS et al. v. GREELY.

[1 Curt. 114; 15 Law Rep. 149; 29 Hunt, Mer. Mag. 203.] [1]

Circuit Court, D. Massachusetts. May Term, 1852.

CUSTOMS DUTIES—APPRAISEMENT—INVOICE VALUE—COMMISSION—RATE—SUFFICIENCY OF PROTEST.

1. The tariff act of 30th of August, 1842 [5 Stat. 563], explained by the act of 3d of March, 1851 [9 Stat. 629], provides, that the value of the article upon which the duty is to be charged shall be ascertained in a certain manner, and that "to such value or price shall be added all costs and charges except insurance, and including, in every case a charge for commissions at the usual rates." *Held*, that, by the proper construction of this clause of the act, a commission should, in all cases, be added to the invoice value, although in fact no commission is paid, and although it is not customary for the importers of the article in question to pay any commission.

2. Where the rate of the commission charged and added by the collector, is that prescribed by the secretary of the treasury as the usual one, it is incumbent upon the merchant to show that it is higher than the rate usually paid, when any commission is paid.

3. The act of 26th of February, 1845 [5 Stat. 727], requires, that no action shall "be maintained against any collector to recover the amount of duties so paid, under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." The merchant paid duties upon commissions, under protest, and the protest set forth this ground of objection alone to such payment,—that the merchant "pays no such commission:" *Held*, that the protest was insufficient, and that, consequently, the action could not be maintained.

[Cited in Pierson v. Lawrence, Case No. 11,158.]

4. The merchant, in his suit to recover duties paid under protest, must be confined to such grounds of objection to the payment thereof as his protest contains.

[Cited in Burgess v. Converse, Case No. 2,154; Pierson v. Lawrence, Id. 11,158; Davies v. Arthur, Id. 3,611, 96 U. S. 153.]

[This was an action by Otis Norcross and others against Philip Greely, Jr., the collector of the port of Boston, to recover a certain amount paid for duties claimed to have been illegally exacted.]

S. Bartlett and S. Bartlett, Jr., for plaintiffs.

George Lunt, Dist. Atty., for defendant.

CURTIS, Circuit Justice. This is an action for money had and received, to recover from the collector of the port of Boston an excess of duties, paid under protest by the plaintiffs, upon the importation of parcels of crockery ware, made at different dates, the earliest on the 22d day of February, 1851, and the last on the 28th day of April, 1852. The complaint is, that in valuing the merchandise for the assessment of duties, there was added to the invoice cost, and to the other charges, a commission of two and one-half per cent.

The plaintiffs have introduced evidence, tending to prove that, for many years, the usual course of trade, between England and the United States, in this species of merchandise, has been, for the dealer here to give orders for the particular articles desired by him, either to the manufacturer in England, or to some person here who was a correspondent of one or more of the English manufacturers, and accustomed to receive orders in their behalf. These persons have sometimes been agents of particular manufacturers, sent here to solicit orders for their employers. Sometimes they have been persons established in this country, to whom different manufacturers have been in the habit of transmitting their catalogues of articles and prices, together with their rates of discount, and, upon the information thus afforded, these persons have made contracts with the dealers in this country, and either transmitted the orders, for the execution of such contracts, to the manufacturers, or they have been sent by the dealers themselves; and sometimes one of these persons, making such contracts with the dealers here, and finding that his correspondents could not completely execute them, has employed an agent in England to purchase in the market what was needed to complete the orders received by him. It also appears to have occasionally, though rarely, happened, that the dealers here send orders to an agent in England, when some particular articles are desired, and they do not know to what manufacturer to apply to obtain them. When the dealers here give orders to an agent of a manufacturer, or to a person established here, who is a correspondent of an English manufacturer, or send their orders themselves directly to a manufacturer, they pay no commission. In the other cases mentioned, in which the merchandise is bought in the market, either for the dealers, or for the person here who undertakes to supply the dealers, a commission is paid; and the evidence tends to prove that, in the absence of a special contract, two and a half per cent, is the usual rate of commission, when any is paid. The legality of adding the amount of a commission, in so many of the instances now in question, as occurred after the first day of April, 1851, depends upon the first section of the act of the 3d of March, 1851 (9 Stat. 629), which went into operation on that day. Eleven of the importations having been made prior to that day, are governed by the sixteenth section of the act of the 30th of August, 1842 (5 Stat. 563). But this difference is not material, the language of the two acts touching commissions, being the same, the last act having been passed to

[1] [Reported by Hon. B. R. Curtis, Circuit Justice. 29 Hunt. Mer. Mag. 203, contains only a partial report.]

fix the time to which the valuation should have reference, in consequence of the decision of the supreme court of the United States, in the case of Greely v. Thompson, 10 How. [51 U. S.] 225. Each of these acts, after directing the value of the article, in the markets of the country of exportation, to be ascertained, further says: "And to such value or price shall be added all costs and charges, except insurance, and including, in every case, a charge for commissions at the usual rates."

The plaintiffs maintain, that the purpose of congress was to have the value of the article, when ready to go into consumption here, ascertained; that, for this purpose, there was to be added to its cost or value abroad the expenses of procuring and bringing it here; that if, from the nature and general course of the trade, a charge for commissions is not usually, in fact, incurred, then such a charge does not usually enter into, or constitute a part of, the value of the articles when ready for consumption here; and, therefore, to include a commission in such cases would be merely arbitrary, and not in accordance with the object in view, which was to ascertain the actual and true value. And it is argued, that the language of the act admits of an interpretation to this effect; not that in every case a commission was to be added, but that it should be added only in those cases in which it was usual to pay a commission; and in every case, when added, it should be at the usual rates. It must be admitted, that this is not the natural meaning of the words of the law. A direction to include, in every case, a charge for commissions at the usual rates, is certainly not complied with if such a charge is omitted in any case. The words, "in every case," apply to the act of including a commission, as well as to the rate of that commission. It is necessary to find sufficient reasons for the rejection of this natural and obvious meaning of the language of congress, and the adoption of a different and more restricted rule; and it is not a sufficient reason that the court does not perceive the propriety or practical expediency of the rule as expressed in a revenue law. A striking illustration of this may be seen in a recent case in the supreme court of the United States. Lawrence v. Caswell, 13 How. [54 U. S.] 488. The act of March 2, 1799, § 59 (1 Stat. 672), had directed an allowance of two per cent. to be made for leakage of liquors in casks, paying a specific duty by the gallon. The tariff act of 1846 [9 Stat. 42] had repealed the specific, and substituted ad valorem duties on all liquors. No reason could be given why the allowance should be made in the one case and not in the other. But the court held, that the deduction could not be made, although the effect was to include in the valuation what, owing to the usual leakage, would not go into consumption in this country.

It is true, that to add a charge for commissions in all cases, including those in which it is not usual to pay such a charge, may be said to be in some sense arbitrary. But an examination of the legislation of congress on this subject, will show that this objection is not entitled to much weight. The act of the 2d of March, 1799, § 61 (1 Stat. 673), first prescribed a rule for fixing the valuation of merchandise for the assessment of ad valorem duties. It required the value to be estimated by adding twenty per cent. to the actual cost thereof, if imported from the Cape of Good Hope, or from any place beyond the same, and ten per cent. on the actual cost thereof if imported from any other place or country, including all charges, commissions, outside packages and insurance only excepted. I am not aware what the practice under this law was, and its meaning is not very plain; but it was made plain by the act of March 3, 1817 (3 Stat. 369), which enacted, that in all cases where an ad valorem duty shall be charged, it shall be calculated on the net cost of the article at the place whence imported, (exclusive of packages, commissions, charges of transportation, export duty, and all other charges,) with the usual addition established by law, of twenty per cent. on all merchandise imported from places beyond the Cape of Good Hope, and of ten per cent. on articles imported from all other places. The acts of April 20, 1818, § 4 (3 Stat. 434), and March 1, 1823, § 5 (3 Stat. 722), while they continued to require twenty or ten per cent. to be added to the cost, also required the charges to be included; but the first of these laws expressly excepted commissions, while the last included them among the charges to be added. The act of July 14, 1832, §§ 4, 15 (4 Stat. 590, 593), repealed the addition of twenty or ten per cent., but required that there should be added to the cost, or appraised value, "all charges except insurance." And, finally, the laws now in question direct that in every case a charge for commissions shall be included among the charges to be added to the valuation or cost.

It thus appears that, in prescribing the rules by which the valuation should be made, or the cost ascertained, congress has not attempted to reach the precise cost or value in each case, or even each class of cases. That sometimes a round sum, twenty or ten per cent., has been added to the cost abroad, to cover all charges and expenses of procuring the article, and bringing it here; sometimes this addition has been taken to cover a part only of these charges and expenses; sometimes commissions have been directed in all cases to be excluded, and sometimes to be in all cases included; the apparent purpose, in reference to these smaller items constituting part of the value here being, to prescribe some convenient general rule which would operate fairly in general,

but not to endeavor to conform it even to classes of cases of importations of some particular articles, which are procured so as to form exceptions to the general course of trade. It is true, that if commissions were never paid for the purchase of merchandise of this kind, there might be difficulty in complying with the direction contained in the act, which requires the commissions to be at the usual rate. If there were no usual rate of commissions for the purchase of crockery ware in England, it might then be necessary to ascertain whether commissions were paid for the purchase of such or similar ware imported hither from countries other than England; but I do not understand this to be necessary upon the evidence now before the court, because, although the evidence strongly tends to prove that it is not usual for the dealers to pay a commission, it also tends to prove that commissions are sometimes paid, and that, when paid, the known and usual rate is two and a half per cent. I shall therefore instruct the jury: 1. That the acts of congress required the addition of a commission in all these cases to the invoice cost, although they should find that the plaintiffs, in fact, paid no commission, and that it is not customary for the importers of crockery ware from England into this country to pay a commission. 2. That the rate of commission, added in these cases, being that prescribed by the secretary of the treasury as usual, it is incumbent on the plaintiffs to show that it is higher than the rate usually paid, when any commission is paid, otherwise their verdict must be for the defendant.

It remains to consider the objection taken to the protest. The act of February 26, 1845, requires the person paying duties, as a preliminary requisite to the maintenance of an action to recover them back, to sign a protest in writing, "setting forth distinctly and specifically the grounds of objection to the payment thereof." The law having confided to the secretary of the treasury the power to determine, in the first instance, what sums shall be exacted as duties, but having also secured to the citizen a right of appeal to the judicial tribunals from his decision, this act of congress has required the importer, before making the payment, to specify, in writing, the grounds of his objection; and it follows, that when his appeal comes to be heard by the courts, he must be confined to such grounds of objection to the payment as his protest contains. Now these protests contain only one ground, namely, that the plaintiffs "pay no such commissions," as are added. There is certainly a great want of distinctness in this specification. It may mean that they pay less commissions than are added, or that they pay none. Giving to it the most liberal interpretation, and the broadest popular meaning, which, perhaps, under this act of congress, requiring the protest to set forth distinctly and specifically the grounds of objection, I should hardly be warranted in doing, still it amounts only to this, that the plaintiffs do not pay commissions. It does not set forth the ground of objection to the payment taken at the bar, that commissions are not usually paid in this trade of importing crockery ware from England, nor that there is no usual rate of commission, nor that two and one half per cent. is not the usual rate of commission. It has not been attempted to maintain that the payment was illegally exacted, merely because the plaintiffs paid no commissions. Yet this is the only ground of objection set forth in the protest; and for this reason I must instruct the jury that the action cannot be maintained.

The plaintiffs elected to have a nonsuit entered.

Case No. 10,295.

NORDLINGER et al. v. The CATHERINA.

[3 Wkly. Law Gaz. 366.]

District Court, D. New York. May, 1859.

SHIPPING—BILL OF LADING—PLEADINGS.

[Where merchandise is received on board a vessel in good order, as shown by the bill of lading, which contains no exceptions of the perils of the sea, and the cargo is damaged during the voyage, it is incumbent upon the carrier to explain the cause of injury, and in absence of proof tending to exonerate him, a recovery may be had for such injury.]

In admiralty. Libel by Jacob Nordlinger and another against the schooner Catherina for damages for injury to cargo.

This was a libel filed to recover for damages to cargo. It is alleged that in December, 1855, thirty-one bales of merchandise were shipped on board the schooner in good order at Rotterdam, for which the master signed a bill of lading, and that only fifteen bales were delivered, and claimed, damages for the loss of the rest. The answer denied all the allegations of the libel, except that certain merchandise was received on board, said to contain seed, which was stowed in the proper and usual manner and delivered in the same order as received, damages for which the respondent is not liable excepted. The testimony showed that the merchandise was hemp seed. The bill of lading admitted its receipt in good order, and contained no exception of the perils of the seas, but it contained the clause, "Weight and contents unknown." It was proved by the mate of the schooner that the seed was well stowed on the top of the cargo below deck. The sixteen bags were rotted by the steam or sweat of the hold, and the seed came out into the hold, was mixed up with the dirt, &c., in the hold, and was gathered up and put into bags on unloading the vessel, but the libelants refused to receive it in that

condition. The voyage lasted seventy-two days, and the weather was bad. No other proof was given of the loss of the cargo than the testimony of the mate.

Mr. Starr, for libelants.

Bebee, Dean & Donohue, for claimants.

BETTS, District Judge. Held, that the pleadings on both sides are exceedingly curt and uninstructive, and the libel would have been dismissed for omitting to set forth a definite cause of action had not the answer happened to supply its defects by intimating that the merchandise consisted of seed. Joining this concession to the loose suggestions of the libel, the court may be justified in implying that the controversy related to thirty-one bags of some kind of seed, and then admit the bill of lading and other proofs to specify and explain the contract between the parties.

That the testimony of the mate plainly imports that the packages when put on board were in good order and full, and may be invoked by the libelant in corroboration of the admission of the bill of lading, and supplies all the proofs which the claimant could demand extraneous to the bill of lading to remove the effect of the clause of "Weight and contents unknown."

That the cargo then being received in good order, it devolves upon the ship-owner to show from what causes the injury arose, if he would free himself from his positive obligation as common carrier.

That this court has never felt authorized to imply an exoneration of a common carrier by water from responsibility for losses occasioned by perils of the sea when not expressly stipulated by the parties in the contract.

That no proof is given to exonerate the schooner, and the libelant is accordingly entitled to recover.

Decree for libelants, with a reference to compute damages.

NORDLINGER v. The CATHARINE. See Case No. 2,512.

Case No. 10,296.

NORDLINGER v. VAIDEN.

District Court, D. Mississippi. 1867.

WAR — CONTRACT PAYABLE IN CONFEDERATE CURRENCY.

[A. sold property during the war to B. for $15,000, to be paid in Confederate notes. *Held*, that A. could not sue on this contract, nor on a note for $15,000 given to secure payment, though the note did not specify in what currency payment should be made.]

[Cited in Lawson v. Miller, 44 Ala. 616.]

[Decided by HILL, District Judge. Nowhere reported; opinion not now accessible. The statement of the point determined was taken from 2 Am. Law Reg. 188.]

Case No. 10,297.

The NORFOLK et al.

BUTT v. The NORFOLK. BUTT v. The UNION. CORY v. The NORFOLK. CORY v. The UNION.

[2 Hughes, 123.] [1]

District Court, E. D. Virginia. Sept. 24, 1877.

JURISDICTION IN ADMIRALTY—EXCLUSIVE OF STATE COURTS—MARITIME LIENS—MATERIALS — STATE LAW—MORTGAGE—SEAMEN—PRIORITY — CHANGE IN OWNERSHIP.

1. Where the admiralty jurisdiction of the United States courts attaches at all, it does so exclusively of the jurisdiction of the state courts.

2. The assignment of his claim by a material-man does not defeat the admiralty lien.

[Cited in The Emma L. Coyne, Case No. 4,-466.]

3. It attaches against a home vessel in favor of a material-man, under section 5, c. 148, Code Va. 1873, and especially under chapter 44, Acts Assem. Va. 1876-77, enacted January 26, 1877.

4. The claims of a material-man and of a seaman or engineer of a ferry steamer are superior to that of a mortgagee.

[Cited in The Canada, 7 Fed. 735.]

5. Where there is no change of ownership circumstances must be very strong to render the claim of a regularly employed engineer of ferry steamers for wages in arrear stale.

6. A claim by an engineer for overdue and unpaid wages does not necessarily become stale in twenty months.

In admiralty, for supplies furnished and for seamen's wages.

James M. Butt files two libels for supplies furnished on the credit of the boats about to be named. William H. H. Cory, engineer of the same boats, plying across Norfolk harbor, files two libels, one against each of them. The boats are ferry steamers which were used on the Ferry Point or Berkeley Ferry, named the Norfolk and the Union. The steamers were run alternately, one of them running when the other was withdrawn for repairs. Cory's service began in March, 1873, and terminated on the 1st of June, 1877, his wages being, by agreement, at the rate of $65 per month; and he claims that there was due him at his retirement from the line, the sum of $1269.96, which is equivalent to an arrearage for nearly twenty months. A statement of the items showing the balance thus claimed to be due him is filed with the libels, and is made out by J. A. Jackson, master and principal owner of the boats, and proved by the said master in evidence to be correct. Cory also avers in evidence the correctness of the claim. On the 1st of May, 1875, a deed of trust was made by Jesse A. Jackson, sole owner of the Norfolk, and by said Jackson and Lycurgus Berkeley, joint owners of the Union, conveying to Charles Sharp, trustee, these

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

two boats for the purpose of securing to Myer Myers the amount of a promissory note made by said Jackson and Berkeley for $2500, bearing six per cent. interest, and indorsed by B. & J. Baker, Tilley & Hunter, Charles W. Pettit, and William H. Lyons. The deed was recorded in the office of the collector of customs at Norfolk, pursuant to act of congress. It was stated in evidence by Jackson and Cory, that Cory being a well-to-do man, not needing the regular wages due him, the resources of the business were applied to paying the other employés on the boats and the interest periodically falling due on the note of Jackson and Berkeley, which interest was paid up to the 1st of August last past. It was sought in evidence by the indorsers of the promissory note, to bring Cory's account into question, and to show that the amount claimed was more than was due; but no competent evidence was adduced in support of the objection, nor was any issue of fraud raised in the pleadings. So that no defence was presented in form to be considered by the court, except the one made in the answers of the trustee and others, that the claim was, as to the larger part of it, stale, most of it having accrued after Cory had notice of the deed. It was shown in evidence that Cory for a year or more before his retirement from the service of the boats knew that there was a claim upon them to the amount of $2500, for which Pettit and others were sureties, and that this knowledge was such as would naturally put him upon inquiry to discover the existence of the lien of the deed of trust which had been given to secure the note to Myers. It seems that the firm of Beaman & Bro. had recovered judgment against J. A. Jackson in a state court in September, 1876, under which a state common law lien was acquired upon the estate of Jackson in December of that year; and that a chancery proceeding was instituted in the same court in March last, for discovery of the estate of Jackson, with a view to subjecting such estate to the judgment of Beaman & Bro. These judgment creditors, by counsel, intervene by petition, claiming that the admiralty has no proper jurisdiction in the premises; and that, although chapter 44 of the Acts of Assembly of Virginia for 1876–77, passed January 26, 1877, gives the libellant a lien upon these vessels for wages which accrued since its passage, yet that he has lost that lien for the greater portion of his wages by not having perfected it under the provisions of the 2d section of the act of assembly (chapter 200) of March 21, 1877. The same counsel contends that the libellant, Butt, had received by assignment, from a firm of which he was a partner, the note for which he now libels, which note the firm had taken from Jackson for supplies, and that by so doing he waived his lien in admiralty. He also claims that the assignee of this note has no standing in admiralty, his taking the note having had the effect of waiving the admiralty lien.

C. B. Duffield, for libellants.

Charles Sharp and Thomas R. Borland, for claimants and sureties.

HUGHES, District Judge. As to the question of jurisdiction raised by counsel of Beaman & Bro., it could only be considered with reference to the libel and claim of James M. Butt, for supplies to the two boats. The law of Virginia, as it stood in chapter 148 of the Code of 1873, § 5, has been held by me, with the general acquiescence of the bar, to have given such a lien as is contemplated by rule 12 in admiralty, given in [Webb v. Sharp] 13 Wall. [80 U. S.] 14, and prescribed by the United States supreme court, and treated by that rule as a basis for the admiralty jurisdiction in favor of a materialman against a home vessel. The amendment of that section, made by act of assembly of January 26, 1877 (page 32 of Acts of 1876–77), was enacted solely for the purpose of making certain what had already been held to be clear on principle. It is also a settled principle of American law that where the United States courts have admiralty jurisdiction, the state courts have no constitutional jurisdiction; the admiralty jurisdiction being, in virtue of section 711 of the Revised Statutes of the United States, "exclusive of that of the state courts." That the admiralty court has everywhere jurisdiction of seamen's wages, earned on shipboard, and that in Virginia, by virtue of the lien expressly given by state law, admiralty has jurisdiction under rule 12 of the claims of material-men upon a home vessel for supplies furnished on the credit of the vessel, are propositions which cannot now be disputed. If the admiralty has jurisdiction at all, that jurisdiction is "exclusive of the state courts." Nor is there any validity in the objection that a note was taken for the amount due for supplies now the subject of libel. The supreme court has settled that point in the case of The St. Lawrence, 1 Black [66 U. S.] 532, and of The Guy, 9 Wall. [76 U. S.] 758; which decisions were mere affirmations of what was before the well-settled law of the subject. See 2 Pars. Shipp. & Adm. (Ed. of 1869) 152, 153. There is nothing in the objection that the claims for supplies have been assigned by the firm of Tilley, Morton & Eaton, and by the firm of Forbes & Butt, of which Butt was a member, to Butt individually. The doctrine of admiralty is, that the person really entitled to the claim is the one who should file the libel. See Ben. Adm. § 380, and authorities there cited.

The main question is, therefore, the only one left to be considered; which is, whether Cory's claim has become stale as to any part of it. The doctrine of the admiralty is,

that there must not be unreasonable delay in asserting a claim, where that delay of itself tends to produce injury to other claimants. Except as against innocent purchasers of vessels without notice of a claim, and without opportunity of knowing of its existence, the rule of staleness is not rigidly enforced in admiralty. In the present case the libellant was the engineer of the boats, when the trust deed to Sharp was executed, and has remained so until within three months of filing his libel. Being a man in such circumstances in life as did not render it necessary for him to collect his wages punctually, and being on such terms of friendship with the master and owner, Jackson, as to induce him to grant indulgence in the matter, and deferring his own claim for payment while the other employés on the boats were receiving their wages regularly, and while the interest accruing on the note secured by the trust deed was regularly paid, the indulgence he granted was such as the indorsers of the note ought not to complain of. I cannot, on any evidence that has been given in the case, believe that there has been fraudulent collusion in regard to the libellant's claim between Jackson and Cory. Jackson has no interest to prefer Cory; and himself and Cory bear good names in the community, and there is no proof either of act or motive on Jackson's part tending to establish a suspicion of fraudulent collusion, and so I feel bound to treat Cory's claim as proved. As there is no specific time within which an admiralty court will arbitrarily rule against a claim as stale, and as the question of staleness depends upon the circumstances of each case, and as in this case there is nothing to show unreasonable laches, much less laches for a fraudulent purpose on the part of the libellant, I do not feel at liberty to throw out any part of the libellant's claim of $1269.96, as stale. See The Key City, 14 Wall. [81 U. S.] 653; The Prospect [Case No. 11,443]; The Canton [Id. 2,388]; The Granite State [Id. 5,687]; The Mary [Id. 9,190]; The Sea Lark [Id. 12,579]; The D. C. Salisbury [Id. 3,694]; The General Cass [Id. 5,307]; The Cheesman [Id. 2,633]; The Gregory [Id. 4,102]; The Cayuga [Id. 2,537]; Swett v. Black [Id. 13,690]; Cobb v. Howard [Id. 2,924]; Fretz v. Bull, 12 How. [53 U. S.] 468.

A decree may be taken for each of the libellants for the amounts claimed by them.

NORFOLK & P. R. CO. (GILBOUGH v.). See Case No. 5,419.

NORMA, The (BONE v.). See Case No. 1,626.

Case No. 10,298.

NORMAN v. HIGGINS.

[Nowhere reported; opinion not now accessible.]

Case No. 10,299.

NORMAN v. INSURANCE CO. OF NORTH AMERICA et al.

[7 Chi. Leg. News, 173; 4 Ins. Law J. 827.]

Circuit Court, S. D. Illinois. Jan., 1875.

INSURANCE COMPANIES—AUTHORITY OF AGENT TO INSTITUTE CRIMINAL PROCEEDINGS.

[Though the agent of an insurance company has an implied right to investigate the origin of a fire on premises insured by such company, and to employ a detective for that purpose, the company is not responsible for the act of the agent in instituting criminal proceedings against a person suspected of setting the fire, unless such act was authorized by general or special instructions to the agent, or was ratified by the company, with knowledge of what had been done.]

These companies [The Insurance Company of North America, the Franklin Fire Insurance Company of Philadelphia, and the Aetna, Phoenix, and Hartford Insurance Company of Hartford, Conn.] in December, A. D. 1872, had insurance on Mr. Chapman's store at Carbondale, Illinois, in which Norman was a clerk, which was burned. Upon the advice of a detective, Norman was arrested as the incendiary, but the information inculpating him subsequently proved false. Norman, therefore, brought suits against all of the above-named companies for a conspiracy to arrest him and for false imprisonment. The question as to whether the agents of the companies authorized the arrests, or whether the detective acted upon his own responsibility, was a disputed fact; but in reference to the liability of the companies in the case the jury should find the arrest to have been authorized, Judge TREAT charged the jury as follows.

Joshua Allen and Duff & Lemma, for plaintiff.

Leonard Swett and Edwards & Knapp, for defendants.

TREAT, District Judge (charging jury). I wish to say to counsel, that there is an important proposition in this case which I am called upon to decide, and I hope, if my views do not meet theirs, exceptions will be made so that the question can be reviewed hereafter. My view in brief of the case is that the agents of these insurance companies had the implied right, when this fire took place, to investigate the question of whether it was an incendiary fire or not. The companies of course would be interested in such an investigation, because, if it should turn out that the place was set on fire by the insured or anybody by his connivance, it would avoid the policies, and that would relieve them from paying the amount. I think, too, in that connection, that these agents had the right to employ a detective to make that investigation, and that their acts in making the investigation and employing the detective would be binding on the company. But the question of instituting criminal proceedings, I think, is a very

different thing. These insurance companies have no more interest than any citizen in the question, whether criminal proceedings are to be instituted or not; they are not any more bound than any other citizen to institute any such proceedings. And my opinion clearly is, that these agents, from their general employment as adjusters, had no right of themselves to institute such proceedings, unless they had authority from the company. If the company had authorized them to institute criminal proceedings, whenever they thought it necessary in their discretion, then their act would bind the companies, or if the companies authorized them to make the arrest in this particular case, the companies would be bound. Perhaps the companies might be bound in another way. If, after the arrest was made, all the facts were reported to the companies, they might approve and ratify the acts of their agents, and make themselves liable for what they did not originally authorize.

In this view of the case, I shall instruct the jury, that they cannot find a verdict against these defendants, or any of them, unless they were authorized to commence these criminal proceedings by the companies, either by general or special instructions. Or if the jury should believe, from the evidence, that these agents set this prosecution on foot, and they afterwards reported their acts to the companies, and that they indorsed or ratified their acts, that would make the companies liable.

Mr. Swett: We would ask the court to instruct that if they find that the arrest was ratified, such ratification must be from the company at headquarters, and could not be by the same agents who made the arrest.

THE COURT: Yes, it must be by the companies, upon receiving these facts from their agents.

Mr. Allen: As to the act of the company, that could be proved, of course, by circumstances, like any other act. It was not necessary to show any resolution.

THE COURT: I don't say it would require a formal resolution on the part of the company, but the jury should be satisfied in order to find against these companies that they did authorize this prosecution.

Mr. Swett: That is, the companies themselves.

THE COURT: Yes, not the agents who were here on the ground. I admit that there is a good deal in this important question, and I hope it will be preserved in this case, so it can be reviewed.

THE COURT: Do you wish the jury to pass upon this question, or do you regard this view of the court correct?

Mr. Allen: Yes, sir, I think so; I suppose there is no question that the jury can find against all or a part of the companies.

THE COURT: The jury can find a verdict of guilty against all, or in part. The jury may retire.

NORMAN, The (KERR v.). See Case No. 7,-732.

Case No. 10,300.

NORMAN v. MANCIETTE.

[1 Sawy. 484;[1] 4 Am. Law T. Rep. U. S. Cts. 60; 3 Leg. Gaz. 132.]

Circuit Court, D. Oregon. Feb. 22, 1871.

ARREST OF DEBTOR — TIME WITHIN WHICH TO CHARGE BODY IN EXECUTION — ABSCONDING DEBTOR, WHO IS — CONSTITUTIONALITY OF LAW TO ARREST AND IMPRISON — ACTION FOR FALSE IMPRISONMENT—PROBABLE CAUSE—DAMAGES.

1. A creditor who has caused the provisional arrest of an absconding debtor under section 106 of the Code (Code Or. 164) has until the time allowed for a return of an execution against property to charge the body of such debtor in execution.

[Cited in U. S. v. Griswold, 11 Fed. 808.]

2. An absconding debtor is one who is about to leave the state, either openly or secretly, with intent to hinder, delay or defraud his creditors of their just debts.

3. A debtor who is about to remove from this state without the consent of his creditors and without a mind to return, is presumed to be acting with such intent, and prima facie he is an absconding debtor.

4. The legislature has power to authorize the arrest and imprisonment of such a debtor so as to enable his creditors to enforce the establishment and collection of their debts by legal proceedings in the tribunals of this state.

5. There can be no recovery in an action for false imprisonment when it appears that the affidavit on which the defendant procured the arrest of the plaintiff is sufficient on its face, because then there is no trespass; and if the affidavit be false, the action must be for malicious prosecution, in which both malice and want of probable cause must be alleged and proved.

6. In an action for false imprisonment, the question of probable cause is only material in mitigation of damages.

[This was an action by Frederick Norman against Pierre Manciette for false imprisonment.]

O. P. Mason, for plaintiff.

J. W. Whalley and M. W. Fechheimer, for defendant.

DEADY, District Judge. On May 10, 1870, the plaintiff commenced an action in the circuit court of Multnomah county, against the defendant and A. Labbe and John C. Work, for false imprisonment, wherein he laid his damages at $5,000. On July 25, the state court, on the petition of the defendant Manciette, made an order removing the cause as to him to this court, on the ground that the plaintiff was a citizen of Oregon and of the United States, and the defendant was an alien and a subject of the empire of France.

On September 5, the defendant answered the complaint in this court, whereby he admitted that he caused the arrest of the plaintiff as follows: That on April 6, 1870, the

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

plaintiff being indebted to defendant, and an action being then pending before Justice Work, in Central Portland precinct, to recover said debt, the defendant made and filed in said justice's court the following affidavit, in pursuance of which said justice then and there issued a writ of arrest against plaintiff, upon which he was then arrested and taken before said justice, and in default of bail was by said justice committed to the jail of the county, where he remained until he was discharged by order of defendant, on April 13. The answer also averred, that said affidavit was true, and that the justice had jurisdiction to issue the writ, and that the proceedings thereunder were regular and lawful. The affidavit is in these words:

"P. Manciette v. Fred. Norman: I, P. Manciette, being first duly sworn, say, that I am the plaintiff above named; that the defendant is indebted to me in the sum of $46, upon an account stated on or about April 5, 1870, at which time defendant promised to pay said sum of $46; although requested, he has failed to pay said sum or any part thereof and the same is now justly due and owing plaintiff from defendant, and that defendant is about to leave the state of Oregon, with intent to delay, hinder and defraud his creditors. Wherefore the plaintiff prays that a writ may issue for his arrest as in such cases provided."

On November 2, plaintiff replied to the answer and denied that the justice had jurisdiction to issue the writ of arrest, as alleged in the answer, or that the proceedings thereunder were regular and lawful, and alleged that the plaintiff was discharged from said arrest on April 13, by order of the circuit court for the county of Multnomah, state of Oregon, upon a writ of habeas corpus sued out by said plaintiff, and not by the order of said defendant, as alleged in the answer.

The cause was tried at the September term and a verdict found for defendant. The plaintiff moved for a new trial, upon the ground of error in the instructions of the judge to the jury. On January 17, 1871, the motion was argued and submitted. On the argument of the motion, two points were made by counsel for plaintiff:

(1) Admitting the legality of the original arrest, plaintiff was detained thereon one day longer than he should have been, and for this he was entitled to a verdict.

(2) That the affidavit upon which the writ of arrest issued is insufficient and therefore not a justification of the arrest.

To understand the first point, it is necessary to state that on the trial it appeared that the action against Norman by Manciette was commenced on April 6—the date of the summons therein—and that on April 12—six days thereafter—judgment was given against Norman for want of an answer. By the laws of this state, in action in a justice's court, the summons must require the defendant to appear and answer "at a time and place named therein, not less than six nor more than twenty days from the date thereof." Code Or. 585.

After judgment and return of an execution against property unsatisfied, where the defendant has been personally arrested, the plaintiff may have an execution against his body as a matter of course. Code Or. 210. The undertaking of bail upon a provisional arrest is to the effect, that the defendant will render himself amenable to the process of the court during the pendency of the action and to such as may be issued to enforce the judgment given against him, if any. Id. 167. A person confined in jail on an execution in a civil action may be discharged therefrom at the end of ten days, if it appears to the satisfaction of a judge or two justices that he has no property liable to an execution. Id. 759, 760.

The question upon this point is, therefore, whether the plaintiff is entitled to any and what time after judgment wherein to charge the defendant in execution. There is no direct provision on the subject in the Code. Under Rev. St. N. Y. the period of three months was allowed, and it seems that if the ca. sa. or execution was sued out after that time, it was sufficient, if the defendant had not in the meantime obtained a supersedeas or discharge on account of the plaintiff's neglect. Minturn v. Phelps, 3 Johns. 446. It appears that, at common law, the practice was to sue out a ca. sa. or execution against the body at any time within a year from the rendition of the judgment, and if the defendant had been arrested provisionally, upon a capias ad respondendum he remained in custody of the sheriff or his bail until he was charged in execution. If the Code does not provide any particular time within which the plaintiff must take out execution against the body of the defendant, he must be allowed a reasonable time within which to do so—and certainly this is more than one day. Again, it appears from the foregoing citation from the Oregon Code, that the plaintiff cannot have execution against the body in any case until process against the property of the defendant has been returned unsatisfied in whole or in part. Now an execution in justice's court is returnable in thirty days from its date. Id. 594.

Taking these provisions of the Code together and construing them by the light of the common law, my conclusion is that the plaintiff has, until the return of the execution against the property, to take out execution against the body, and that in the meantime if the defendant has been arrested provisionally he must remain in the custody of the sheriff, or his bail, or satisfy the judgment. Nor does it appear that the plaintiff can be liable for false imprisonment for neglecting to give directions for defendant's discharge, when for any reason he has become entitled to it. The duty of procuring the discharge under such circumstances devolves on the de-

fendant, himself, and if for any cause he remains in custody after his imprisonment is legally at an end, it is his own fault rather than the plaintiff's. In such a case a simple application to the court from which the process issued would procure his discharge. Russell v. Champion, 9 Wend. 462.

But if the position assumed by counsel for plaintiff be conceded that the one day's imprisonment of the plaintiff, after the entry of judgment was unauthorized and the defendant is liable therefor, I am satisfied that a new trial should not be granted for that cause alone. A new trial will not be granted merely to enable the plaintiff to recover nominal damages, and when no just end would be obtained by it. Crary v. Sprague, 12 Wend. 47; Hyatt v. Wood, 3 Johns. 241; Fleming v. Gilbert, Id. 532; Hunt v. Burrell, 5 Johns. 138; Hopkins v. Grinnell, 28 Barb. 537; McLanahan v. Universal Ins. Co., 1 Pet. [26 U. S.] 170; Hill, New Trials, p. 51, § 14.

From the evidence I am satisfied that the plaintiff sustained no appreciable injury by reason of this day's imprisonment. At the time of his arrest he appears to have been engaged by the trip as a cook on first one, and then another of the steamers running from this port to the northward. After his discharge he appears to have remained here until after the June election, and was most probably in the employ of some parties interested in the result of it. He does not appear to have had any credit or business standing to be injured by either the arrest or detention. Upon the evidence at the trial a jury would not be warranted in giving the plaintiff anything beyond his actual damages for this one day's detention in prison. The indebtedness is admitted. It was for board furnished plaintiff at defendant's restaurant. The plaintiff has no right to complain if the defendant concluded from his broken promises and equivocal and suspicious conduct that the former intended to leave the country with the intent to avoid the payment of his debt. The plaintiff even refused at the last moment before the issuance of the writ and his intended departure on the steamer, to leave a watch he had as security for the debt, and when arrested, instead of attempting to apply this article of property in satisfaction of the demand, as he knew he could, he hastened to pawn it with a friend, to enable the latter to help him defeat the defendant in his attempt to recover the sum due him. In short, there is nothing in the case which tends to show that the defendant acted from malice; but on the contrary, the evidence is quite satisfactory that whether the arrest or subsequent imprisonment were justifiable or not, the defendant had probable cause to believe that the plaintiff was about to leave the country with intent to defraud him of his just dues. Upon this point the motion for a new trial must be denied.

A question was made by counsel for defendant that it did not appear that plaintiff was the person discharged on the writ of habeas corpus as alleged in his replication. Whether this be so or not is not material to the defendant. There is no proof that the plaintiff was discharged by his order as alleged in his answer.

In support of the second point counsel for plaintiff contends that section 106, subd. 1, p. 164, Code Or., under which this arrest was made is in conflict with the constitution of the state, and therefore void. The section in question provides that the defendant may be arrested "in an action for the recovery of money or damages on a cause of action arising out of contract when the defendant is not a resident of the state or is about to remove therefrom."

The constitution (article 1, subd. 19) declares: "There shall be no imprisonment for debt except in cases of fraud and absconding debtors." This clause of the constitution has never been construed by the supreme court of the state, and this court, in this case, must therefore give it such construction as to it appears proper.

It may be proper to remark at the outset, that as between the state constitution and the legislature of the state, the power of the latter is unlimited, except when expressly restrained by the former. Subdivision 19 of article 1 of the constitution is a limitation or restraint upon the power of the legislature, over a rightful subject of legislation, and therefore not to be construed so as to include cases beyond its plain and obvious meaning and purpose.

In U. S. v. Walsh [Case No. 16,635], I held that this clause of the constitution should be construed as if it read: "There shall be no imprisonment for debt arising upon contract express or implied, except," etc. In support of this conclusion it was then said: "The word debt is of very general use and has many shades of meaning. Looking to the origin and progress of the change in public opinion, which finally led to the abolition of imprisonment for debt, it is reasonable to presume that this provision in the state constitution would intend to prevent the useless and often cruel imprisonment of persons who, having honestly become indebted to others, are unable to pay as they undertook and promised. * * * General or abstract declarations in bills of rights are necessarily brief and comprehensive in their terms. When applied to the details of the varied affairs of life they must be construed with reference to the causes which produced them and the end sought to be obtained. A person who wilfully injures another in person, property or character, is liable therefor in damages. In some sense he may be called the debtor of the party injured, and the sum due for the injury a debt; but he is in fact a wrongdoer, a trespasser, and does not come within the reason of the rule which exempts an honest man from imprisonment, because he

is pecuniarily unable to pay what he has promised. For instance, a person who wrongfully beats his neighbor, kills his ox, or girdles his fruit trees, ought not to be considered in the same category as an unfortunate debtor."

With this general view of the intent and purpose of the constitution, I proceed to consider the alleged conflict between it and the statute under which the plaintiff was arrested.

For the plaintiff it is contended that absconding debtors and debtors about to remove from the state are not in the same category—not the same class of persons—that the latter description includes persons not within the purview of the first, and hence the conflict. Is the argument, or rather the assumption upon which it is founded, correct?

And first, to remove, as used in the Code, must be construed not to apply to a debtor who is about to depart from the state with a definite intention of returning within some reasonable time. Such a debtor may be said to be about to absent himself from the state, but not to remove from it. But a debtor who is about to leave the state without any definite purpose to return, is one who is about to remove from the state—to exchange this place for another.

Is such a debtor an absconding debtor? I think he is. True, he may not leave the state clandestinely or secretly, but he withdraws himself from it without fulfilling his obligations to his creditors resident in it—leaving his debts behind him unsatisfied. By such removal, whether public or secret, his creditors are deprived of the opportunity of realizing their demands by due process of law out of his present property or further accumulations, unless they should go to the trouble, expense and uncertainty of pursuing him into another jurisdiction. The power of the legislature to authorize and provide for arrest and imprisonment for debt is unlimited "in the case of absconding debtors." The phrase "absconding debtors," grammatically speaking, includes debtors who have actually absconded, as well as those who intend to do so. But after a debtor has left the state he is beyond the reach of its process, and for this reason, if no other, the power to imprison on this account is practically limited to the case of debtors still within the state. Yet it is not to be restrained to such debtors only as may be taken in the act of stepping across the state line, or on to a stage coach, steamboat or railway carriage, that will carry them beyond the process of the law in a few hours or minutes. There is no good reason why the law should be more tender concerning a debtor who is preparing to abscond—getting ready to remove without paying his debts—than one who is in the act of absconding. In either case the end to be obtained is the same. The right to imprison is a remedy given to the creditor to enable him to prevent his debtor from permanently removing beyond the jurisdiction without his consent. But if the creditor's right to this remedy does not arise until the debtor is actually in the act of absconding, then in most cases it would prove to be too late to be of any service to him. In my judgment, from the moment of taking the first step toward the contemplated removal, without any definite intention of returning, the debtor becomes an absconding one; and the legislature has ample power to prevent the accomplishment of this purpose, by authorizing and providing for his arrest and imprisonment in such manner and upon such terms and conditions as it may think best. Prima facie, a debtor who removes from the state without the consent of his creditors, does so with the intent to hinder, delay or defraud them of their just debts. True, clandestine going is a particular circumstance from which, in an otherwise doubtful case, it may be reasonably inferred that the debtor is removing without an intent to return, and with the intent to hinder, delay or defraud his creditors. But if a removal by a debtor from the state can never amount to an absconding unless done or attempted in a clandestine or secret manner, then if a fraudulent debtor will only have the shrewdness and effrontery to remove openly, he may leave his creditors in the lurch with impunity.

This provisional arrest is only allowed to secure the appearance and answer of the debtor in the action for the recovery of the debt. If judgment is obtained against the debtor, and he has no property or effects liable to execution, he can procure his discharge and exemption from further imprisonment on this account. But, in the meantime, the creditor has had an opportunity of obtaining a personal judgment against the debtor, which is sufficient to establish his claim in any country in christendom to which the debtor may remove. And this is not all. Before the debtor can be discharged from imprisonment upon an execution to enforce such judgment, he may be compelled to apply money and valuables belonging to him, to its payment, which he would otherwise fraudulently and successfully conceal and secrete beyond the reach of an ordinary execution against property. But if a debtor is permitted to remove from the state with impunity without first satisfying his creditor, the latter is thereby deprived of these and other means given by the law of the state to enforce the collection of his debt from a reluctant or dishonest debtor. This being so, he is hindered and delayed in his debt if not ultimately defrauded out of it by such removal. His debtor has absconded—removed from the state without performing his promise to one of its citizens according to its legal obligation.

To prevent this injury to the creditor, the legislature, in the exercise of its unlimited

power to authorize imprisonment "in case of absconding debtors," has given him the right to cause the provisional arrest of his debtor about to remove from the state, and I do not find any reason for concluding that there is any repugnance or conflict between its act and the constitution, but the contrary.

Upon the construction of the constitution there can be no doubt but that the affidavit of the defendant was sufficient to justify the issuing of the writ of arrest. Indeed, it would be sufficient, it seems to me, even under the narrow and limited construction which counsel for plaintiff maintained should be given to the phrase—"in the case of absconding debtors." It alleges that Norman being indebted to Manciette upon account stated "is about to leave the state of Oregon with intent to delay, hinder and defraud his creditors." The affidavit for arrest need not pursue the language of the Code. It is sufficient if it contains terms which are substantially equivalent to those of the statute. To leave the state is equivalent to remove from it. Primarily, both of these terms import a withdrawing therefrom without a mind to return. But this affidavit goes farther and alleges that such leaving or removal is about to take place with intent to "hinder, delay and defraud creditors." That this expression is equivalent to an allegation that a debtor is about to abscond from the state, in any or the worst sense that can be given to that term, is to my mind very plain. Whether the debtor would have left or absconded secretly or openly if the creditor had not interposed and caused his arrest, could not be known to the creditor beforehand, when he made this affidavit. Nor was it a material question in what manner he was about to leave or abscond, but rather for what purpose or with what intention. The manner of attempting the removal or accomplishing it is only material as tending to show the object of it. Prima facie, a removal from the state by a debtor, without a mind to return, is an absconding—a permanent withdrawing from the state, while his pecuniary obligations to his creditors are unperformed, to their prejudice, hindrance and delay.

The affidavit upon which the defendant caused the arrest of the plaintiff being regular and sufficient upon its face, this action for false imprisonment will not lie. In such case there is no trespass; but if the arrest was wrongful or false in fact—procured upon a false allegation, the remedy of the party is an action for malicious prosecution, in which he must allege and prove both malice and want of probable cause. In this action the question of probable cause could only have been material in mitigation of damages in case the arrest had been held to be a trespass because of the insufficiency of the affidavit. Sleight v. Ogle, 4 E. D. Smith, 445. In this case if the action was for malicious prosecution, I should feel warranted in declaring upon the evidence adduced at the trial that their was neither malice or want of probable cause.

Motion for new trial denied.

Case No. 10,301.

NORMAN et al. v. STORER et al.

[1 Blatchf. 593.] [1]

Circuit Court, S. D. New York. Oct. Term, 1850.

EXECUTORS AND ADMINISTRATORS — PROFITABLE INVESTMENT—ACCOUNTING TO LEGATEE —COSTS OF SUIT.

1. Where $1,000 was given to a legatee by a will, the money to be raised out of the testator's estate, and paid over to the legatee; and the executor and trustee under the will, having raised the money, instead of paying it to the legatee, purchased bank stock with it; and afterwards, when called on by the legatee to account, sold the bank stock, and paid over the proceeds, $1,460.34, to the duly authorized agent of the legatee, which he received as and for the $1,000 legacy, the stock having been sold with his knowledge and assent, *held* that, as there was no evidence the legatee was advised of the purchase of the bank stock, or ever assented to it, the executor had a right to sell the stock and pay over the proceeds.

2. Until the investment was sanctioned by the legatee, he had a right to claim the money; and until then, too, the executor had a right to recall or change the investment, or pay over the legacy, being bound, if any profits were made by the investment, to account for them, and to make up the loss, if any.

3. The stock did not belong to the legatee, and the executor was guilty of no conversion or wrong in selling it.

4. In a suit in equity against an executor and trustee for an account, where it appears that he acted in good faith in the execution of his trust, but misapprehended his duty in the particulars in respect to which he is charged in the final decree, he will, where a balance is found by a master's report to be due from him, be charged with interest only from the date of the report on the sum found due.

[Cited in Robinett's Appeal, 36 Pa. St. 186.]

5. But, he will be charged with the costs of the suit, although he succeeded on several points in it, and greatly reduced the amount claimed from him. The balance found was contested by him, and the suit was necessary to recover it.

The bill in this case was filed against the defendants [George L. Storer and William Van Hook] as executors and trustees of the estate of David Berdan, deceased, and called for an account and settlement of the share of the estate which belonged to Frances, the wife of the plaintiff [Anthony M.] Norman, and the widow of the testator. She took under the will, in lieu of dower, certain interests in the real and personal estate which went into the hands of the executors. The case was heard on pleadings and proofs, and a decision given in October, 1846, on various questions raised, and a reference made to a master to take and state the accounts between the parties, and

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

report them with the evidence, documentary or oral, that might be given before him. The court then decided, that a certain power of attorney given by Mrs. Norman, (then Mrs. Berdan,) to her brother John S. Chapman, on the 15th of February, 1835, was legal and binding on all the parties concerned, and authorized the attorney to collect, receive and control all the funds and moneys in the hands of the defendants belonging to her individually, and which she had a right to collect and receive as her individual and absolute property from the executors, as bequeathed to her under the will of her late husband. All other questions were reserved till the coming in of the master's report. [Case unreported.] The case now came up on exceptions by the plaintiffs to the master's report.

Seth P. Staples, for plaintiffs.
Robert Emmet, for defendants.

NELSON, Circuit Justice, after disposing of an unimportant exception, proceeded as follows:

The next exception is to the allowance of the payment of the $1,000 legacy belonging to Mrs. Berdan under the will. This sum was to be raised out of the estate of the testator, and paid over to the legatee, to be disposed of as she saw fit. The defendant Storer having raised the money, instead of paying it over to Mrs. Berdan, purchased forty shares of stock in the Fulton Bank, which cost $1,359.39. On the 18th of February, 1835, the stock was sold for $1,460.34, and the proceeds were paid to Chapman, her agent. The stock was purchased in the name of Storer, in trust for Mrs. Berdan, and was charged in his books as paid to her; but there is no evidence that she was advised of the purchase, or that she ever assented to it. The stock was sold with the knowledge and assent of the agent, and he received the proceeds as and for the legacy of the $1,000.

The power of attorney to the agent authorized him to transact all business in relation to the estate of Mrs. Berdan, to settle her accounts with the executors, and to receive whatever sums of money might be due to her, or remained in the hands of the executors, or of any other person, &c. It is insisted that the stock belonged to Mrs. Berdan; that the power of attorney did not authorize the receipt of the avails of it; and that the sale and payment of the proceeds by the executor were in his own wrong, and the allowance by the master erroneous.

It is clear that, until the investment of the legacy in the bank stock by Storer was sanctioned by Mrs. Berdan, she had a right to repudiate it, and claim the money. It is, also, equally clear, that until then the executor had a right to recall the investment, or change it, or pay over the legacy or money to her. He held the money in trust, and it was in accordance with his general duty as trustee to place the fund in some safe investment until it was paid over. But, this did not change the relation in which he stood to the fund, or to Mrs. Berdan, or alter the liability he was under in respect to it, as executor under the will. If any profits were made by the investment, he was bound to account for them; as a trustee is not allowed to speculate with the trust funds for his own advantage. These are general principles, applicable to trustees, and to all persons standing in that relation; and are applied every day in courts of equity in the settlement of their accounts. The investment is for the security of the fund; and that it may not lie idle until paid over to the cestui que trust.

Inasmuch as the legacy was due, there can be no doubt that it would at any time have been competent for Storer to have converted the stock into money, and paid it over to Mrs. Berdan in discharge of his trust, including the gains, if any, and making up the loss, if any; and that this right would have continued until, by an arrangement between them, she had agreed to accept the stock in lieu of the legacy.

The idea that a trustee who has invested the fund in his hands for safety or profit while the trust continues, and until the money is to be paid over to the cestui que trust, is guilty of a conversion or wrong in recalling the investment, and putting himself in a condition to discharge himself of the trust, is altogether unfounded. He is obliged to make the conversion, or pay the money out of his own pocket. In this case, Storer was called on for the money, as the power of attorney was ample for this purpose; and a refusal to pay it over would have subjected him to an action. Mrs. Berdan had never assented to the investment, and she or her authorized agent had a right to call for the advance at any time. For these reasons, I am satisfied that the exception taken to the master's report is not well founded, and that the item was properly allowed.

Subsequently questions arose in the case as to the allowance of interest on items in the account, that had been adjusted with Chapman, but which it was held did not come within the power of attorney; and also as to costs. The master had left the question of interest open, and referred it to the court. The allowance of interest was resisted by the counsel for the executors.

NELSON, Circuit Justice. I am of opinion that, under the circumstances, interest should be allowed only from the date of the report on the sum reported by the master as due to the plaintiffs. My impression throughout the case was, that the defendants had acted in good faith in the execution of their trust, but had misapprehended

their duties in the particulars in respect to which they were charged in the final decree of the court. I am also of opinion, that the defendants must be charged with the costs of the litigation. It is true that the court decided in their favor on the question as to the validity of the power of attorney, and thereby reduced greatly the amount claimed by the plaintiffs. But still, a balance has been found against the defendants, which has been contested by them throughout the litigation; and the suit was necessary to obtain its recovery. The question upon the power went only to an abatement of the amount claimed, not to the whole cause of action. All that can be said is, that the plaintiffs have recovered much less than they claimed and expected. But this affords no proper ground or any cause, of itself, for denying costs to the prevailing party. The suit was necessary in order to recover the balance found, as it was not admitted in the answer, but on the contrary was contested on various grounds which turn out to have been unfounded.

NORMENT, The (UNITED STATES v.). See Case No. 15,898.

Case No. 10,302.

In re NORRIS et al.

[2 Hask. 19.][1]

District Court, D. Maine. Jan., 1876.

BANKRUPTCY OF COPARTNERSHIP—PROVABLE DEBT—INDIVIDUAL NOTES—FIRM INDORSEMENT—USE OF FIRM.

1. The holder of a note, signed by a firm, payable to one of the partners and endorsed by him, given in renewal of the partner's note endorsed by the firm to raise the partner's share of the firm capital as authorized by the articles of copartnership, may prove the same in bankruptcy against the firm assets; but having knowledge of all the facts, he may be required, before taking a dividend from the firm, to apply in payment of the note any security pledged by the partner whose surety the firm in fact was.

2. The holder of a note, signed by a partner and endorsed by the firm, may prove the same in bankruptcy against the assets of the firm without first applying to its payment securities pledged by the partner to secure it.

3. The endorsement of a firm, made by a partner to raise money for his benefit, binds the other partners when the firm books disclose the entire transaction and they make no objection to it.

4. The holder of a note, signed by a firm and endorsed by a partner, the proceeds of which were credited upon the firm books and received by the firm, may prove the same in bankruptcy against the firm assets, even though the assignees show that the partner, with the assent of his copartners and without fraud, drew for his own use firm assets so received.

In bankruptcy. Proof of debt. Appeal by the assignees from the allowance by Mr. Register Fessenden of a proof of debt against firm assets.

Charles P. Mattocks and Edward W. Fox, for appellants.

William L. Putnam, for appellee.

FOX, District Judge. The assignees in bankruptcy of this firm have appealed from the allowance by the register of the proof of debt by John E. Donnell for $28,448.86 on sixteen notes, given by the firm to John T. Hull and endorsed by him and Robert I. Hull, the notes having been discounted on the endorsement of said Donnell and subsequently taken up by him. In his proof he states that he has no security upon any property belonging to the copartnership, but holds as collateral security forty second mortgage bonds of the Portland Real Estate and Building Co. for $1,000 each, and two bonds of the Portland Tenement House Co., belonging to John T. Hull individually, and that copies of the agreement under which he holds said bonds are annexed and made part of his proof. He also holds nine second mortgage bonds of said Real Estate and Building Co. for $1,000 each, as collateral security for the note of $5,000, one of the sixteen for which there is no written agreement.

The copartnership of Norris, Hull & Co. was entered into on the first of Sept., 1871, by W. G. Norris, John T. Hull and Robert I. Hull, for the manufacture of shoes in Portland. Norris was to contribute his time and skill, but no other capital. The Hulls were each to contribute to the capital, five thousand dollars in cash or by use of the firm name for their individual benefit, they paying the discount upon such paper. The articles of copartnership are of an uncertain and somewhat ambiguous nature; but it is conceded by both sides that each of the Hulls was to furnish capital to the extent of $5,000 with the privilege of procuring this sum upon the paper of the firm which was to remain, as between the parties, the individual liability of the Hulls. Such notes were to be assumed and discharged by them, the firm to be exonerated from any liability, by such use of its name for the benefit and convenience of the Hulls. The firm continued in business until Feb. 6, 1874, when it suspended payment, being deeply insolvent.

The principal objection made to the allowance of this claim is, that the notes in proof were renewals of prior notes which originally were the individual liabilities of the Hulls and from which the firm of Norris, Hull & Co. derived no advantage; that Donnell was well aware of these facts, and in Aug. 1873, induced John T. Hull, without the knowledge of Norris, to change the form of the notes, substituting as promisors, the firm, instead of John T. and Robert I. Hull, in fraud of the creditors of the copartnership.

It appears that John T. Hull was the finan-

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

cier of this firm from the commencement, and was interested at the same time with his brother Robert in certain real estate transactions in this city, and was also erecting a block of houses on Carrol street. He was in the habit of receiving large sums on account of these real estate transactions, all of which are credited on the books of the firm, and went into their cash, and he also made payment therefor as required. Much of the difficulty in this investigation has arisen from the various accounts kept by him in the company books with these concerns, and by his appropriation, of the amounts in his hands, from time to time to the one purpose or the other, according as the condition of the particular account might render necessary.

In order to raise their proportion of the capital, the Hulls made two notes for $5,000 each, payable to and endorsed by the firm, which were subsequently endorsed by Donnell as security for which liability he received from John T. Hull, Dec. 6, 1871, 200 shares of stock in the Portland Real Estate and Building Co. In August, 1873, a new arrangement was made by the Hulls and Donnell by which he agreed to endorse for them and the firm not exceeding $25,000, for which he held as collateral forty second mortgage bonds of $1,000 each of the Portland Real Estate and Building Co., and two first mortgage bonds of $500 each of the Portland Tenement House Co. The 200 shares of stock held by Donnell were, before that, exchanged for twenty second mortgage bonds of the Portland Real Estate and Building Co. By the agreement executed August 5th, it was stipulated that "this collateral security should be held for all past, present and future endorsements, and other liabilities for said Hull, or Norris, Hull & Co., and for all past, present and future indebtedness of them or either of them to said Donnell."

The claims presented by Donnell may be divided into three classes:

I. This class contains only one note of $5,000, dated Nov. 29, 1873, payable in four months, as has been already stated. The note now presented is the note of the firm, payable to John T. Hull, and endorsed by him and his brother, R. I. Hull. It is not denied that this note was a renewal, and it appears to have been originally one of the notes made by the Hulls to raise their share of the capital. As first drawn, it was the promise of the Hulls payable to Norris, Hull & Co., and endorsed by them and by Donnell, and the money was raised thereon. This note, as between the firm and the Hulls, was their individual debt, which they were, by the articles of co-partnership, bound to pay and discharge, and to save harmless the firm from all loss or liability on account thereof. It is shown that Donnell was informed of the substance of the articles of copartnership, and of the purpose for which this note was issued, and of the various renewals and modifications by which the firm eventually became promisors for this sum, instead of endorsers.

The change of the relation of the parties to this paper can not affect their rights in the present controversy, as Donnell, from the commencement, has been fully aware of the consideration and purpose for which this paper was made, and of the real relation of the parties thereto. From its very commencement, the firm was liable, but in reality, as between the firm and the Hulls, it has always remained the individual liability of the Hulls, and nothing has been done which can affect or in any way change this relation. The assignees claim that as against Donnell, it is still to be deemed the individual liability of the Hulls, and that he can have no redress whatever against the firm for its payment.

This question must depend entirely on the legal effect of the articles of copartnership, as Donnell admits he had cognizance of them. From them, it appears that while, as between the firm and the Hulls, they were to assume and discharge the notes on which the capital was procured, yet the articles provided that the firm was also to become responsible upon these notes to the holders, and, although in the position of accommodation endorsers, they were at all times accountable as such endorsers to whoever might become the legal holders of such paper.

If the present claim was founded on the original note of the Hulls as makers and the firm as its endorsers, the firm having by the original contract stipulated that such should be their liability, that the Hulls should have the right to use the firm name upon which to procure their capital, Donnell would be fully authorized, if he had subsequently taken up the notes, to enforce his claim against the firm as endorsers; and in my view, the facts here disclose no valid defence, which could be established by the firm against such liability.

This note must be considered, for the purpose of the present investigation, as if it were the original note of the Hulls endorsed by Donnell, and for which Donnell held as collateral security, as he states in his proof of debt, "$9,000 of second mortgage bonds of the Portland Real Estate and Building Co." Hull is to be deemed the party primarily liable to pay and discharge this note, and the firm are his sureties only; and it is but equitable that the property of the principal should be applied to relieve the estate of the surety from its liability as far as practicable. I am of opinion, therefore, that although Donnell has the right to prove the full amount of this note against the firm estate, yet the court may withhold the payment of any dividend therefrom until he has exhausted the security given to him therefor by the principals; that while he is entitled to receive the full amount of the note from the parties thereto, he should be ordered and

required to convert the security into money, and ascertain what may be realized therefrom, and apply the same to the payment of the note; and for any balance remaining unpaid, he may receive the dividends from the estate of the firm, until he shall have been paid the full amount of his claim.

II. This class contains three notes given by the firm to John T. Hull; one for $3,000 dated Oct. 4, 1873, which was a renewal of the Hulls' promise on a like amount dated August 1, 1873. A second for a like sum and of like terms, dated Oct. 10, 1873, given in renewal of Hull's note, dated July 7, 1873, and the last, for $2,800, dated Nov. 19th, and given in part renewal of Hull's note dated July 16, 1873. All of these notes, having in their inception been the promise of the Hulls, and the firm having appeared thereon merely as endorsers, it becomes necessary to examine and determine what was the exact relation of the firm to these notes, and the purposes for which they were given. The cash book of the firm shows that the firm in fact received the full amount which was realized from these notes; it is all there credited by the firm; and it further appears that it was not uncommon for John T. Hull to raise money for the firm on paper of a similar kind, and that the books of the firm disclosed the true state of these transactions. These notes were originally made for the sole use and benefit of the firm, and although the Hulls appeared as the parties primarily liable as the promisors, and the firm only secondarily accountable as endorsers, yet in truth, their relations inter sese were exactly the reverse, and the firm, having derived the advantage from this paper, was bound to bear the burden of its payment and indemnify the Hulls therefrom. It is claimed by the assignees that although such was the apparent condition of things, yet in fact the money realized from these notes was in a short time withdrawn by John T. Hull from the firm, and applied to the payment of claims against him on account of real estate; but the books do not disclose that such was the state of accounts at that time.

On the first day of August, which was the date of the last of the original notes, there stood on the firm books to the credit of the Hulls almost $10,000; and nearly the whole of this amount so continued until the first of September following; but soon after that, considerable drafts were made upon this credit, which were continued until the whole was withdrawn and the Hulls became indebted to the firm. The books from day to day disclosed the conduct of John T. Hull. There were no false entries or concealments of any of his proceedings. That he was procuring money on the credit of the firm was quite apparent, and it was equally apparent what disposition he made of it. Norris, therefore, as one of the firm, was chargeable with notice of what the firm books disclosed, and he not having made objection thereto, must be deemed to have assented to the conduct of the business by his copartner.

It is objected, that by the change of the relation of the parties to these notes after Aug. 3d, a fraud on the creditors of the firm was accomplished; that the object was to so arrange matters "that in case of the bankruptcy of the makers of these notes, dividends from the copartnership could be drawn for the full face of the notes, without being compelled to deduct the value of the securities received from the Hulls; and that in fact, it was an attempt on the part of the Hulls to pay their individual debts from the assets of the copartnership." The ground work of this objection fails, as the notes were originally for the firm's benefit, and the proceeds were used in their business; but if it were otherwise, the firm was in the beginning accountable as endorser, and the holders could have proved their whole debt against the firm estate, although the individual members had given security upon their private estate to the holders of this paper. Emery v. Canal Nat. Bank [Case No. 4,446]; In re Cram [Id. 3,343]. I am of opinion that these notes were justly and legally provable against the copartnership estate.

III. This class is composed of twelve notes amounting to $14,700, all having their origin after Aug. 5, 1871, and all the promise of the firm endorsed by the Hulls individually, and subsequently by Donnell, the proceeds of all which were credited on the copartnership books. Upon this state of facts the burden is certainly upon the assignees to satisfy the court why these notes are not valid claims against the firm estate. It is admitted that prima facie the firm was accountable; but it is claimed, that although the proceeds of these notes at the moment went to the benefit of the firm, yet, that a large portion of the amount was subsequently withdrawn by J. T. Hull to discharge claims against the Hulls, on account of their real estate, the balance due from the Hulls on this account at their failure, being about $4,000.

It is quite apparent that the firm derived very great advantage in the outset from the course adopted by John T. Hull, in his management of this business. From Oct. 11, 1871, to Sept., 1873, there was generally on the books of the firm a credit to the Hulls of about $10,000, and sometimes largely in excess of that amount. John T. Hull, "on account of the Carrol street houses," a block which he appears to have been constructing on his individual account, stands on the books of the firm as its creditor during the first half of the year 1873, and as late as the 18th of August of that year, he was a debtor to the extent of only $5,800 on this account; but this balance increased, until at the date of their failure, he owed t[illegible] firm, on account of Carrol street houses, $6,074.52, making in all about $10,000 drawn from the firm to pay debts contracted by the

Hulls in their real estate transactions. John T. Hull in these matters appears to have been consistent, making the firm, in fact, the bankers of the Hulls in their business arising out of their real estate; when in funds, the firm received the money on this account, and derived the benefit from it, and when debts accrued, he looked to the firm to meet them, and they were so paid. Although it may be argued that he should not have paid these debts from the funds of the copartnership, yet there is no evidence that it was done by him with any fraudulent purpose. I am satisfied both of his partners were aware of his so doing, and did not dissent thereto. He well knew that through his means the firm had received large sums by loans, for which the only security was the bonds secured upon this real estate, and in which the copartnership had no interest.

Donnell was the nominal president of the real estate and building company; but no evidence is presented, which satisfies me that he was aware that John T. Hull was appropriating any of the firm assets to the payment of bills contracted by him in erecting the Carrol street houses; and it was not claimed at the argument that the expense in the erection of this block appeared upon the books of the company of which Donnell was president. Of the $4,000 due the firm from J. T. & R. I. Hull, probably some portion would appear on their books, as having been paid by the Hulls for the benefit of that corporation; but it is not shown to me that those books disclosed that they received it from Norris, Hull & Company; and it is proved that the Hulls obtained, from other sources, funds which were applied by them to the use of the real estate and building company. I can not, therefore, from any evidence before me, find that Donnell was aware that the Hulls were withdrawing these sums from the copartnership, to be applied in payment of bills contracted by them on account of their real estate; and if John T. Hull misappropriated the funds of the partnership, Donnell cannot be held accountable therefor. It must be borne in mind that every dollar of these notes was primarily for the copartnership benefit, and appears on their books; and even if it were established that Donnell was aware that Hull did apply to his private account some portion of the company funds, yet, I am satisfied that each of his copartners assented to his so doing; and under such circumstances, the firm could not sustain a valid defence to a suit by Donnell upon these notes, taken up by him as endorser, the whole amount of which had once gone to the firm's benefit, as their books disclosed. If the firm or the assignees can have any redress as against Donnell, it can not be presented in this manner as a defense to these notes.

The result of the whole is, that Donnell now holds $28,000 of the notes of this firm, for $5,000 of which sum the Hulls are accountable to the firm, and for the payment of which their individual estate is pledged as security, and the proceeds of which must first be applied to the payment of this sum before the firm estate can be called upon for contribution. There will still remain $23,000, which has gone to increase the copartnership assets, and for which the individual property of the Hulls is pledged to Donnell; but the Hulls have withdrawn for their private benefit about $10,000, for which amount they are indebted to the partnership. In this sum is not included the sums taken by them from the firm for their support, which appear to be less than was drawn out by Norris for the same purpose. Throughout the entire existence of this copartnership, its credit has been almost wholly dependent on the endorsements of its paper by Donnell, which have been obtained upon the security of the private property of the Hulls, all of which is lost to them, and the larger portion of which has gone to the firm credit. Appeal dismissed. Proof allowed.

[This case was again heard upon the proof of debt of the Portland Savings Bank. Case No. 10,303.]

Case No. 10,303.

In re NORRIS et al.

[2 Hask. 74.] [1]

District Court, D. Maine. July, 1876.

NEGOTIABLE INSTRUMENTS — BOND RECEIVED AS SECURITY WITHOUT NOTICE OF WANT OF TITLE —PROOF OF DEBT IN BANKRUPTCY—SURRENDER OF SECURITY.

1. A creditor, receiving a negotiable bond from his debtor as security for a loan, without notice of his want of title, acquires a valid title to the same as against the true owner.

2. Such creditor cannot treat the bond as security received from a third party and prove his whole debt in bankruptcy against the estate of his debtor.

3. He must either surrender the security to the assignee or forego the proof of its debt against the bankrupt's estate.

In bankruptcy. Proof of debt. Question certified by Mr. Register Fessenden. Can the Portland Savings Bank prove its debt against the estate of Norris, Hull & Co., bankrupts, without surrendering a negotiable bond received from them as security for their debt, without notice of their want of title, and now claimed to belong to the Portland Tenement House Company and to have been pledged by the bankrupts without authority so to do? [This case was previously before the court upon the matter of the proof of debt of John E. Donnell. Case No. 10,-302.]

James T. McCobb, for creditor.

Charles P. Mattocks and Edward W. Fox, for assignee.

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

FOX, District Judge. The Portland Savings Bank offers proof of two claims against the firm estate for loans made the firm, secured by bonds of the Portland Tenement House Company. These bonds were negotiable and pledged to the bank by John T. Hull, one of the firm, in the firm's behalf, and at the time of the loan without notice of any failure of title. It is now claimed that these bonds were the property of the Portland Tenement House Company, and that John T. Hull, who was its treasurer, had no right to pledge them for the debts of Norris, Hull & Co. The bank, therefore, prays for leave to prove its whole debt against the bankrupt estate without deduction or surrender of its security; but this I am of opinion ought not to be allowed. The general principle undoubtedly is that a party, holding security other than the property of the bankrupt, may prove for his entire claim and retain his security. In re Cram [Case No. 3,343]; In re Norris [Id. 10,302]. But it seems to me that the present case is withdrawn from this rule by the fact that the savings bank has, through the bankrupts, acquired a valid title to these securities. They were negotiated for value to the bank. The title of the bank became perfect; and however valid the title of the Tenement House Company might otherwise have been, it has, against the bank, lost its title which the bank has through the bankrupts acquired; and as between these parties, the bank, if it relies on this security, should be estopped to deny the title to have once been in the bankrupts, under whom its title has been acquired. Its whole dealings with these securities was with the bankrupts, as being their property, and its rights thereto were acquired from them and from no other party.

The bank, therefore, for this hearing, must either stand by and hold on to its security and apply it to the satisfaction of its demands, as it can do without being accountable to any other party, or if it prefer so to do, may surrender its security to the assignee as the representative of the party from whom it was received, and may then prove for the full amount of its claim. Whether the assignee can afterwards derive any benefit to the estate from this security must remain for future decision.

Register to follow this opinion.

Case No. 10,304.

NORRIS' CASE.

[1 Abb. U. S. 514;[1] 4 N. B. R. 35 (Quarto, 10); 1 Am. Law T. Rep. Bankr. 227; 3 Am. Law T. 216.]

District Court, E. D. Michigan. June Term, 1870.

DISTRICT COURT—JURISDICTION IN BANKRUPTCY.

1. Although, by the bankrupt law of 1867 [14 Stat. 517], jurisdiction in bankruptcy is conferred on the district court, instead of being vested in a new tribunal, yet the district court, when sitting as a court of bankruptcy, is to be regarded as a separate court, exercising powers and a jurisdiction distinct from its powers as a district court as originally constituted.

2. The district court, when sitting as a court of bankruptcy, should not decline jurisdiction of a claim presented by petition, which is within its jurisdiction as a court of bankruptcy, on the ground that the claim might be prosecuted by bill, in the district or circuit court, sitting in equity.

[Cited in Re Krogman, Case No. 7,936; In re Marter, Id. 9,143.]

Petition in bankruptcy. Philip H. Emmerson, the assignee of James W. Norris, bankrupt, filed his petition in this court, alleging that said James W. Norris, within six months before the petition for adjudication of bankruptcy was filed against him, and in the month of November, 1869, he being then solvent, and in contemplation of bankruptcy, did sell and cause to be conveyed and delivered to Charlotte M. Rogers, certain real estate in the city of Battle Creek, in this district, valued at about nine thousand dollars, and two certain promissory notes, with a view to prevent the same from coming to the assignee in bankruptcy of said Norris, and to evade the provisions of the bankrupt act, and to delay the operation and effect thereof, the said Charlotte M. Rogers having reasonable cause to believe that the said Norris was insolvent, and that said sale and conveyance was made by said Norris in contemplation of bankruptcy, and with the view aforesaid, and praying for injunction, and for a decree setting aside the said conveyance, and that the said Charlotte M. Rogers convey and release to the said assignee the real estate so conveyed, and deliver to him the said promissory notes. An injunction was allowed, and an order was made and served requiring the said Charlotte M. Rogers to show cause why the relief prayed should not be granted. The said Charlotte M. Rogers now appears by her counsel and objects to the proceedings on the ground that petition is not the proper remedy, and contends that the proper remedy is by bill in equity.

Moore & Griffin, for petitioner.

Mr. Hughes and Mr. Russell, in opposition.

LONGYEAR, District Judge. By section 1 of the bankrupt act the district courts are constituted "courts of bankruptcy," with certain general and specific powers and jurisdiction. Courts of bankruptcy, as they existed in England at the time the act was passed, were and still are separate and distinct organizations, with powers and jurisdiction separate and distinct from all other courts, and it is undoubtedly in this sense that the words are used in the act; that is, courts possessing power and jurisdiction peculiar to themselves. The only difference is that here, instead of creating a new organization, an organization already existing,

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

known as the district court, is taken up and made use of in lieu of such new organization. But the district court, when acting as a court of bankruptcy, is none the less a separate and distinct court, and exercising powers and jurisdiction separate and distinct from its powers and jurisdiction as district court, than if it were such separate and distinct organization.

The general jurisdiction conferred upon the court of bankruptcy is of "all matters and proceedings in bankruptcy;" and it is further specifically provided (section 1), that such jurisdiction shall extend, among other things, "to the collection of all the assets of the bankrupt," and "to the adjustment of the various priorities and conflicting interests of all parties."

It is clear from these provisions, and, in fact, it was conceded by counsel upon the argument, that the court of bankruptcy has jurisdiction in the premises. By what right can this court, sitting as a court of bankruptcy, refuse to entertain and exercise that jurisdiction when it is invoked? It is said that by section 2 jurisdiction is conferred on the circuit and district courts of suits at law or in equity in such cases, and that it was evidently contemplated that such course should be pursued. No doubt a party may pursue either course he may choose; but again it is asked, by what power or authority can a party be required to pursue the one course or the other? The jurisdiction and powers of each of these three courts,—the circuit, the district, and the bankruptcy court,—are in this respect equal and co-extensive, and the bankruptcy court has no more right to say to a party invoking the exercise of its jurisdiction, "You must reform your proceedings and seek your remedy in the district or circuit court," than the district court would have to say to a party commencing his suit there, "You must go into the bankruptcy or the circuit court," or the circuit court to say to him, "You must go into either of the other two." Much more might be said in this direction, which will be readily suggested to the mind of the thoughtful student, but I will not pursue the argument further. Neither will I presume to answer the objetions raised to this course of procedure, that it is summary in its character, and that it is novel and inconvenient in practice. These objections have been answered so completely in the full, able, and exhaustive opinion of Judge Swayne, of this circuit, in Bill v. Beckwith [Case No. 1,406], that it would be mere presumption on my part to attempt to add anything thereto.

The leading opinion in support of the opposite doctrine (that the remedy in a case like the present should be by a suit at law or in equity in the circuit or district court), is that of Judge Nelson, in Re Kerosene Oil Co. [Case No. 7,726]. With all deference to the acknowledged learning and ability of that eminent jurist, that opinion bears evidence upon its face that it was not well considered. The argument and the conclusion are entirely unsatisfactory to my mind, particularly that portion of the argument in which he says: "It is by no means clear that an appeal would lie from a decision of the district court to the circuit court under section 8 in the summary proceedings in the present case." It is conceded that an appeal would not lie in such a case under section 8. The learned judge, however, seems to have entirely overlooked section 2, in which full provision is made for a review in such cases by the circuit court, as is clearly shown in the opinion of Chief Justice Chase in Re Alexander [Id. 160].

Aside, however, from the views entertained by me individually, in favor of the right and propriety of proceeding in a case like the present by petition, summarily, in the court of bankruptcy as is here done, it is to be observed that it is important that there should be as great uniformity as practicable in the manner of proceeding in the several courts; and inasmuch as the question has already been adjudicated in favor of the right to proceed in this manner by one of the presiding judges of the court before which the question raised in this case may be reviewed, I should feel it my duty, from considerations of a practical nature, if no other, to decide the question in conformity to that adjudication, even if I entertained serious doubts (which I do not) of its correctness.

In this case, the petition is presented in the same court in which the bankruptcy proceedings are pending, and this opinion is, of course, limited to such a case. The objection and motion are overruled, and the assignee is allowed to proceed upon his petition.

Order accordingly.

Case No. 10,305.

NORRIS et al. v. COOK et al.

[1 Curt. 464.] [1]

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

PRINCIPAL AND AGENT — AGENT'S REQUEST FOR APPROVAL OF HIS ACTS—SILENCE OF PRINCIPAL —JURY—REQUEST TO COURT FOR INSTRUCTIONS.

1. If a consignee writes a letter to his consignor, and fully informs him what he has done, the silence of the consignee, after a reasonable time, is an approval of his conduct.

[Cited in brief in Feild v. Farrington, 10 Wall. (77 U. S.) 148.]

2. Though the consignee in such a case must have plainly disclosed a departure from instructions, and the reasons which induced him to depart from them, he is not bound to detail facts of a general nature, which he may reasonably presume the consignor has knowledge of.

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

3. If the jury send a written request for instructions to the court, when not in session, the court, after notice to the counsel, will reply in writing, if it deems it safe and proper to do so.

[Cited in Read v. Cambridge, 124 Mass. 569.]

This was an action of assumpsit, to recover of the defendants [George L. Cook, and others] the proceeds of the sales of a vessel and part of a cargo of lumber, consigned by the plaintiffs, who were merchants at Bristol, Rhode Island, to the defendants who were merchants at San Francisco, California, and also to recover the amount which ought to have been received from the sale of the residue of the cargo, which was consumed by fire, on shore, at the last mentioned place. The plaintiffs alleged that their orders to the defendants were to sell the vessel and cargo immediately, on their arrival; and that though there was no breach of orders as to the vessel, the cargo was landed and stored contrary to orders, a part sold afterwards, for a less price than could have been obtained on arrival, and the residue burnt in one of the conflagrations by which San Francisco had been visited. The defence was, that there was no breach of orders, or if there was any departure from instructions, it was known to the plaintiffs, and acquiesced in by them. After the jury had been fully instructed by the court, they retired to deliberate on their verdict, and the court adjourned till the next morning. In the course of the evening, the presiding judge received from the jury the following communication in writing: "The jury are not able to agree; and wish you to give us information on the grounds named below, viz. is it the duty of the consignor to inform the consignee that he approves or disapproves of his doings, or is his silence evidence of his acquiescence, generally?" On the receipt of this communication, the judge sent for the counsel on both sides, and made known to them, at his chambers, the above request of the jury, and read to them the following answer, which he proposed to send to the jury: "If the consignee writes a letter to the consignor, and fully informs him what he has done, and the consignor intends to disapprove of his conduct, he is bound to inform the consignee, within a reasonable time, that his conduct is not approved; and if he is silent, his silence is an approval of the conduct of the consignee. This is a rule of law, and is applicable to all such cases." The jury afterwards returned a verdict for the defendants, and the plaintiffs moved for a new trial, assigning for cause that the above instruction was not correct.

Greene & Blake, for plaintiffs.
Carpenter & Bradley, for defendants.

CURTIS, Circuit Judge. It is in accordance with the practice of this court, when a jury address a written inquiry to the court, while not in session, to summon the counsel, and make known to them the inquiry, and then proceed to answer it in writing, if the court thinks it safe and proper to do so; and no exception is taken to this course now. The objection is, that the instruction was not correct, because not sufficiently qualified. The argument is, that ratification is not binding, unless made with a full knowledge of all the material facts; and that the court ought to have required that the plaintiffs should be informed, not only of what the consignees had done, but of all the circumstances necessary to enable the consignors to make up their mind, understandingly. And that in this case, the consignors ought to have been told, not only that the consignees were about to land the cargo, but that the expenses of landing and storing a cargo there were unusually great, when compared with those charges at other ports; also, that timber was declining in price at the time it was landed, and how long the consignees intended to keep it on hand, and that the fire risks in that city were unusually great. The instruction given in this as in all other cases, must be considered with reference to the facts of the case. The consignment was made by letter, bearing date Feb. 11, 1850; which was received and replied to by the defendants, April 17, 1850. In this letter they say: "Lumber is, in some cases, selling at less than home prices, and vessels are extremely low. We see no fair prospect of any essential change in either." On May 29, 1850, the defendants acknowledged a receipt of a duplicate of the letter of consignment, and further say: "There is no improvement to notice in the lumber market." On the 27th July, 1850, the vessel and cargo arrived, and on the 31st the defendants wrote a letter, detailing, with great minuteness, the difficulties they had encountered in obtaining possession under the plaintiffs' mortgage, which was the title by virtue of which they made the consignment, and the litigation which had grown out of it, and referring the plaintiffs to their circular respecting the markets. On the 14th of August, they again wrote to the plaintiffs, informing them of their further difficulties about the title, and that they had sold the vessel well for $2,400. And they add: "The lumber is now being landed and stored, as we cannot get an offer of more than $50 per M. for the lot. We have been, and shall continue to be, as economical as possible in regard to expenses, but we anticipate we shall be able to remit you but a part of your claim." On the 31st August, 1850, the defendants again wrote to the plaintiffs, giving some further information about the litigation, and referring the plaintiffs to their circular for information of the state of the market. On the 13th September, they again wrote, chiefly concerning another suit which had been brought against them on account of the cargo, and adding: "We have no improvement to notice in the lumber market; on the contrary, prices generally are not so good as they were some weeks since." They also refer to their circular for further information concerning the market. It was admit-

ted that all these letters were received by the plaintiffs, but they first wrote in reply under date of October 25, 1850. In this letter they acknowledge the receipt of the defendants' letter of the 13th September, but make no reference to any other letter. They give some information concerning the title to the property, to enable the defendants to conduct the litigation, but they were entirely silent on every other topic. There was no evidence tending to show that any information concerning the markets, contained in the defendants' letters and circulars, was untrue. But it appeared that the charges of unloading and storing cargoes of lumber and all other commodities at San Francisco, were then, and, since the discovery of gold, and the consequent high prices, had been, very great compared with the charges at other ports, and that lumber was often, though not uniformly, sold before landing. Such were the facts, in reference to which this instruction was given. And I think there was no room to contend that the plaintiffs did not have all the information, concerning the state of the market, which the defendants could give. But, in respect to this, and the other facts, concerning the rate of charges and expenses, and the fire risks, a more comprehensive answer may be given to the objection, which, in my opinion, is well founded in law, and that is, that it is not the duty of the consignee to communicate anything which he has a right to presume the consignor knows. Now, when a merchant makes a consignment to a distant port, he is presumed to be acquainted with the nature of the business in which he engages; and this includes not only the customary modes of buying and selling, but the usual rates of charges, and the risks to which his property will be subjected at that port. And accordingly it will be found, by examining the decisions, that no one of them, so far as I know, has ever required information on these points to be given by the consignor.

The rule, as laid down by Mr. Justice Story, in his Commentaries on Agency, (section 258,) is: "If the principal, having received information from his agent, of his acts, touching the business of his principal, does not, within a reasonable time, express his dissent to the agent, he is deemed to approve his acts, and his silence amounts to ratification." This requires information of the acts of the agent, but not of those surrounding circumstances of a general nature, which usually accompany all such transactions, and which the principal must be supposed to be cognizant of when he made the consignment, and to have kept himself informed of afterwards. Take the rule laid down in Richmond Manuf'g Co. v. Starks [Case No. 11,802], which is supported by the authorities, that if a merchant neglects, after a reasonable time, to object to an account current, he is deemed to acquiesce in it, and it is treated as an account stated; it is manifest an account current conveys no information concerning the previous or expected states of the market. In Cairnes v. Bleecker, 12 Johns. 300-306, Mr. Justice Spencer says: "It is a salutary rule in relation to agencies, that when the principal has been informed of what has been done, he must dissent, and give notice in a reasonable time, otherwise his assent to what has been done shall be presumed." And the same law may be found in Bredin v. Dubarry, 14 Serg. & R. 30, and in other cases.

Certainly the consignor must not be misled by the consignee, upon any point, general or particular; and he is entitled to such information concerning the acts of his agent as will put him upon a decision of the question whether he will ratify a departure from his orders. Thus, if the agent does not plainly disclose that he has departed from instructions, as was the case of Courcier v. Ritter [Case No. 3,282], he is not bound to reply. So I think the principal is entitled to a fair statement of any special circumstances which have induced the agent to depart from his instructions. And in this case there was such a statement; for in letters previous to that of the 13th of September, the defendants had informed the plaintiffs that lumber was very low, that there was no immediate prospect of its rise, and in the letter of the 13th of September they say: "The lumber is now being landed and stored, as we cannot get an offer of more than $50 per M. for the lot;" and there was no evidence in the case tending to show that this was not true, or that it was not the cause for their landing the cargo. Indeed, I do not understand the plaintiffs' counsel to contend, that the instruction given would not have been correct, if the consignment had been made to a port like Liverpool, or New Orleans; but it was argued that San Francisco, being in 1850 comparatively a new place of trade, the same presumption of knowledge, or the same duty, on the part of the consignor to inform himself concerning these general facts, did not exist. But I do not think the rule of law varies with the age and amount of trade of the port of destination. If it were to do so, I can conceive of no standard which could be applicable to any case. How old must a port be, and how much trade must it have had, and how long continued, to exempt the consignee from the duty of going into a minute history of all the facts which could have a bearing upon the interest of the consignor? If the trade is recent, if it is subject to great and sudden fluctuations, if the dangers from marine or fire perils at the port are unusual, the consignor may reasonably be supposed to have known these facts when he sent his property there; because, ordinarily, men do not embark in such enterprises without informing themselves on these points. And perhaps no case could be put which would afford a better illustration than this, of the impropriety of allowing the rule of law to be varied on account of any of these circumstances. For, in the first place, though the

trade was recent, yet it is known to have attracted a most extraordinary degree of attention from the commercial world, and its details were, and have continued to be made public, and watched with great interest, almost from day to day. And if I were now to hold, that San Francisco was not, as a place of commerce, in 1850, within the settled rules of law concerning the relative rights and duties of consignors and consignees, I fear I should be doing great practical injustice, and certainly I should not be able to say, at what period in its commercial life, these rules first began to be applicable. This would introduce a degree of uncertainty into the vast commercial transactions of that place, which would be as little consistent with the just interests of those engaged in them, as with the law itself, as I understand it. The motion for a new trial is overruled, and judgment is to be rendered on the verdict.

NORRIS (GALE v.). See Case No. 5,190.

NORRIS (GOODRICH v.). See Case No. 5,-545.

Case No. 10,306.

NORRIS et al. v. The ISLAND CITY.

NEMON v. SAME.

[1 Cliff. 219.][1]

Circuit Court, D. Massachusetts. May Term, 1859.

SALVAGE—SERVICE—COMPENSATION.

1. A dismasted bark, without rudder, having no anchor attached to her chain, in a severe storm, was taken by a schooner to a safer position and there left; and upon the arrival of the schooner in port, intelligence of the condition of the bark was transmitted to the owners. The bark was saved by another vessel. *Held*, that the services of the schooner entitled her to a liberal compensation.

[Cited in The Blackwell, 10 Wall. (77 U. S.) 12; The Sabine, 101 U. S. 387.]

2. The duration of the schooner's service was twenty-four hours; her value, with her cargo, $8,500; the vessel relieved by her was worth $70,000. Salvage compensation decreed to libellants and petitioners in this case, $3,300.

[Cited in The Camanche, 8 Wall. (75 U. S.) 475.]

This was a libel [by John Norris and others] claiming salvage compensation for services rendered by the schooner Kensington to the bark Island City, and was like Adams v. The Island City [Case No. 55], certified to this court. The nature of the service is sufficiently set forth in the report of that cause. A few days after the libel was filed, William C. Norton et al., as owners of the schooner, filed their petition to become parties to the libel. It appeared that the Kensington was worth about $8,500.

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

H. A. Scudder, for Norris et al., cited The Henry Ewbank [Case No. 6,376]; Tyson v. Prior [Id. 14,319]; Rowe v. The Brigg [Id. 12,093]; The Aid, 1 Hagg. Adm. 84; The London Merchant, 3 Hagg. Adm. 395; The Emblem [Id. 4,434].

Hutchins & Wheeler, for Norton et al.

The salvage service of the Kensington was effectual and complete. The bark was taken from a position of the greatest danger to a place where she securely remained until taken in tow by the Forbes. But for the Kensington she would not have been saved. Sending the telegraphic despatch was a salvage service. The Ocean, 2 W. Rob. Adm. 92. The Kensington and her crew were the principal original salvors, and their rights should not be impaired by the conduct of those on board the Forbes in placing the Island City a second time in a place of peril. Success is not absolutely necessary to entitle salvors to compensation; if they contribute to success, they are entitled to salvage. As to amount of salvage to be allowed in the case, 3 Kent, Comm. (5th Ed.) pp. 245, 246, note b; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240; Tyson v. Prior, [supra]; Bond v. The Cora [Case No. 1,621].

B. R. Curtis and William Dehon, for claimants.

CLIFFORD, Circuit Justice. Salvage is the compensation allowed to persons by whose assistance a ship or its cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict, or recapture. When the property is not saved, or if it perish, or, in case of capture, is not retaken, no such compensation can be allowed. A different principle, however, applies when the property is actually saved, and more than one set of salvors have contributed to the result. In such cases, all who have engaged in the enterprise, and have materially contributed to the saving of the property, are entitled to share in the reward which the law allows for such meritorious service, and in proportion to the nature, duration, risk, and value of the service rendered. Applying these principles to the case under consideration, it is impossible to say that the schooner did not materially contribute to the saving of all the property which constitutes the subject of controversy at the present time. All the evidence shows that the bark, when she was relieved by the schooner, was in great peril. She was dismasted and without any rudder, and was in fact lying without any anchor attached to her chain. Lying in that condition in a severe storm, she was relieved by the voluntary efforts of the officers and crew of the schooner, placed in a safer position, and intelligence transmitted to her owners. These were valuable services, and fully entitled

those who performed them to a liberal compensation. Considering that the duration of the service did not much exceed twenty-four hours, and that the value of the schooner and her cargo was much less than that of either of the steamers, her share of the amount allowed as salvage ought to be less. It has already been determined that the property is liable to pay a salvage compensation to the amount of thirteen thousand dollars. Of that amount the libellants and petitioners in this case are entitled to the sum of three thousand three hundred dollars, to be apportioned one third to the owners of the vessel, and the remaining two thirds to the officers and crew.

[For other libels for salvage services rendered to the bark Island City, see Cases Nos. 55 and 3,410.]

Case No. 10,307.

NORRIS v. NEWTON et al.

[5 McLean, 92;[1] 7 West. Law J. 515.]

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

SLAVERY—DAMAGES FOR HARBORING FUGITIVES—ARREST OF FUGITIVE—HABEAS CORPUS BY STATE COURT — SUFFICIENCY OF AFFIDAVITS — HELD UNDER AUTHORITY OF THE UNITED STATES.

1. Under the constitution of the United States, the master of fugitives from labor may arrest them wherever they shall be found, if he can do so without a breach of the peace, and take them back to the state from whence they fled.

2. A state judge, on proper affidavit being made, may issue a writ of habeas corpus, and inquire into the cause of detention.

[Quoted in Ex parte Robinson, Case No. 11,934; Ex parte Sifford, Id. 12,848. Cited in Re Reynolds, Id. 11,722; Robb v. Connolly, 111 U. S. 624, 4 Sup. Ct. 546.]

[Cited in Re Robb, 64 Cal. 433, 1 Pac. 883.]

3. The affidavit of a colored person is sufficient for this purpose.

4. Every person within the jurisdiction of a state owes to it an allegiance. He is amenable to the laws of the state, and the state is bound to protect him in the exercise of his legal rights.

5. When it appears, by the return to the habeas corpus, that the fugitives are in the legal custody of the master, and the facts of the return are not denied, there is an end to the jurisdiction of the state judge. His jurisdiction is special and limited.

[Quoted in Ex parte Robinson, Case No. 11,934. Cited in Ex parte Sifford, Id. 12,848; Re Farrand, Id. 4,678; Re Reynolds, Id. 11,722.]

6. When it appears the fugitives are held under the authority of the Union, it is paramount to that of the state

[Quoted in Ex parte Robinson, Case No. 11,934. Cited in Case of Electoral College, Id. 4,336.]

[Cited in brief in Ex parte Holman, 28 Iowa, 93. Cited in Kneedler v. Lane, 45 Pa. St. 303; McConologue's Case, 107 Mass. 167; Ohio & M. R. Co. v. Fitch, 20 Ind. 506.]

7. And so when an individual is held under the authority of a state, the federal judiciary have no power to release the person so held.

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

8. If the return to the habeas corpus be denied, the master must prove that his custody of the slaves is legal.

[Cited in Re Robb, 64 Cal. 433, 1 Pac. 883.]

9. If he fail to do this, or make an insufficient return, the state judge may release the fugitives.

10. But the master may subsequently arrest them, and prove them to be his slaves.

11. The master, though he may arrest without any exhibition of claim, or judicial sanction, when required, must show a right to the services of the fugitives.

[This was an action by John Norris against Leander Newton and others to recover damages for harboring fugitive slaves.]

O. H. Smith and Mr. Liston, for plaintiff.
Marshall & Jarnegin, for defendants.

CHARGE OF THE COURT. Gentlemen of the Jury: The plaintiff has brought this action to recover damages for harboring and concealing four colored persons who were his slaves in Kentucky, by reason of which they were enabled to escape, and he has lost their services. It is proved that the plaintiff is a citizen of Boone county, Kentucky, and that he held, as his property, the negroes—Lucy, Lewis, George, and James—named in the declaration. It is also proved by several witnesses, that these negroes absconded from the service of the plaintiff, on Sunday night, the —— day of October, 1847. Otho Dowdon was at the house of the defendant on that night, saw the negroes there, but, on his rising next morning, at about sunrise, he was informed that they had absconded, and that the plaintiff was in pursuit of them. The witness and several other persons aided the plaintiff in his pursuit of the fugitives for more than one month, but were unable to find them. Certain articles of property, which were known to belong to the negroes, were found near Clarksburg, Indiana; but, not being able to trace them farther, the pursuit was relinquished. About two years after the slaves had absconded, the plaintiff was informed that they resided in Cass county, state of Michigan. He immediately set out, in company with several persons, to recapture them. On the 27th of September last, the company arrived at Casopolis, a village in the above county, about ten or eleven o'clock at night. The house where the negroes were found was entered. A guard was placed at the door to prevent the escape of any one, and the inmates of the house were charged to make no outcry or alarm. The plaintiff, finding his negroes among others in the house, informed them that he had come to take them back to Kentucky. They recognized him, and the younger boys were willing to return. Lewis, the eldest boy, objected, as he had recently been married. The plaintiff informed him that his wife might accompany them, saying that she should be well treated. She, however, declined going with her husband. Lucy, the mother of the

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

children, interposed no other objection than that her husband would be left behind. David, her husband, had absconded with the others, but was not found when they were recaptured. The four slaves were put into a wagon, Lewis having his arms tied to prevent his escape. The plaintiff's party immediately set out on their return to Kentucky, travelling the remaining part of the night. They took a somewhat circuitous route, passing through the village of South Bend early in the morning of the 28th of September. Between one and two miles south of that village, they stopped to take refreshments. While thus engaged, Crocker, the sheriff of the county, and others, rode up to them, and in a few minutes the company increased to one hundred and forty, or upward, some of them being armed, others had bricks, stones, or clubs. Some of the plaintiff's party observed that force was about to be used to take the negroes from them, and they must resist it. The slaves were directed to get into a wagon, and weapons were drawn. Crocker, one of the defendants, informed the plaintiff that the sheriff had a writ of habeas corpus, and that they had no other object than to ascertain whether the negroes belonged to him. The plaintiff replied that they might ask the negroes whether they were not his slaves. Crocker charged them to answer no questions, but said to the plaintiff that resistance would be useless, as there was force enough to take the negroes back to the village; but, if the plaintiff would agree to return, he should have a fair trial, and it would not detain him more than an hour or two. The plaintiff consented, and returned with the negroes to South Bend. As they approached the court house, a great number of people, black and white, joined them. Time was given to the plaintiff to procure counsel. It appears that the first writ of habeas corpus had been issued for Lucy and Richard, the names of the other two boys not being known. After the return to the village, the first habeas corpus was abandoned, and a second writ, naming the four fugitives, was issued. This was on the forenoon of Friday. To the second writ the plaintiff returned, that "the within named persons were held in his custody as his slaves —that he was a citizen of Boone county, where slavery was authorized by law, and that he had a just claim to the persons named, as his slaves, by the laws of that state—that sometime in the month of October, 1847, the said slaves had absconded and fled from his service in said state, and took refuge in the state of Michigan, where he found them on the 27th instant, and then and there arrested them as fugitives from labor, and took them into his custody, and that he was then on his journey to Boone county, Kentucky, with tnem as his own slaves and property, they being fugitives from labor."

The counsel who appeared for the negroes moved the judge, who allowed the writ, and before whom it was made returnable, to discharge the negroes, on the ground of the insufficiency of the return; and the case was argued by the counsel on both sides. The court-house was crowded with spectators, and great numbers remained outside of the house, there not being room for them within it. Several of the persons within the house were armed with clubs. The crowd became much excited as the argument was in progress. Under the apprehension that the judge would discharge the fugitives, the plaintiff, by the advice of his counsel, applied for, and obtained, a warrant to arrest the slaves as fugitives from labor, under a statute of Indiana. Hearing that such an application was about being made, Crocker, one of the defendants, who acted as counsel for the negroes, warned the state officer not to issue the warrant, as the supreme court of Indiana had declared the statute to be unconstitutional and void, under the decision of the supreme court of the United States in the case of Prigg v. State of Pennsylvania [16 Pet. (41 U. S.) 539]. But the warrant was issued, and was held by the plaintiff to arrest the fugitives, should the judge discharge them. The judge supposed the procedure was under the act respecting fugitives from labor, of 1793 [1 Stat. 302]; and on the ground that the master had no right to arrest the fugitives to take them out of the state where the arrest was made, but for the purpose only of taking them before some judicial officer of the state, or of the United States, discharged the negroes from the custody of the plaintiff. While the judge was pronouncing his opinion, the plaintiff, holding the writ from the state officer in his hands, arrested the fugitives under it. The opinion being pronounced, Crocker exclaimed in a loud voice, three times, the negroes were discharged—that they were free; and some one said it was the time for action, and called upon those nearest the fugitives to hand them out.

At this time, the plaintiff, touching each of the fugitives, arrested them under the warrant he held, and his party drew their weapons—one or two revolvers and knives—and, standing near the fugitives, warned the crowd not to approach them. The excitement was intense. The plaintiff claimed the protection of the sheriff, and asked him if he would suffer the fugitives, who were his property, to be forcibly taken from him. The sheriff observed that he was doing all he could to pacify the crowd; and it was finally agreed that the negroes should be put into jail, for safe keeping. The plaintiff accompanied them to the jail door, declaring that he would trust no one with the possession of them. Crocker entered the jail shortly after it was entered by the plaintiff with the fugitives and the sheriff. On his coming out of the jail, Crocker pacified the crowd by informing them that the sheriff had as-

sured him the negroes should not be surrendered from his custody without a fair trial. This was a short time after dark, on Friday. On the same evening and the next day, warrants were issued against certain persons of the plaintiff's party, charging them with a riot and other breaches of the peace. One of them was fined by the justice. Civil process was issued against the plaintiff, claiming large damages, in the name of one or more of the negroes, on account of their arrest and imprisonment. Bail was required in the civil and criminal proceedings. On Saturday, the streets of the village of South Bend were crowded with people, the greater part of whom were colored. The latter entered the village in companies, some of them bearing firearms, and almost all of them had clubs. Through the ensuing day the crowd increased. The number of negroes was estimated, by different witnesses, from one hundred and fifty to four hundred. Many of them came from Cass county, in Michigan. The circuit court of the state met at South Bend on Monday, and the complaints for violations of the criminal laws of the state, against the plaintiff and his party, were made before the grand jury. No bills were found, and the persons charged were discharged from their recognizances. On Monday, another writ of habeas corpus was allowed by the judge, directed to the sheriff, commanding him to bring forthwith the negroes in his custody before him, etc. A notice was given to the plaintiff of the issuing of this writ, and of the place where the hearing would be had; but the plaintiff, under the circumstances, declined any further attempt to take the fugitives, and assigned as a reason that his rights had been violated, and that he should claim compensation from those who had injured him. The slaves were discharged by the judge, and, surrounded by a great number of colored persons, they proceeded from the court-house to a wagon, in which they were conveyed off.

Under the act of 1793, the master, or his agent, had a right to seize his absconding slave wherever he might be found—not to take him out of the state, but to bring him before some judicial officer of the state, or of the United States, within the state, to make proof of his right to the services of the fugitive. But, by the decision in the case of Prigg v. State of Pennsylvania, 16 Pet. [41 U. S.] 539, the master has a right to seize his slave in any state where he may be found, if he can do so without a breach of the peace, and, without any exhibition of claim, or authority, take him back to the state from whence he absconded. Believing that this remedy was not necessary to the rights of the master, and, if practically enforced, would produce great excitement in the free states, I dissented from the opinion of the court, and stated my objections with whatever force I was able. But I am as fully bound by that decision as if I had assented to it. Had the state judge power to issue a writ of habeas corpus in this case? This writ is favored by our laws. It is secured to any person in the fundamental laws of the states and of the Union, as necessary to protect him against acts of oppression. To the people of England it is equally endeared. The people of Indiana, and the people of the other states, have declared that this writ shall not be suspended, except in time of war, or rebellion, and under the greatest emergencies. Every person within the sovereignty of Indiana, without regard to color or condition in life, is bound by its laws and subject to its jurisdiction; and it is immaterial whether his residence be temporary or permanent; he owes for the time being an allegiance to the state. And the principle applies to a mere traveller through the state. He is amenable to the civil and criminal laws of the state; and the state, so long as he shall remain within it, is bound to protect him in his liberty and in the exercise of his legal rights. In a proper case made, the judicial officers of the state cannot withhold from him the benefit of the writ of habeas corpus.

In the present case, affidavits were made that the fugitives in question were free, and that they had been kidnapped by the plaintiff in the state of Michigan, with the view of making them slaves. An affidavit was made to this effect by a white person, a citizen of Michigan, and by one of the colored persons in the custody of the plaintiff. It is objected that a colored person, not being a competent witness in Indiana, could not make such an affidavit. I think differently. For this purpose, at least, he may be sworn. It has been so held in Virginia, and in some of the other slave states. The affidavits being presented to the state judge, which show an unlawful detention and imprisonment, he is bound under the law of the state to issue the writ, if demanded. He knows nothing of the case, and can be presumed to know nothing of it, except what appears upon the face of the affidavits. There can be no higher offense against the laws of humanity and justice, or against the dignity of a state and its laws, than to arrest a free man within its protection, with the view of making him a slave. And this may often be done with impunity, if the remedy by the writ of habeas corpus may not be resorted to. There is no other remedy known to the law, which is so speedy and effectual.

I have no hesitancy in saying that the judicial officers of a state, under its own laws, in a case where an unlawful imprisonment or detention is shown by one or more affidavits, may issue a writ of habeas corpus, and inquire into the cause of detention. But this is a special and limited jurisdiction. If the plaintiff, in the recaption of his fugitive slaves, had proceeded under the act of congress, and made proof of his claim before

some judicial officer in Michigan, and procured the certificate which authorized him to take the fugitives to Kentucky, these facts being stated, as the cause of detention, would have terminated this jurisdiction of the judge under the writ. Thus it would appear that the negroes were held under the federal authority, which, in this respect, is paramount to that of the state. The cause of detention being legal, and admitted or proved, no judge could arrest and reverse the remedial proceedings of the master. And the return made by the plaintiff, being clearly within the provisions of the constitution, as decided in the case of Prigg v. State of Pennsylvania [supra], and the facts of that return being admitted by the counsel for the negroes, the judge could exercise no further jurisdiction in the case. His power was at an end. The fugitives were in the legal custody of their master—a custody authorized by the constitution and sanctioned by the supreme court of the Union. If the facts, on the return of the habeas corpus, had been denied, it would have been incumbent on the master to prove them, and that would have terminated the power of the judge. Had the legislature of Indiana provided, by express enactment, that in such a case the judge should discharge the fugitives, the act would have been void. No procedure under it could have been justified or excused. And in the case under consideration, the custody of the master being admitted to be under an authority paramount to that of the state, the discharge of the fugitives by the judge was void, and, consequently, can give no protection to those who acted under it.

No judge of the United States can release any one from a custody under the authority of the state. Some years since, an individual was indicted in the circuit court of the United States for the First circuit, if I mistake not, for a capital offense. The defendant was ascertained to be imprisoned for debt under state process; and the lamented Mr. Justice Story very properly held that he had no power to release him from that custody by a habeas corpus. The authority of the plaintiff to arrest and hold in custody his slaves, under the decision in the Case of Prigg, was as unquestionable as could be that of an officer acting under judicial process. If the master, in his return to the habeas corpus, or in his proof, the return being denied, should fail to show his right to the services of the fugitives, the state judge would have the power to discharge them from his custody. Such a discharge would not be conclusive on the rights of the master. He might again arrest the fugitives, and by additional evidence establish his right to their services. This would be consistent with the dignity of a state, and enable it to give protection to all who are within its jurisdiction, and are entitled to its protection, while, at the same time, it could not impair the rights of the master. It imposes on him no hardship. When he undertakes to recapture his slaves, under the highest authority known to the country, he must be prepared to show, if legally required to do so, that he is exercising a rightful remedy. This remedy being by the mere act of the party, and without any exhibition of claim or judicial sanction, must be subject to the police power of the state, at least so far as to protect the innocent from outrage. The legal custody of the fugitives by the master being admitted, as stated in the return on the habeas corpus, every step taken subsequently was against law and in violation of his rights. I deem it unnecessary to inquire into the procedure subsequently. It was wholly without authority. The forms of law assumed afford no protection to any one. The slaves were taken from the legal custody of their master, and he thereby lost their services.

It is argued, that the plaintiff abandoned his right to the fugitives by failing to appear to the writ on Monday. Of what value could such an appearance have been to him? His right was admitted in the fullest and broadest terms, as set forth in the return to the second writ. And this being held insufficient by the judge, of what avail could his proof have been? A mistake of the law cannot, in such a case, prejudice the rights of the plaintiff. Crocker acted as counsel. So far as his acts were limited to the duties of counsel, he is not responsible. But, if he exceeded the proper limits of a counsellor at law, he is responsible for his acts the same as any other individual. Every person of the large crowd in the court house, or out of it, who aided, by words or actions, the movement which resulted in the escape of the fugitives, is responsible. On such an occasion, liability is not incurred where no other solicitude is shown by words or actions, than to obtain an impartial trial for the fugitives. But it is earnestly contended that the slaves were entitled to their freedom, from the privilege given to them by the plaintiff to visit Lawrenceburg, in Indiana, on their own business, to sell articles of produce, and at other times were sent there on the business of the plaintiff. It appears that the plaintiff was an indulgent master—that he gave to David, the husband of Lucy, and father of the boys, a piece of ground to cultivate in vegetables for their own use and profit. David was seen by several witnesses at Lawrenceburg at different times, selling vegetables; but there is no express evidence that the plaintiff sent him, or consented that he should cross the river. At one time he was seen at Lawrenceburg, and the plaintiff was also seen in the village at the same time, so that an inference may be drawn that David was there with the consent of his master. At another time David was seen at Lawrenceburg, and the oldest boy, Lewis. A yellow woman was also seen with them, who, the

witness supposes, though he is not certain, may have been Lucy, the wife of David.

Several witnesses state the confessions of the plaintiff, at South Bend, that he had been very indulgent to the fugitives, in permitting them to sell their vegetables on the Indiana side of the river. Some of these confessions are disproved by persons who were present, and who give an entirely different construction to the words of the plaintiff. Instead of saying that he had permitted them to attend the market at Lawrenceburg, he said he had permitted them to attend the market at a village on the Kentucky side, and that he did not know that David might not have crossed the river to find a better market. The conflicting statements of witnesses will be examined and weighed carefully by the jury. Before the interests of the master can be affected by the slave being seen in a free state, it must be clearly shown that he was in such state with the consent of his master. But neither the acts nor the value of the services of David are involved in this case. He has not been arrested by the plaintiff. It is insisted that, if the slaves had been permitted to go to the state of Indiana by the plaintiff, and afterward returned voluntarily to their master, they could not set up the fact as a ground of their release. The courts of the slave states are divided on this question. It is now pending in a case before the supreme court, brought from Kentucky. Under such circumstances, if the jury shall find from the evidence that the fugitives named in the declaration, or any part of them, had, with the consent of the plaintiff, been in Indiana, and had returned to the services of their master, they will so find the fact, and the question will be duly considered on a motion after verdict. There is no pretence to say, when the slaves left the service of the plaintiff, they left with his consent. The facts show clearly that they absconded. The court are asked to instruct you that as the fugitives are still liable to be recaptured by the plaintiff, he cannot recover their value in damages. Whether the plaintiff shall be able to recapture the slaves, if his right to do so be admitted, is subject to many contingencies which cannot well be estimated by a jury. There is certainly no obligation on the plaintiff to use future exertions to reclaim the fugitives; and it would seem to be unjust that those, through whose instrumentality their services have become lost to the plaintiff, if the jury shall so find, should avail themselves of such a defense. In such a case, the act of congress of 1793 gives an action to the plaintiff for the damages received. The damages, in the present case, are estimated by two witnesses, one of whom states them at $2,450, and the other at $2,700, making a difference between the two estimates of $250. The plaintiff's counsel claim interest on the damages estimated from the time the negroes absconded. The court will give no instructions on the question of interest, but will say to the jury, if they shall find for the plaintiff, they will assess such damages as, on a full consideration of the evidence, they shall believe he has sustained.

I was gratified at the avowal of one of the counsel in the defense, that he disclaimed all influence with the jury, except that which arose from the facts and law of the case. And he particularly repudiated that argument which invoked the conscience of the jury against the established law. This was a manly avowal, and fit to be made in this place and on this occasion. No earthly power has a right to interpose between a man's conscience and his Maker. He has a right an inalienable and absolute right, to worship God according to the dictates of his own conscience. For this he alone must answer, and he is entirely free from all human restraint to think and act for himself. But this is not the case when his acts affect the rights of others. Society has a claim upon all its citizens. General rules have been adopted, in the form of laws, for the protection of the rights of persons and things. These laws lie at the foundation of the social compact, and their observance is essential to the maintenance of civilization. In these matters, the law, and not conscience, constitutes the rule of action. You are sworn to decide this case according to the law and testimony. And you become unfaithful to the solemn injunctions you have taken upon yourselves, when you yield to an influence which you call conscience, that places you above the law and the testimony. Such a rule can apply only to individuals; and, when assumed as a basis of action on the rights of others, it is utterly destructive of all law. What may be deemed a conscientious act by one individual, may be held criminal by another. In the view of one. the act is meritorious; in the view of the other, it should be punished as a crime. And each has the same right, acting under the dictates of his conscience, to carry out his own view. This would overturn the basis of society. We must stand by the law. We have sworn to maintain it. It is expected that the citizens of the free states should be opposed to slavery. But with the abstract principles of slavery we have nothing to do. As a political question there could be no difference of opinion among us on the subject. But our duty is found in the constitution of the Union, as construed by the supreme court. The fugitives from labor we are bound, by the highest obligations, to deliver up on claim of the master being made; and there is no state power which can release the slave from the legal custody of his master.

The chief glory and excellence of our institutions consist in the supremacy of the laws. We are instructed to reverence and obey them from our earliest years. And it is this, connected with a faithful administration of the laws, which has given security to persons and property, throughout the wide extent of our country. In this consists, in a

great degree, the strength of our government. And we should be careful not to weaken its power. There is enough in the general aspect of our affairs, if not to alarm, at least to admonish us that every cord which binds us together should be strengthened. In regard to the arrest of fugitives from labor, the law does not impose active duties on our citizens generally. They are not prohibited from exercising the ordinary charities of life toward the fugitive. To secrete him, or to convey him from the reach of his master, or to rescue him when in legal custody, is forbidden; and for doing this a liability is incurred. This gives to no one a just ground of complaint. He has only to refrain from an express violation of the law, which operates to the injury of his neighbor. Is this a hardship? No law-abiding man can so consider it. He cannot claim a right to do that which the law forbids, without striking at the basis of society. If the law be unwise or impolitic, let it be changed in the mode prescribed; but, so long as it remains the law, every good citizen will conform to it. And every one who arrays himself against it. and endeavors by open or secret means to bring it into contempt, so that it may be violated with impunity, is an enemy to the interests of his country.

Gentlemen, the case is with you. In your deliberations you will carefully weigh the evidence, and, in coming to a determination, you will be guided only by the evidence and the law.

The jury returned a verdict for the plaintiff, for $2,850 in damages.

NORRIS (UNITED STATES v.). See Case No. 15,899.

NORTH, In re. See Case No. 1,207.

NORTH, In re. See Case No. 6,764.

Case No. 10,308.

NORTH v. CLARK.

[3 Cranch, C. C. 93.][1]

Circuit Court, District of Columbia. May, 1827.

OYER OF LETTERS OF ADMINISTRATION.

The plaintiff is bound to give oyer of his letters of administration whenever demanded before the expiration of the rule to plead.

At the last term, Mr. Wallach, for plaintiffs, suggested the death of North, and, in open court directed the appearance of the administrators to be entered, which was done. Afterwards, at the same term, Mr. Morfit, for defendant, prayed oyer of the letters of administration, and pleaded that the plaintiffs never were administrators. At this term, Mr. Wallach objected to the plea, saying that it was too late, after the plaintiffs had been permitted to appear, and relied on the case of Wilson v. Codman, 3 Cranch [7 U. S.] 193.

CRANCH, Chief Judge. In the case of Wilson v. Codman [supra], Marshall, C. J., in delivering the opinion of the court says: "They (the words of the judiciary act of 1789; 1 Stat. 73) contemplate the coming in of the executor as a voluntary act. From the language of the act, this may be done instanter. Unquestionably he must show himself to be executor, unless the fact be admitted by the parties; and the defendant may insist on the production of his letters testamentary, before he shall be permitted to prosecute. But if the order for his admission, as a party, be made, it is too late to contest the fact of his being an executor. If the court has unguardedly permitted a person to prosecute, who has not given satisfactory evidence of his right to do so, it possesses the means of preventing any mischief from the inadvertence, and will undoubtedly employ those means." Those means, we suppose, are to strike out the appearance of the plaintiff, upon motion made during the same term, and to permit the defendant to pray oyer of the letters of administration, and plead that the plaintiff is not administrator. This plea he has a right to plead, and it is a good plea in bar, and not in abatement. 1 Saund. 274, note 3; 1 Chit. Pl. 484. We think the plaintiff is bound to give oyer of his letters of administration, whenever demanded, before the expiration of the rule to plead, notwithstanding the dictum in Roberts v. Arthur, 2 Salk. 497, where it is said that, "upon the profert of a deed, it remains in court all that term, but no longer, unless it be controverted; but letters testamentary, or of administration, do not remain in court; for the party may have occasion to produce them elsewhere." We know of no rule which requires oyer to be prayed for before the defendant is bound to plead. The rule day is substituted for a day in the term, and, we think, is to be considered as a day in the term. In the present case, however, the defendant did not wait for the rule to plead, but prayed oyer almost instanter. We think his plea is in due time, and ought to be received.

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

Case No. 10,309.

NORTH et al. v. The EAGLE et al.

[Bee, 78.][1]

District Court, D. South Carolina. Jan. 9, 1796.

MARITIME LIENS—SUPPLIES TO FOREIGN VESSEL—SERVICE PERFORMED ON LAND—EFFECT OF NOTE OR BILL ON LIEN.

1. Supplies to a foreign vessel in a neutral port will constitute a lien on the vessel, and are recoverable in a court of admiralty.

[Cited in Zane v. The President, Case No. 18,201; Phillips v. The Thomas Scattergood, Id. 11,106; Packard v. The Louisa, Id. 10,652; Leland v. The Medora, Id. 8,237; The

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

Calisto, Id. 2,316; The Stephen Allen, Id. 13,361; The Jerusalem, Id. 7,294; Steele v. Thacher, Id. 13,348; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 391.]

[2. Cited in Phillips v. The Thomas Scattergood, Case No. 11,106, to the point that where contracts are made between owners of a vessel and carpenters and others to perform service on land or within the body of a county the admiralty has no jurisdiction.]

[3. Cited in Leland v. The Medora, Case No. 8,237, to the point that a note or bill of exchange taken of an owner or master will not be a discharge of a lien.]

This is a suit instituted against both vessel and captain to recover the amount of sundry necessary articles of shipchandlery, supplied by the actors for the use of this brig, at the request of the captain. It is contended, on the part of the majority of the owners, that the vessel should not be liable, because, at the time they purchased their shares, the captain [Caesar Peronne] engaged to pay all outfits and expenses. They allege also that the captain drew an order on Lefevre, one of the owners, for the amount of North and Vesey's account, who, thereupon, gave a receipt for the same, and so effectually released the vessel from any lien they might otherwise have had. It appears, however, that the receipt given by the actors was conditional, viz. that when the order should be paid, this receipt should be in full.

This is a very clear case. The law, as laid down in Cowper, 639, is indisputable: that whoever supplies a vessel with necessaries has a treble security, the person of the master, the vessel itself, and the owners thereof, whether the supplies be furnished with their knowledge, or not. Although all the owners in this instance are here, yet this is the case of a foreign vessel in a neutral port, and the law applies accordingly. The captain might have hypothecated the vessel by deed, for payment of this demand; and the owners would have been without remedy. The actors and the captain agree that the supplies were furnished on the credit of the vessel. The lien had attached, and the conditional receipt did not at all impair it.

This case differs materially from those where contracts are made between owners of a vessel with carpenters and others to perform a service on land, or within the body of a county; in these instances, the admiralty has no jurisdiction. Here Peronne, the captain, was a stranger, and none of the other owners appeared, till the supplies were furnished. Indeed, by their account the captain had engaged to furnish them. The actors would not have furnished these articles upon any other than the security of the vessel. It is true that they might have proceeded against the owners or captain at common law; but they have chosen rather to impound the vessel in this court; and I am clearly of opinion that their libel must be sustained, and their demand be paid out of the proceeds of the brig, which has been sold, pendente lite, by consent. They must also have their costs of suit.

Case No. 10,310.

NORTH v. HOUSE et al.

[6 N. B. R. (1872) 365.] [1]

District Court, W. D. Texas.

BANKRUPTCY — ASSIGNMENT TO CREDITOR WITHIN SIX WEEKS OF FILING OF PETITION.

A debtor made an assignment of his stock in trade and notes of hand to one of his creditors within six weeks of the filing of a petition in bankruptcy against the debtor. Assignment *held* void under section thirty-five of the bankrupt act [of 1867 (14 Stat. 517)]; and assignee in bankruptcy entitled to recover from the preferred creditor the value of the goods and notes thus transferred to him.

[Cited in Mathews v. Riggs, 80 Me. 110, 13 Atl. 49.]

At law.

DUVAL, District Judge. This was a suit brought on the law side of the United States circuit court for the Western district of Texas, by W. F. North, assignee of the involuntary bankrupt, W. A. Rawlings, for the recovery of eighty thousand dollars, the alleged value of certain goods, wares, etc., and certain notes, accounts, etc., which the plaintiff charged the defendant with having converted to his own use. The plaintiff claimed to recover their value as part of the assets of the bankrupt's estate. The defendant answered, denying the allegations in the petition and joining issue.

The facts were, that the bankrupt, W. A. Rawlings, was a merchant in Huntsville, Texas, and has been for three or four years prior to this suit. That the defendant, Thomas W. House, did a forwarding and commission and wholesale business in Houston, Texas, where, in connection with his mercantile and commission business, he also conducted a banking, exchange and collecting business; that the defendant, House, had been for several years prior to this action the correspondent of the bankrupt at Houston; that he had sold him large bills of goods and that the bankrupt had shipped him a large amount of cotton; that the bankrupt's commercial paper was (or at least the greater part of it) payable at the counting rooms of Thomas W. House; that in September, eighteen hundred and seventy, when the bankrupt was north, purchasing goods, that the defendant, House, was with him; that at that time a portion of the bankrupt's paper, being a note to Sheldon & Company for about twenty-five hundred dollars, was past due, and Buckley, a member of that firm, tried to induce the defendant, House, in whose hands the paper

[1] [Reprinted by permission.]

was, to pay it. He declined to do so, but promised to see it paid out of the first shipments of cotton which would come to his hands from the bankrupt. He never paid it and it is still unpaid. The defendant, House, also informed Messrs. Evans, Gardner & Company, that he considered the bankrupt solvent, (the bankrupt had referred them to House,) and on this assurance, they, in September, eighteen hundred and seventy, sold him goods. That the bankrupt's paper, to the amount of thirteen thousand dollars, matured in January, February, and early in March, eighteen hundred and seventy-one, and was presented at the counting house of the defendant for payment. None of it was paid, and a considerable amount of it was protested and remained unsettled in the hands of House. That while this state of affairs existed, on the twenty-eighth of March, eighteen hundred and seventy-one (Rawlings, the bankrupt, having made on the last of February an ineffectual effort to borrow about three hundred dollars of House, and having then past due and in House's hands over fifteen thousand dollars of paper, and being then, besides, indebted to House himself in the sum of forty thousand or fifty thousand dollars,) came to Houston and attempted to induce the defendant or his agents to make him a further moneyed advance, (House was then temporarily absent from Houston,) but his agents refused. The bankrupt then proposed to sell them his storehouse, his stock of goods, valued at about twenty-five thousand dollars, and his notes and accounts, valued at about fifteen thousand dollars. This offer was accepted, and a deed was made to House on March twenty-eighth, eighteen hundred and seventy-one, expressing a consideration of about forty-three thousand dollars. That the payment was made by House assuming and paying certain debts and obligations of the bankrupt. That not a dollar was paid to the New York creditors, whose paper was endorsed to House for collection, and a large part of which was at that very time in his hands. That on receiving intelligence of the execution of this deed House made no objection to it, but took possession of the bankrupt's store, retained his clerks and placed one of his own in charge, and sold the goods in his own name. That four days after the transfer he paid, for the bankrupt, six thousand dollars to one Thomason, a creditor, and to Gibbs & Co., also creditors, about thirteen hundred dollars. That on May ninth, eighteen hundred and seventy-one, and within six weeks of the above transfer, Jehial Read & Co., for themselves and other New York creditors, filed a petition in bankruptcy against Rawlings, alleging said transfer to be an act of bankruptcy, charged it to be fraudulent, made House a party, and sued out an injunction. Rawlings was adjudged a bankrupt on June twenty-eighth, eighteen hundred and seventy-one; the injunction dissolved as to House, it being admitted that he was solvent and able to respond in damages; the plaintiff elected assignee September fourteenth, eighteen hundred and seventy-one; and this suit instituted by him on December fourth, eighteen hundred and seventy-one.

The cause was tried before DUVAL, District Judge, at the January term, eighteen hundred and seventy-two, when he charged the jury as follows:

"Gentlemen of the Jury: This suit is brought by W. F. North, as the assignee of W. A. Rawlings, who, on the petition of certain of his creditors, was adjudged a bankrupt on the twenty-eighth day of June, eighteen hundred and seventy-one. This adjudication, however, related back and took effect on the ninth of May, eighteen hundred and seventy-one, when the creditors' petition was filed. After such adjudication, to wit: on the fourteenth day of September, eighteen hundred and seventy-one, a deed of assignment was made to said North by the register in bankruptcy, whereby all the estate, real and personal, of the bankrupt, including all the property conveyed by him in fraud of his creditors, vested in his assignee, and gave to the latter the right to bring and maintain suits for the recovery thereof. The petition in this case avers that on the twenty-eighth day of March, eighteen hundred and seventy-one, (though it seems from the evidence to have been a few days earlier,) the bankrupt being then insolvent and being also in contemplation of insolvency, and well knowing that such was his condition, fraudulently assigned and made over to T. W. House, one of his creditors, a stock of goods, wares and merchandise of the value of about fifty thousand dollars; and also notes, accounts, book accounts and debts, due said bankrupt, to the amount of about thirty thousand dollars. The petition further alleges, that at the time of such assignment the said House well knew that Rawlings was insolvent and in failing circumstances, and that he was in contemplation of insolvency and of bankruptcy, and that all of the property thus assigned to House was so done with a view to give him a fraudulent preference over his other creditors, and to hinder, delay and defraud them in the collection of their just debts. So much of the bankrupt law as applies to this case provides as follows: 'That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, makes any pledge, payment, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefitted thereby, having reasonable cause to believe such person is in-

solvent, and that the same is made in fraud of the provisions of said act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefitted.' The act further provides: 'That if such sale, transfer, assignment or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud.'

"In this case the questions for the jury to determine are: First, was Rawlings insolvent or in contemplation of insolvency at the time of his assignment to House, and did he make said assignment with a view to give a preference to him over other creditors? Second, did House have reasonable cause to believe that Rawlings was then insolvent, and that said assignment was made in fraud of the provisions of the bankrupt act? If the jury believe, from all the evidence in the case, that they should give an affirmative response to both these questions, then they must find a verdict for the plaintiff. And, to satisfy themselves on these points, the jury can look to all the facts and circumstances disclosed by the evidence, and draw such reasonable conclusions therefrom as they deem just and proper. The great object of the bankrupt act is to do away with all fraudulent preferences, by which one creditor in the collection of his debt obtains an unconscientious advantage over another, and to provide for a just and equal distribution of the bankrupt's assets among all his creditors. In order to render a transfer or conveyance fraudulent and void under the thirty-fifth section of the act, it is not necessary to bring home to the person receiving such transfer or conveyance actual knowledge that the party making the transfer was insolvent or intended a fraud upon the bankrupt act; it is sufficient to render the deed fraudulent and void as to such person, if he had sufficient knowledge of the financial condition of such party to put a man of ordinary business capacity on enquiry as to the condition of the debtor; and if, in this case, you believe that the evidence shows the bankrupt, Rawlings, to have been insolvent on the twenty-eighth of March, eighteen hundred and seventy-one, (the date of the transfer,) and that the defendant, House, either knew, or had from his knowledge of the bankrupt's business, reasonable cause to believe him insolvent, and unable to pay his commercial paper and his debts as they fell due, then the deed of assignment is fraudulent and void, and conveys no right to the party in whose favor it was made. And if the jury believe that the transfer under consideration was not made in the usual and ordinary course of business of the debtor, then that fact is prima facie evidence that it is fraudulent, and unless rebutted or controlled by other evidence in the case, is sufficient to establish knowledge, on the part of those dealing with him, of the bankrupt's insolvency.

"If the jury believe, from the evidence and under the instructions given them, that the transfer in question is fraudulent and void, they will return a verdict for the plaintiff, and allow him such amount as you believe from the testimony was the value of the goods and notes on the twenty-eighth of March, eighteen hundred and seventy-one, with interest thereon, at eight per cent., per annum, down to the time of this trial. Nor, if the deed is fraudulent, is the defendant, House, entitled to credit for the amount he may have paid to certain creditors of Rawlings, for the payments themselves would be in fraud of the bankrupt act, and give an undue preference to those paid over the other creditors, if the bankrupt was then insolvent and the defendant had reasonable cause so to believe.

"If the jury find for the defendant they will so say by their verdict.

"(Signed) T. H. Duval, U. S. Judge.

"The jury, if they find for the plaintiff, will state in their verdict against which of the defendants the same is rendered."

And, at the instance of the plaintiff, he gave the following additional instructions:

"In determining the question as to whether or not the defendant, House, had reasonable cause to believe that the bankrupt, Rawlings, was insolvent at the date of the transfer, you have a right to look at all the facts in evidence bearing on this point; the business and personal relations of the parties; the connection, if any, the defendant had with the commercial paper of the bankrupt, and his opportunities and means of knowing his financial condition, and if from these and other facts in evidence you believe that the defendant had reasonable cause to believe the bankrupt insolvent, then the deed is void and you will find for the plaintiff.

"Hancock & West, Plff's Att'ys.

"Given. (Signed) T. H. Duval.

"The mere fact that the defendant was not present when the deed was made, and knew nothing of the transaction, does not affect its character. If, when informed of it, he did not repudiate it, but accepted benefits under it, then he is as much bound by the acts of his agents in accepting the deed as if he had accepted it himself. It was, under the law, the privilege of the defendant to have surrendered the property and repudiated the deed, had he desired to do so.

"Hancock & West, Plff's Att'ys.

"Given. (Signed) T. H. Duval.

"The mere fact that the defendant may have paid a valuable consideration or advanced money on the deed in question will not validate it, if he had reasonable cause to believe the party insolvent at the time of its execution, and he was so insolvent.

"Hancock & West, Plff's Att'ys.

"Given. (Signed) T. H. Duval."

The defendant asked no instructions.

The jury returned a verdict for the plain-

tiff for the sum of thirty-nine thousand one hundred and sixty-five dollars and sixty-five cents.

Case No. 10,311.

NORTH et al. v. KERSHAW et al.

[4 Blatchf. 70.] [1]

Circuit Court, S. D. New York. July 1, 1857.

PATENTS—PRELIMINARY INJUNCTION—LICENSE—LEGAL OWNER A PARTY TO INFRINGEMENT SUIT—LACHES—ACQUIESCENCE.

1. Where a patent has not been judicially established, or acquiesced in by the public, a preliminary injunction will not be issued on it, unless the plaintiff's right is free from doubt, and the violation of right by the defendant is equally clear.

[Cited in New York Grape-Sugar Co. v. American Grape-Sugar Co., 10 Fed. 837; Dickerson v. De La Vergne Refrigerating Mach. Co., 35 Fed. 144.]

2. Where the legal owner of a patent granted a license to use it, and covenanted not to license any one else, and not to use the patent himself, and the license provided that such owner should have one-half of the damages to be recovered for the violation of the patent: *Held*, that the legal owner was a necessary party to a suit for an infringement of the patent.

[Cited in Huber v. Myers Sanitary Depot, 34 Fed. 753.]

3. Where, on a motion for a preliminary injunction on a patent, the evidence as to the originality of the invention is such as to show that there would be, at least, as much probability of doing irreparable mischief as of preventing it, by granting the injunction, the motion will be denied.

[Cited in Southwestern Brush Electric Light & Power Co. v. Louisiana Electric Light Co., 45 Fed. 896.]

4. Where the defendant claims to have done the acts complained of under the authority of a patent, and with the knowledge of the plaintiff, and unmolested for a length of time, and to have, in consequence, invested money in the business sought to be stopped, a preliminary injunction will not be granted except in a case free from all reasonable doubt.

In equity. This was an application for a provisional injunction. The bill claimed that the defendants [James Kershaw and others] were violating two letters patent belonging to the plaintiffs [O. B. North & Co.], for improvements in the manufacture of harness-saddles. One of the patents was originally issued to John T. Denniston, on the 20th of November, 1846. [No. 4,860.] Denniston, on the 22d of January, 1847, sold one-third of that patent to Aaron Remsen, and one-third of it to Aaron D. Polhamus. Denniston, Remsen and Polhamus, on the 14th of June, 1856, granted a license under it to the plaintiffs and covenanted that they would not license any one else. On the 9th of September, 1856, the patent was reissued. The other patent was originally granted to A. H. Gazley, March 14th, 1848. [No. 5,476.] Gazley died before September, 1850, and Charlotte Gazley was appointed his administratrix. She, in September, 1850, assigned the title to the patent to Nathaniel Wright; and he, in June, 1855, sold it to the plaintiffs. In October, 1856, the plaintiffs took out a reissued patent in their own names.

Edwin W. Stoughton and Samuel Blatchford, for plaintiffs.
George Gifford, for defendants.

INGERSOLL, District Judge. Neither of the patents sued on in this case has been established on a trial, either at law or in equity. Nor have the exclusive rights which they purport to grant been acquiesced in by the public. Under these circumstances, to authorize the issuing of a preliminary injunction, the right of the plaintiffs must be clear and free from doubt, and the violation of right on the part of the defendants must be equally clear.

As it respects the Gazley patent, it is clear that, whatever rights were granted by the reissued one, are exclusively in the plaintiffs; that no one but the plaintiffs has any portion of either the legal or the equitable rights so granted; and that, to maintain the rights so granted, it is not necessary that there should be any other plaintiffs. With respect to the Denniston patent, it is not clear that the proper parties plaintiffs are before the court, to maintain a suit on that. The legal title to the Denniston patent is in Denniston, Remsen and Polhamus. The plaintiffs have no legal right to that patent. They have only a license to use it, and a covenant on the part of Denniston, Remsen and Polhamus, not to license any one else, and not to use the patent themselves. By the terms of the license, one-half of the damages to be recovered for the violation of the Denniston patent, is to belong to Denniston, Remsen and Polhamus. They, therefore, have an immediate and direct interest in any suit brought on the Denniston patent, and are not only proper parties but necessary parties, in any suit brought for an infringement of the Denniston patent.

The originality of the improvements which these two patents purport to secure to the patentees, is not so clearly established as to authorize the injunction prayed for. After examining the proofs exhibited on the motion, it appears that there would be, at least, as much probability of doing irreparable mischief as of preventing it, by granting the injunction. To succeed, on a motion of this kind, the plaintiffs should make a stronger case.

There is one view of the case, as presented on the part of the defendants, which should incline a court to refuse a preliminary injunction, unless the right on the part of the plaintiffs, and the violation of right on the part of the defendants, are made clear and manifest. The defendants claim that they have a right to make the harness-saddles which they are manufacturing, under and

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

by virtue of a patent issued to Robert Spencer, in August, 1850. As soon as the Spencer patent was obtained, Spencer and the defendant McMonnies commenced the manufacture of harness-saddles in the way they are now making them. McMonnies was interested, at first, to the extent of one-fourth, in the Spencer patent. Subsequently, he purchased another fourth; and, about four years ago, finding that the improvement was useful, and that no one had molested them in the manufacture, he bought out Spencer's entire interest Since the purchase of the entire interest, he has continued to manufacture saddles in the mode in which he now manufactures them, with the knowledge of the proprietors of the Denniston and Gazley patents, and without any suit or molestation by them. McMonnies advanced his money to manufacture saddles in the way in which he is now manufacturing them, in the confidence that the proprietors of the Denniston and Gazley patents would have no right to molest him in such manufacture. They, by their non-interference, signified, either intentionally or unintentionally, that he had at least some reason to indulge in such confidence. Under these circumstances, no preliminary injunction should be granted, except in a case free from all reasonable doubt. Such a case has not been made out by the plaintiffs. The motion, must, therefore, be denied.

Case No. 10,312.

NORTH v. McDONALD.

[1 Biss. 57.][1]

Circuit Court, N. D. Illinois. April Term, 1854.

ATTACHMENT—JURISDICTION—WHAT CONSTITUTES CONCEALMENT—NO ISSUING OF PROCESS NECESSARY.

1. Where the defendant is a citizen of Illinois, and the plaintiff a citizen of another state, and an attachment writ is served upon property, and defendant personally served with process, this court can take cognizance of the case.

2. A man who leaves a place to avoid service of process, requesting false information to be given of his movements "conceals himself so that process cannot be served upon him" within the meaning of the attachment law of Illinois.

3. Circumstances authorizing the issuing of an attachment stated.

4. It is not necessary that process should be first issued, or that an attempt should be made by an officer to find him. It is sufficient if he so conceal himself that an attempt to serve process would be useless.

5. The concealment may be at a distance as truly as where he resides, and if it turn out that he was in another county, it is no objection that process was not issued to that county.

Attachment, with personal service, tried by the court. Upon an affidavit alleging that the defendant concealed himself so that ordinary process could not be served upon him, a writ of attachment was issued on the 11th of March, 1853, and on the 15th served on property of the defendant in DeWitt county, and on the 11th of April personally served on defendant. The defendant was a citizen of this state, a resident of Chicago, and had kept a store here, until immediately prior to the issuing of the writ. He had then transferred his stock to a brother who went into possession. The evidence showed that defendant was largely indebted and embarrassed. The plaintiff was a resident of another state, and his agent came to Chicago about the 5th of March, made inquiry at the store for defendant, and was told by his brother and the clerks that he had gone to Joliet, but would return. He called every day for eight days, and was always told that he would probably be back the next day. On inquiry of other persons he learned that defendant had goods at Bloomington, but on going there he found that defendant had been there and had moved some goods further south. On his return he sued out this writ. Another witness, testified that he had, at that time, claims in his hands against defendant to the amount of four or five thousand dollars; was on the lookout for him, and passed his store almost every day; found him in once between February 22d and March 8th, thinks it was about the 7th of March, and requested him to pay one of the claims. Defendant refused, and said that he had disposed of his goods, and declined to state to whom, but said that his brother was the agent of that person, and that inquiry might be made of him. Witness, in the presence of defendant, asked the brother to whom the goods had been transferred, and he declined to state, but said that he might ascertain by going to the records. On examination of the records, witness could find nothing; called again the next day and was told that he would be in soon. On inquiry at the hotel where he boarded, was told that he had gone east. Mr. Maher, to whom, as it afterwards appeared, the goods had been transferred, told witness that defendant had gone to the junction on the Galena road. Witness called at the store every day until March 20th; and sometimes one account and sometimes another was given as to defendant's absence. Another witness who also had claims against defendant, called at the store on the 7th of March, and was told by defendant's brother that he had gone to Rockford and was expected back that night; called repeatedly for several days, and was at one time told by defendant's brother that he had received a letter from him at Sycamore; would not allow witness to see the letter or examine the books; on inquiring of persons living near was told that defendant had gone to Australia. Defendant was an unmarried man, and had no dwelling house. He returned to Chicago on the 21st of March. Defendant's brother called as a witness, admitted the various falsehoods told to different cred-

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

itors, and stated that in fact his brother had gone to Bloomington to bring to Chicago the goods which they had at that place. He further declared that his brother left publicly and mentioned the circumstances.

H. G. & E. S. Shumway, for plaintiff.

N. B. Judd, for defendant.

DRUMMOND, District Judge. The defendant being a citizen of this state and the plaintiff a citizen of another state, and as the attachment was not only served on property, but the defendant was also personally served with process, in accordance with the rule laid down in Toland v. Sprague, 12 Pet. [37 U. S.] 300, and the act of congress of March 14, 1848 (9 Stat. 213) this court can take cognizance of the case. There is no doubt there must be an intentional concealment to avoid the service of process, and the question is did the intention exist in this case coupled with the actual concealment or avoidance.

The evidence might undoubtedly be more conclusive, but, after a careful examination, I have become convinced that the attachment properly issued. It is to be remarked that in the great majority of these cases, the evidence will consist of various circumstances and incidents, none of which in themselves may be sufficient, but which, when taken altogether, produce the conviction as to the intention. Men, when they seek to avoid the service of process do not publicly announce their purpose, on the contrary, they would be more likely to declare the reverse. We must judge from their acts, and it seems to me clear that these repeated falsehoods were not told by the clerks without the defendant's knowledge and instructions. The defendant was deeply embarrassed; creditors were calling on him daily and pressing their claims. He had transferred his goods. He left town suddenly without informing them where he was gone. His clerks, and particularly his brother, who had charge of his business, misled and attempted to deceive his creditors as to where he was. It appears to me that the facts warrant the belief that he left to avoid the service of process, and that he returned because of the service of attachments upon his property. If he left for that purpose, requesting false information to be given of his movements, he concealed himself, in my opinion, just as truly as though he had hid himself in a cave. Of course I do not refer to cases where a person leaves his home or place of business with the intent to depart from the state, or to remove his property out of the state, but to the case of a person concealing himself within the state which can be done as effectually at a distance as near at home.

It has been objected that a process should in point of fact have been first issued and an attempt made to serve it before the attachment would lie. That part of the statute we are now considering authorizes an attachment to issue in case "such debtor conceals himself, or stands in defiance of an officer so that process cannot be served upon him." It comprehends two classes of debtors and in contradistinction—the debtor who conceals himself so that process cannot be served upon him, and the debtor who stands in defiance of an officer so that process cannot be served. The objection goes the extent of maintaining that there can be no other evidence of concealment except what follows or is attended with attempted service of process. If this were the meaning it may well be asked why the statute has a double aspect. There may be some reason for saying that the last clause implies that the debtor must defy the officer that has the process, but however that may be, I think in the other case he is not required to conceal himself from an officer who has a writ, but to conceal himself so that the attempt to serve a process would be useless. If the rule were otherwise, a creditor would be obliged to follow a debtor into any county in the state where the latter concealed himself,—that is, he would be required to perform an impossibility—because the concealment implies the creditor does not know where to follow him,—and if it turned out afterwards that the debtor was concealed in a county different from his residence, or that where process was issued, it would always be a fatal objection to an attachment in this class of cases, that process was not issued against the defendant in the county where he was. Because the same argument would ever hold good, viz.,—non constat, but if process had been issued in the county where the debtor was, it might by possibility have been served on him. Morgan v. Avery, 7 Barb. 656; Genin v. Tompkins, 12 Id. 265. Issue and judgment for the plaintiff.

NORTH (YALE & GREENLEAF MANUF'G CO. v.). See Case No. 18,123.

NORTH, The CHRISTOPHER. See Case No. 2,707.

NORTHAM, The C. H. See Cases Nos. 2,689 and 2,690.

NORTHAM (PHILADELPHIA & R. R. CO. v.). See Case No. 11,090.

NORTHAM (PRATT v.). See Case No. 11,-376.

Case No. 10,313.

The NORTH AMERICA.

Superior Court, S. D. Florida. Dec. 13, 1842.

Court of Appeals, Territory of Florida. Feb. 1, 1843.

SALVAGE — COMPENSATION — ATTACHMENT OF VESSEL AND CARGO—APPLICATION OF MASTER FOR RESTORATION—EMBEZZLEMENT BY MASTER.

[1. Four vessels and 59 salvors saved $965 in specie, and cargo and materials valued at $4,-589.59, from a vessel wrecked on the Florida reef. *Held*, that they should be allowed 45 per cent. upon the net balance after deducting costs and charges.]

[2. When a vessel and cargo are attached in admiralty, at the suit of salvors and others, at a place distant from the residence of the owners, and the master intervenes, and claims the restoration to him of the property, or its proceeds, as the agent in law of the owners and others interested in the property, and it appears that he has been guilty of embezzlement of any of the cargo, or has fraudulently colluded with salvors, or has barratrously run his vessel ashore, or has done, or omitted to do, any other act, indicating a reckless depravity or fraudulent intent, inconsistent with his duty and the safety of the property confided to his care, the court should withhold from him the property under its control.]

[3. A box containing $10,000 in gold was on board when the vessel struck a reef, but was not in the cargo saved by the salvors, who made strenuous efforts to find it after the loss was discovered, and before they left the wreck. The master did not at any time show a due amount of anxiety as to its loss or its recovery. He made no charges against any person, but denied all knowledge in respect to it, and stated that he neither had it, nor knew where it was. The salvors proved themselves innocent of the charge of theft. *Held* (reversing the decision of the superior court) that, while the facts raised a suspicion of fraud by the master, they were not sufficiently conclusive to justify withholding from him the residue of the proceeds after deducting salvage.]

[Libel in rem by George W. Carey and others against the cargo and materials of the ship North America, for salvage.]

W. R. Hackley, for libellants.
Adam Gordon, for respondent.

MARVIN, District Judge. This suit is instituted by the libellants against the cargo and materials of the ship North America, for the recovery of salvage. The ship was wrecked on the Florida reef on the night of 26th of November, and the hull totally lost. The cargo and materials were saved by the libellants. It appears that the ship was bound on a voyage from New York to New Orleans and first struck upon the Bahama banks, where she lost her rudder. All the passengers but one were there transshipped on board of another vessel bound to this port. The ship was gotten off, and, a temporary rudder being constructed, she proceeded on her voyage, and on the night of the 23d struck upon the Florida reef. Assistance was offered to Captain Hall, to get his ship off, on the morning of the 24th, but refused, he endeavoring to press his ship off the rocks by the force of his sails. On the night of the 26th the ship bilged, and the libellants were employed to save the cargo and materials. With considerable labor, they succeeded in saving the entire cargo, except a few casks of coal, and the apparel and furniture of the ship. The cargo and materials have been sold for the sum of $4 589.59. There was a box of specie saved, containing the sum of $965, making in the aggregate the sum of $5,554.59. The wharfage, storage, bills for labor in landing and storing the cargo, and the costs and expenses of this suit, will make a considerable item to be first deducted from the amount. There were four vessels and fifty-nine men employed in saving the property, among whom the salvage is to be distributed. It is not common for the courts to decree the same rate of salvage upon money, jewels, &c., as upon other property, they being light and portable articles of great value, and easily saved; but as they contribute when a part of the cargo, the same as other property, in adjusting an average, it can make no difference, in the present case, whether I decree a specific rate of salvage upon the specie, or decree the salvage upon the aggregate amount. I think, therefore, that forty-five per cent. upon the net balance after deducting the above charges will be a reasonable salvage.

The question of the amount of salvage being thus disposed of, the only remaining question is the claim interposed by Captain Hall, to have the residue of the proceeds of the cargo and materials paid to him, as master of the ship, and, as such, the agent in law of the persons interested. Before considering the question of law arising upon this claim a statement of facts appears to be necessary, in order to show how the question arises. The facts appear to be these: The ship had on board, as freight, when she left New York and when she struck upon the Florida reef, two boxes of specie,—the one containing $965 in silver, which was saved, and is now in the custody of the marshal; the other containing, as the master was informed, $10,000 in gold. The box of gold is missing. The master, in answer to interrogatories propounded to him by the salvors, described the box as being about eight inches square, iron bound, and sealed. He presumes it was on board the night the wreckers commenced discharging the ship on the reef, but does not know where it now is, and has not seen it, or any part of its contents, since his arrival in this port. After the passengers had left the ship on the Bahama banks, the two boxes of specie were stowed, by the direction of the master, together in the run of the ship. The mates both testify that since they thus stowed them they have seen nothing of the box of gold, and do not know what has become of it. When the wreckers commenced discharging the ship, the second mate went into the hold, to keep watch of the money, and the cargo generally. When they had been at work about an hour in removing cargo on deck, one of the wreckers was sent into the hold to bring up the boxes of money. The second mate joined him in the hold, and they went together to the place where they had been stowed, and found the box of silver, but the box of gold was not found. The wreckers then searched the hold of the vessel and deck thoroughly, with an avidity made keen by the hope of acquiring salvage upon the money. The Eliza Catherine, one of the wrecking sloops, then lying alongside, but having, as yet, taken in no cargo, was also searched by the first mate of the ship. The box had evidently been removed, and was now nowhere to be found. Captain

Johnson testified that he was stationed at the after hatch, on the middle deck, through which the greater part of the cargo was hoisted, and through which the missing box would naturally come, during the whole period of discharging the ship. His business was to bear off and direct the course of the packages as they were hoisted on deck. He swears positively that no such box as the missing one passed through that hatch while the ship was discharging. Cortlandt Williams was in like manner stationed at the middle hatch, through which a part of the cargo was passed, from the time the wreckers commenced work until the box was missed, and, with the exception of a minute or two, until the ship was discharged. He saw no such box. No other hatches were open. The first mate of the ship testifies that it was his business to keep and take an account of the boxes and other articles taken from the ship and laden on board the wrecking vessels, and that the box in question was not passed on board any of the vessels while he was thus employed. He was absent from this duty but for a short time, when the second mate supplied his place. The second mate testifies that, while he was thus occupied in supplying the place of the first mate in taking such account, the box in question was not passed on board any of the wrecking vessels. All this testimony is uncontradicted and its force unaffected by any explanations.

The master of the ship does not charge any of the salvors, either by a particular or a general charge, with having taken the box; nor, so far as appears, does he charge any of his own crew, or the passengers on board, with having abstracted it. He simply declares that it was on board, but is now lost. So far as any investigation has progressed in this court in regard to its loss, he seems to be interested only when its embezzlement is indirectly imputed to himself, and seems to take no interest in its recovery. Had the box in question been really embezzled by any of the wreckers or his own crew, it could have easily been recovered by instituting the necessary searches before the wrecking vessels had communicated with the shore. Again, had any of the salvors embezzled it, and Captain Hall had so charged, and produced prima facie proof of it, although he might not be able to point out the particular guilty one, no salvage would have been decreed until the box was forthcoming, and the powers of this court would have been employed in every practicable manner to have obtained its restoration. But there is not the shadow of any proof that any of the salvors have been concerned in the abstraction; on the contrary, fearing, from their situation and the nature of their employment that the court might suspect them of embezzling it, they have themselves, without being accused, effectually proved themselves innocent. From the whole testimony, the following facts, I think, are clear: The box was on board when the ship struck the Florida reef. It was not left on board when the ship was abandoned. It was not removed by any of the wreckers, or, if removed by any wrecker, it was removed with the knowledge of, and by collusion with, Captain Hall, and without the knowledge of the wreckers generally. The idea that Captain Hall has secured and concealed this money with the view to avoid the recovery of salvage on it, and intends to return it to the owners, is plausible, and at least charitable, compared with the idea that he has embezzled it. But the motive of saving to the owners a few dollars in salvage does not seem adequate to induce the commission of a fraud upon innocent persons, who have but just rendered him an important service while in distress. Nor does this idea accord with his own depositions under oath, and his declaration that it is lost. To near now to the point: The question is whether it be the duty of the court, under these circumstances, to restore the proceeds of the cargo and materials to Captain Hall, on the ground of his being the master of the ship, and as such the agent of whoever may be interested, and therefore entitled to receive them.

The authority of the master of a ship, in the course of a voyage, is, under ordinary circumstances, confined to the command and navigation of the vessel, and the transportation of the cargo. But it is considered that, under circumstances of emergency or necessity, he acquires a superinduced authority, and acts as the agent and representative of all persons interested; and his acts done in good faith, and in the exercise of a fair discretion, are binding upon the persons he represents. He may, in the course of a voyage, throw overboard the cargo, or any part of it, in a case of necessity, for the preservation of the ship or residue. If driven into a port of necessity he may sell the cargo, if perishable. So he may sell a part of the cargo, or hypothecate the ship, cargo, and freight, for repairs, the payment of salvage, or ransom, to enable him to perform the voyage. So, in a case of urgent necessity, he may sell the ship. He may prosecute in his own name suits for injuries done to the ship or cargo, and may appear, defend, and interpose claims in all suits instituted against the ship and cargo. In short, his powers seem adequate to any occasion for the preservation of the ship and cargo. In this court, his authority to appear and defend the ship and cargo against claims of salvage, and to receive their proceeds when sold, has been constantly recognized and acted upon, with but few exceptions, hereafter noted. But these extraordinary powers are conferred upon the master, not for his advantage, but the owners'; not to enable him to destroy, lose, make money out of, or embezzle, the cargo, or any part of it, but to preserve and safely keep

it for the owners. If he become incapable of properly exerting his authority, or exert it in direct hostility to the interests of the owners of the property committed to his charge, the end for which it is conferred is defeated, and instead of being the preserver he becomes the destroyer. Suppose that in the progress of a voyage the ship be wrecked, and the cargo and materials be saved, and brought into some intermediate port, and attached, libelled, and sold for salvage, and the master appear and claim, as the agent of the absent owners, the residue of the proceeds of the sale after payment of salvage, and, in the progress of the examination of the claim of salvage, it satisfactorily appear to the court that the wreck of the ship was produced by the voluntary and barratrous act of the master, or that he had colluded with the salvors to increase the amount of their salvage, or had accepted gifts and gratuties from them to abandon the property to an exorbitant claim of salvage, or had been detected in making large embezzlements of the cargo, or had been guilty of any other gross fraud or dereliction of duty, or had suddenly become insane, or, neglecting his duties, had remained for weeks stultified and stupefied with liquor, or had otherwise become unfit to have the charge of large amounts of money; can it be pretended that, in these and like cases, it is not the duty of the court, upon its own mere motion, to refuse to restore the proceeds of the cargo and materials to the master, and to take measures to secure them to the persons interested? Shall the court, because he is clothed with authority to receive the proceeds for their safety and preservation, and for the use of the persons interested, recognize his authority as binding on it, when a strong presumption arises that, if once possessed of them, he will lose, squander or embezzle them? I think the true rule to be adopted in such cases is that when the circumstances are such that, if known to the owners of the property, they would unhesitatingly revoke the master's authority, the court is bound, in justice to them, to regard his authority as revoked, and treat it accordingly. It appears to me that a position so just, and in this court so necessary to be maintained, in order to protect the interests of shippers residing in distant and foreign countries, needs not to be fortified by authority cited from the text-books or reported cases. It is conceded that it would be difficult to procure such authorities. The question has probably never arisen in any court but this, as no other court within my knowledge is situated as this is. But it has arisen twice in this court within a few years. In the case of The Isabel [Case No. 7,098], decided in 1840, this court refused to restore to the master the proceeds of the sale of the brig and cargo, although the brig and cargo both belonged to foreigners. In that case the court was satisfied from the evidence before it that the brig had been voluntarily wrecked by the master, and that the strong inducement to that act was the possession of the very proceeds in question. The proceeds were subsequently paid to the owners, on proof of their interest. In the case of The Pequot [unreported] the proceeds of the sale of the cargo were in like manner withheld from the master, the circumstances of the case being such as to induce a strong presumption that the loss of the vessel was the result of a preconcerted arrangement. If the position above assumed be sound, then I know of no court in which it ought to be more inflexibly adhered to than this, when I consider the large amount of property annually shipwrecked on this coast, and brought within its jurisdiction by suits for salvage and recur to repeated instances of the barratry of masters; their collusion with the wreckers, and other persons whose interests are antipodal to the interests of the owners of the property committed to their charge; their gross frauds and derelictions of duty,—I think it peculiarly incumbent on this court to exercise its full powers, and to watch over, and guard with its panoply, the interests of the betrayed and unknown owners. I cannot doubt that the present case is within the rule above laid down, and that the owners, if they knew the circumstances, would unhesitatingly revoke the master's authority. Of course, the master's claim to receive the proceeds of the sale of the cargo and materials must be disallowed. The proceeds must be paid only to the owners, or their agent appointed to receive them.

[From the decree of the superior court, Hall, master, appealed to the court of appeals of the territory of Florida, where the following opinion was delivered:]

BRONSON, District Judge. This cause comes to this court on an appeal from the decree of the superior court of the Southern district, sitting in admiralty. The original cause in the court below was instituted by a libel for salvage. The ship North America (Hall, master), bound from New York to Mobile, on the 23d November, 1842, ran ashore upon the Florida reef, where she remained until the night of the 26th November, when she bilged, and was finally lost. George W. Carey and his associates, licensed wreckers of Key West, saved the cargo and materials of the ship, and brought them into that port, and libelled and attached them for salvage. Hall, the master of the ship, appeared on behalf of the absent owners, and answered the libel, and claimed, in his capacity of master, the surplus of the proceeds of the sale of the property saved after payment of the salvage. The superior court decreed salvage to the libellants, but refused to restore the residue of the proceeds to Captain Hall, and ordered "that the claim of G. S. Hall to have the

residue of said proceeds and specie restored to him be disallowed, and that the same be kept deposited with the clerk of this court until further order, and that the clerk cause a notice to be published in one of the commercial newspapers printed at Mobile, advising all persons interested in said proceeds to present their claims and make proof of their interest to this court without delay, and as they may be advised." It is from this portion of the decree that Captain Hall appeals, and now asks of this court to decree to him, for the benefit of the owners, or whoever may be interested, the residue of the proceeds withheld from him by the decree of the superior court.

It appears that, when the ship North America struck on the reef where she was lost, she had on board two boxes of specie, one containing about $965 in silver, and the other said to contain $10,000 in gold. The box of silver was saved by the wreckers, but the box of gold was nowhere to be found; it was lost or missing, and neither the captain nor the sailors can give any account of it. The salvors, in their libel (with the view either of claiming salvage on this gold, or perhaps to exculpate themselves in advance from any suspicions which might rest upon them in relation to it), allege that they were not able to find this box of gold, that it never came to their possession, and that they have no knowledge of it; and they charge that Captain Hall himself either had taken the box, or knew where it was, and they propound to him certain interrogatories on that subject. These interrogatories were badly or inartificially drawn, and evasively answered, but Captain Hall, both in his answer to the libel and the interrogatories, denies all knowledge of the box, and says, in substance, that he neither has it, nor knows where it is, but makes no charges against any person in respect to it. He admits that the box was on board, and stowed in the run of the ship, when she struck on the reef. Much evidence was given on this subject in the court below, and although the trial or hearing of a cause in admiralty on appeal is de novo, and new allegations may be made and new proofs adduced, yet the hearing in this court has been had on substantially the same allegations and proofs as in the superior court. It is unnecessary, however, now to detail this evidence more particularly, but for the present it is sufficient to say that the proofs were such in the court below as to satisfy the judge there that no blame or suspicion attached to the salvors; but he also came to the conclusion that Captain Hall himself had either embezzled the box, or disposed of it with some fraudulent intent towards the owners or underwriters, and, acting upon that supposition, he refused to restore to him the proceeds in question. In the opinion pronounced in the court below the judge laid down the rule that where a vessel or cargo is libelled at some intermediate port on its voyage, and on the hearing (the captain having intervened, and claimed the restoration of the ship or cargo or residue) facts and circumstances are disclosed in relation to the master's misconduct which, if known to the owners, would induce them unhesitatingly to revoke his authority, then the court is bound, in justice to them, to consider his authority as revoked, and to treat it accordingly.

Without giving an unqualified assent to the rule thus laid down, this court have no hesitation in saying that when a vessel and cargo are attached in admiralty, at the suit of salvors or others, at a place distant from the residence of the owners, and the master intervenes, and claims their restoration to him, or the restoration of the proceeds, as the agent in law of the owners and others interested in the property, and it appears in evidence that he has been guilty of an embezzlement of any of the cargo, or has fraudulently colluded with salvors, or has barratrously run his vessel ashore, or has done, or omitted to do, any other act, in relation to the property under his care, involving gross violation of his duty, and not originating in ignorance, mistake, or error, but indicating a reckless depravity or fraudulent intent, inconsistent with his duty and the safety of the property confided to his care, the court may and ought to withhold from him the property under its control.

There can be no doubt that under circumstances of emergency or necessity the master of a vessel acquires a superinduced authority or agency over the vessel and cargo fully adequate to such emergency or necessity, and, in the absence of the owner or supercargo, he is vested by law with every power and authority for their safety and preservation. He may in his own name prosecute suits for injuries done to either the vessel or the cargo while under his care, and may appear—and indeed it is his duty to appear—and defend all suits instituted against either, and claim their restoration to him for the benefit of the persons interested. He may also adjust average, and do many other things in behalf of the owners of the ship and cargo requiring very plenary powers and large authority, and indeed he has a special or qualified interest in the property under his care that is valid as against all the world except the true owner. Whether this authority over or qualified interest in the ship and cargo be deemed to be vested in him by operation of law, as necessary to enable him fully to protect the property and accomplish the purposes of the voyage, or as conferred upon him by the express or implied assent of the owners of the ship and cargo for the like purposes, is immaterial; the intent or purpose for which this power and authority or interest is given or deemed to be conferred is still the same,—it is to enable him to preserve the ship and cargo for the benefit of all concerned, and bring his voyage to a successful termination. If, then, instead of exerting his

authority with the view to accomplish the end for which it was given, he fraudulently exerts it to defeat that very end,—if he willfully attempts to destroy the property under his care, or delivers it up to pirates or marauders, or corruptly colludes with salvors, and conspires with them to abandon the defense of the property, and, by fraud upon the court, to obtain a judicial sanction of an unwarrantable amount of salvage, or if he otherwise traitorously abandons the interests of those whose agent he is in law, and basely attempts to cheat and defraud them of their property, or permits it to be done,—the end for which his authority is given or agency conferred is defeated. Such acts amount to an abandonment of his agency, and in such cases the same law which, ex necessitate, confers the authority upon the master, or recognizes the existence of it as derived from the assent of the owners, abrogates and supersedes it.

The right of an admiralty court to withhold from a master on its own motion, the proceeds of his ship and cargo, and to treat his authority as superseded, under the circumstances above indicated, by no means implies the right of the judge to turn knight errant in defense of the rights and interests of the commercial world, or travel out of his appropriate sphere, and go on a voyage of philanthropy, to seek for wrongs and injuries to be redressed, or to constitute himself the unsolicited avenger of every act of fraud and knavery committed within his jurisdiction or upon the high seas; but the doctrine above advanced merely requires of him a very simple and obvious duty in respect to property of absent owners which may be brought into court, and if the parties to such knavery, or any of them, come into a court of admiralty as parties litigant, and if the property which is the subject-matter of such fraud is brought within the immediate jurisdiction of admiralty judge by attachment, and suit properly instituted, the court then becomes the custodian of such property, and as such is bound to see that it is not delivered up to knaves and harpies whose only object is to defraud the true owners, and whose only motive in committing the fraudulent acts which called into exercise the jurisdiction of the court may have been to acquire the possession of the very property in question, or the proceeds of it, by a judicial sanction obtained by fraud and imposition, and although this case, and the rule now laid down as applicable to such cases, may be without precedent and unheard of in admiralty jurisprudence, yet the principle is by no means without authority, and, if it were, still the reason of the rule which this court are disposed to adopt is founded so deep in the immutable principles of justice—in the dictates of common honesty as well as the promptings of common sense—that no reasonable hesitation could be indulged in. The case of U. S. v. La Jeune Eugenie [Case No. 15,551], and particularly the opinion of the judge in that case, page 460, plainly recognizes and sanctions the principle above laid down, and the right of the court, under such circumstances, to retain the proceeds for the true owners.

It is conceded that in the ordinary course of proceedings, when the libel is dismissed, or the libellants' claim is satisfied, a decree of restitution to the claimant, on proof of his interest, naturally follows; and it is equally true that when this plain course of proceedings is departed from the court becomes involved in difficulties and embarrassments of a delicate and responsible character.

In the present case, Captain Hall claims that the residue of the proceeds in question, which, in contemplation of law, have followed the appeal to this court, should be restored to him. No person appears to resist his claim. Apparently (as is said), it is a suit without parties, and but for the consent of Captain Hall the hearing would have been simply on the libel and answer, and without proof, and, if he himself had not adduced before this court the testimony taken in the court below, there would have been no evidence of the abstraction of the box of gold, and the proceeds might well have been restored to him without argument. Thus far the persons really interested have not appeared in this matter, and, in its efforts to preserve these proceeds for the true owners, the court is brought to appear as a kind of party to a proceeding pending before it; but this is by no means a proceeding so anomolous as has been supposed; a court of equity may be, and frequently is, in the same situation,—particularly when an ex parte application is made for a fund in court by a party claiming a right to it, but whose claim the court might believe to be founded in fraud or wrong.

Another inconvenience was strongly urged in the argument of this cause, which would result from a departure from the plain and ordinary course of proceeding, of restoring to the master the residue of the proceeds in court after payment of salvage, and other claims thereon. It was this: that when, as in the present case, there are various persons severally interested in the proceeds, and they are withheld from the master by the court, the labor and difficulty of adjusting and fixing the respective portions which each is entitled to receive is devolved upon the court. The court is converted into a sort of broker, to look up, examine, and adjust the various claims upon the proceeds, in the shape of commissions, wharfage, storage, labor, seamen's wages, notary public fees, and finally to adjust and fix the various items of expense chargeable to each shipper, or to adjust average. This, however, is an argument ab inconvenienti merely, and might have weight with an indolent judge,

or one who eschews labor or responsibility, but is by no means entitled to much consideration in determining the principle involved as to the power and duty of the court.

Nor have this court been inattentive to other considerations that were suggested in the argument at bar, as that the decree is not in conformity to the pleadings or issue, and the dangerous latitude to which such powers might be carried by corrupt judges, but notwithstanding all the seeming inconveniences and apparent inconsistency of the court's appearing as a kind of party to such a controversy, we are still of the opinion that it may and ought, in the cases before mentioned, to withhold the proceeds from the master. Suppose, in a case of salvage, the master and salvors collude to defraud the owners and underwriters, and this fact clearly appears on the hearing of the cause, it would be the duty of the court to amerce all the parties in costs and damages, refuse the salvage claimed, and preserve the property for the true owners. It would be asking too much of any court to allow itself to be used, and its records to be polluted, in working out a judicial sanction to the grossest iniquity and fraud, and when the fraud was detected, and the parties arrested in their proceedings towards its consummation, it would be singular justice indeed for the court to give up property in its custody to one of the parties in the transaction, when the court should know that such party claiming it had defrauded, or was endeavoring to defraud, the true owner of the very property in question. Still the active and unsolicited interference of a court of admiralty in cases brought before it is to be indulged in with great caution, and the facts and circumstances which call for its volunteer interference should be very strong.

The ability and zeal with which this cause was argued by Captain Hall's counsel on the questions of law involved in it seem to call for this expression of the opinion of this court on the main question as to the powers and duty of the court below. It will be seen that, could we entertain the same opinion as that entertained by the judge of the court below in respect to the facts or the testimony touching Captain Hall's conduct, we should, in the main, concur with him. Looking at the record and the facts before this court, we do not think they warrant the conclusion that Captain Hall has embezzled this box of gold, or that he has been guilty of that gross fraud in relation to its safe-keeping which, upon the showing before us, would justify us in coming to the conclusion that he was morally unfit and disqualified to have the residue of proceeds restored to him, and that his authority should be considered as revoked. In short, without attempting to collate or compare or explain the testimony, we deem it sufficient to say that, though the facts proved may well raise a suspicion, yet they are not of a character sufficiently conclusive to justify the withholding the residue of the proceeds in question, and they must therefore be restored to him.

It is therefore ordered, adjudged, and decreed that the residue of the proceeds of the sale of the cargo and materials of the ship North America, now in the registry of the superior court for the Southern district, and subject to the order of this court, after deducting the costs and expenses of this suit, and the charges upon said proceeds allowed in said superior court, be paid to Captain G. S. Hall, master of said ship, for and on account of whom it may concern.

Case No. 10,314.

The NORTH AMERICA.

[5 Ben. 486.] [1]

District Court, E. D. New York. Jan., 1872.

SEAMAN'S WAGES—FIREMAN—INJURY ON BOARD SHIP—MEDICAL TREATMENT ON SHORE.

1. A seaman injured while in the service of the ship is entitled to medical treatment at the expense of the ship.

[Cited in Longstreet v. The R. R. Springer, 4 Fed. 672.]

[Cited in Scarff v. Metcalf, 107 N. Y. 216, 13 N. E. 797.]

2. A fireman on board a steamer is a seaman.

3. A fireman shipped for a voyage from New York to Rio Janeiro and back. When a few days out from New York, he injured one of his arms, while in the discharge of his duty, so as to be unable to work. When the ship arrived at St. Thomas, he went to a hospital, and remained there under surgical treatment till the ship returned, when he went on board and came home, doing no work. He was sent to the hospital on the judgment of the officers of the ship, as well as his own. The ship paid his expenses at the hospital, without consulting him, and they amounted to more than his wages for the voyage. *Held*, that he was entitled to recover wages for the whole voyage.

[Cited in Longstreet v. The R. R. Springer, 4 Fed. 672.]

In admiralty.

James K. Hill, for libellant.

Geo. P. Andrews, for claimants.

BENEDICT, District Judge. This action is brought to recover wages for a voyage from New York to Rio Janeiro and back. The libellant was shipped as a fireman, and, when a few days out from New York, while in the discharge of his duty, was so injured in one of his arms as to be unable to work. Upon the arrival of the steamer at St. Thomas, on the voyage out, he went ashore to a hospital, and there remained under surgical treatment until the steamer touched again on the voyage home, when he went on board and came home, doing no duty however, and being still unable to do any, because his arm was not

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

yet entirely well. He claims in this action wages for the whole voyage.

On the part of the steamer it is contended, that there was a medicine chest on board, and that a competent doctor was attached to the ship, and that the libellant could have been properly and cheaply treated on board the ship, but that he demanded to be sent to the hospital at St. Thomas, and was sent there upon his demand alone; that his expenses at the hospital were paid by the steamer, and amounted to more than his wages for the whole voyage, wherefore her owners insist that they are not liable to him for any sum whatever.

The maritime law, as declared ages ago (Laws of Oleron), and as still declared (Pars. Mar. Law), casts upon every ship-owner the obligation to provide suitable care, medicines, and medical treatment, including nursing, diet and lodging, for any seaman who becomes sick, wounded or maimed in the service of the ship. And the rule applies to the case of this libellant, who, although a fireman, is a seaman within the meaning of the rule. Whether in any case this obligation can be properly discharged, by retaining the seaman on board the vessel, depends upon the facts of the particular case.

In the present instance, if it be true that the doctor attached to the ship could have properly treated the case of the libellant on board the ship, I think the small attention which the wound received, and the condition in which the arm remained up to the time of the arrival of the steamer at St. Thomas, being very painful and doing badly—the fact, that in reality the bones were broken, although not discovered to be so by the ship's doctor—the fact that the man was of no use on board, but the contrary, and the evidence of the conversations of the officers and of the man warrant the conclusion that the libellant went to the hospital, as much upon the judgment of the officers of the ship as upon his own, and for the convenience of the ship. At the time the libellant went to the hospital, no suggestion was made to him that he could be cured on board, or that the expenses of the hospital would be charged to him. He was received at the hospital as a ship's patient, on the understanding that he was there at the expense of the ship, and the hospital charges were paid by the ship without consulting him. The circumstances indicate that, in the opinion of the officers of the ship, the obligation of the ship to the libellant, in respect to his cure, could not, in this instance, be properly discharged by keeping him on board. Indeed, I should feel unwilling in any case to charge a seaman with hospital expenses ashore, incurred in curing an injury sustained in the discharge of his duty, unless it be made to appear that in a case where the seaman could be properly treated on board, he went into hospital against the expressed judgment of the master of the ship, and with notice that he would be charged with the expenses incurred in the hospital.

In the present case, I am of the opinion that he cannot be charged with those expenses.

The act of 1790 (chapter 29, § 8 [1 Stat. 134]), if it has effect in any case to change the responsibilities of the ship as fixed by the maritime law (The George [Case No. 5,329]), has no effect here, as the present is a case where surgical aid, and not medicine, was necessary (Davis, J., 1 Sumn. Append. p. 595).

The libellant is accordingly entitled to a decree for wages during the voyage, at the rate of wages mentioned in the shipping articles.

NORTH AMERICA, The (COVERDALE v.). See Case No. 3,289.

NORTH AMERICA, The (HERSEY v.). See Case No. 6,429.

NORTH AMERICA, The (PERU v.). See Case No. 11,017a.

NORTH AMERICA, The (THAIN v.). See Case No. 13,853.

Case No. 10,315.

NORTH AMERICAN INS. CO. v. WHIPPLE.

[2 Biss. 418;[1] 3 Chi. Leg. News, 141.]

Circuit Court, N. D. Illinois. Jan., 1871.

EQUITY—REFORMATION OF INSURANCE POLICY.

1. A court of equity has power to reform and cancel an insurance policy issued by mistake for a greater length of time than was intended by the parties.

2. Circumstances stated under which a policy will be cancelled even after a loss has occurred.

This was a bill to amend and reform an insurance policy issued to the defendant on the 22d of October, 1864, and to enjoin the prosecution of a suit at law upon it. The defendant on that day called at the office of B. W. Phillips & Co., agents for this and several other insurance companies, asking for insurance on his stock of goods in Chicago, for two months, which insurance was apportioned among the different companies represented by Phillips & Co., of which the complainant took $15,000. The application was filled out in due form, for the period of two months, in the presence of Whipple, and was the memorandum used by the policy clerk in making out the policies; the total premium paid by the defendant was $60, which was proved to be the regular rates for two months' insurance in the respective companies for the amounts insured by them; wherever any record of the policy appears on the books of the insurance agents, it appears as a two-months policy. The policy clerk who filled out the policy testified that he made a

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

mistake in making it out, by filling out the policy to run until the 22d of December, 1865, instead of two months, according to the memorandum of application handed to him. The stock of goods was totally destroyed by fire on the 16th of December, 1865, and the defendant claimed that the insurance company was liable to him, and had commenced suit to recover the amount of his policy. The defendant's answer, the oath having been waived, insisted upon the validity of the policy, and that it was meant to be issued for fourteen months.

Goodwin, Larned & Towle, for complainant.

E. A. Storrs, for defendant.

BLODGETT, District Judge.[2] It is alleged, in substance, that the firm of B. W. Phillips & Co. was, at the time of the issue of said policy, and had been for some time previous thereto, agents in the city of Chicago for the complainant and several other insurance companies. On the said 22d day of October, 1864, said defendant applied to said firm for sixty days' insurance, to the amount of $40,000 on their said stock in trade, which amount was distributed by said firm among the various companies for which they were acting as agents, in doing which, $15,000 of said amount was allowed to complainant, and the policy in question issued therefor. But it is alleged that a mistake occurred in the making out of said policy, so that the same, instead of insuring the defendants for sixty days, as was the intention and meaning of the parties at the time, insured them for the term of fourteen months, or until the 22d day of December, 1865. The bill further alleges that a fire occurred in the store of defendant on the 16th day of December, 1865, totally destroying the stock of goods in said store, and that defendant now claims to hold complainant for said loss, to the extent of said $15,000 policy, and have commenced suit at law to recover the same. The bill prays that said contract of insurance may be so reformed and amended as to express the real intent of the parties, and that the further prosecution of said suit may be enjoined. The defendant answers without oath (answer under oath being waived by the bill) and insists that the policy was, in fact, intended, as it reads, to be a fourteen month policy, and deny that there is any mistake in the policy, or that the same should be in any respect reformed or changed. The answer also admits that the said policy was a part of the $40,000 applied for on the 22d of October, 1864, but denies that all said policies were made or intended to expire at the same time, and insists that said policy was in full force at the time of said fire, and now constitutes a valid right of action against the complainant.

[An examination of the authorities leaves no room to doubt the power of a court of equity to correct mistakes of the character alleged in this case when the allegations of the bill are fully sustained by the proof. In [Bradford v. Union Bank of Tennessee] 13 How. [54 U. S.] 66, Judge Nelson, in delivering the opinion of the court, says: "One of the most common class of cases, says Judge Story, in his Equity Jurisprudence, in which relief is sought in equity on account of a mistake of facts, is that of written agreements, either executory or executed. Sometimes by mistake the written agreement contains less than the parties intended. Sometimes it contains more, and sometimes it merely varies from their intent by expressing something different in substance from the truth of that intent. In all such cases, if the mistake is clearly made out by proof entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties." See, also, Henkle v. Royal Exch. Assur. Co., 1 Ves. Sr. 317; Hunt v. Rosmanier, 1 Pet. [26 U. S.] 13; Worden v. Williams, 24 Ill. 75; Ballance v. Underhill, 3 Scam. 459; 23 N. Y. 359; 12 Eng. Law & Eq. 178; 10 Fost. (N. H.) 193; 10 N. Y. 486; 1 Paige, 279; 8 Wend. 166. The answer in this case, not being called for under oath, is a mere pleading, and has no effect as evidence.

[The proofs taken in the case show that on the 22d of October, 1864, R. M. Whipple, one of the defendants, called at the office of B. W. Phillips & Co., complainant's agents, and asked for $40,000 insurance on the stock of goods of said firm, in their store, at 226 and 228 Lake street, for two months; that said Phillips & Co., being agents for several other insurance companies besides complainant, apportioned said risk as follows: Continental Insurance Co., of New York, $10,000; Equitable Insurance Co., of Chicago, $5,000; Market Insurance Co., of New York, $15,000; North American Insurance Co., of New York, $15,000. Mr. Davis, a clerk, at that time, for Phillips & Co., filled up an application in due form for the $10,000 allotted to the Continental, for two months, and in the margin noted the amount allotted to each of the other companies, to make up the $40,000. This was done in the presence of Whipple, and was the memorandum used by the policy clerk to make out the policies from. The total amount paid by Whipple as premiums on all these policies was $60, distributed as follows: North American Insurance Company, $22.50; Continental, $15; Market, $15; Equitable, $7.50; which is proven to be the regular rates charged for two months' insurance in the respective companies for the amounts insured by them. It is also shown that all the books of said Phillips & Co., in which any record of said policy was kept, show it to be a two months' policy. H. A. Beach, who was the policy clerk who filled out the policy from the application made by Barrett, testifies that he

[2] [From 3 Chi. Leg. News, 141.]

made a mistake in the policy, and, instead of making it out for two months, according to the memorandum application handed him by Barrett, made it to run until the 22d of December, 1865.] [2]

It is easy to see how, in the filling up of printed blanks, a mistake like that alleged by the complainant might happen; and the policy clerk says that it occurred from the fact that he was accustomed, in the majority of instances, to fill up yearly policies. All the other policies were made out for two months, that is they expired on the 22d of December, 1864, instead of the 22d of December, 1865.

This is not contradicted by the defendant. Defendant himself, who personally procured this insurance, has no recollection, or does not testify to any, in regard to what transpired at the time he applied for the insurance. He admits that he obtained the insurance at the time mentioned, but does not profess to remember the time the policies were to run, from anything he can now recall of the transaction. It is shown in the proofs, and I presume it would be taken notice of without proof, that fourteen months is an unusual time for the life of an insurance policy. The usual time is two, three, four, six, and twelve months, and if, for any reason, the defendant had had occasion to apply for a policy so much out of the usual course of business, it would have made some impression upon his memory and that of the clerks and agents of the insurance company who participated in the transaction. So, also, the fact that only so small an amount was paid for a policy having so long a time to run would seem to be a circumstance calculated to excite attention and impress itself upon the memory. It is true that the defendant testifies that he afterwards sent his policies to the insurance agents to have them looked over and mistakes corrected; but both the agents deny that they ever saw this policy, and assert positively that they supposed the same had expired on the 22d of December, 1864, and had so entered the same on their books, and so informed complainant, and had no knowledge that the policy in question was claimed to be in force, until after the fire.

Under the evidence in this case I can but conclude that the substantial allegations in the bill are made out by the proofs, and that the complainant is entitled to the relief prayed.

Decree accordingly.

NOTE. If by fraud or mistake the terms of the order for insurance have been departed from in the policy, the court will consider the order as containing the contract between the parties, and variance from the order, unless contradicted by the proof, would be evidence of mistake. But the order can only be resorted to, so far as it varies from the policy, and in all other respects the policy will govern. Delaware Ins. Co. v. Hogan [Case No. 3,765]; Collett v. Morrison, 9 Hare, 162.

If from mistake, the policy has been so framed, as not to correspond with the previous agreement of the parties, the error may be corrected, and the policy reformed in a court of equity; but this equitable power of remodeling a written agreement, is wisely exercised with extreme caution, and only upon the clearest evidence. To justify the remedial action of the court, the existence of the mistake, if positively denied by the insurer, must be established by proof morally irresistible. 1 Duer, Ins. p. 71.

A court of equity is the proper tribunal to reform a policy, but the evidence for this purpose must be very clear. Henkle v. Royal Exch. Assur. Co., 1 Ves. Sr. 317.

If a policy, when drawn and received, does not correctly express a previously concluded agreement for insurance, which it was designed by both parties to execute, equity will reform it. Oliver v. Mutual, etc., Ins. Co. [Case No. 10,498].

There cannot be any doubt that a court of equity has authority to reform a contract, where there has been an omission of a material stipulation by mistake. A policy of insurance is within this principle. But a court ought to be extremely cautious in the exercise of such an authority. It ought to withhold its aid where the mistake is not made out by the clearest evidence. Andrews v. Essex, etc., Ins. Co. [Case No. 374]; Phoenix Fire Ins. Co. v. Gurnee, 1 Paige, 278.

In the above cases the loss had occurred before bill filed.

[2] [From 3 Chi. Leg. News, 141.]

NORTH AMERICAN LAND CO. (GILMORE v.). See Case No. 5,448.

NORTH AMERICAN STEAMSHIP CO. v. LORILLARD. See Case No. 12,333.

NORTHAMPTON INSURGENTS, TRIAL OF. See Cases Nos. 5,126 and 5,127.

NORTH BENNINGTON BOOT & SHOE CO. (ODORLESS RUBBER CO. v.). See Case No. 10,438.

NORTH BRITISH, ETC., INS. CO. (JOHNSON v.). See Case No. 7,400.

Case No. 10,316.

The NORTH CAPE.

[6 Biss. 505; [1] 8 Chi. Leg. News, 121.]

District Court, N. D. Illinois. Jan., 1876.

City Tax against Vessel not Duty of Tonnage—Jurisdiction of Admiralty — Assessment against Vessel by Name — What Constitutes Valid Assessment and Warrant — Secret Ownership.

1. The assessment of a vessel owned in a city, by the city assessor, for city taxes, is not a "duty of tonnage" within the meaning of Const. U. S. art. 1, § 10, cl. 1.

2. A court of admiralty has jurisdiction to try the question of unlawful seizure of maritime property for taxes or duties.

[Cited in Haller v. Fox, 51 Fed. 299; Re Fassett, 142 U. S. 480, 12 Sup. Ct. 298.]

3. It is not a valid objection that the assessment and warrant are against the vessel by name and not against the owner.

4. The owner not having listed the vessel for taxation as required by law, an assessment by the assessor, showing the name of the ap-

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

parent owner, the description of the property, and its valuation, is sufficient to found a legal warrant. It is too late for the owner to object after the warrant has been issued.

5. An assessor is not required to look into the secret ownership of personal property, but may assess it against the apparent owner by possession or muniment of title.

This was a libel by Jacob Johnson and others against the schooner North Cape, George Von Hollen and the city of Chicago, for possession of the schooner North Cape. The admitted facts are that said schooner was on the 1st day of May, 1874, owned by the libellants, Jacob Johnson, Spier Amundson, and Nels Peterson—Johnson owning one-half, and the others each a quarter interest—Johnson and Amundson residing in this city, and Peterson at Lake View. Said vessel was registered, enrolled, and licensed under the laws of the United States in the office of the collector of the port of Chicago, in the name of Johnson, as owner, and was engaged at and since that time in the business of commerce upon the navigable waters of the United States, between the port of Chicago and ports of other states, being a vessel of over twenty tons burden. Between the 1st of May and the 1st of July, in the year 1874, said vessel was assessed by the assessor of the city of Chicago at the valuation of $7,000, said assessment being entered on the assessment book in the following form:

A complete list of all the taxable personal property of the South division of the city of Chicago, Ill., according to the assessment roll, as returned or revised by the board of assessors for the year 1874.

List of Vessels Registered in this District and Not Returned.

Name of Vessel.	*Name of Owner.*	*Valuation.*	*Tax.*
North Cape.	Jacob Johnson.	$7,000	....

By an ordinance duly passed by the common council of the city of Chicago, on the 9th day of November, 1874, a tax of eighteen mills on the dollar was levied and assessed for the fiscal year 1874, on all real and personal property in said city, at the valuation thereof shown by the assessment for that year as made by the city assessor. And on the 9th day of December, 1874, a warrant was issued to George Von Hollen, collector of said city, authorizing and directing him to collect said tax. The warrant was in the same form as the assessment as far as regards the description of the schooner and name of owner and her valuation, with an additional column in which the tax was carried out and fixed at $126, which is eighteen mills on her valuation. The warrant was in the usual form and directed the collector to collect the taxes assessed from the persons and property against whom the same was assessed. This tax remaining unpaid, the collector, on the 13th of September, 1875, levied upon and took possession of said schooner under the assumed authority of his said warrant, and held the same by virtue of said levy at the time of the filing of the libel in this case. It was also admitted that the practice of the city assessor in making assessments upon vessel property has been and is to assess the same to the owner or owners with their other personal property when the owners list or return the same to the assessor, but when the owners fail to return or list their vessel property, the vessel is assessed by name in the name of her owner as appears by the register in the office of the United States collector of customs of the port of Chicago.

Magee, Oleson & Adkinson, for libellants.

Francis Adams, Asst. Corp. Counsel, and John C. Richberg, for respondents, the collector and city of Chicago.

BLODGETT, District Judge. It is claimed by the libellants that the levy upon this vessel was void: First, because this is a "duty of tonnage," within the meaning of the third clause of section 10 of the first article of the constitution of the United States. Second, because said assessment and warrant for the collection of said tax are void, for the reason that the assessment is against the vessel itself by name, and the warrant runs against the vessel and not against the owner.

On the part of the respondents, Von Hollen and the city of Chicago, it is urged, by way of demurrer to the libel, that a court of admiralty has no jurisdiction in the case made by the libel and facts in this case, and that the only remedy is to be found in the courts of law.

I do not find that this precise question of jurisdiction has ever been raised and passed upon by the courts of this country or England. At least neither my own examination nor the industry of counsel has discovered any direct authority bearing upon the question. Upon general principles, however, I am of opinion that admiralty has jurisdiction in a case of unlawful seizure of maritime property for taxes or duties. Kent says: "The admiralty possesses authority to decree restitution of a ship unlawfully withheld by a wrong-doer from the real owner. In cases of illegal captures, and of bottomry, salvage, and marine torts, the admiralty courts in this country inquire into and decide on the rights and titles involved in the controversy." 1 Kent. Comm. 371. And the student of this branch of the law well knows that the tendency has been to enlarge the sphere of admiralty jurisdiction rather than to restrict it since Chancellor Kent's time. Admiralty has jurisdiction of all torts upon and injuries to maritime property committed on navigable waters, when actions of trespass on the case would lie if committed upon land on other classes of property. Philadelphia, W. & B. R. Co. v. Philadelphia & H. G. Steam Towboat Co., 23 How. [64 U. S.] 209; Waring v. Clark, 5 How. [46 U. S.] 441–464. So, too, Mr. Justice Story enumerates the following classes of cases as unquestionably falling within the

jurisdiction of the admiralty courts, viz.: "Assaults and other personal injuries; cases of collisions, or running of ships against each other; cases of spoliation and damage (as they are technically called), such as illegal seizures, or depredations upon property; cases of illegal dispossession, or withholding possession from the owners of ships, commonly called possessory suits; cases of seizures under municipal authority for supposed breaches of revenue or other prohibitory laws; and cases of salvage." 3 Story, Const. 530, § 1663. [Conk. Adm. 21.] [2] In the case of The Tilton [Case No. 14,054], it was said by the same learned authority, that suits in admiralty, touching property in ships, are either petitory suits, in which the mere title to the property is litigated and sought to be enforced, or they are possessory suits, to restore the owner to the possession. The same point was held by the same learned judge in De Lorio v. Boit, [Id. 3,776]. And it is a fundamental principle that admiralty has jurisdiction of petitory and possessory actions to recover ships when replevin would lie at common law. Ben. Adm. 164 & 275.

Concluding, then, that this is a proper case for admiralty jurisdiction, the question is, does the case made entitle the libellants to the relief prayed, or to any relief in the premises? The first point made by the libellants is, that the tax in question is a "duty of tonnage" laid specifically upon this vessel by the city of Chicago, and as such void, because not laid with the assent of congress.

What is the "duty of tonnage" meant to be prohibited by the constitution of the United States? It is a well known historical fact that nearly all European states and divers free cities and ports were in the habit of levying a tax upon all vessels entering their ports, in proportion to their tonnage. And this was what was known to the maritime and commercial world at the time of the adoption of the constitution as tonnage-tax, or duty of tonnage. The intention of the framers of the constitution was not only to make commerce free between the states, but to prohibit the states from in any manner, of their own will or caprice, interfering with foreign commerce. A tonnage-tax is defined to be "a duty levied on a vessel according to the tonnage or capacity, without reference to where her owner resides. It is a tax upon the boat as an instrument of navigation, and not a tax upon the property of a citizen of the state." The duty of tonnage which the constitution of the United States prohibited the states from levying is any duty or tax on a ship, as such, without regard to the residence of her owner, whether it be a fixed sum upon its whole tonnage or a sum to be ascertained by comparing the amount of tonnage with the rate of duty, when a ship, as an instrument of commerce, is required to pay a duty as a condition to her being allowed to enter or depart from a port, or load or unload a cargo, either upon her tonnage, her property, or as a license to her officers or crew. Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1; Passenger Cases, 7 How. [48 U. S.] 283, 459; Steamship Co. v. Port Wardens, 6 Wall. [73 U. S.] 31; State Tonnage Tax Cases, 12 Wall. [79 U. S.] 204, 212. This tax does not purport to be levied upon this vessel according to her tonnage, but acording to her valuation as property. It is a tax upon this ship as part of the taxable property of the city of Chicago, she being owned and registered here. This tax is not, like a tonnage-tax, imposed upon the ship as such for the privilege of trading or taking shelter in this port, but treats the ship as property subject to a tax in this city.

The question of the liability of property in boats and vessels to be taxed by the state authorities, on valuation, as other property of the state is taxed, has been frequently discussed by the supreme court of the United States, and the power uniformly conceded.

In the Passenger Cases, 7 How. [48 U. S.] 402, the court said: "A state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens." So in the State Tonnage Cases, 12 Wall. [79 U. S.] 212, the court said: "But ships and vessels owned by individuals, and belonging to the commercial marine, are regarded as the private property of their owners, and not as the instruments or means of the federal government, and as such, when viewed as property, they are plainly within the taxing power of the states, as they are not withdrawn from the operation of that power by any express or implied prohibition contained in the federal constitution. Argument, therefore, to show that they may be taxed as other property belonging to the citizens of the state is hardly necessary, as the opposite theory is indefensible in principle, contrary to the generally received opinion, and is wholly unsupported by any judicial determination. Direct adjudication to support that proposition is not to be found in the reported decisions of this court, but there are several cases which concede that such a tax, if levied by a state, would be legal, and no doubt is entertained that the concession is properly made.

"Taxes levied by a state upon ships and vessels owned by the citizens of the state, as property, based on a valuation of the same as property, are not within the prohibition of the constitution, but it is equally clear and undeniable that taxes levied by a state upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the states from levying any duty of tonnage without the consent of congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the

[2] [From 8 Chi. Leg. News, 121.]

state which levies the tax or the citizens of another state, as the prohibition is general, withdrawing altogether from the states the power to lay any duty of tonnage under any circumstances, without the consent of congress.

"Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question, but if the states, without the consent of congress, tax ships or vessels as instruments of commerce, by a tonnage duty, or indirectly, by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess, as every such act falls directly within the prohibition of the constitution.

"Prior to the adoption of the constitution the states attempted to regulate commerce, and they also levied duties on imports and exports, and duties of tonnage, and it was the embarrassment growing out of such regulations and conflicting obligations which mainly led to the abandonment of the confederation and to the more perfect union under the present constitution."

In the light of these authorities I therefore conclude that this tax is not a "duty of tonnage."

I come now for a moment to consider the second objection to this seizure, on the ground that this assessment and warrant are against the ship and not against the owner, and for that reason void. It was conceded on the hearing that ships and vessels are personal property, and such all the authorities define them to be. The law in this state in force at the time this assessment was made required the owners of all personal property to return each year to the assessor a schedule or list of all their personal property subject to taxation, by a certain day, to be fixed by the assessor, and it was the duty of the assessor to fix the fair cash value thereof. Rev. St. Ill. 1874, c. 120, § 24; Id. c. 24, §§ 249, 251-253. The twenty-fifth section of chapter 120 prescribed the form of the schedule, and required, among other things, that it should distinctly set forth in the seventeenth item "every steamboat, sailing vessel, wharf-boat, barge, or other water-craft," etc. And by the thirteenth section of the same chapter it was provided that "all persons, companies, and corporations in this state, owning steamboats, sailing vessels, wharf-boats, barges, and other sailing craft, shall be required to list the same for assessment and taxation in the county, town, city, village, or district in which the same may belong or be enrolled, registered, or licensed, or kept when not enrolled, registered, or licensed."

Here is a plain and palpable duty imposed by law upon the owner of vessel property. It was admitted on the hearing that, between the 1st of May and 1st of July, 1874, a notice was sent to, or served upon the owners of all vessels, as shown by the register of the port, requiring them to list their property as required by law. It is not contended that the interest of these libellants, or either of them, was scheduled in any list of taxable property returned by them or either of them to the assessor. In fact, it is admitted that the only tax assessed upon or against this property is the one now in question. Undoubtedly this vessel, being personal property, should be taxed against some owner. The general theory of our law does not allow of the assessment of the tax on personal property as an independent res or thing, as it may be assessed on real estate under certain circumstances, although there are some features of our later revenue laws which seem to point to the idea that the legislature intended, even in regard to some classes of personal property, like bank shares, capital stock, and vessel property, to tax the thing itself without regard to any personal liability of an owner. But, notwithstanding these incongruities, the general principle running through our law, as it now stands and stood at the time the tax was levied, required the owner of vessel property to list it as personal property for taxation where it was subject to taxation, either by virtue of his residence or the enrollment and registration of the property. It is not necessary that I should decide what would be the duty of the owner of a vessel residing at one place when his vessel is enrolled or registered in another tax district, as it is not claimed that these owners, or either of them, were taxed elsewhere for this vessel, and it is admitted that two of the owners, representing three-fourths of the property, resided in Chicago, and the vessel was registered or enrolled as owned by libellant, Jacob Johnson. Here it is admitted that the owners of this property made no returns of it to the assessor, and the assessor assessed it in the form and manner I have indicated. The assessment and warrant show the name of the vessel and the name of her registered owner, her valuation, and the tax; nor does it appear that Johnson or either of the other libellants made any return of other personal property. The position is, that this is a tax against the vessel, as such by her name—an assessment and warrant in rem, so to speak—instead of an assessment against her owners.

But I differ with the proctors for libellants as to the construction and effect to be given this assessment and warrant. True, the owners might have returned their interest in this vessel in their list of personal property, and if they had done so it should and would have gone into their personal property assessment; but they neglected to do this, and left the assessor to search out this property, fix its ownership, and assess its value as best he could. The assessor has made an assessment in which the name of the owner, the description of the property, and its valuation, all appear. What more is

requisite? and what else could the assessor have done under the circumstances? The warrant, like the assessment, shows the name of the owner, the description of the property, its value, and the amount of the tax. I know of no other legal requisites for a tax warrant; nor does it make any difference, in my estimation, that the description of the property is in the first column to the left hand, and the name of the owner in the second. It seems sufficient if these facts appear on the face of the paper.

This may have been, and, for aught that appears in this case, was, the only property for which Jacob Johnson was taxed in the year 1874. If his property was valued too high, or if he was taxed as sole owner of a piece of property when he was only part owner, the law provides a way in which he could by attending to it in apt time have had the assessment corrected; but it does not lie in his mouth, after neglecting his duty in regard to listing his property, and after allowing the time to pass within which the assessment, as made by the assessor, stood open for correction, to object to the assessment in these particulars; when it was his obvious duty to have made it right in the first instance or had it corrected in proper time.

The policy of our law is that all property shall bear its equal share of the burdens of the state and city government. A court of admiralty is essentially a court of equity, and unless the libellant shows that some plain legal or equitable right has been violated, or is in danger of being violated, relief will not be given in this court. This vessel was subject to taxation by the city of Chicago. She was registered in the name of Jacob Johnson, who was a resident of this city. He must, for the purposes of taxation, be presumed to be the sole owner. It is possible that if Johnson had, while the assessment was subject to correction, appeared before the proper tribunal and shown that he was only half owner, and asked to have the assessment corrected in that particular, it might have been done. But he failed to do this, and there is enough, as I think, upon the face of the assessment and warrant and upon the admitted facts, to show that the tax was properly assessed.

It may be said that Peterson, one of the libellants, and owner of a quarter interest in the property, did not reside in the city of Chicago, but resided at Lake View, and, therefore, his interest could only be taxed where he resided. My answer to that is, that Johnson appeared to be the sole owner of record, and officers charged with the assessment and collection of taxes are not required to look into the secret ownership of personal property. They do their duty when they assess the property against the apparent owners, as shown by possession or muniment of title. Take, for instance, a large wholesale or manufacturing firm in this city. There may be silent partners residing elsewhere, who have an interest in the goods, but the property is here, the firm, as a business entity, is here, and this, therefore, should be, and under the law is, the place of taxation.

I come, then, to the conclusion that the tax complained of in this case is not a "duty of tonnage," and that the warrant under which this vessel is seized and held is so far good as to amount to a justification in this court of the seizure complained of. I do not say that it would be a justification in a court of law, for that question is not before me; but a court of admiralty, like a court of equity, looks into the substantial merits of the controversy, and I find this property subject to assessment in the city, that it was in form so assessed, and a warrant issued to the collector for the collection of the tax, and no reason is shown or made to appear why the tax should not be paid. If the property is taxed in the name of one owner instead of three, it is owing to the negligence of those owners in not returning their schedules, or calling for a correction of the books after the assessment was made. The libel will, therefore, be dismissed with costs.

Case No. 10,316a.

The NORTH CAROLINA.

[Blatchf. Pr. Cas. 44.][1]

District Court, S. D. New York. Aug., 1861.[2]

PRIZE.

Vessel condemned as enemy property.

The ship North Carolina was captured, on the 14th of May, 1861, at sea, off Cape Henry, by the United States ship Quaker City, under the command of Acting Master S. W. Mathew, and was libelled by the United States and her captors, as subject to forfeiture, for violation of the blockade of the Virginia ports, and as enemy's property. On the trial the United States district attorney abandoned all the other charges than that she is the property of enemies. Her master, for himself and other part owners, intervened, and took issue upon the charges, averring that the vessel was owned by him and co-owners in the state of Virginia, and denying that they were insurgents, and asserting that they were true and loyal citizens of the state of Virginia. Her crew also intervene by claim for wages due them for services on board the ship up to the time of capture, amounting to $277.79.

BETTS, District Judge. The test oath made by the master is, that the ship belonged to Norfolk and other ports of Virginia, but no other particulars of ownership are stated, except a partial list of the names of the owners; and, he adds in answer to the fifth prepara-

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

[2] [Affirmed in Case No. 10,317.]

tory interrogatory, that the ship belonged to Harvey & Brothers, of Norfolk, Virginia, and the orphan children of John Gordon, deceased, and John Tanis, and John Foster, and Seth Foster, (the witness,) all the owners being residents of Norfolk but the two last, who are residents of Mathews county, Virginia. The vessel was captured without cargo on board.

It has already been so often ruled by the court, in disposing of the preceding suits, that the hostilities waged by rebels and insurgent citizens of the United States, under the appellation of "Seceding States," or "Confederate States," against the government, laws and constitution of the United States, constitute a condition of public war, and that the rebels levying such war have become enemies of the United States, notwithstanding their allegiance to the mother country, and in public acceptation residents of the state or place waging war, that it is needless to reiterate that doctrine on this occasion. It being considered by the court that the ship North Carolina, when captured by the libelants, was the property of enemies of the United States in open war against them, she is adjudged lawful prize of war, and ordered to be condemned in this suit, with costs of suit.

The decree in this case was affirmed by the circuit court on appeal, July 17, 1863 [Case No. 10,317].

Case No. 10,317.

The NORTH CAROLINA.

[Blatchf. Pr. Cas. 645.] [1]

Circuit Court, S. D. New York. July 17, 1863. [2]

PRIZE—ENEMY PROPERTY.

Decree of the district court, condemning vessel and cargo as enemy property, affirmed.

[Cited in The Amy Warwick, Case No. 341.]

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

[The ship North Carolina was captured by the libelants, and was adjudged by the district court to be lawful prize of war, and was ordered to be condemned, with costs of the suit. Case No. 10,316a. From that decree the owners of the North Carolina appeal.]

NELSON, Circuit Justice. This vessel was captured off Cape Henry, on the 14th of May, 1861, by the steamer Quaker City. Her owners were citizens and residents of the state of Virginia at the time. She has been condemned as enemy property. Decree below affirmed. [Case No. 10,316a.]

NORTH CAROLINA, The. See Case No. 6,-451.

1 [Reported by Samuel Blatchford, Esq.]

2 [Affirming Case No. 10,316a.]

Case No. 10,318.

NORTH CAROLINA v. TRUSTEES OF UNIVERSITY et al.

[1 Hughes, 133; [1] 5 N. B. R. 466; 65 N. C. 714.]

Circuit Court, D. North Carolina. 1871.

JURISDICTION OF CIRCUIT COURT — SUIT BETWEEN STATE AND ITS OWN CITIZENS.

The circuit courts of the United States have not jurisdiction of a case, either at law or in equity, in which a state is plaintiff against its own citizens. The constitution of the United States does not confer such jurisdiction, nor is it conferred by any act of congress. Such jurisdiction is not conferred upon the circuit court in this case by the bankruptcy act of 1867 [14 Stat. 517], because there are other necessary parties than the assignee in bankruptcy, and without such parties the plaintiff could not sustain this suit in any court.

[Cited in Payson v. Dietz, Case No. 10,861; Texas v. Lewis, 12 Fed. 3, 14 Fed. 66.]

[Cited in Gilbert v. Priest, 8 N. B. R. 166; Cogdell v. Exum, 69 N. C. 464.]

[This was a bill in equity by the state of North Carolina against the trustees of University and C. W. Dewey, assignee, and others.]

BROOKS, District Judge. The attention of the court has not been invited to the question of jurisdiction in this case by either the complainant or respondent in their arguments, yet that is a question to be considered in the opinion of the court, and the first properly demanding attention. All the authority vested in the courts of the United States to hear and determine causes arises under the provisions of the constitution of the United States or acts of congress. By the provisions of the constitution the supreme court of the United States is established, and its jurisdiction prescribed directly, and it is further provided that congress shall have power to create or establish inferior courts. Then we think that it necessarily follows that congress has the power to prescribe the jurisdiction of such courts. We are sustained in this view by the opinion in the case of Osborne v. U. S. Bank, 9 Wheat. [22 U. S.] 738, and Sheldon v. Gill, 8 How. [49 U. S.] 448. The second section of the third article of the constitution relates to the subjects or classes of cases declared to be within the jurisdiction or power of the United States courts, and is as follows: "The judicial power shall extend to all cases in law and equity arising under this constitution; the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of

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

the same state claiming lands under grants of different states;" and lastly, "between a state, or the citizens thereof, and foreign states, citizens, or subjects." If the framers of our constitution had proceeded no further, it might be contended with more reason that this suit as instituted comes within the jurisdiction intended to be conferred upon the circuit courts, but, as if to leave no doubt upon the subject, they proceed, in the second clause of the second section of the third article, to enumerate the class of cases over which the supreme court shall have original jurisdiction, and with these we find all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party; and it is further provided that, as to all other subjects included within the jurisdiction prescribed, the supreme court shall have appellate jurisdiction. It may be said that, though original jurisdiction is by this provision of the constitution conferred upon the supreme court, it is not exclusive, but only concurrent with some other tribunal. We think that a fair construction of the language of the constitution excludes such a conclusion, and we are happily sustained in this opinion by the opinion of the court in the case of Gale v. Babcock [Case No. 5,188]. It will be seen that in this case it is decided that the circuit courts have no jurisdiction of a cause in which a state is a party. If more authority should be desired upon this point, we refer to the case of Osborne v. U. S. Bank, 9 Wheat. [22 U. S.] 820, in which it is declared that, in such cases in which original jurisdiction is conferred upon the supreme court, founded on the character of the parties, the judicial power of the United States cannot be exercised in its appellate form. In the case before us the state of North Carolina is complainant, and the only complainant, and it is the character of that party that brings the case within the original jurisdiction prescribed for the supreme court, and consequently, according to the opinion of the court in the case last cited, is excluded from the appellate jurisdiction of that court.

[We hold that it was not intended by any provision of the constitution or the laws to confer jurisdiction on this court in any case involving many thousands of dollars (as in this case) without the right of appeal in the event either party should be dissatisfied with the decision of this court].[2]

Again, in the cases of Martin v. Hunter's Lessees, 1 Wheat. [14 U. S.] 237; Cohen v. Virginia, 6 Wheat. [19 U. S.] 392,—it is decided that, in such cases as draw in question the laws, constitution, or treaties of the United States, though a state may be a party, the jurisdiction of the supreme court is appellate, for in such a case the jurisdiction is founded, not upon the character of the parties, but upon the nature of the controversy. Such cases may be taken by appeal or writ of error from the highest judicial tribunal of a state to the supreme court of the United States.

The great American constitutional judge, in delivering the opinion of the supreme court of the United States in Cohen v. Virginia before referred to, uses this language: "It has also been argued, as an additional objection to the jurisdiction of the court, that cases between a state and one of its own citizens do not come within the general scope of the constitution, and were obviously never intended to be made cognizable in the federal courts. The state tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another state, but not in proceedings by a state against its own citizens. That jealousy which might exist in the first case could not exist in the last, and therefore the judicial power is not extended to the last. This is very true (says this learned judge), so far as the jurisdiction depends upon the character of the parties. If the jurisdiction depended entirely upon the character of the parties, and was not given where the parties had not an original right to come into court, that part of the second section of the third article which extends the judicial power to all cases arising under the constitution and the laws of the United States would be mere surplusage. It may be true that the partiality of the state tribunals in ordinary controversies between a state and its citizens was not apprehended, and therefore the judicial power of the Union was not extended to such cases." The ground, as is seen, upon which the jurisdiction of this court is claimed in this case, depends upon the character of the parties, and not the character of the subject in controversy. All we have said, it will be observed, relates more particularly to the provisions of the constitution, and in regard to the prescribing and the distribution of the judicial power of the United States.

The act of 1789, section 24 [1 Stat. 85], is the first whereby congress undertook to prescribe the jurisdiction of the circuit courts, and we find by the seventeenth section of that act that such courts are vested with original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds a certain sum stated, and the United States are plaintiff or petitioner, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. It is quite clear, we think, that the provisions of this act do not embrace a case in which a state is a party. This question, however, was raised soon after the passage of the act in the case of Gale v. Babcock, before referred to; and in this case it was decided that the circuit court had no jurisdiction between a state and its citizens, or citizens of other states. It was at one time supposed that the constitution

[2] [From 5 N. B. R. 466.]

gave a broader power to the court. But it has been long since settled that the civil jurisdiction of the circuit courts is governed by the acts of congress. Turner v. Bank of North Carolina, 4 Dall. [4 U. S.] 10; McIntyre v. Wood, 7 Cranch [11 U. S.] 506; Kendal v. U. S., 12 Pet. [37 U. S.] 616; Carey v. Curtis, 3 How. [44 U. S.] 245. But the power to entertain this suit is claimed by counsel, for this court, under the provisions of the bankrupt act of 1867. After a careful examination of the provisions of that act, we are of opinion that it was not designed to confer, and does not, in fact, confer, such power. If we could believe that the original jurisdiction conferred by that act upon the circuit courts was as full as or equal, in all respects, to that conferred upon the district courts, we could not regard it as intending to produce so inevitable a conflict with the provisions of the constitution before referred to, limiting and restricting, according to our construction, the original jurisdiction in cases in which states are parties, to the supreme court. We hold that no such jurisdiction as that contended for in this case was intended to be conferred upon this court; and further, if it was clearly otherwise, that any attempt to do so on the part of congress would be ineffectual; for, as has been before seen, the constitution having itself provided that the jurisdiction in such cases should be original in the supreme court, it must be regarded as exclusive of the other courts of the United States, as much so as if the term "exclusive original jurisdiction" had been employed. And this appears to us to be the view entertained by the court in the case of Osborne v. U. S. Bank, before cited.

It has been suggested that there has been greater necessity for the exercise of jurisdiction by this court in this case, because, as is insisted by the bankrupt law, the jurisdiction conferred upon the district and circuit courts of the United States is exclusive, and that no suit by or against an assignee can be maintained in the state courts. We agree that the only jurisdiction actually conferred by that act is with these courts; but it does not follow that an assignee may not sue or be sued in the state courts, and we think that an assignee may sue or be sued in the state courts. If we entertained the opinion that all controversies respecting a bankrupt's estate could only be heard and determined in the district or circuit courts of the United States, we confess that we would express the view we entertain with much more hesitation than we now feel. Let the bill be dismissed.

NORTH CAROLINA (UNITED STATES v.). See Case No. 15,727.

NORTH CAROLINA R. CO. (SWASEY v.). See Case No. 13,679.

NORTHERN BANK OF KENTUCKY v. LABITUT. See Case No. 842.

Case No. 10,319.

The NORTHERN BELLE.

[1 Biss. 529.] [1]

District Court, D. Wisconsin. Sept. Term, 1866. [2]

PERILS OF THE SEA DEFINED — DUTY OF CARRIER AS TO VESSEL—BARGES—OPINIONS OF INSURANCE AGENTS OR SHIPPER NO EXCUSE.

1. A loss by perils of the sea or dangers of river navigation, includes only such as are of an extraordinary nature, or arise from irresistible force, or from inevitable accidents, or from some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence. In taking two loaded barges in a strong wind around a point where the channel was narrow and the water shallow,—but where one barge could have passed in safety,—the carrier is guilty of negligence.

2. The first duty of a carrier by water is to provide a sea-worthy vessel, tight and stanch, and suitable in every respect to the particular service in which she may be employed.

3. Barges, for bulk wheat must be firmly and well built, in the best manner, and of the best materials. It is just as necessary that they should be tight, stanch, and strong, as a ship or any other vessel.

4. Any opinions expressed by agents of the insurance company, or by the shipper, form no excuse. The whole responsibility of the sea-worthiness or fitness of the barge rests with the carrier.

This libel in admiralty was brought for the value of a cargo of wheat, shipped in bulk at Hastings, in Minnesota, on the barge Pat Brady, to be towed by the steamboat Keokuk on the Mississippi river, and delivered at La Crosse, in Wisconsin, in good order, the unavoidable dangers of river and fire only excepted. It is charged in the libel, that the barge was sunk and the wheat damaged, in consequence of the unseaworthiness of the barge, and of the negligence and unskillfulness of the officers and crew of the boat. The answer of respondent alleges, that the barge was tight, stanch and strong, and sea-worthy, and in every respect fit to perform the voyage; that the wheat was carefully stowed in the barge, which was taken in tow by the boat; that when opposite Prescott, the wind was so strong, and blew so hard, that it drove the barge on to a bar, so that the barge stranded on the bar; and while so grounded, and in consequence of the strain and injury thereby received, and the violence of the storm, the barge commenced leaking; that the failure to deliver the wheat at La Crosse was the result of unavoidable dangers of river navigation, and not, in any manner, of default of respondent, or of unseaworthiness of the barge. The boat and barge were used in the business of carrying wheat in bulk.

[See Case No. 7,721.]

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

[2] [Affirmed by circuit court. Case unreported. Decree of circuit court affirmed by supreme court in 9 Wall. (76 U. S.) 526.]

J. H. Van Dyke, for libellant.
J. W. Cary, for respondent.

MILLER, District Judge. A loss by perils of the sea, or dangers of river navigation, includes such losses only to the cargo as are of an extraordinary nature, or arise from irresistible force, or from inevitable accidents, or from some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. If the loss occurs by a peril which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be, in the sense of the phrase, such a loss by the perils of the sea or the dangers of the river, as will exempt the carrier from liability, but rather a loss by his gross negligence. A loss from the effects of storms and tempests, in straining the ship, or causing her to spring a leak, or ship a sea whereby damage or injury is done to the goods on board, are losses perfectly attributable to the perils of the sea; although in a mitigated sense, they may be said to be ordinary accidents. Story, Bailm. § 512, and cases referred to.

It appears from the evidence that the accident occurred in the daytime, and on a warm day in June. The water was so low that the barges had not over three-fourths of a load. The captain and pilot were well acquainted with the bar at Prescott, and knew that it was at that season one of the most troublesome bars in the river on account of low water, and that the turn around the point was very short. The pilot had never met with an accident there. They could have passed in the channel, which was 150 to 200 feet wide, in safety with one barge, and they knew that the wind that was blowing fresh all day, might be stronger at that point. The wind was not a breeze, but enough to make the boat flank some. The wind was not so strong as to require the pilot house to be closed, or to inconvenience the pilot. The accident was not unavoidable. One of the barges should have been taken through at a time. The pilot knew one barge could be taken through safely. He knew the bar, and the course of the wind, and the low stage of water; and with all this knowledge, he backed and attempted to force his heavily loaded boat and two barges through or over the sand bar, at the risk of breaking something. Lines might have been put forward to secure the boat from flanking, and should have been done. If the pilot was running on the starboard side of the channel, as testified by libellant, then he was in fault for not exercising more care and diligence to avoid the accident. The Louisiana, 3 Wall. [70 U. S.] 164–174. The carrier is in the light of an insurer, and must establish the exception in the bill of lading beyond a reasonable doubt. Pressure of the barge against the bar caused her seams to open.

After a thorough examination of the testimony, I am well satisfied that the barge was not of sufficient strength to carry wheat in bulk, safely, particularly at low stages of water. From her age and construction, she was not strong enough to resist the inward pressure of bulk wheat on her sides, and the outward pressure of a tow-boat and a second barge against the sand bar. Carriers on the river of bulk wheat stowed in barges, must have barges well and firmly built, in the best manner and of the best materials. A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a sea-worthy vessel, tight and stanch, and suitable in every respect to the particular service in which she may be employed. It is just as necessary that a barge employed in carrying wheat in bulk, should be tight, stanch and strong, as a ship, or any other vessel. The cargo is liable to damage by wet; and by shifting and settling it presses hard on the walls of the barge. The barge Pat Brady does not come up to the requirements of the law. She was old and slightly built, with knuckles instead of knees. But five weeks prior to the accident in question, by being pressed against something when in tow of the steamboat Keokuk, the seams of this barge opened, and her butts sprung as in this case. Repairs were made on her by putting in some new timbers, but she still remained an old and weak barge, liable to give way at any time. Witnesses who examined her after the repairs, testify that portions of her timbers were entirely decayed. It is quite certain that the barge was not of sufficient strength to resist an effort to plough through a sand bar, or the pressure of short turns on a bar, for the sake of speed, as appears to be the practice of the officers of claimant.

It was the duty of the carrier to see to the sufficiency of the barge. Any opinions expressed upon that subject by agents of the insurance company, or by the shipper, form no excuse. The whole responsibility of the sea-worthiness or fitness of the barge, rests with the carrier, and he is responsible for defects in it. Upon a casual view, the barge may have been thought nearly as good as new after the repairs, but at the same time she is proven to be old and rotten. Claimant has failed to sustain the answer, either as to the sea-worthiness of the barge, or the exception of dangers of the river, and the decree must be for libellant.

This case was carried by appeal to the circuit court, and then to the supreme court of the United States, and the opinion of the latter court affirming the judgment of the district court is published in 9 Wall. [76 U. S.] 526. [See Cases Nos. 7,663 and 5,361.]

As to carrier's duty in providing a sea-worthy vessel, see 928 Barrels of Salt [Case No. 10,272], and cases there cited.

The clause "except the perils or dangers of the rivers or lakes" considered. McArthur v. Sears, 21 Wend. 190.

Dangers of navigation and perils of the sea defined. 1 Pars. Shipp. & Adm. 253; 3 Kent, Comm. 216, and cases there cited.

NORTHERN CENTRAL RY. (JACKSON v.). See Case No. 7,142.

Case No. 10,320.

The NORTHERN INDIANA.

[3 Blatchf. 92; [1] 16 Law Rep. 433, 449.]

District Court, N. D. New York. 1853.

Circuit Court, N. D. New York. Nov., 1853.

COLLISION — STEAM AND SAIL — NEGLIGENCE OF STEAMER — DARKNESS AND FOG — SPEED — CLOSE-HAULED SCHOONER—LOOK-OUT.

1. Running a steamer of fifteen hundred tons burthen at the rate of seventeen miles an hour, along a track frequented by sailing vessels, when it is impossible, in consequence of a thick fog, or the darkness of night, to discern an approaching vessel in time to avoid running her down, is, of itself, conclusive evidence of such gross negligence or recklessness, as to render the steamer liable for all the damages occasioned by a collision between such steamer and another vessel, unless it is clearly proved that those in charge of the other vessel were also in fault.

2. In a night so light and clear as to render that degree of speed justifiable, the fact that a collision with a close-hauled schooner occurred while the latter displayed a plain light, and the signal lights required on the northern and northwestern lakes by the act of congress [9 Stat. 382], is enough to cast upon the steamer the burthen of establishing, by satisfactory evidence, that there was no want of care or skill on the part of those in charge of her.

[Cited in Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 26 Fed. 602.]

3. When a steamer, under a full head of steam, is about meeting a close-hauled schooner in an open lake, their courses being nearly opposite, the duty of checking speed and changing direction devolves upon the steamer alone, and the schooner has the right, and it is ordinarily her duty, to keep her course.

[Cited in The Osprey, Case No. 10,606.]

4. The want of a look-out, detailed and stationed for the constant performance of that specific duty, is, of itself, a circumstance of a strong, condemnatory character, and, in case of collision, exacts from the vessel neglecting it, clear and satisfactory proof that the misfortune encountered was not attributable to her misconduct in that particular.

[Cited in The Ancon, Case No. 348; M'Cabe v. Old Dominion S. S. Co., 31 Fed. 239; The Manhasset, 34 Fed. 419.]

5. The mate, while the officer of the deck, and holding temporary command of a steamer of fifteen hundred tons burthen, is continually liable to be called to the discharge of duties incompatible with the keeping of a constant and vigilant watch during the darkness of the night, and ought not to be relied on for that purpose. For such purpose, he would ordinarily be less reliable than the man at the wheel, when specifically charged with that additional duty; and it is well settled that the wheelsman is not a sufficient look-out for such a vessel under such circumstances.

[Cited in Baltimore & O. R. Co. v. Wheeling P. & C. Transp. Co., 32 Ohio St. 145.]

6. The inside of the pilot-house, on board of such a steamer, is not, in a dark night, the proper position for a look-out.

7. When the officer in charge of a steamer discovers the light of another vessel, and that there is danger of a collision, and cannot, by reason of darkness or fog, determine her position or her course with sufficient certainty to enable him to decide what change should be made in the steamer's helm, he should slacken and, if necessary, stop and reverse his engine, so as to diminish the speed of his vessel, until he is able to determine what change of direction will prevent a collision; and a failure to do so, connected with an improper order for the change of the helm, given in ignorance of the course and position of the other vessel, will render the steamer liable.

[Cited in The Free State, Case No. 5,090; The Louisiana, Id. 8,537; McWilliams v. The Vim, 12 Fed. 913; The City of New York, 35 Fed. 609.]

8. The cases of St. John v. Paine, 10 How. [51 U. S.] 557, and The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, referred to, and their doctrines applied.

9. It is no answer to proof of an excessive and unjustifiable rate of speed on the part of a steamer, while running in a dark night or in thick weather along the track of sailing vessels, that a reduction of speed would subject the steamer's owners to penalties for the non-performance of their contract with the post-office department. No contract with a public office, and no considerations of public convenience, can justify a rate of speed highly dangerous to the lives and property of persons pursuing their lawful business on the same route.

10. No precise rate of speed can ever be prescribed. It must depend upon the locality, and the particular and peculiar circumstances of each case; but it must not be such as cannot be maintained without probable injury to the lives and property of others.

[Cited in The Hansa, Case No. 6,037.]

Various libels in rem were filed in the district court against the steamboat Northern Indiana, to recover damages for a collision.

HALL, District Judge. Considerable time having elapsed since the argument of these causes, I have examined with great care the very full minutes of testimony taken by me at the hearing, and have endeavored to ascertain, with as much certainty as practicable, the material facts upon which the rights of the parties depend.

The testimony, as in most cases of collision, is indefinite and conflicting, and, in respect to questions of time and distance, necessarily conjectural and uncertain; but the most important questions of fact which arise in the case may, perhaps, be determined with quite as much certainty as in most cases of this character.

The libellants in these causes seek to recover the damages sustained by them respectively, in consequence of a collision between the steamboat Northern Indiana and the schooner Plymouth, on the 23d day of June last. The libellants in one of the suits were the owners of the Plymouth; and the libellants in the other cases were the owners of portions of her cargo.

The collision occurred on Lake Erie, about twenty-five miles northerly from Cleveland, Ohio, about one o'clock in the morning. The schooner sank a few minutes after the collision, and was, with her cargo, totally lost.

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

The witnesses differ somewhat widely in reference to the direction and force of the wind, the darkness of the night, and the density of the haze upon the water. The darkness and haze are represented by the claimants' witnesses to have been so thick as to prevent them from seeing the schooner in time to avoid the collision; while those on board of the schooner declare that the night was clear, with only a few small scattering clouds to obscure the bright star-light, and that the haze upon the water was so slight as not to materially obstruct the view of an approaching vessel.

There was no moon, and the night was not entirely clear; but, from the whole evidence, it may be safely assumed that, notwithstanding the slight haze upon the water, the night was not so dark, nor the weather so thick, as to render it impossible for those on board of the steamer to discern an approaching vessel in time to avoid a collision; nor so light as to excuse the slightest want of that sleepless vigilance and watchful care which the law requires of those having charge of the direction and speed of a steamer of the great size and power of the Northern Indiana.

The wind was blowing freshly, and the lake was somewhat rough. The steamer was making about seventeen miles an hour, and the schooner about seven and a half miles an hour, at the time those on board of each discovered that there was danger of collision with the other. The steamer was, therefore, running about fifteen hundred feet, and the schooner about six hundred and sixty feet, per minute.

The steamer was three hundred feet in length, and of the burthen of about one thousand five hundred tons. The schooner was one hundred and four feet in length, and of the burthen of one hundred and ninety-seven tons. The Plymouth was proceeding from Huron, in the state of Ohio, to Buffalo, New York. She was fully laden with wheat, flour, &c., and was steering northeast by east, with all sails set. The wind was from the north northwest, but was variable, veering, from time to time, a point or two to the northward. The schooner was, therefore, running by the wind, within a point or two of being close-hauled, and with her larboard tacks aboard. She carried the necessary lights, and was, in all respects, sea-worthy and sufficiently manned.

The alleged course of the schooner, with due allowance for lee-way, would probably have brought her to the place of collision; and it is therefore assumed that her courses, by the compass, were correctly stated by her captain and wheelsman. The steamer was proceeding from Buffalo, via Dunkirk, to Monroe, Michigan. About ten o'clock the previous evening, when a little below Ashtabula, and about five or six miles from land, her captain determined to proceed direct for the middle passage at the islands. The course of the steamer was therefore changed to southwest by west three-fourths west, as stated by those having charge of her direction. They also state that this course was not changed until the danger of a collision became apparent.

The steamer's course, from the point where her direction was thus changed, (judging from the chart produced on the trial, and conceded to be correct), should probably have been nearly west by south. It was, however, stated by her captain, that the compasses of different steamers frequently differ one or two points, and it will, therefore, be assumed, that the course of the steamer, as indicated by her own compass, was correctly stated by the claimants' witnesses. Her real course must nevertheless have been nearly west by south, to have brought her to the place of collision; and this direction would have brought the two vessels somewhat nearer the angle at which they struck. The difference is, however, so small as not materially to affect the rights of the parties.

The schooner was struck on her starboard side, about midships, and nearly at right angles. The stem of the steamer was driven nearly to the centre of the deck of the schooner, which soon sank, and schooner and cargo were totally lost. In my judgment, these general facts are fully and satisfactorily established by the evidence. Portions of the testimony, bearing directly upon the questions raised by the respective parties, will be herafter stated somewhat in detail, and will be considered in connection with the general facts above stated. And this testimony will be deemed more or less reliable, as it is consistent, in a greater or less degree, with the conclusions already drawn from the whole evidence in the case.

In the view which I have taken of the case, it is unnecessary to examine in detail the testimony in respect to the darkness and haze, which, it was claimed by the persons on duty on board of the steamer, prevented an earlier discovery of the schooner. I hold it to be unquestionable, that running a steamer of one thousand five hundred tons burthen, at the rate of seventeen miles an hour, along a track frequented by sailing vessels, when it is impossible, with the greatest care and vigilance, to discern an approaching vessel in time to avoid running her down, is, of itself, conclusive evidence of such gross negligence, not to say recklessness, as to render the steamer liable for all the injury caused by a collision; unless, indeed, the other party is clearly in fault.

The claimants' case is full of difficulty, upon either view of the testimony. If the night was so thick and dark that the schooner could not, with proper care, have been discovered in time to avoid the collision, the steamer's liability necessarily follows the proof that she was running at the rate of seventeen miles an hour; and, if the night was so light and clear as to render that degree of speed justifiable, the fact that the collision

occurred while the schooner was carrying a plain light on her jib-boom, and a green signal light on her pawl-bitts, is enough to cast upon the claimants the burden of establishing, by the most satisfactory evidence, that there was no want of care or skill on the part of those in charge of the steamer.

It cannot be necessary to refer to authorities to sustain these propositions, or to discuss, at much length, the several questions raised in these cases; but the alarming frequency of collisions and accidents upon Lake Erie, and the manifest want of care and skill disclosed by the evidence in these cases, and in another tried at the same session of this court, will perhaps justify the citation of English and American authorities, and a more full discussion of some of the questions presented. This discussion, it is hoped, may lead those engaged in lake navigation to inquiry and reflection; and to the exercise of that extreme care demanded alike by the public safety and private interest.

Before proceeding to the examination of the grounds upon which the libellants rest their allegations of negligence and misconduct against those in charge of the steamer, I shall consider that branch of the claimants' defence which urges, that the negligence and misconduct of those who had charge of the schooner, either caused the collision, or contributed to produce it.

It was contended by the claimants, that the libellants, were not entitled to a decree, because the proof did not show that the schooner exhibited the necessary lights, prior to and at the time of the collision; and because the schooner did not change her course in time, and avoid the steamer—especially as the look-out and wheelsman of the schooner saw the light of the steamer fifteen or twenty minutes before the collision, and made no effort to avoid her, until it was too late to escape by a change of the course of the schooner.

The captain, wheelsman, look-out man, and one of the seamen of the schooner, swear distinctly that they saw the lights on the jib-boom end and pawl-bitts, and that they were burning immediately before, or else immediately after, the collision; and, if these four witnesses are to be believed, the schooner's lights were unexceptionable. These witnesses are, to some extent, corroborated by the witnesses for the claimants. The mate of the steamer swears that he saw the schooner's light shortly before the collision, and the wheelsman of the steamer also swears that he saw the plain or jib-boom light a little more than a minute before the collision occurred. Upon this evidence, I cannot doubt that the schooner's lights were sufficient. This point of the defence is, therefore, overruled.

That the schooner's course was not departed from, and that those on board of her made no effort to avoid the collision until her helm was changed after the danger became imminent and unavoidable, is doubtless established by the evidence. It therefore becomes necessary to inquire, what was the duty of the schooner under the circumstances?

The two vessels were about meeting in the open lake. Their courses were nearly opposite, there being at most but about two points between them—the steamer under a full head of steam, and the schooner nearly close-hauled. In my judgment, it was the right of the schooner to pursue her course, and the duty of the steamer to avoid the schooner, if the night was such as to enable those on each vessel, by keeping a vigilant watch, to determine, in due time, the position and course of the other. The evidence satisfies me that this might have been done on the night in question, and that the collision was caused by negligence and inattention, and not by a reckless determination to maintain an immoderate speed when it was impossible to discover a vessel or her lights in time to avoid a collision.

The movements of a steamer are always under control. Her course can be changed at will, and much more readily than that of a close-hauled sailing-vessel; and her motion may be checked, or even reversed, in an almost incredibly short space of time. The first engineer of the steamer stated, on his examination, that when the steamer was running at the rate of seventeen miles an hour, the proper signals for checking, stopping, and backing, could be given through the bells, the wheels be reversed, and the speed of the steamer be so far checked as not to injure a vessel by collision, while the steamer was running twice and a half or three times her length (750 or 900 feet), and that, if running at the rate of twelve miles an hour, only two-thirds that number of feet would be required for that purpose. In this case, the speed of the steamer might have been so checked, after there was not more than one thousand feet between the vessels, as to prevent the collision, or so diminish its force as to render the damage comparatively trifling; and, with no more than two or even four points between the courses of the two vessels, the course of the steamer might have been so changed, when not more than six hundred feet distant, as to have avoided this small schooner.

I shall, therefore, hold, that the duty of checking speed and changing direction, to avoid a collision, devolved upon the steamer alone, and that the schooner had the right to keep her course. The cases of The Perth, 3 Hagg. Adm. 414; The Iron Duke, 2 W. Rob. Adm. 377; The Rose, Id. 1; St. John v. Paine, 10 How. [51 U. S.] 557; The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, are deemed abundant to sustain this position.

In the case of St. John v. Paine [supra], the court declared (page 583) that steam vessels are regarded "in the light of vessels navigating with a fair wind, and are always un-

der obligations to do whatever a sailing vessel going free or with a fair wind would be required to do under similar circumstances. Their obligation extends still further, because they possess a power to avoid the collision, not belonging to sailing vessels even with a free wind, the master having the steamer under his command, both by altering the helm and by stopping the engines. They are, also, of vast power and speed, compared with craft on our rivers and internal seas propelled by sails, exposing the latter to inevitable destruction in case of collision, and rendering it at all times difficult, and not unfrequently impossible, to get out of their way. Greater caution and vigilance are, therefore, naturally to be exacted of those in charge of them, to avoid the danger of the navigation. This justly results from the superior power to direct and control the course and speed of the vessel, and the serious damage consequent upon a failure to avoid the dangers. As a general rule, therefore, when meeting a sailing vessel, whether close-hauled or with the wind free, the latter has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her. The Shannon, 2 Hagg. Adm. 173; The Perth, 3 Hagg. Adm. 414; The Rose, 2 W. Rob. Adm. 1; Hawkins v. Dutchess & O. Steamboat Co., 2 Wend. 452; 3 Kent, Comm. 230; Abb. Shipp. (Boston Ed. 1836) 228. By an adherence to this rule on the part of the sailing vessel, the steamer with a proper lookout will be enabled, when approaching in an opposite direction, to adopt the necessary measures to avoid the danger, as she will have a right to assume that the sailing vessel will keep her course. If the latter fails to do this, the fault will be attributable to her; and the master of the steamer will be responsible only for a fair exertion of the power of his vessel to avoid the collision, under the unexpected change of the course of the other vessel and the circumstances of the case."

Another complaint in respect to the management of the schooner rests upon the allegation that her wheelsman put his helm up, after the danger became imminent. This fact was established by the testimony of the wheelsman himself. But he also swore, that it was not done until the danger was imminent, and that there was not sufficient time after that, and before the collision occurred, for the schooner to have answered her helm. The other testimony in the case is strongly corroborative of the wheelsman on this point; and there is certainly no reason to suppose that putting the helm up changed the course of the schooner to such an extent as to produce or aid in producing the collision. It may also be observed, that the helm was changed under circumstances similar to those referred to by Chief Justice Taney in the case of The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 461, when he said: "Nor do we deem it material to inquire whether the order of the captain, at the moment of the collision, was judicious or not. He saw the steamboat coming directly upon him, her speed not diminished, nor any measures taken to avoid a collision. And if, in the excitement and alarm of the moment, a different order might have been more fortunate, it was the fault of the propeller to have placed him in a situation where there was no time for thought, and she is responsible for the consequences. She had the power to have passed at a safer distance, and had no right to place the schooner in such jeopardy that the error of a moment might cause her destruction, and endanger the lives of those on board. And, if an error was committed under such circumstances, it was not a fault."

It was also contended, by the advocates for the claimants, that they had proved, by their own wheelsman, that the wheelsman of the schooner stated, after the collision, that "he put his helm down; he believed it would have been better if he had kept his helm up; and he believed, if he had done so, the vessel would not have hit." This was denied by the wheelsman of the schooner, who stated that he kept his helm up, (after it was changed when the danger became imminent), until the vessels struck, and then put it down; and that he did not tell the wheelsman of the steamer that he put his helm down and changed the course of the vessel before the collision. The evidence in regard to the swinging of the schooner after the collision, and her present position, as she lies in the water, the change of the helm of the steamer, and the angle at which the vessels struck, render it quite clear, that whatever change was made in the schooner's helm, her course was not altered to such an extent as to contribute to the production of the injuries of which the libellants complain.

Having thus disposed of the question of negligence or misconduct on the part of those navigating the schooner, it becomes necessary to inquire, whether the collision was the result of inevitable accident, or of negligence, misconduct, or want of skill on board of the steamer.

The evidence on the part of the claimants shows, that the mate of the steamer had charge of her deck at the time of the collision; and that he, together with the wheelsman, was in the pilot-house when they first discovered the lights of the schooner. The wheelsman was at the wheel, and the mate was sitting at an open window, at the right of the centre of the forward part of the pilot-house. The mate and wheelsman agree in stating that, when they first discovered the schooner's light, it was about a point or a point and a half to the larboard of the steamer's course, and that they supposed the schooner was then some four hundred and fifty feet from the steamer. They declare that the night was dark and the weather thick; that there was a haze upon the water; and that a vessel's light could not be seen

more than a quarter of a mile. The mate swears that the moment he saw the light, and before he ascertained the course of the schooner, he ordered the helm hard a-port, saw the wheelsman commence executing his order, and then passed around the wheel, and went out on the opposite side of the pilot-house, and on to its top; that he then first saw the vessel which he had been unable to see when sitting in the pilot-house; that he thereupon instantly rang the bells for checking and backing the engines, and that he knew the wheels had been reversed before the collision, because he saw in front of the wheels the white foam caused by their reversed motion.

The watchman's statement is not only different but extraordinary. He swears that he was standing on the larboard side of the lower deck, about thirty-eight feet aft from the cut-water, and had been there about two minutes before the collision, looking nearly in a straight direction ahead, but along the larboard bow; that he was looking out for obstructions; that he saw no light, but saw the schooner; that it did not exceed a minute from the time he saw the schooner to the time of the collision; that the moment he saw the schooner he heard the engine bells ring—first, three taps to check, then one to stop, and then one to back the engine; and that the engine was stopped half a minute before the collision. And yet he swears that he does not think the schooner was more than her length (one hundred and four feet) from the steamer when he first saw her. On his cross-examination he swore, that the backing bell rang half a minute or a minute before the collision, and also that he thought the speed of the steamer was lessened nearly one-third after the wheels were reversed, before the collision occurred.

The first engineer of the steamer swears, that he was about twenty-five feet from the engine when the engine bell first rang; that the bells for checking, stopping, and backing were rung in quick succession, and answered as rapidly as possible by himself and the third engineer; that, after the wheels were reversed, they made between one and a half and two revolutions backwards before the vessel struck; and that it would take a little less than a minute to make these revolutions.

The third engineer agrees with the first in stating that the wheels made between one and a half and two revolutions after they were reversed, and before the collision; and he states that it would take half a minute to make these revolutions.

There is some other testimony on behalf of the claimants, but it does not materially conflict with the testimony of the mate and wheelsman, in respect to the position and proximity of the schooner when first discovered, or change the aspect of the case in reference to the sufficiency of the look-out, or the effort made to avoid the collision.

Upon the whole evidence, I am entirely satisfied that the collision was not the result of inevitable accident, but was caused by negligence and want of skill and care on board of the steamer.

1. There was no sufficient look-out. The steamer was running along a track where vessels are accustomed to meet, and in a night so dark as to render more than the usual precautions absolutely necessary. While the great speed of the steamer made it the imperative duty of those engaged in her navigation to exercise extraordinary vigilance to secure from danger the lives and property of others pursuing their lawful business along the same route, the usual and ordinary precautions required in clear weather, and in nights not unusually dark, were not adopted.

The ony persons on duty on board of the steamer, at and immediately before the collision, were the first and third engineers, below, and the mate, wheelsman, and watchman, on the decks. The engineers were both out of the engine room—the first engineer at the gangway, some twenty-five feet distant; and the third engineer just outside of the door, and looking into the engine room. The mate was in the pilot-house, with and near the wheelsman, and the watchman was, as he says, on the forecastle deck, about thirty-eight feet abaft the stem.

The mate was the officer of the deck, and the wheelsman was employed in his proper duty at the wheel. The business of the watchman, who was called a "look-out" by the advocates for the claimants, was stated by himself to be, "to look out for the welfare of the boat in general—to look out for the fires, pumps, baggage, lights, and trimming of the boat—to look out ahead, what time I have—to relieve the man at the wheel, or the mate, if he wants to leave the deck." The duties of such a "look-out" are altogether too general and multifarious to be of any particular service in guarding against collision on board of a steamer running in a dark night at the rate of seventeen, or even twelve, miles an hour.

The decisions of the courts of admiralty in England, and of the supreme court of the United States, have declared, in distinct and explicit language, the necessity of "stationing," in the most appropriate position, at least one person, too look out for approaching vessels. It was declared by the supreme court of the United States, in the case of St. John v. Paine, 10 How. [51 U. S.] 557, 585, that "a competent and vigilant look-out, stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching, at the earliest moment, is indispensable, to exempt the steamboat from blame, in case of accident in the night-time, while navigating waters on which it is accustomed to meet other water craft." And it was added: "There is nothing harsh or unreasonable in this rule; and its strict observance and enforcement will be found as beneficial

to the interests of the owners as to the safety of navigation; a remark equally true in respect to all other nautical rules which, the results of experience have shown, enter so materially into the proper management of the vessel."

In the case of The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, 463, Chief Justice Taney, in delivering the opinion of the same court, used the following language: "It is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant look-out, besides the helmsman. It is impossible for him to steer the vessel and keep the proper watch, in his wheel-house. His position is unfavorable to it, and he cannot safely leave the wheel, to give notice, when it becomes necessary to check suddenly the speed of the boat. And, whenever a collision happens with a sailing vessel, and it appears that there was no other look-out on board the steamboat but the helmsman, or that such look-out was not stationed in a proper place, or not actually and vigilantly employed in his duty, it must be regarded as prima facie evidence that it was occasioned by her fault. She has command of her own course and her own speed; and it is her duty to pass the approaching vessel at such a distance as to avoid all danger, where she has room; and, if the water is narrow, her speed should be checked, so as to accomplish the same purpose."

The English courts require even greater vigilance. In the case of The Europa (one of the Cunard steamers) 2 Eng. Law & Eq. 557, the look-out was adjudged insufficient by the high court of admiralty, and the steamer was condemned in damages, where a collision occurred during a thick fog, and in the path of vessels passing between England and this country, although it appeared that the second officer of the watch was on the bridge, a quartermaster on the topgallant forecastle, and another quartermaster at the con, besides the quartermaster at the wheel; and this, when the steamer was seen at a distance of twelve hundred feet, and was running only twelve and a half miles an hour, in the open sea, seven hundred miles from land.

The want of a look-out, detailed and stationed for the constant performance of that specific duty, is, of itself, a circumstance of a strong condemnatory character, and exacts, in all cases, from the vessel neglecting it, clear and satisfactory proof that the misfortune encountered was in no way attributable to her misconduct in that particular. Poole v. The Washington [Case No. 11,271]; The Emily [Cases Nos. 4,452 and 4,453].

No look-out was stationed on board of the steamer, as required by the cases in our supreme court. The watchman, or man of all work, who esteemed it his duty to look out ahead only when he could find nothing else to do in discharging his other multifarious duties, was not a proper or sufficient look-out, even if he had the competent skill for that service. The mate was the officer of the deck, holding the temporary command of the vessel, and continually liable to be called to the discharge of duties inconsistent with the keeping of a constant and vigilant watch; and he ought not to have been relied upon for that purpose. In such a steamer as the Northern Indiana, his proper duties as officer of the deck would materially interfere with the attempted discharge of the additional duties of a look-out, and render him less reliable for that purpose than the person at the wheel, who, it has been seen, is always held insufficient. If the officer of the deck assumes to act as the look-out, the proof must be clear and satisfactory that he was, during all the time a look-out was material, in the proper position, and constantly and vigilantly discharging that duty.

If the officer of the deck could be considered a competent look-out, he was not, in this case, in a proper position, and his conduct, as proved by his own testimony, is conclusive evidence that he was himself conscious of his neglect. When he discovered the schooner's light, and saw that there was danger of collision, he first ordered the helm hard a-port, and then left his seat in the pilot-house, (in which he could not then see the schooner, or ascertain her course), and hastened to a more elevated position, better adapted to the purposes of a look-out, on the top of the pilot-house. When he reached that point, he could see the schooner and her relative position and direction, and then only did he ring the bells to slacken, stop and reverse the engine.

But we are not left to our own judgment and that of the mate, in reference to the necessity of selecting a better position than the pilot-house as the station for the look-out. In addition to the language of Chief Justice Taney, already quoted, it was said by Mr. Justice Nelson, in delivering the opinion of the court in the case of St. John v. Paine, 10 How. [51 U. S.] 585, already referred to: "We are also satisfied that the steamboat was in fault in not keeping at the time a proper look-out on the forward part of the deck; and that the failure to descry the schooner at a greater distance than half a mile ahead is attributable to this neglect. The pilot-house, in the night, especially if dark, and the view obscured by clouds in the distance, was not the proper place, whether the windows were up or down. The view of a look-out stationed there must necessarily have been partially obstructed."

In the case now under consideration, there is direct evidence of the unfitness of the position for the look-out on board of the steamer. While there, the mate could not discover the schooner, or determine her course, but he was able to do so as soon as he reached the top of the pilot-house. In the mean time, the steamer had proceeded with unabated speed, and her course had been changed in the wrong direction, by an order given in ig-

norance of the course and exact position of the schooner.

2. The mate was clearly in fault in ordering the helm hard a-port. The helm should probably have been ordered hard a-starboard; but, as the mate could not, at the time he first descried the schooner, determine what order he ought to give to the helmsman, he should have reduced the speed of the vessel at once, and as much as practicable, and only have given an order to change the course of the steamer after he had ascertained what order was necessary to prevent the collision. The Perth, 3 Hagg. Adm. 414; The James Watt, 2 W. Rob. Adm. 270.

There is little doubt that this mistaken order of the mate, (especially as he neglected to reverse it when he subsquently discovered the course of the schooner), was the real cause of the collision. If the steamer had kept her course, it is probable there would have been no collision; and I apprehend that there is not the slightest reason to doubt, that if the helm of the steamer had been put hard a-starboard at the time the schooner was first discovered, the steamer would have passed under the schooner's stern, and the collision would have been avoided. The contrary order caused the steamer to swing in such a manner as to appear to those on board of the schooner to be constantly changing her course, as she proceeded on her way, with a persevering determination to force a collision.

3. If, as was contended on the part of the claimants, the night was so dark, and the haze so thick, as to prevent those on board of the steamer from descrying the schooner in time to avoid a collision, the speed of seventeen miles an hour maintained by the steamer was wholly unjustifiable, and rendered her liable for all damages occasioned by the collision.

It was suggested by the advocates for the claimants, that rapidity in travel, and in the transmission of the mails, was in accordance with the spirit of the age, and that reducing the steamer's speed in consequence of the darkness of the night, would have subjected her owners to penalties for the non-fulfilment of their contract with one of the departments of the national government; and, they asked, if they could not run seventeen miles an hour, how fast could they run? A full answer to the suggestion was given by Lord Ellenborough, in a case where the driver of an English mail-coach was indicted at the Old Bailey for manslaughter, he having run over and killed a man in the public street. It was urged in his defence that, by contract with the post-office, he was compelled to go at the rate of nine miles an hour. Lord Ellenborough, adverting to that defence, in summing up, observed, that no contract with any public office, and no considerations of public convenience, could justify the endangering of the lives of his majesty's subjects. This doctrine was properly applied by Dr. Lushington, in the high court of admiralty, in a case of collision. The Rose, 2 W. Rob. Adm. 1.

No precise rate of speed can ever be prescribed. It must depend upon the locality, and the peculiar circumstances of each particular case, but it must not be such as cannot be maintained without probable risk to the lives and property of others. The Europa, 2 Eng. Law & Eq. 557; Newton v. Stebbins, 10 How. [51 U. S.] 586, 606.

But, even when the rate of speed may be justified, if a corresponding degree of caution and circumspection be observed, a steamer will be held liable if all necessary precautions be not taken; and, for the rate of speed maintained by the steamer on such a night as that on which this collision took place, the watch on board the Northern Indiana was, as has been shown, entirely insufficient. The Europa, 2 Eng. Law & Eq. 557; The Virgil, 2 W. Rob. Adm. 201; The Itinerant, Id. 236; Jones v. The Hanover [Case No. 7,466].

Upon the whole case, I conclude that the speed of the steamer was unjustifiable, if the darkness and haze were such as probably to prevent an approaching vessel from being discovered by a proper look-out in time to avoid a collision; that the look-out was clearly insufficient, whether the night was as thick and dark as is represented by the claimants' witnesses, or as clear and light as is represented by the witnesses for the libellants; that the signals to check, stop and back the engines should have been given when the schooner was first discovered; that the order to put the helm hard a-port was the reverse of what it should have been; that the neglect to give the signals to the engineers in time, and the mistaken order to the helmsman, were the natural results of the ignorance of the course and exact position of the schooner; and that that ignorance almost necessarily resulted from the neglect to station a proper look-out at the point to which the mate himself deemed it necessary to hasten when he found there was danger of a collision. With these views of the case, I cannot fail to enforce the claims of the libellants, unless I disregard not only the dictates of my own judgment, but also the decisions of the supreme court of the United States—decisions which it is my duty as well as my inclination at all times to respect and follow.

A strict adherence by the district courts to the decisions of the supreme court, in the cases cited from 10 How. [51 U. S.] and 12 How. [53 U. S.] will lessen the number of collisions and accidents upon our inland seas, and these decisions I shall deem it my duty to uphold and enforce while I have the honor to sit in this court.

Decrees for the libellants will be entered for the amounts mentioned in the statements handed to the clerk.

The claimants then appealed to the circuit court.

John Ganson, for libellants.

Dennis Bowen, Henry W. Rogers, and John L. Curtenius, for claimants.

NELSON, Circuit Justice. I have examined the pleadings and proofs in this case, and entirely concur in the very able opinion delivered by the learned district judge in the court below, and in all the views there taken by him, and in the conclusions at which he arrived.

It would be a work of supererogation on my part to go over the case again. The proofs are clear and decisive, that the collision occurred through the failure of the mate and the hands on board of the Northern Indiana to properly observe the familiar nautical rules, in the navigation of their vessel, on the occasion and under the circumstances when the collision occurred, and especially through their not having a proper look-out at the time. If there had been one, there is nothing in the case to excite a reasonable doubt that the collision would have been avoided. If it could not have been, the navigation of Lake Erie must be perilous indeed; so much so as to put at fault all the safeguards that skill and experience have constructed to prevent these marine disasters. Decree affirmed.

Case No. 10,321.

NORTHERN INDIANA R. CO. et al. v. MICHIGAN CENT. R. CO.

[5 McLean, 444.] [1]

Circuit Court, D. Indiana. 1853.

CORPORATIONS—WHERE AMENABLE TO PROCESS—NECESSARY PARTIES TO ACTION—LOCAL ACTION.

1. A corporation is not amenable to process, except in the state where its business is done.

2. A corporation in Indiana cannot sue, in that state, a corporation doing business in the state of Michigan.

3. Persons or corporations interested, must be made parties, especially where the object of the bill cannot be attained, without seriously affecting the interests of such persons or corporations.

4. When a subject is essentially local, as trespass on real estate, &c., the action must be brought in the state where the injury was done.

In equity.

Bronson & Denis, for plaintiffs.

Mr. Jay, for defendants.

OPINION OF THE COURT. This is an application for an injunction, due notice having been given to the defendants. The complainants in their bill represent that, under a charter granted by the state of Indiana, they surveyed and located a railroad through Northern Indiana, and that the route of that part of the Western division of said railroad, lying between Michigan City, in the county of Laporte, and the western line of the state of Indiana, was duly surveyed and located, and the right of way therefor duly acquired; and that they are entitled to have the sole and exclusive occupancy of the lands acquired for that purpose. That a part of the lands so acquired consist of a strip of ground eighty feet in width, extending from Michigan City to the west line of the state, and that their railroad has been completed upon the whole of said route from Elkhart to Laporte, and from Michigan City to the west line of Indiana, on which their cars are now running for the transportation of passengers, &c. And the complainants aver that the Michigan Central Railroad Company, are a corporation created by, and doing business in the state of Michigan; that they were incorporated by an act of the legislature of the state of Michigan for the purpose of constructing a railroad from Detroit, in the state of Michigan, to some point in the same state upon Lake Michigan, accessible to steamboat navigation on the lake, and with authority to extend their railroad to the southern boundary of the state of Michigan; that said road has been constructed to New Buffalo, and thence to the northern line of the state, in the direction toward Michigan City, in the state of Indiana; and that they have extended their road to Michigan City. And the complainants allege that the New Albany & Salem Railroad Company is a corporation created by and under certain acts of the legislature of the state of Indiana, and doing business therein, and that it has no power or franchise to construct, or authorize the construction of any railroad whatsoever, except what is specified in certain statutes, &c. That on or about the 24th of April, 1851, the Michigan Central Railroad Company, and the New Albany & Salem Railroad Company, entered into a contract by which the Michigan Company claim the right to construct a railroad, by a route nearly parallel with the complainants' railroad from Michigan City to the western line of the state of Indiana. And that, in fact, the Michigan Company have constructed their road, or are about constructing it, in the immediate vicinity of the complainant's road, and several times crossing the same, all which is an infraction of the complainants' franchise; that they pass over the lands owned by complainants, which were purchased for the accommodation of their road; and they aver that the New Albany & Salem Company are not authorized by any act of the legislature, to build a road between Michigan City and the western line of the state, and they pray that the Michigan Central Company may be enjoined from making their road, and from running cars on the same, &c.

No answer has been filed to the bill, but the question comes up as on a demurrer. The bill is filed by a corporation in Indiana, against a corporation of Michigan and the question necessarily arises whether the

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

circuit court of the United States, sitting in Indiana, has jurisdiction in such a case. It is clear that a corporation cannot be sued out of the state in which it is established, and in which its corporate functions are exercised. The individuals of the corporation are liable to an action of trespass, if done out of the state where process is served, but as corporators they are responsible only in the state where the business of the corporation is done. The Michigan Central Railroad, in building the road from Michigan City to the western line of Indiana, claims to act under the contract made with the New Albany & Salem Company, which claims a right under its charter to make the road, and transferred the right to the Michigan Company. The bill asks an injunction against the Michigan Company in its corporate capacity, as in that capacity the contract was made, and the work complained of has been done. I know of no process which can reach a corporation of Michigan from the circuit court, sitting in Indiana. It is amenable to no process out of the state. The circuit court of the United States, sitting in a state, has no jurisdiction beyond the limits of the state, except in criminal cases subpoenas may be issued for witnesses throughout the United States. In every other particular, the federal court, acting in a state, is as limited in its jurisdiction as any state court, whose jurisdiction extends throughout the state. It seems to be very clear that the circuit court, sitting in Indiana, has no jurisdiction in this case, as presented by the bill. If the bill be filed in Michigan, against the Michigan Central Railroad Company, the circuit court, in a proper case, would have jurisdiction over the company. But such a procedure would give rise to another question, whether a court of chancery, in a case respecting the title to land, and particularly to restrain a right set up under the authority of the state of Indiana, could exercise jurisdiction while sitting in the state of Michigan. In the discussion, questions of a local character would necessarily arise, which could not, it would seem, be acted upon in Michigan.

But independently of this objection, there is another which, it appears to me, is fatal to the jurisdiction. The New Albany & Salem Railroad Company, is not made a party to this proceeding, and that company is materially interested in the case. The bill sets up that the charter of that company, does not extend north beyond Salem, and especially that it does not authorize the construction of a railroad from Michigan City to the western line of the state. It appears that the road from Michigan City west, has not only been constructed to the western line of the state, but it has been extended to Chicago, and is now in operation; and it also appears that a very large proportion of the railroad from Salem to Michigan City, has been built, and will soon be completed and in operation. It also appears the Michigan Company, in building the road from Michigan City to the western line of Indiana, agreed to subscribe a half million of dollars to the road from Salem to Michigan City, which has not only been subscribed, but some part of it has been paid.

From the above facts, it appears that the New Albany & Salem Company is interested to the whole amount of its charter as claimed, from Salem to Michigan City, and thence to the western line of the state, and that more than a million of dollars have been expended on these lines of road. And yet the bill calls upon the court to act on this subject, and to decide, that the New Albany & Salem charter gives no authority to make a railroad from Michigan City to the western line of the state, and consequently the Michigan Company has no right to build the road under its contract. An injunction, as prayed for, would not involve the rights of the New Albany & Salem Company, to the extent of their charter as above stated, and money expended under it, but it would defeat the further payment of the subscription of half a million of dollars, to the road between Salem and Michigan City, by the Michigan Central Railroad Company. Upon the whole, I cannot grant the injunction.

If the complainants desire to bring the subject before the supreme court, by filing the bill in the Michigan circuit court of the United States, an answer or demurrer may be filed, and a decree, pro forma, entered, which will bring the case, without much delay, before the supreme court.

[NOTE. An appeal was taken to the supreme court from a decree of the Michigan circuit court dismissing the bill. Case not reported. This decree was affirmed upon the appeal. 15 How. (56 U. S.) 233.]

Case No. 10,322.

In re NORTHERN IRON CO.

[14 N. B. R. 356.][1]

Circuit Court, E. D. Michigan. July, 1876.

BANKRUPTCY — VOTE FOR ASSIGNEE — PROOF REQUIRED OF CREDITOR—VOTE BY MANAGERS OF CORPORATION.

1. As a very general rule, the register should demand the same degree of proof, before admitting a creditor to vote for assignee, as is requisite in a trial at law or a hearing in equity. Exceptional cases, if free from all suspicions, might authorize his deviation from such rule.

2. The managing officers of a corporation, when bona fide creditors, have the same rights to vote for assignee as any other claimant. Their debts, however, should be more carefully scrutinized by the register, and if, after such scrutiny, he entertains suspicion of their rectitude, they should be postponed.

3. In making such examination, he should not be called upon to decide upon doubtful proofs; and if the claim is not susceptible of ready and demonstrable explanation, a case of suspicion under the statute should be deemed to exist.

The register certified to the district court, that the first meeting of creditors for the

[1] [Reprinted by permission.]

choice of an assignee was commenced December 10, 1875, and concluded January 5, 1876; on which last day there were present twenty-seven creditors, the aggregate of whose claims amounted to sixteen thousand three hundred and seventy-seven dollars and one cent. Five creditors, whose claims amounted to seven hundred and twenty dollars and twenty-six cents, were absent. All the creditors present voted for Francis B. Spear, of Marquette, for assignee. On the second day of the meeting, and before the election of the assignee, the following claims were offered to be proved: First. The claim of William B. Hatch, for the sum of ten thousand dollars, upon a promissory note payable to the order of Charles T. Harvey, and appearing, by the proofs offered, to have been transferred by said Harvey to the claimant since these proceedings in bankruptcy were commenced. Second. The claim of Samuel M. Pettengill, for the sum of ten thousand dollars, upon a promissory note to the order of Charles T. Harvey, and also transferred by Harvey to claimant since these proceedings were commenced. Third. The claim of John Glass & Sons, alleged to be on a promissory note for five hundred and thirty-seven dollars and ninety-four cents, which note is not produced, nor any copy of it; the claimants averring, as a reason for not producing either the note or a copy of it, that it is in the hands of their attorneys at Marquette. Fourth. The claim of Redington & Adams, for two hundred and twenty dollars, the consideration of which is set forth in the deposition as for "merchandise sold and delivered" by claimant to said bankrupts; the deposition referring to a schedule annexed, which states the indebtedness to be, "Paid R. White, for twenty thousand brick, two hundred dollars, and paid for loading brick on to vessel, twenty dollars." The allowance of these claims was postponed by the register, under section 5083, until the election of an assignee; the first two on the ground that the claimants derived their interest from Charles T. Harvey, who was the original creditor, and so continued until after the commencement of the proceedings in this case; and who, at the time the debt was created, and so continuing up to the bankruptcy of the corporation, was its president and principal managing officer. The claim of John Glass & Sons was postponed until the note on which the claim was founded, or a sworn copy of it, should be produced. The ground on which the claim of Redington & Adams was postponed was the variance between the consideration, as stated in the deposition, and in the exhibit.

By HOVEY K. CLARKE, Register. The grounds upon which the claims of Hatch and Pettengill were postponed are the same as those submitted by me to the court in the case of the Lake Superior Ship Canal, Railroad & Iron Co. [Case No. 7,997]. I am unable to see anything in this case which would justify a different conclusion. The case of John Glass & Sons depends upon the propriety of requiring a party claiming under a promissory note to produce it or a sworn copy of it. In no other court would a party be excused from producing the original except upon proof of its loss. A relaxation of this rule, so as to allow proofs upon sworn copies, is, I think, as far as can be permitted, and retain on the files of the case at least some semblance of evidence to prevent duplicate proofs, an evil which practice shows to be sufficiently common to require caution in this part of a register's duty. As to the proof of the claim of Redington & Adams, I am satisfied, on reflection, that it should have been allowed. The variance illustrated a habit of careless swearing, which, unfortunately, is too common in proving debts in bankruptcy, and, though it may have deserved rebuke, I think, now, nothing more. All which, together with the proofs of debt offered, and the request made on behalf of the claimants, are herewith certified.

Alfred Russell, for creditors.

Moore, Canfield & Warner, contra.

BROWN, District Judge. By section 5083 of the Revised Statutes, when a claim is presented for proof before the election of the assignee, and the judge or register entertains doubts of its validity, or the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen. In the case of the Lake Superior Ship Canal, Railroad & Iron Co. [Case No. 7,997], it was held by this court that the managing officer of a corporation, who was responsible for the conduct of its business prior to its bankruptcy, ought not to be admitted as a creditor before the appointment of an assignee. I fully concur in this opinion, and it seems to me this case falls within the rule there announced. The notes were given to the president for moneys paid and advanced by him to the corporation, and were not transferred to the holders until after the commencement of proceedings in bankruptcy. Advances of this kind are very frequently made by the officers of a corporation, and the effect of allowing proofs of these debts, before the appointment of an assignee, would frequently result in the choice of a person devoted to the interest of the directors, who would thus become indirectly reinstated in the control of its affairs. In addition to this, it is no infrequent thing for officers and directors of corporations to obtain the allowance of claims in their own favor, which, upon a thorough sifting, are found to be collusive and fraudulent, as against the other creditors of the association. I deem the argument of the register in the Ship Canal Case, upon this point, unanswerable. When the proof of debt is entirely

free of any suspicion it is his duty to receive it. Where there is any doubt, I should not willingly interfere with his discretion in postponing it.

The only hesitation I have, with regard to the deposition of Glass & Sons, is, whether the register has the right to receive a copy or proof of contents of a note in any case without evidence of the loss or inaccessibility of the original. The rule at law is well settled, and while I approve of a relaxation of that rule in depositions of proofs of debt, I am clearly of the opinion that the note should be produced before the dividend is paid, that the amount may be indorsed upon it. The door being thus thrown open by the admission of secondary evidence, I am not disposed to disturb the practice of the register in requiring the production of a copy, notwithstanding the general rule of law that there are no degrees of secondary evidence. The practice of receiving copies conduces so much to the convenience of parties who may desire to retain the notes, for the purpose of suing other parties to them, that I cannot but approve such a departure from the stringent rules of common law; but I perceive nothing unreasonable in the practice of the register in requiring a copy in lieu of parol evidence of contents. The certificate and opinion of register are therefore approved.

The decision of the district judge was carried by petition for review into the circuit court.

EMMONS, Circuit Judge. In reference to the exclusion of the claim of Redington & Adams, it is conceded by the learned register there was error. We agree with the district court that where it demonstratively appears that the result could not have been changed by a different ruling, proceedings will not be reversed for such cause. This is in harmony with practice upon writs of error and all other apppellate proceedings where errors are affirmatively shown to be immaterial. As a very general rule we think the register should insist upon the same degree and character of proof as that demanded in a trial at law or hearing in equity. We do not mean to say that exceptional cases may not arise when a register would be justified in accepting a less degree of proof for the purpose of allowing the creditor to vote for the assignee. If it should appear that some accident prevented the presentation of a paper, and circumstances freed the case from all suspicion, we should approbate the reception of proof of its contents for this single purpose, leaving the creditor to more full evidence when the assignee was appointed. Here we do not think satisfactory reasons were shown why the absent draft was not produced. We quite agree with the opinion of the register in this regard, and approve the postponement of the proof of Messrs. Glass & Sons' claims. Did the postponement of the claims of Hatch and Pettengill rest upon the reasons which learned counsel have imputed to the district court and the register, and did the record render such reasons necessary, we should promptly reverse the rulings.

It is by no means requisite they should hold, nor do we suppose they did hold, that the mere fact that a claim accrued to a managing officer of a corporation necessarily throws any considerable suspicion upon it. The financial history of the country shows that they who suffer most by the failure of corporations, in a very large majority of instances, are its leading shareholders and officers. So nearly universal is this that the failure of institutions with which citizens are connected almost invariably affects their personal credit. Business men presume that they are involved in its affairs, and pause for much explanation and exert careful scrutiny before they conclude they are not its creditors and losers by the catastrophe. It is the duty of tribunals to take judicial notice of a condition so common. It would be most unwarrantable to erect a rigid and certainly novel rule of law which would in all instances exclude the managing officers of a corporation, who are its creditors, from participating in the choice of assignee. It would violate the express provisions of the statute, and be quite at war with its spirit and intention. The judicial being is as distinct, in legal contemplation, from its shareholders and officers as two natural persons from each other. The authors of the bankrupt law [of 1867 (14 Stat. 517)] understood this familiar truism, and the letter of the law must be read in reference to it. If the officer is a creditor, he has just as much right as any other creditor. To disfranchise him, and assert that in no case shall he participate in the choice of assignee, would constitute an unjustifiable violation of the statute. We do not understand that any such irrational rule has been asserted by either the register or the district court. In the Case of the Ship Canal Company [supra] the claims were so suspicious as to have called for their postponement had they been those of third persons. In the record before us now very large claims, in proportion to the whole assets, were presented in behalf of the president and managing officer. When explanation is required by the register, as it was his right, and we think his duty, in all such instances to ask, the response is a general curt affidavit, no better than a common-law declaration, for "money laid out and expended," unaccompanied even by a bill of particulars. Beyond doubt the register rightfully postponed the claims. Had the books of the company been presented, and all then had appeared fair in the ordinary course of business, if the debt had had a natural commercial growth, such as is usual in similar circumstances, the claim would not have been postponed. There is no right to post-

pone any claims unless the register has suspicion they are unfounded. Such suspicion cannot be entertained judicially in the court below or recognized here unless predicated upon facts which legitimately excite it. If they exist with prima facie force, beyond question the creditor must be accorded the opportunity of removing them. In prescribing the limits of this investigation, the largest discretion must be accorded to the register. He should not be called upon for long postponement, which would delay the appointment of an assignee. He should not be called upon to unravel complicated and suspicious transactions, and decide ultimately the question of right. A suspicion within the statute arises when the claim is not susceptible of a ready and simple explanation. Such explanation would be given by a managing director who presents the books of the corporation, and shows that, in the ordinary course of its business, he has made advances and incurred liabilities such as would naturally spring from his position and means. Whether he is a large shareholder as well, and every circumstance which goes to show bona fides should be looked to. If all these are laid before the register, and then a mistake in legal conclusion is made, it would be subject to review by the district and circuit courts, like any other ruling. From the very able decisions of the register, whose judgment is appealed from in this case, we do not understand that he would in every instance postpone the claim of a managing officer, simply because he is such, if he offers to explain and show its rectitude. It may frequently happen that the intelligence and interests of these officers would be eminently useful in the selection of a trustee. The modern practice is quite common in equity of appointing corporate officers receivers, on account of their knowledge of affairs. Although this principle should not be carried so far as in any instance to make defaulting officers and wrong-doers—they who are really the substantial bankrupts—instruments of winding up, still, in many instances, great injury may be done by excluding officers from the power of voting, or even acting as assignee.

NORTHERN R. CO. (HUBBARD v.). See Case No. 6,818.

Case No. 10,323.

NORTHERN SHORE STATEN ISLAND FERRY CO. v. The HUGUENOTS.[1]

District Court. D. New York. June 19, 1862.

COLLISION—STEAMERS APPROACHING WHARF.

In admiralty.

Clark & Hale, for libelants.

Mr. Williams, for claimants.

SHIPMAN, District Judge. The libelants are owners of the steamboat Thomas Hunt, running form New York to Staten Island. The Huguenots is owned by a rival company, and runs on the same route. The suit is brought to recover damages for a collision which occurred at the landing in the village of Factoryville, where both boats touch, and took place June 10, 1861. The boats approached the dock from opposite courses. The wharf was long enough for both boats to have landed at the same time with ease and safety. They reached the dock both at about the same time, the Hunt perhaps a little the first. The Huguenots approached under too great headway, which ought to have been sooner checked, as it might have been without any difficulty whatever. The consequence was she passed the point of the dock where it was her duty to have stopped, and struck the Hunt on her bow, doing the latter some damage. There was no excuse for this, and she is therefore adjudged in fault, and must be held responsible.

Decree for libelants, with an order of reference.

[For hearing on exceptions to commissioner's report, see Case No. 10,330.]

[1] [Not previously reported.]

Case No. 10,324.

NORTHERN TRANSP. CO. v. CHICAGO.

[7 Biss. 45.][1]

Circuit Court, N. D. Illinois. Nov., 1874.[2]

FOREIGN CORPORATION—EMINENT DOMAIN—NEGLIGENCE—TIME OF OCCUPATION—DAMAGES FOR NEGLIGENCE—SINKING CAUSED BY WEIGHT OF WALL.

1. A foreign corporation has the right to hold and occupy as lessee or otherwise, such property as is necessary or convenient for the transaction of its business.

2. A municipal corporation has a right to enter upon a street, or tunnel under a street, for the purpose of making public improvements; and also has a right for the same purpose to enter upon, occupy and obstruct a portion of the river in front of plaintiff's lot, and construct a coffer-dam there if it was necessary in order to enable it to construct the tunnel.

3. Under such circumstances, however, the city would be liable for damages if it did not use due skill, care and dispatch, so as not to unnecessarily interfere with private property.

4. The fact that the street and river were used for a great length of time makes no difference, as the injury, if any, is only greater in degree, provided however, that they were not used longer than was necessary.

5. The city would be liable for damages caused by the sinking of a wall by reason of the excavation, if they could be charged with negligence.

6. But if such sinking was caused not by the weight of earth but by the superinduced pressure of the weight of the wall, there would be no liability.

At law.

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

[2] [Affirmed in 99 U. S. 635.]

H. F. Waite, for plaintiff.
T. Lyle Dickey, for defendant.

BLODGETT, District Judge (charging jury). This is an action brought by the plaintiff to recover damages by reason of having been deprived of the use of lot 1, in block 4, in the original town of Chicago, by the construction of La Salle street tunnel.

It appears from the evidence in the case, and it may be taken as one of the admitted or conceded facts, that the plaintiff was in possession of the lot in question under a lease from Timothy Wright, which upon certain contingencies was to extend until 1877. The lot in question was bounded upon the east side by La Salle street, and abutted upon the Chicago river on the south, and was docked for the purpose of enabling vessels to approach along-side the end of the lot, and to there load and unload, and lie for the purpose of commerce; and the lot was also occupied or built upon by a warehouse, which was used by the plaintiff for the purpose of transacting its business.

It also appears that plaintiff is a corporation created under the laws of some other state than this—whether Ohio or New York is not material for the purposes of this case—and was engaged in the business of transporting freight and passengers by a line of propellers between the city of Chicago and the city of Ogdensburg, and transacting a general transportation business.

It is also conceded that La Salle street extends, as laid out, across the river, and is one of the streets of the city of Chicago. Whether it was so platted, and the plat so acknowledged as to vest the fee-simple of the ground covered by the street in the city for the purposes of a street, or whether, by the platting and dedication in the case, the city only acquired right to use the ground as a street, as a common public highway, under a common law dedication, is perhaps immaterial.

But the testimony on the part of the plaintiff tends to show that the street was so platted and recorded that the right of way only is vested in the city authorities, and that the fee-simple in the lands did not vest in the city authorities. I do not consider, however, that this distinction is material for the purposes of this case.

It is also admitted that the defendant at the time mentioned, that is, in the month of November, 1869, entered upon La Salle street for the purpose of constructing a tunnel thereon under the river, and commenced the excavation necessary to construct the tunnel, as has been described to you by the witnesses, taking out the whole body of the earth or material in the centre of the street to within from 18 to 20 feet of the sides of the street, down to the depth of from 30 to 40 feet, removing the material and replacing in the excavation thus made the masonry for the construction of the tunnel; and that for the purpose of constructing the tunnel under the river, the city entered upon the river, in front of a portion of the plaintiff's lot, about 25 feet, and extended from the front a coffer-dam somewhat beyond the middle of the river, thereby depriving the plaintiff of access to its lot to the extent of the 25 feet, and to a considerable extent impeding the plaintiff's access to the remainder of its lot, so that it could not use its lot as conveniently as before the obstruction was placed there; not that the obstruction was total, but it was so great as to seriously impair the plaintiff's use of the property during the time the coffer-dam was retained in place.

It is also in proof on the part of the plaintiff that, by reason of the interference caused by the construction of the tunnel in La Salle street, and by reason of the coffer-dam in the river, the plaintiff was, for the time being, obliged to withdraw the transaction of most of its business from this lot, and obliged to rent other premises during the season of 1870, at which to transact its business, and also in the fall of 1869, to close up the business for part of the fall.

It is also proven on the part of the plaintiff, and insisted on the part of the defendant, that plaintiff had made arrangement with Mr. Diffendorf, by which Diffendorf took possession of the premises in question, paid the rental upon them, paid the plaintiff a certain amount of compensation for the expenditures which the plaintiff had put upon the premises by way of improvement, such as erecting buildings, etc., and paid the insurance and the taxes; that Mr. Diffendorf, as the plaintiff's agent, transacted upon the premises the plaintiff's business on commission, and on being compelled to rent other premises, Mr. Diffendorf, at the end of the season of 1870, made a settlement with the plaintiff by which certain damages were allowed him for the inconvenience and expense to which he had been subjected.

The proof on the part of the defendant tends to show that the construction of this coffer-dam in the river was necessary for the purpose of constructing the tunnel in question, and that there was no practical method known to persons skilled in the business, by which the tunnel could have been constructed, except by the construction of the coffer-dam, so as to enable the excavation to be made in the bed of the river.

The evidence on the part of the defendant also tends to show that there was no unreasonable delay in pushing forward the work; that it was done as rapidly as it could be done, and there being no evidence on the part of the plaintiff to show that there was any unreasonable delay, it may be taken as a proven fact in the case that the construction of the coffer-dam was necessary to the progress of the work, and that the work was pushed forward with reasonable vigor and dispatch.

Taking these as conceded and established

facts in the case, I shall deem it my duty to withdraw from your consideration a large proportion of the claim which the plaintiff has made against the defendant in this case; as I hold the law to be well settled, and so charge you as the law of this case, that the defendant had the right under the law to enter upon La Salle street and make such public improvements as in the juagment of the city authorities were necessary, and to construct the tunnel in question, and that they also had the right for that purpose to enter upon the portion of the river in front of the plaintiff's lot, and construct the coffer-dam there, if it was necessary in order to enable it to construct the tunnel; that plaintiff took his lot subject to the right of the city to make the necessary public improvements in the streets. The method of crossing the river at this point was one to be determined by the city authorities; they could decide whether they would cross, or have the public cross, the river by a ferry, by a bridge, or by a tunnel, and when they had determined to effect the crossing by a tunnel, they had the right to use and occupy so much of the street as was necessary to construct the tunnel, using due skill, and care and dispatch, always in doing it, so as not unnecessarily to interfere with private property by such entry upon the street; although access to its property through the street may have been practically prevented by the occupation of the street, for the purposes of constructing the tunnel, and although access to the lot from the river may have been partially prevented during this time, yet these were incidental inconveniences to which the plaintiff, as owner of the lot, must submit in order that the public may be accommodated by the construction of the tunnel.

The city had the same right to enter upon the river for the purpose of erecting works there to facilitate the construction of the tunnel, that it had to enter upon the street and construct the tunnel itself, always, however, subject to the condition that it should not unnecessarily or negligently injure the plaintiff.

If, for instance, there was a want of due care in the management of the excavation, so that a portion of the plaintiff's walls were caused to crack or break down by reason of such negligence, the defendant is liable for such negligence, but not liable for the general act of entering upon the premises; and therefore, if you find from the evidence in the case that by reason of the negligence on the part of the defendant, or its contractors, which is the same thing, in the bracing or staying of the banks of the tunnel or cut, the walls of the plaintiff's building were caused to fall down, or break, or crack, or become impaired, so that it was necessary to take them down, then the plaintiff would be entitled to recover such damages as the building sustained thereby, but the exclusion from the use of the building, or from the beneficial use, which has been complained of by reason of the necessary occupation of the street (because we must presume that it was necessary) while the tunnel was being constructed, and from the access to his lot by the river as conveniently as he otherwise would have had, but for the necessary construction of the coffer-dam, does not entitle him to the damages which he sustained by such exclusion.

I cannot distinguish the damage which the plaintiff sustained by reason of its exclusion from the lot in this case, from that which every lot owner sustains upon the streets of a city, by the tearing up of the street for the purposes of laying water pipes, or for the purpose of grading, or paving, or any other necessary work of repairing or improving the street; it is only greater in degree.

The plaintiff in this case may have been excluded from the enjoyment of his property eight months. The ordinary citizen by the laying of water pipes may have been excluded only for a week or a day from the convenient access to his premises, but it is the same kind of injury, and only greater in degree.

It is not a taking of the plaintiff's property for public uses. It is only subjecting him to inconveniences for the time being by the construction of public works, and as such, it is one of the incidents to owning a lot in a city, abutting upon a street and upon navigable water.

As I said before, this excludes from your consideration, therefore, the main element of damage which the plaintiff has put in evidence here; that is, the expense of hiring other premises upon which to carry on its business during the season of 1870.

There is left, however, as I said before, the question to be considered by you in the light of the evidence, as to whether the work in La Salle street was so unskillfully or negligently done as to cause any part of the walls to fall, or the building to be impaired. You have heard all the testimony bearing upon that question.

The testimony tends to show, and does show, if I may so state, that the south-east corner of the warehouse, where the office and vaults were situated, became so impaired by the cracking or leaning of the wall outward that it was deemed necessary to take it down, and it was taken down and rebuilt, although there was no apparent settling of the ground in the immediate vicinity, nor any caving in, yet the wall seemed to fall from some cause at this point, and the claim is that it fell from the construction of the tunnel by some displacement of the ground, which, was, perhaps, not apparent to the eye.

You will also bear in mind that the evidence shows that further along, near the north end of plaintiff's building, there was a caving in of the banks, so that the earth near, or, perhaps, immediately under the

wall, was to some extent displaced. The wall fell down there, and was subsequently rebuilt, and the building repaired to some extent.

You have heard all the testimony in regard to the extent of the repairs, and the manner in which the building was left, and it is for you to say whether the building was substantially restored to its original condition by the repairs which were made, so that the plaintiff, on the removal of the coffer-dam, and the other obstruction to the access of its property, could again enter into the enjoyment of its property as fully as before.

If you are satisfied that the building was not so repaired by the defendant as to make it as useful for the plaintiff's purposes as it was before the injuries occurred, then the plaintiff will be entitled to recover such damages as would make it as useful for his purposes.

The plaintiff's title is by a lease, as has been stated, and while there is no express provision in the lease, or right on the part of the tenant to take away the building on the termination of the lease, there is no covenant on the part of the landlord to keep the building in repair; but I think a fair construction of the whole lease, together with the general law in relation to fixtures between landlord and tenant, taken in connection with the evidence in the case, shows that the building was a fixture, and was treated as such between the lessor and lessee.

It seems that the building was constructed several years prior to the making of the lease, which was in force at the time the injury occurred, and was constructed by the plaintiff under some former lease.

The lease continued until the plaintiff built these buildings, or rather the lease was extended or renewed. The plaintiff occupied the buildings with no covenant on the part of the landlord to keep them in repair.

The evidence shows that he had rebuilt them once, and I shall charge you that the buildings in question were a fixture which plaintiff had the right to consider as its own as between itself and any person committing an injury upon it.

It is for you to say, in the light of the testimony in the case, whether the building in question sustained any damage by reason of negligence or unskillfulness on the part of the defendant in the construction of the tunnel, and if it did, the plaintiff will be entitled to recover such damages as the proof in the case shows you these damages amounted to.

A point has been made that defendant, being a foreign corporation, is not entitled to hold property in this state. I simply charge you upon this question, it being purely a question of law, that the plaintiff had the right to occupy and hold, as lessee or otherwise, such property as was necessary or convenient for the transaction of its business.

In considering the question of negligence, you should take into account all the circumstances of the case.

The evidence on the part of the defendant tends to show that it braced the cut as thoroughly as it thought the necessity of the case demanded, but the evidence shows that notwithstanding such bracing, it fell through in one place, or caved in, and the question arises whether, under the circumstances, the mere fact that it caved in does not show that there was some negligence somewhere. The fact that an accident occurred out of the ordinary course of events is usually evidence that somebody is to blame—that somewhere there has been negligence.

It was evidently the intention of these contractors, and of the engineers in charge of the work, that the embankment should be kept in an upright position, and it expected that it had resorted to means and instrumentalities sufficient to maintain it. It is equally clear that some part of the embankment, notwithstanding these precautions, did fall in, and that thereby that part of the wall was broken.

The evidence in regard to the settling of the south-east corner, where the vault was located, is not so clear, but, at the same time, the concurrent settling away of the wall, with the progress of the work, is a circumstance to be taken into account by you in determining whether or not the excavation was the cause of the giving way of the wall at the south-east corner.

If you are satisfied that it was, then the question is, whether there was any unskillfulness or want of care in this regard, or whether it was one of those phenomena, or occurrences, which no precaution could have guarded against, whether any bracing across the cut at this point would have prevented the adjacent wall from being to some extent affected. You must pass upon these questions, gentlemen, in the light of evidence. The court cannot help you any more than to call your attention to the facts.

Mr. Waite: I will ask the court to instruct the jury that even if the city be entitled to lay a coffer-dam along across the river, it had no right to lay the coffer-dam in front of the plaintiff's lot, and for any damages which the plaintiff may have suffered by the coffer-dam being in front of the dock, it is entitled to recover in this action.

THE COURT: I refuse this, always assuming that the proof shows that the coffer-dam was necessary. I look upon the river just as I do the street. They have the same right to go into the river and construct a coffer-dam, in order to complete the work, that they have to go on to the street and put down a track, or other work, which is nec-

essary, in order to carry on improvements.

Mr. Dickey: I ask the court to charge the jury, in so far as the settling of the walls of the building is concerned, that while it was the duty of the defendant to protect the work, so that the weight of the natural earth of the plaintiff's lot could not have caved in, yet it was not bound to protect against the effect of the weight of the wall of the building; that if the jury believe, from the evidence, that the cracking was caused by the weight of the wall, which otherwise would not have occurred, the defendant is not liable for this.

THE COURT: I will say to the jury, that if you are satisfied, from the evidence, that the sinking of the wall was due to the weight of the walls upon the selvage, or portion of the earth which was left, and not to the removal of the material which was taken out of the street, then the defendant would not be liable. If you are satisfied that if the wall hadn't stood upon the plaintiff's lot, at the place where it did, there would have been no change in the level of the ground there, but that the change in the level, which caused the deflection of the wall, was caused by the weight of the wall resting upon the earth, after the excavation was made, then the defendant is not liable. The principle is precisely like that of two adjacent owners,—one man building a building, and sinking his foundation four feet into the ground; the adjoining owner may think it is necessary for him to set his six or ten feet into the ground, and he excavates for that purpose. Now, if the wall first built, by reason of its own weight, causes the earth to crush or cave away, after the excavation, before the building has been erected upon the adjoining lot, the owner of the adjoining lot making the deeper excavation is not liable. Each man, in other words, must look out for his own foundation.

The jury found a verdict for the plaintiff, and awarded one hundred dollars damages.

[Plaintiff appealed to the supreme court, where the judgment of this court was affirmed. 99 U. S. 635.]

NORTHERN TRANSP. CO. (VAN SCHAACK v.). See Case No. 16,876.

Case No. 10,325.

The NORTHERN WARRIOR.

[1 Hask. 314.][1]

District Court, D. Maine. Dec., 1870.

COLLISION—LIGHTS—NARROW CHANNEL—STEAM AND SAIL—PERSONAL INJURIES TO DECK HAND ON STEAMER.

1. In cases of collision, the want of proper lights is immaterial, when their absence did not occasion or contribute to the disaster.

2. A sailing vessel, beating through a narrow channel, is not required to hold one course longer than prudence requires, considering the nature of the channel, and the strength of the wind and tide.

3. The testimony of competent seamen on board such vessel, as to whether she was managed with skill and prudence, is entitled to more weight, from their better opportunities to observe, than the testimony of witnesses on board another vessel, who had no particular opportunities to judge of the matter.

[See The Hope, 4 Fed. 89.]

4. A steamer, about to meet a sailing vessel beating through a channel 300 feet wide, is at fault in holding speed at eight knots.

5. It is the duty of the officers of a steamer, under such circumstances, to have such command over her as to avoid all reasonable chance of accident.

6. A deck hand on board such steamer cannot recover of the sailing vessel damages for personal injuries received in a collision between the two vessels, caused by the fault of the steamer.

In admiralty. Libel in rem by one of the deck hands of the steamer Alliance against the schooner Northern Warrior, for damages to his person received in a collision of the two vessels. The owners of the schooner made claim, and answered that the collision occurred without her fault, but from the fault of the steamer.

Charles Hamlin and Charles P. Mattocks, for libellant.

Thomas M. Giveen, for claimants.

FOX, District Judge. This libel is promoted by one of the deck hands of the propeller Alliance against the Northern Warrior, for severe personal injuries, sustained by the libellant in a collision which occurred between these vessels in the Penobscot river, about 6 p. m., on the evening of the fourth of November last. The libellant was in the forecastle of the Alliance, was knocked down by the bowsprit of the schooner, which was forced through the bulwarks, and broken in two or three places. Three of his ribs were fractured, and he was also severely bruised and otherwise injured, and from the testimony of the physicians, it is evident that his injuries are of a very severe and permanent character.

The schooner is a flat-bottomed scow, with three keels, fifty-three tons burthen, twenty feet beam, square stem and stern, drawing three feet light, and something more to leeward when on a tack, and could not run in safety in less than four feet. She carried bowsprit and jib-boom, with jib and fore and main-sail, and was used for transporting lumber in and about the Penobscot river and bay. About 4 p. m. of the day of the collision, she sailed from Bangor, light, for Stearns Mills, about three miles below, with a captain and mate on board, who are also owners, and are shown to have been for many years acquainted with the navigation of the river. She exhibited no lights. There was a bright moon. The wind at the time

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

of leaving Bangor was light from the north-west, and so continued until they had reached within three-quarters of a mile of the mill, when it changed to the south-west, and as the channel there takes a south-westerly course, it was necessary for the schooner to tack to reach the mill.

The Alliance is a three-masted propeller of 418 tons, with a usual speed of eight knots, was on her regular trip from Boston to Bangor at this time. It is alleged in the libel and shown that she had burning the red and green lights, but it is not averred that she had a white mast-head light as required by law, and from all the testimony, it is doubtful whether she showed any such light. The question as to the lights of either vessel, I do not hold material in the present case, as in my view the want of them did not occasion or contribute to the collision.

The night was clear moonlight, and quite light. Vessels and other objects could be and were seen at a long distance, and it is proved that each of the vessels was seen from the other when more than a mile distant, and they continued in plain sight of each other until the collision occurred, which was just before six o'clock, with the tide about half flood.

The place of the collision was nearly opposite Stearns Mill. The river is there about 600 feet wide from bank to bank. On the western side it is shoal. About half way across there is a bank of edgings, drift stuff, &c., a portion of which, about ten or twelve rods long and half that width, is bare and more or less exposed at low water, from one to three feet in height, according to the state of wind and tide. From this bank to the eastern shore is about 300 feet. Flats extend a few rods from the eastern shore at low tide. The remainder of this space is the channel with a good depth of water. At high tide small vessels can run between the west shore and the bank of edgings.

Having made quite a number of tacks after the wind had changed to the south-west, the schooner was seen by the lookout of the Alliance at the time she began her last tack westerly from the eastern shore, the Alliance at that time being over on the western shore. At the same time the Alliance was seen by the lookout of the schooner, who testifies that the propeller did not show any white light, but only her port-light, and he supposed she was a three-masted schooner at anchor, as he could see her masts.

The regulations require that vessels at anchor shall show a white light, and no reason is suggested by the witness for his mistaking a red port-light for the proper anchor-light. When the captain of the Alliance saw the schooner tack on the eastern shore, he gave orders to port, and go to the eastward under the ship's stern. The propeller was then going eight knots, and her speed was not reduced until the collision became inevitable.

The schooner having commenced her tack westerly, after running a certain distance came about, and whilst nearly in the eye of the wind, heading down river, her fore and main-sail full, with her jib not drawn away, the collision took place. The schooner was under a slight headway, but not sufficient for steerage-way. There is some conflict of testimony as to the position of the vessels when the schooner came about, the master and witnesses for the Alliance stating that they were not more than fifteen rods off, whilst some of the witnesses for the schooner say that they were forty rods distant. Considering the speed of the propeller, and that an attempt was made to stop her before the collision, I am of opinion that the statement in behalf of the schooner in this respect is probably the most accurate.

It is claimed that the schooner is accountable for the collision by not having run out her tack as she was by law bound to do; that if she had completed her tack, the collision would not have occurred, as there would have been ample space for the steamer to have gone to the eastward, under the stern of the schooner, as the captain says he intended to do, if she had run on her west track as far as she ought to have done. It is said that she could without difficulty have passed over the bank or edgings, or if not, that she did not go so near thereto as she safely could, but that she unreasonably shortened her tack. The tide was about half flood, the rise and fall, as I understand, was about twelve feet. The schooner on a tack required four feet. The edgings at low water were exposed one to three feet, and from these data, it is certainly very doubtful whether she could then have passed over the bank with safety. The night was so clear that vessels at the mill wharf and objects on shore were plainly discernible. The captain of the schooner from his boyhood had been well acquainted with the locality, the mate had known it for more than twenty years, and both of them testify that they could not have crossed the bank, as the tide then was. Their testimony is corroborated by two of the crew of the schooner Arabella of Kittery, who were at the time on a wharf on the eastern shore, directly opposite the bank, and who were acquainted with its situation and height. One of them states that at the time there was but a little over two feet of water upon it, and Curtis, the first mate of the propeller, also swears that the schooner could not at this time have passed over the bank, and although the captain and some other officers of the propeller express a different opinion, I am well satisfied it would not have been prudent and good seamanship for the schooner to have attempted at that hour to have crossed the bank. Those on board the schooner, from their long acquaintance with the river and their knowledge of the capacities of their vessel, have the best opportunity to form an

opinion. No motive is suggested for their not passing over it, if it could have been done with safety. They had an interest as owners to manage carefully and prudently, and as the crew of the vessel to complete their trip as soon as was practicable, and their judgment, in my opinion, is entitled to more respect, corroborated by that of disinterested persons on the shore, than that of persons on board another vessel, who had no particular reason for forming a better judgment upon the matter. The weight of the evidence on this point is clearly with the schooner, and I hold she was not in fault for not attempting to cross the bank as the tide then was.

The law in relation to steamers meeting a sailing vessel when on a tack is very clearly expounded by Benedict, J., in the case of Whitney v. The Empire State [Case No. 17,586], the case of a schooner sunk in a collision with a steamer at Hell Gate, he says, "The remaining fault charged upon the sailing vessel, and the one most strenuously urged, is that she did not beat out her starboard tack. The duty of a sailing vessel to beat out her tacks, when meeting a steamer in narrow water, is unquestionable; but this rule does not require the sailing vessel in all cases to go as near to the shore as the depth of the water will permit, without reference to the other exigencies of the channel. In beating through a passage like Hell Gate, tacks must be made with reference to the safe passing points and shoals ahead, and when approaching Halletts Point with a strong ebb tide, a sailing vessel is entitled to come about in time to insure avoiding the reef at that point, although she may not be at the time of tacking as near the Long Island shore as the depth of water would permit her to go. The end of the southern tack of sailing vessels from Negro Point is therefore no fixed point, but must vary according to the capacity of each vessel and the strength of the wind and tide at the time. This being so, it seems clear that the opinion of those engaged in the navigation of the sailing vessel, who knew the capacities of their vessel and can most accurately judge as to the effect which the wind and tide are having upon her, is entitled to more weight, as showing the proper place for the tack, than opinions formed by persons aboard a steamboat approaching from below. In this case the testimony of the persons on board the schooner is positive and emphatic, that they proceeded as far upon the tack as it was safe for them to go."

Such also in the present instance is the statement of the captain and mate, the only persons on board the schooner. They are interested in the result, being owners of the schooner, but they are shown to have been well acquainted with this portion of the river for more than twenty years, and nothing is presented in evidence or stated in the argument as a cause for their adopting any other than a prudent and usual course at this time.

Pendleton who was on the lookout on the schooner says, that they were within twenty feet of the reef edgings, and Cornish, the master, puts the distance at fifteen or twenty feet. Mitchell, one of the crew of the Arabella, who was on the wharf about a quarter of a mile from the place of the collision, and who was watching the movements of the vessels, says, "The schooner could not have gone any nearer with safety; she was within sixty feet of the edgings, and there was twenty rods between the steamer and the eastern shore of the river at the time."

Frisbee, another of the Arabella's crew, gives the distance of the schooner from the edgings at the time of tacking as thirty feet.

Abbott, the second mate of the steamer, says, "The schooner came in stays about the the middle of the river." The shoal is near the middle of the river, and according to Abbott's account, therefore the schooner must have been near to the shoal or bank.

Curtis, the first mate, says, "The schooner tacked about the middle of the channel. We were as near the eastern shore as we dared to go. She could not have gone over the reef, but could have run eight or ten rods more on this tack and then tacked without touching the edgings. We were three to six rods off when order to reverse engine was given. Schooner's jib was not drawn away when she struck us."

The quartermaster, who was at the wheel says, "Schooner tacked in mid-channel, which is three to four hundred feet wide. I was within three or four rods of eastern shore and some five or six rods off when she tacked."

I do not find that the captain of the steamer testified as to the position of the schooner in the river at the time of the collision. He does say that the steamer was near the eastern shore, and after the steamer came off the rocks, she backed across the river eight rods beyond the place where the schooner tacked.

The balance of this testimony, in my opinion, is rather in favor of the schooner, and upon this point, the libellant having the burden of proof, I cannot find that the schooner was in fault for not continuing further on her westerly tack.

It is said that the testimony of the officers of the propeller establishes the fact, that at the time of the collision, she was as near to the eastern shore as she could run with safety, the quartermaster and others putting the distance from the shore as only three or four rods. In cases of this kind, occurring at night, but little reliance should be placed on estimates as to time or distances. In this instance, I am confident the libellants' witnesses are mistaken, as from their own testimony the collision took place as far west as mid-channel, which was 150

or 200 feet from the eastern shore, and the propeller could not therefore have been so near to the shore as is now claimed. Mitchell says the steamer was twenty rods from the shore at the time of the collision, and his position on shore and having no interest in the cause, entitle his opinion on this point to considerable weight with the court.

It is also claimed that the schooner was so near the eastern shore as to force the propeller upon the rocks. It is conceded that at this time the propeller went upon the rocks and there remained bows on for about half an hour until released by the tide, although repeated attempts were made to back her off. It is incredible however, that this schooner, without steerage-way on her, in a light breeze, and of only fifty-three tons burthen, could have forced this propeller of over 400 tons on shore in this manner. I have no doubt that the steamer was driven on shore by her own motion, with her helm to port, her engine not having been reversed until the instant of the collision. She then making eight knots, and it was entirely her own headway, and in no respect this little scow, which drove her with such force upon the rocks as to keep her there for a half hour on a flood tide with the whole power of her engine to assist her to come off. The steamer when free from the schooner ranged ahead, breaking off the jibboom as she went on, and after that the bowsprit, as they passed through her bulwarks into the forecastle. After the propeller was clear from the schooner, the latter came to anchor in the river, but not in proximity to the eastern shore as I understand the testimony.

It is admitted by Pendleton, who was the lookout on the schooner, that at the time he saw the propeller approaching them, and at a distance of forty rods, as he says, he hailed the steamer to go to the westward, and that she might have done so with safety. If so, there must have been the requisite space between the schooner and the bank of edgings, and it is therefore contended that the schooner could not have been so near to the bank as is now claimed. To my mind there is considerable force in this objection, and it has caused me to entertain a doubt on this point. But on the whole, I think that Pendleton might have supposed that the only safe course for the schooner, at least, was for the propeller to go to the westward. It was certain if she held her course that a collision would occur, as the schooner could not get out of her way, and the witness may have believed that as the schooner payed off to the eastward, the distance between her and the bank would increase before the steamer came up, so that there would be space enough for her between the bank and the schooner. It is not claimed that the schooner ran close up to the bank, but that she tacked leaving a rod or two, which distance increased rather than diminished by reason of the current and wind.

Evidence has been offered of certain statements of Pendleton, made by him to the agent of the boat the day after the collision, tending to prove that he agreed to pay for the damage sustained by the steamer. Their accuracy is denied by Pendleton, and payment was never made. Such evidence in cases of this kind is of but little weight and effect, and courts of admiralty as a general rule attach little importance to conversations of this kind after the accident. In determining disputed questions of fact appertaining to the navigation of the respective vessels, the court will as a general rule depend upon the positive testimony of the witnesses, rather than admissions or statements made as to such matters.

The captain and other officers of the Alliance have been examined as witnesses, and have endeavored to exonerate themselves in the mind of the court from all responsibility for the collision. The attempt has been without success; on the contrary, from their own statements, I think the course adopted by those in charge of the Alliance was the principal cause of the accident, and that their vessel was not managed with reasonable skill and prudence.

The captain admits that when he saw the schooner, he knew she was a fore and aft vessel, but could not see that she was a scow, as this was not the kind of vessels most usually and ordinarily found with this rig. He had no right to presume it was a vessel of this description, a light scow; but on the contrary, all the presumptions were that she was a fore and aft deck schooner, coming down the river with a cargo, such an one as could not possibly have passed over the bank at that tide. The captain, therefore, should have understood when he saw this fore and aft schooner making her tack, that she could not pass over the bank, but that her tack would be confined to the main channel, the narrow passage of 300 feet between the bank and eastern shore. Under this condition of things, it was not in my opinion safe or prudent for a steamer to pass at a rate of eight knots a vessel making her tacks in so narrow a passage. Such speed is altogether too great, and endangers the safety of both the steamer and sailing vessel, as there are always contingencies which may happen to a vessel tacking in so narrow a channel, to prevent her completing her entire tack, and which compel her to come about sooner than was anticipated. The 16th article of the rules relating to navigation requires every steamer when approaching another ship so as to involve risk of collision to slacken her speed, or if necessary to stop and reverse. In this narrow passage with a vessel ahead on a tack, those in charge of the steamer should have had sufficient command over her to avoid all reasonable chance of accident. As Sir

John Patterson, in The Batavier, 40 Eng. Law & Eq. 25, remarks, "At whatever rate the steamer was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, she had no right to go at such a rate. At all events, she was bound to stop, if it was necessary to do so, in order to prevent danger being done by the swell to the craft that were in the river."

If those in charge of the propeller were keeping a proper watch and attending to the movements of the schooner, they must have seen she was about to tack four to eight minutes before the collision was imminent, as it took that time for her to come about. If they saw her movements, it was their duty at once to have stopped and reversed their engine; but they did nothing of the kind till she was square about, heading down river, with her square sails full. I am satisfied the signals to reverse were not given until the collision was imminent, and that her headway was retarded but little if any. Under such circumstances, it was a fault of the propeller not to have sooner slackened her speed and reversed, while if her officers gave their orders so soon as they were aware of the position of the schooner, then it is clear that there was not a proper lookout kept, as her change of position must have been sooner discovered with a vigilant watch, attending to his duties. Libel dismissed.

Case No. 10,326.

The NORTHFIELD.

The HUNTER.

[4 Ben. 112.] [1]

District Court, S. D. New York. April, 1870. [2]

COLLISION IN NEW YORK HARBOR — STEAMBOATS CROSSING—WRONGFUL STOPPING—SPEED.

1. The steam-tug H., with a schooner lashed to her port side, was on her way from Hoboken, N. J., to a place south of Governor's Island. The steamboat N., a ferry-boat running from New York to Staten Island, left her slip at Whitehall, and swung around with the ebb tide, on a port helm, changing her direction from south to south-west, until she should be clear of Governor's Island, when her course would be about south, to Staten Island. The course of the H. was about south. The N. was going from ten to twelve knots an hour and the H. about two. When the vessels were about 300 yards apart, the H., without giving any signal, stopped and backed. The N. was then on a port helm, intending to pass under the stern of the H. As soon as the stopping of the H. was seen, the N. put her helm hard a-port, and also stopped her engine and attempted to reverse it, but, owing to her speed, it was only on the third attempt that the engineer was able to get the engine to pass the centre. The engine made one or two turns back before the collision. The N. struck the schooner in the side, injuring her so that she sank. The excuse given by the H. for stopping was, that the cleets to which the lines that held the schooner were fastened, were so loose that it was feared that the swell caused by the near passage of the N. ahead of her, where it was supposed the N. intended to pass, would have caused the breaking loose of the schooner. A libel was filed on behalf of the schooner against both steamboats. *Held*, that, as the vessels were crossing, and the N. had the H. on her starboard side, it was the duty of the H. to keep on, and of the N. to keep out of her way.

[Cited in The Britannia, 34 Fed. 553; S. C. 153 U. S. 142, 14 Sup. Ct. 799.]

2. The H., therefore, was in fault in stopping and backing.

[Cited in The Britannia, 34 Fed. 552; The Fountain City, 10 C. C. A. 278, 62 Fed. 91. Distinguished in dissenting opinion in The Britannia, 153 U. S. 153, 14 Sup. Ct. 803.]

3. The excuse set up by her for so doing was itself a fault. She had no business to be navigating with cleets so loose.

4. The N. was not in fault in her rate of speed, that being shown to be her usual rate.

5. She had the right to assume that the H. would keep on, and to shape her own course so as to pass under the stern of the H., if the latter kept on.

[Cited in The Susquehanna, 35 Fed. 323.]

6. The stoppage of the H. was the cause of the collision; and the inability on the part of the N. to reverse her engine before she did, was not a fault.

[Cited in The St. Johns, 34 Fed. 766; The Britannia, 153 U. S. 142, 14 Sup. Ct. 799.]

7. The H. was solely liable for the damage.

In admiralty.

James C. Carter, for libellant.

Beebe, Donohue & Cooke, for the Hunter.

Charles A. Rapallo, for the Northfield.

BLATCHFORD, District Judge. This is a libel filed by the owner of the three-masted schooner Hero, against the side-wheel steamboat Northfield and the screw steam-tug Hunter, to recover for the damages sustained by him, claimed to amount to $4,500, by the sinking of the schooner, with a cargo of one hundred and fifty-seven tons of coal on board of her, which she was transporting, for hire, at the time, and some personal effects and provisions belonging to the libellant, the whole having been totally lost, in consequence of a collision which occurred between the schooner and the Northfield, on the morning of the 18th of May, 1868, between ten and eleven o'clock, at a point between the Battery and Governor's Island, in the harbor of the city of New York, just where the East river forms a junction with the North river. The schooner was in tow of the Hunter, being lashed to the port side of the Hunter, and was on her way from Hoboken, in New Jersey, where she had taken on board her cargo of coal, to a place below and south of Governor's Island, there to be left by the Hunter and anchored, until she should be taken in tow by another and more powerful steam-tug, to be carried through Hell Gate, on her way to New Haven, in Connecticut, whither

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

[2] [Affirmed by circuit court. Case unreported. Decree of the circuit court affirmed by supreme court in 154 U. S. 629, 14 Sup. Ct. 1184.]

she was bound. The Northfield was on her way, as a ferry-boat, from her slip at Whitehall to Staten Island. The tide was strongly ebb. The Hunter and the schooner had approached near to the Battery, and were in the North river ebb tide, heading down, with such tide, to a point to the westward of Governor's Island. The Northfield, as she came out of her slip, swung around, with the ebb tide, on a port helm, so as to pass from a course about south to a course about southwest, until she should be clear of Governor's Island, and then make her course about south, to Staten Island. The course of the schooner and the Hunter was about south. The courses of the Hunter and the Northfield were, therefore, approaching each other and crossing each other, and they were so near to each other as to involve risk of collision, if neither should make any movement to keep out of the way of the other. Under these circumstances, the Northfield had the Hunter on her own starboard side, and it was the duty of the Northfield, under article 14 of the act of April 29th, 1864 (13 Stat. 60), to keep out of the way of the Hunter and the schooner. It was equally the duty of the Hunter, under article 18 of the same act, to keep her course. The Northfield was going at a speed of from ten to twelve knots an hour through the water. The Hunter was a weak tug, and was not going more than two knots an hour through the water. The Northfield was on a port helm all the time from the time she left her slip up to the collision. She saw the Hunter and her tow, and, according to the clear testimony of those in charge of her, recognizing her duty to keep out of the way, ported her helm, to a sufficient extent, in view of her own speed and of the progress which she saw the Hunter and her tow were making, to enable her to pass safely under the stern of the Hunter and her tow. She was thus swinging all the while from the south towards the west, with her head. When, however, the Hunter and her tow were about three hundred yards distant from the Northfield, the Hunter, instead of keeping her course, stopped her engine. The moment this was seen by the Northfield, her engine was slowed and stopped, and an effort was made to reverse it, and her helm was put hard to port. The engine of the Hunter, after being stopped, was backed, and then started ahead again before the collision. The speed of the Northfield was so great, when her engine was stopped, that, when her engineer, on receiving two bells to back, gave steam to back, the resistance of the water to the wheels prevented the engine from backing over the centre, and he gave a quarter of a turn ahead, and then gave steam to back a second time, and the engine again refused to pass the centre in backing, and he gave a quarter of a turn ahead a second time, and then gave steam to back a third time, and, on this trial, the centre was passed in backing, and her engine made one or two revolutions backward before the collision, but her speed was not materially diminished, and her stem struck the port side of the schooner just forward of the schooner's mizzen rigging, and not over thirty feet from the schooner's stern, and cut a hole through her side and penetrated some distance into her cargo of coal, from the effects of which blow she soon sank.

It is quite clear, from the testimony of those on board of the Hunter, that, if the Hunter had not stopped at all, but had kept her course, the Northfield would have passed safely under the stern of the schooner and the Hunter. The stopping by the Hunter was the causa causans of the collision. The excuse set up by the Hunter, in her answer, for stopping, is, that the schooner was attached to the Hunter by lines fastened to cleets on the schooner, which cleets the owner and claimant of the Hunter, who was on board of her at the time, was fearful would loosen if any extra strain should come upon them, and let the schooner go adrift; that, although the probabilities were that, if both vessels had kept on their respective courses, there would have been no collision, and the Northfield would have passed ahead, yet such course would have brought the vessels in such close proximity as to render it probable that the waves made by the Northfield would have broken the schooner adrift; and that, with a view to save any such result, and to prevent any possible contingency of a collision, the Hunter was stopped, to allow the Northfield to pass ahead a proper distance. It is quite apparent, from the evidence, that those on board of the schooner and those on board of the Hunter entirely mistook the purpose of those in charge of the Northfield. The Northfield, from the position of her slip, headed to the south, as she came out of it, and, as she swung around, from the south towards the west, on a port helm, her heading would, up to a certain time, if her keel had been projected forward in a straight line, have carried her across the bows of the Hunter and her tow. But, the swinging of the Northfield, up to the time the Hunter stopped, was gradual, based upon the visible movement of the Hunter forward, and upon the speed of the Northfield, and those in charge of the Hunter, knowing that it was the duty of the Northfield to keep clear of the Hunter, ought not to have assumed that the Northfield was intending to pass ahead of the Hunter, rather than astern of her. In so assuming, they took the risk of being wrong in the assumption. They were wrong, in fact, as it is clear, on the proofs, that the Northfield always intended, and all the time manoeuvred so as to pass under the stern of the Hunter. That, on the evidence, was the proper course for her, and it would have been recklessness, involving fault and condemnation, in case of a collision, if she had attempted to pass ahead of the Hunter. The stopping of the

Hunter did not occur in articulo periculi. When she stopped, there was no risk of collision, in fact, if no obstacle were to be interposed in the way of the Northfield, as she was swinging. But, when the Northfield was about three hundred yards distant, the Hunter stopped, and then backed, as has been described, forcing upon the Northfield the necessity of porting still more, and of stopping and reversing. This was a fault in the Hunter, contributing to the collision. The excuse set up by her in regard to the loose cleets on the schooner, is, also, in itself a fault. The evidence shows that the Hunter stopped twice on her way over from Hoboken, in consequence of the looseness of the cleets, in order to avoid getting too near to the swell created by other steamers. It was a fault in her to tow the schooner by lines fastened to cleets on the schooner that were so dangerously loose, as to make it necessary for her to stop where she did, and thus get into the way of the Northfield. There can be no doubt that the Hunter was in fault and responsible for this collision.

There was nothing in the manoeuvring of the Northfield up to the time the Hunter stopped her engine, that can be alleged as a fault in the Northfield. She shaped her course, from the time she first saw the Hunter, so as to pass under the Hunter's stern, and would, on the evidence, have done so, had the Hunter not stopped. Thrown into embarrassment by the stopping of the Hunter, the Northfield put her helm immediately hard a-port, and stopped her engine, and made the attempts to reverse it, before mentioned. Was she, in any respect, in fault, from the time the Hunter stopped? It is alleged that she ought then to have starboarded, and passed ahead of the Hunter and her tow, and between them and Governor's Island. But, it must be remembered, that she was at the time swinging on a port helm, and it seemed to those in charge of her, that she was more likely to avoid hitting the schooner by putting her helm hard a-port, than by starboarding. Although the Hunter stopped her engine, and backed, yet she and her tow were being carried to the south by a strong tide, and, as it was, the Northfield, notwithstanding the delay caused by her unsuccessful attempts to get her engine over the centre in reversing, failed to escape hitting the schooner by but a few feet comparatively. The Northfield is, I think, if necessary, entitled to the benefit of the rule, that the movement forced upon her, by the sudden and unannounced stopping of the engine of the Hunter, when the Northfield and the schooner were at so short a distance apart, is not to be imputed to the Northfield as a fault, even though it may have been a mistaken movement. Knowing that it was the duty of the Northfield to avoid her, the Hunter yet gave no signal, by whistling or otherwise, that she proposed to pass under the Northfield's stern. The Northfield was entitled, under her responsibility to keep clear of the other vessels, to the unembarrassed choice of the means of doing so. The Hunter interfered with that choice, when it had been properly exercised by the Northfield, as the court finds, and interfered with it at so late a moment that a collision was inevitable. But, all that the Northfield could then do to avoid the collision, or lighten the effect of the blow, was done. That her engine twice failed to pass the centre in being reversed, and that she was obliged twice to take a quarter of a turn ahead, in order to pass the centre in reversing, was no fault in the Northfield. There was no defect in her engine. Obliged to stop short at her forward speed, by the sudden stopping of the Hunter, the Northfield had on such headway that the resistance of the water to her paddles, when they were stopped, was too great to be overcome by the application of the steam in the reverse direction, until her headway was sufficiently slackened to make the resistance of the water to the paddles less than the power of the steam. But this predicament of the Northfield was wholly the fault of the Hunter. The Northfield used all the means at her command. Taking the two turns ahead was not improper, and, in fact, was successful, as appears, in securing the reversing, when, without that, it is probable, according to the evidence, that the Northfield would not only have sunk the schooner but would have injured the Hunter. The only possible allegation that could be made against the Northfield would be, that her actual speed before the Hunter stopped was too great. But it was her usual speed, the weather was clear, there was no fog, she saw the Hunter and her tow, and the evidence establishes that there would have been no collision, if the Hunter had not stopped. Nothing is shown to establish that the speed of the Northfield, up to the time the Hunter stopped, was greater than it should have been. Undoubtedly, if it had been enough less than it was to have secured the stoppage of the entire headway of the Northfield, with the manoeuvres in fact adopted by her, after the Hunter stopped, and before the collision, there would have been no collision, or its consequences would have been slight. But this by no means authorizes a conclusion, that the speed of the Northfield was greater than, in view of all the facts, she was entitled to maintain, up to the time the Hunter stopped.

On the whole case, the libel must, as against the Northfield, be dismissed, with costs, and the libellant must recover, against the Hunter, the damages sustained by him, by the collision, with costs.

[On appeal to the circuit court, the decree of this court was affirmed. Case unreported. An appeal was then taken to the supreme court, where the decree of the circuit court was affirmed. 154 U. S. 629, 14 Sup. Ct. 1184.]

NORTH MISSOURI RAILROAD (HODGE v.). See Case No. 6,561.

NORTHOP (VAUGHAN v.). See Case No. 16,899.

Case No. 10,327.

NORTHROP v. GREGORY.

[2 Abb. U. S. 503.] [1]

District Court, E. D. Michigan. June Term, 1870.

ADMIRALTY—ENTRY OF DECREE.

1. A motion to open a decree in admiralty entered by default must be made within ten days after entry; otherwise it must be denied.

[Cited in The Oriental, Case No. 10,569a; Allen v. Wilson, 21 Fed. 884.]

2. A motion to open a decree in admiralty entered by default, must be accompanied by the answer proposed to be filed, or at least by a statement of the grounds of defense intended; so that the court can determine whether the defense is meritorious.

3. A decree signed by a district judge after he has tendered a conditional resignation, but before it has been accepted by the government, is valid.

Motion to rescind a decree entered by default, and allow respondent to answer. The motion was made upon two grounds: (1) Because of mistake by respondent as to return day of the citation; with general allegations of a meritorious defense. (2) Because Judge WILKINS, who signed the decree as district judge, was not such at the time of entry and signing of the decree, he having ceased to be such by his previous resignation; and the decree is therefore a nullity.

Mr. Cheever, for the motion.

H. B. Brown, opposed.

LONGYEAR, District Judge. The decree was entered February 1, 1870, and this motion was made on the 18th of the same month, seventeen days after the decree was entered. By rule 40 the time within which a decree in admiralty may be rescinded is limited to ten days after the entry of the decree. This rule, made by the supreme court in pursuance of law, is of the same binding force upon this court as if it were a statute, and it cannot be disregarded. The limitation to ten days is an implied prohibition against what is so limited being done after that time. The motion, therefore, so far as it is based upon the first ground stated, is too late, and cannot be entertained.

Even if the motion had been in time, there is a fatal objection to its being allowed upon the first ground stated. It is not accompanied with the answer proposed to be put in; neither are the facts proposed to be set up by way of defense divulged, so that the court may see that the same are relevant, and if proven, would constitute a meritorious defense.

2. The motion, however, as to the second ground stated, stands upon a different basis, and might be made at any time, as in this respect it goes to the very existence of the court at the time the decree purports to have been entered. Judge WILKINS' resignation was made and filed December 7, 1869. The decree was entered, as we have seen, February 1, 1870. The commission of Judge WILKINS' successor, as appears by the record of it in this court, bears date February 13, 1870, and he took the oath of office, and his seat upon the bench, March 4, following. The record shows that Judge WILKINS continued to exercise the duties of district judge the same after his resignation was filed as he had done before, and up to the time his successor qualified and took possession of the office.

Judge WILKINS' resignation was made under and in pursuance of section 5 of the act of congress entitled "An act to amend the judicial system of the United States," approved April 10, 1869 [16 Stat. 44], providing "that any judge of any court of the United States who, having held his commission as such at least ten years, shall, after having attained to the age of seventy years, resign his office, shall thereafter during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation."

Judge WILKINS' resignation (after reciting that portion of the act upon which it is founded), is in the following language: "For the sake of enjoying the rights and privileges conferred by said act, and under its provisions, and not otherwise, I do hereby resign," &c. That is, if by the repeal or modification of the act, or otherwise, he should be deprived of the rights and privileges conferred by it, or its provisions should be withdrawn or materially altered, then he did not resign. This is the plain interpretation of the language. The resignation was, therefore, conditional in its terms; and it remained conditional until the government had accepted it, and acted upon it, by the appointment and confirmation of a successor, when it became absolute and binding upon both parties—upon the judge to relinquish the office, and upon the government to pay him his salary during the residue of his natural life.

We are not, however, necessarily concerned here with the question, whether or not Judge WILKINS' resignation deprived him of his office from and after its date, because, if at the time of the entry of the decree he was, in point of law, judge de facto, that is sufficient to sustain the record. That he was such at least, I entertain no doubt.

What constitutes an officer de facto has been very clearly stated, thus: "An officer de facto is one who exercises the duties of an office under color of an appointment or

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

election to that office. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without any color of right; and on the other, from an officer de jure, who is, in all respects, legally appointed and qualified to exercise the office." Judge Storr, of Connecticut, in delivering the opinion of the court in Plymouth v. Painter, 17 Conn. 585, 588. And the same learned authority adds, "These distinctions are very obvious, and have always been recognized."

Judge WILKINS was certainly not a usurper. He was in lawful possession of the office; and notwithstanding his resignation, he never relinquished that possession until his successor was appointed and qualified, but, on the contrary, he continued to exercise the duties of the office the same as before. He still held his commission. His resignation was conditional in its terms, and he was entitled to hold on to his commission until the government had, in some way, manifested its aceptance of or acquiescence in those conditions. He was, therefore, no usurper, but was in reality in the exercise of the duties of the office, under color of right, at least. Under these circumstances, he was, by all the authorities, judge de facto, if nothing more. At all events, he was not a usurper. And if not a usurper, he was an officer either de facto or de jure, and for the purposes of deciding this motion, it matters not which; either is sufficient to sustain the record. Motion denied.

NORTHROP, The WILLIAM H. See Case No. 17,696.

Case No. 10,328.

NORTHRUP et al. v. ADAMS.

[2 Ban. & A. 567;[1] 12 O. G. 430; 2 Cin. Law Bul. 84; Fent, Pat. 28.]

Circuit Court, E D. Michigan. March, 1877.

DESIGN PATENT—ORIGINALITY AND INVENTION—ADAPTATION OF OLD DEVICES—AGGREGATION.

1. The law applicable to design patents does not materially differ from that applicable to mechanical patents. The same general principles of construction extend to both.

2. To entitle a party to the benefit of the act protecting an invention, either for a design or a mechanical device, there must be originality and the exercise of the inventive faculty. In the one there must be novelty and utility, and in the other originality and beauty; mere mechanical skill is insufficient.

[Quoted in Western Elec. Manuf'g Co. v. Odell, 18 Fed. 322.]

3. The adaptation of old devices or forms to new purposes, however convenient, useful or beautiful they may be in their new role, is not invention.

[Quoted in Western Elec. Manuf'g Co. v. Odell, 18 Fed. 322. Cited in Foster v. Crossin, 44 Fed. 64.]

4. The principle of aggregation is as applicable to designs as it is to mechanical inventions.

5. If, in a design patent, the effect produced be simply the aggregation of familiar designs, it will not be patentable.

This suit was brought [by Frank Northrup and others against Samuel Adams] for the alleged infringement of a design patent for a provision or cheese-safe. The invention described in the patent was a rectangular base, with a top supported by four corner-posts, with an intermediate stile or support, dividing each side into vertical panels, all of which were covered with wire-cloth of fine mesh. The front side was made to open as a door, which was single, but folded upon itself, the two parts being hinged together at the centre stile. Around the base is an ogee moulding, and a similar one was run around the top to serve as a cornice. A lighter moulding of the same pattern was run around the edge of each panel, and a pleasant effect was claimed to be produced by staining all of the moulding a dark color, and varnishing all the rest of the wood-work, leaving it of its natural color. The claim of the patent was as follows: "As a design for a cheese-safe, the rectangular cage shown, having two vertical panels on each wall, a moulded top, A, and a moulded base, A'." The defences set up in the answer were—First, that the invention was in public use for more than two years prior to the application for a patent; second, that the invention was not patentable.

Charles J. Hunt, for complainants.

J. W. McGrath and G. H. Lothrop, for defendant.

BROWN, District Judge. Complainant claims his patent by virtue of the clause of Rev. St. § 4929, which extends the protection of the patent laws to any new and original design for a manufacture, or "any new, useful and original shape or configuration of any article of manufacture, the same not having been known or used by others," before his invention or production thereof. The law applicable to this class of patents does not materially differ from that in cases of mechanical patents, and "all the regulations and provisions which apply to the obtaining or protection of patents for inventions or discoveries * * * shall apply to patents for designs." Section 4933. The same general principles of construction extend to both. To entitle a party to the benefit of the act, in either case there must be originality and the exercise of the inventive faculty. In the one, there must be novelty and utility, in the other, originality and beauty. Mere mechanical skill is insufficient. There must be something akin to genius—an effort of the brain as well as the hand. The adaptation of old devices or forms to new purposes, however convenient, useful or beautiful they may be in their new role, is not invention. In the case of

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

Bennage v. Phillippi, 9 Off. Gaz. 1159, the acting commissioner of patents decided, I have no doubt correctly, that the use of a small model of the main Centennial building, for paper-weights and inkstands, was not patentable.

Another apt illustration of this is put by Simons, Design Patents, p. 194, of one who took a familiar statue of a shepherd-boy, thrust a gas-pipe through the leg and arm, and applied it to the purposes of a drop-light. Here was good taste, undoubtedly, but not invention. He merely succeeded in making that which was before purely ornamental serve a useful purpose.

It is true, patents have apparently been issued for designs frivolous in themselves, or new adaptations of old designs; but, as remarked in an excellent opinion by Commissioner Leggett, in the Case of Parkinson (Simons, Design Patents, p. 101), "the practice of the office in granting design patents has been not only liberal, but lax." In the later decisions of the office, a stricter construction has been given to the law, and one more consonant with the familiar principles applied to mechanical patents.

If a combination of old designs be patentable at all, of which I have some doubt, the combination must be such as to produce a new appearance. If the effect produced be simply the aggregation of familiar designs, it would not be patentable. For example, if one should paint upon a familiar vase a copy of Stuart's portrait of Washington, it would not be patentable, because both elements of the combination, the portrait and the vase, are old; but if "any new and original impression or ornament" were placed upon the same vase, it would fall within the express language of the section.

Apply these rules to the case under consideration. Rectangular safes, essentially similar to the complainant's, covered with wire-cloth, have been made and usea many years. When constructed of large size, each side was divided into panels by a vertical stile; when of smaller size, no such division was made. As the difference in size would not be patentable, so the division of each side into panels is none the more so. The only novelty, then, in this patent, is the use of an ogee moulding about the top and bottom, and the combination of this with panelled sides is claimed as complainant's invention. Mouldings of this description, however, have been used for centuries, and applied, not only by way of ornament in architecture, but to articles of furniture and the decoration of interiors. The embellishment of a provision safe with this ancient design is simply the adaptation of a well-known ornament to a new purpose. The result is pleasing in appearance, but not entitled to the protection of the patent laws, as novel or original. Rectangular safes were formely used for the exhibition of cheese in shops; but of late years they have been supplanted by a round safe, with the top divided and connected with hinges, so as to permit one-half of it to be thrown back. The present design appears simply to be a restoration of the old style with a rolling bottom, for the more convenient handling of the cheese, and the addition of a simple moulding around the top and bottom, giving it undoubtedly a more pleasing appearance. While the patentee showed some taste in the manufacture of this article, and while it may have become popular and valuable to him, it does not seem to me to possess the originality without which no manufacture can be patentable. It results that the bill must be dismissed, with costs.

Case No. 10,329.

NORTHRUP et al. v. SHOOK.

[10 Blatchf. 243; 16 Int. Rev. Rec. 196; 7 Am. Law Rev. 573.] [1]

Circuit Court, S. D. New York. Dec. 12, 1872.

BANKS AND BANKING—TAXATION UNDER INTERNAL REVENUE ACT—LICENSE—DEFINITION OF "BROKER."

1. Bankers, confining themselves to the business of banking only, as such business is described in subdivision 1 of section 79 of the internal revenue act of June 30, 1864 (13 Stat. 251), and which is not included in the business of a broker, described in subdivision 9 of said section 79 (Id. 252), as amended by the act of March 3, 1865 (Id. 472), are only liable to pay the banker's license fee and percentages mentioned in subdivision 1.

2. Such bankers, without any further or additional license or license fee, may transact the business of a broker described in subdivision 9, while the mere broker must pay $50 for his license. But, if a banker does business as a broker, he subjects his sales to the duties imposed by section 99 of the act of June 30, 1864 (13 Stat. 273).

3. A person who buys stocks in his own name, for his customers, for a commission, and advances the purchase money on the security of a percentage of such price, deemed sufficient, and deposited with him as security against loss, and sells the stocks for another commission, and settles the account according to the resulting balance to the credit of the customer, having no interest except his commissions and interest, or interest and commissions on his advances, the whole being at the risk, and for the account, of the customer, as to profit or loss, does business as a broker, within the meaning of the acts in question, and subjects his sales to the duties imposed by section 99 aforesaid.

4. Such duties thereupon become chargeable on all his sales, whether of his own property, or of the property of others coming to his possession, and held, for advances made by him as a banker, or purchased and sold on speculation for the account of others, on commission.

[Cited in brief in Anthony v. International Bank, 93 Ill. 227.]

5. Whether, when a tax is paid to a collector of internal revenue, without objection, or notice, in any form, that the party paying deems is erroneous, and the collector pays over the money

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 7 Am. Law Rev. 573, contains only a partial report.]

to the government, the collector is thereafter liable in an action to recover it back, and whether such an action, if maintainable, can be brought until after such an appeal to the commissioner of internal revenue as is required by section 19 of the act of July 13, 1866 (14 Stat. 152), quere.

[This was an action at law by Hiram M. Northrup and Joseph S. Chick against Sheridan Shook, collector of internal revenue, to recover taxes alleged to have been unlawfully assessed.]

Reverdy Johnson, Thomas W. Bartley, James R. Doolittle, and William H. Scott, for plaintiffs.

Noah Davis, Dist. Atty., and Luther W. Emerson, Asst. Dist. Atty., for defendant.

WOODRUFF, Circuit Judge. This action is prosecuted for the recovery from the defendant, who was, at the time of the transactions in question, the collector of internal revenue for the Thirty-Second district of the state of New York, of the sum of $20,830.19, alleged to have been erroneously assessed upon the business of the plaintiffs, and paid by them as taxes, from September, 1864, to and including the sum assessed for July, and paid August 31, 1866. The amount was assessed upon or for their sales of gold, stocks, bonds, bullion, bills of exchange, and promissory notes, between the dates stated. It is not claimed that the amounts of the sales upon which the assessments were made, or the rate of the tax assessed, were, in any respect, erroneous, if the plaintiffs were liable to assessment and tax upon the respective kinds or classes of business done by them, as hereinafter stated. The ground of the assessment was, that the plaintiffs were bankers doing business as brokers, within the meaning of section 99 of the act of June 30, 1864 (13 Stat. 273), as affected by subdivision 9 of section 79 of the same act, as amended by the act of March 3, 1865 (Id. 472), and were liable to tax upon all their sales of gold, stocks, &c., whether their own property, or the property of others. The plaintiffs insist that they are bankers only, doing business under a license as bankers, and not liable to taxation upon any of their sales; and that, although they made sales of the stocks, &c., belonging to others, which were taxed, they were therein acting as bankers only.

The sales in question were, as testified on the trial, of three kinds: (1) Sales of their own property. (2) Sales of gold, stocks, bonds, bullion, &c., transmitted to them by their correspondents, and the same or the proceeds drawn against. In some cases, the sales of the transmitted property were made immediately, and the proceeds at once applied to the payment of drafts so drawn, and, in others, the drafts were accepted or paid, and the gold, stocks, &c., were held for a better market, or to await further orders, and, in the meantime, stood as their security for their advances, and to provide reimbursement therefor. In other cases, there were no actual advances, but the property was held for sale, and, when sold by order of the customer, the proceeds were placed to credit, subject to draft. (3) Sales of stocks made in pursuance of an arrangement for what is called carrying stocks on a margin, wherein they, upon the deposit with them of a percentage on the amount of the stock, advanced money and purchased stock, for the dealer or speculator (who dealt in the hope of making a profit by the rise in the market price), and held the same subject to his order to sell, and finally sold the same for his account as to profit and loss. These transactions were conducted in the name of the plaintiffs, the name of the customer not being disclosed to those from whom the stocks were purchased, nor to those to whom the stocks were finally sold. Upon these purchases and sales, they charged and received from their customers the usual commissions for purchasing and selling stocks for account of others, and the tax imposed and paid to the United States on the sales was also charged to such customers. If the transaction showed a profit, it was paid to the customer, with a return to him of the cash or security held as a margin. If the transaction resulted in a loss, the amount of such margin returned to the customer was correspondingly reduced. It may not be material to the legal questions involved, but it was a fact proved in the case, that much the largest portion of the sales upon which the tax in question was imposed were of the class thirdly above mentioned.

On the trial, it was insisted, on behalf of the defendant, that the plaintiffs were bankers doing business as brokers, within the meaning of the acts of congress relating to taxes on sales of stocks, &c., and that, as such, they were liable to taxation upon all their sales, whether made for themselves, and of their own property, or made for others upon a commission; also, second, that, whether the tax was or was not properly assessed, the amount paid therefor could not be recovered back in this action, because it was a voluntary payment, not made under any duress, of goods, or otherwise, that, the defendant being a public officer, and the tax being assessed and returned to him by the assessor, he collected it and paid it over to the United States in the due discharge of his official duty, without notice of the particular character of the plaintiffs' business, or of the nature of the sales so assessed, and without any notice, protest, or objection made to him by the plaintiffs, that the assessment was, or was claimed by them to be, illegal, or, in any respect, erroneous, citing, in support of this, Elliott v. Swartwout, 10 Pet. [35 U. S.] 137, and Bend. v. Hoyt, 13 Pet. [38 U. S.] 263, decided before the act of congress of February 26, 1845 (5 Stat. 727), requiring a written protest when

duties on imports are erroneously exacted; Lawrence v. Caswell, 13 How. [54 U. S.] 488; [Band v. Hoyt, Id. 267]; [2] Nichols v. United States, 7 Wall. [74 U. S.] 122, decided subsequently to that statute; and U. S. v. Clement [Case No. 14,815],—and that, although, in course of the payments, but at what date is not shown, the plaintiffs, or one of them, repeatedly objected, to an assistant assessor, that the plaintiffs were not liable to these taxes, and remonstrated with him, and received from him an assurance that, if the tax was illegal, it would be refunded, still they made no objection to the defendant, nor claimed before him, by notice, protest or otherwise, that the assessment was illegal; and, third, that, although it was proved that the plaintiffs did, in or after April, 1869, make an application to the commissioner of internal revenue to have the amount of the taxes in question refunded to them, there is no proof of any such appeal as the act of congress of July 13, 1866 (14 Stat. 152, § 19), requires, and, for that reason, this action cannot be maintained.

I. The first, and, in respect of importance, the principal, question is, whether the plaintiffs were liable to the tax assessed and paid.

The provisions of the acts of congress, which are to be construed in deciding that question, are the following: The act of June 30, 1864, § 110 (13 Stat. 277), which imposes a duty of $^1/_{24}$th of 1 per cent., each month, on deposits, $^1/_{24}$th of 1 per cent., each month, on the capital, $^1/_{12}$th of 1 per cent., each month, on the circulation, and an additional ⅙th of 1 per cent., on certain specified excess of circulation; these are required of "any bank, association, company, or corporation, or person, engaged in the business of banking, beyond the amount invested in United States bonds." Section 79, subd. 1, of the same act (Id. 251), declares, that "bankers using or employing a capital not exceeding the sum of $50,000 shall pay $100 for each license," and, for every additional $1,000 of capital, $2; and that "every person, firm or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be regarded as a banker, under this act." Section 79, subd. 9, of the same act (Id. 252), as amended by the act of March 3, 1865 (Id. 472), reads as follows: "Brokers shall pay $50 for each license. Every person, firm, or company, except such as hold a license as a banker, whose business it is, as a broker, to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank notes, promissory notes, or other securities, for themselves or others, shall be regarded as a broker, under this act. * * * Provided, that any person holding a license as a banker shall not be required to take out a license as a broker." Section 99 of the same act (Id. 273) provides, "that all brokers, and bankers doing business as brokers, shall be subject to pay the following duties and rates of duty upon the sales of merchandise, produce, gold and silver bullion, foreign exchange, uncurrent money, promissory notes, stocks, bonds, or other securities, as hereinafter mentioned." Then follows a specification of rates, and a proviso, prohibiting sales, by any one not licensed as a broker or banker, of any stocks, merchandise, &c., not bona fide his own property and actually on hand.

Under these provisions, it is, I think, clear, 1st. That bankers confining themselves to the business of banking only (as such business is described in subdivision 1 of section 79, and not included in the business of a broker described in subdivision 9), are only liable to pay the banker's license fee and percentages mentioned in subdivision one.

2d. That, without any further or additional license, or license fee, they may transact the business described in subdivision 9 of the same section, while the mere broker must pay $50 for his license. This subdivision, by plain implication, contemplates and authorizes bankers, if they see fit, to engage in the business described as the business the transaction of which makes a man a broker, within the meaning of the act.

3d. Section 99 recognizes this construction of the section last referred to. It assumes that bankers may transact the same business for which the broker pays his license fee, and, therefore, declares, that "all brokers. and bankers doing business as brokers, shall be subject" to duties on sales, &c., at rates specified.

4th. Here is no involuntary double taxation. So long as the banker confines himself strictly to the business of banking, he pays for that, and on his business, specified license fees and duties, and nothing more. If, however, he sees fit to engage in the business described not as the business of a banker strictly, but coming, also, within the business of a broker, he then subjects his sales to the duties imposed by section 99.

5th. The distinction between the conditions upon which license fees are paid, the amounts of such license fees, and the classes by whom they are payable, on the one hand, and the general declaration, in section 99, as to what sales shall be subject to duty, is to be borne in mind, in giving a construction to this latter section. The section is not confined to the brokers described in subdivision 9 of section 79, as seemed to me to be assumed on the trial. It includes sales of merchandise and produce, as well as of gold, stocks, bonds, and other securities mentioned

[2] [From 16 Int. Rev. Rec. 196.]

in the subdivision last named, and so it includes produce brokers, and commercial brokers, and, perhaps, some others (subdivisions 13, 14, etc., § 79 (13 Stat. 252, 253); and it, therefore, brings into view all sales by brokers of any kind, made of "merchandise, produce, or gold and silver bullion, foreign exchange, uncurrent money, promissory notes, stocks, bonds, or other securities."

6th. It is obvious, that, if the sales of these various descriptions of property could be made for others, and for a commission, by bankers, under cover of their license, (they having been expressly relieved of the duty to take a license as brokers,) the whole business of selling merchandise, produce, gold, stocks, bonds, &c., might be done by those who hold such a license, and that those whose constant employment it is to make such sales for others for a commission, could and would be tempted to shelter themselves under a banker's license, and some small business within the definition of a banker, and so the tax on brokers' sales, which was very large in its aggregate amount, and, therefore, an important source of revenue, would be defeated. Congress, therefore, declare, not only that brokers, but bankers doing business as brokers, shall pay the tax on their sales. So that, if bankers assume to sell merchandise or produce, as brokers therein, or to sell gold, stocks, &c., as brokers therein, they are subjected to the same tax on sales. Again, knowledge of the enormous extent to which sales are negotiated by brokers must be imputed to congress; and it is clear, I think, that the purpose of the law was, not to tax the private person engaged in other business, when he sold his own property (unless some other provisions included it), but to reach and tax the sales made by persons acting as brokers for a commission, and that it was enacted with knowledge that those sales, as to gold, stocks, bonds, and securities, would include by far the largest portion, and, probably, nearly all, that are made in the commercial cities where such business is transacted.

7th. It was largely assumed, on the argument, that, because the above cited subdivision 1 of section 79, prescribing a banker's license fee, and describing the persons who should pay it, described them as persons having a place of business where, among other things, "money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale," therefore, and irrespective of other specific provision, they are not taxable on the sales which they make. It seems to me quite obvious, that nothing in this subdivision does, per se, determine whether the sales here spoken of are taxable or not; and, were there another and general provision taxing all sales of stocks, bonds, &c., bankers must pay it, as well as other persons. They would have such license to sell as this subdivision imports, but their sales would, nevertheless, be subject to any regulation of sales, whether by taxation or otherwise. No embarrassment, therefore, to a consideration of the question, what sales are taxable, arises from this subdivision of the act; and the door is wide open, to the operation of the section imposing the tax on sales of merchandise, produce, gold, bullion, stocks, &c., according to its proper interpretation. That section (99) hereupon declares, that all brokers, and bankers doing business as brokers, shall be subject to pay the duties specified "upon the sales of merchandise, produce, gold and silver bullion, * * * stocks, bonds, or other securities." This is in accordance with the view last suggested. It contemplates that bankers may sell property of the description enumerated, and that, when they engage in the business of selling as brokers, they shall be taxed, whether their sales are of merchandise, produce, stocks, or other of the specified property.

8th. The question, then, which is the test of the plaintiffs' liability to pay the tax is, whether they were doing business as brokers, within the proper meaning of the 99th section. It will be most convenient to consider this in reference to the third class of their transactions, as above divided, namely, buying stocks in their own names, for their customers, for a commission, advancing the purchase money on the security of what is called a margin, that is, a percentage of such price, deemed sufficient to secure them against loss, selling the stocks, for another commission, and settling the account according to the resulting balance to the credit of the customer, the whole being at the risk, and for the account, of the customer, as to profit or loss, and they having no interest therein, except their commissions and interest, or interest and commissions on their advances.

I have said on a former occasion, cited to me on this trial (Markham v. Jaudon, 41 N. Y. 235, 256), that, in such transactions as these, the actor is not a mere broker. I think so still. It is not a part of the duty or authority of the mere broker to make the purchase and sale in his own name. He is but a go-between or negotiator between two principals. It is not any part of his duty or office, as mere broker, to pay the price, or to assume any liability therefor. He binds his principal, or, oftentimes, both of the principals in the transaction, by his memorandum. He is, in short, a mere agent, acting by authority of another. And these same observations are true of other agents. It is, however, equally clear, that agents may make themselves liable on the contracts which they in fact make for others, either voluntarily or by not disclosing their agency. It would, nevertheless, be true, that their act of purchase and sale would be in execution of their authority as agent, and their principal would and must so treat it. They do not

cease to be agents therein, because they go further than, as agents, they were bound to go, and add their personal liability, in order to aid in the transaction. As between them and their principal they act in the relation of agents. So, they may, by express authority, or, it may be, by authority implied from the usages of trade (when such usages exist), receive the property purchased, and be themselves the instruments of making delivery, when they make sales; and, by consent of the principal, they may take formal title and convey that formal title to the purchaser, and may even convert the transaction, as between them, into an agreement for a speculation in stock in the name of the agent, for the account of his principal. While all these may be superadded to the duty and authority of a mere agent to buy and sell, there still remains the substantive fact, that, whatever effect these other attending circumstances may have, between him and his principal, as the result of the payment by himself, or of his taking title, the actual agency for his principal is not withdrawn from the transaction.

It is, however, claimed, that the definition of a broker, in section 79, subd. 9, excludes such transactions from the class of sales which are subject to tax; or, in other words, that the plaintiffs were not doing business as brokers, under that definition. The terms used are, "person, firm, or company, except such as hold a license as a banker, whose business it is, as a broker, to negotiate purchases or sales of stock, exchange, bullion," &c., &c., "for themselves or others, shall be regarded as a broker, under this act." I observe, upon this, that a banker, although he does the business which is declared to make a person a broker, is not to be deemed a broker, and to take out a license as such. That is the effect of the exception. When the banker is also doing business as a broker, he becomes chargeable with, not the license fee, but only the tax imposed on sales under the 99th section.

What, then, is doing business as a broker? This statute does not declare, further than this—one whose business it is, as broker, to negotiate purchases or sales of stock, &c. This does not tell us what it is "to negotiate purchases and sales, as broker." We must go further, before the definition becomes complete and explicit; and yet, I apprehend, it is not doubtful. On the contrary, it is so well understood, that what negotiating as broker meant required no definition. I have already indicated its meaning. The broker, as such, is the mere agent of a principal, in the negotiation of a purchase or sale. As mere broker, he has no responsibility, except for his own good faith and fair dealing. He, as mere broker, negotiates avowedly for some other, as principal. As mere broker, he neither takes nor gives title, neither receives nor delivers the property, and he has no interest in the transaction, except to earn and receive his commissions. But he may do something more, and yet be a broker, in the acts of buying and selling for others. No one would, I think, suggest that he was less a broker, in buying and selling for another, if he consented to endorse the note of his principal, for the better security of the seller upon credit; or that he would be less a broker, in buying and selling, because his principal consented that, to secure him against loss by such endorsement, he might hold the property, or the title thereto; and, in this precise point of his agency, as broker, in buying and selling for his principal, for the account of such principal, as to profit and loss, and for a commission to himself, I am not able to perceive how superadding to his agency an advance of money to pay for the stock, can have any greater effect. It may be, that an agreement to buy stock in his own name, carry it, and sell it when directed, for the account of his customer, as to profit and loss, involves questions of right and duty between him and his principal, that are peculiar, and about which there may be difference of opinion. But, the agency in the act of buying and selling is always present, whatever legal consequences may flow from the circumstances superadded to the mere brokerage. In the aggregate transaction, he is a broker, and something more. He negotiates a purchase or a sale for another. He earns therein a commission. He has no interest in the profit or loss, when the whole transaction is carried into complete execution, according to the actual intent of the parties. If it were conceded that the transaction is a speculation in stock for account of the customer, which the agent agrees to make in his own name, and even though the agreement does not contemplate, as a practical result, that the stock will in fact come to the possession of the customer, this would not effect the view I take of the agency, as broker, in making the purchase and sale. The customer, on paying the price and all commissions, would, as matter of law, be entitled to receive the stock; and this was proved, on the trial, to be the recognized rule regulating the practice in such cases.

Speculation in stocks for account of others is not mentioned as belonging to the definition of the business of a banker, as defined in the statute. A portion of the business done by these plaintiffs was, no doubt, receiving stocks, bonds, &c., for discount or sale; but that by no means embraced mere speculations in stock, such as I am considering. In some transactions, also testified to on the trial, the plaintiffs sold stocks through a broker employed by them for the purpose. If those were all their sales, it would present a very different question. But they employed a broker only in exceptional cases, when they desired a sale at the "stock-board." I cannot doubt that it was the intention of congress to reach and include

what, I presume, constitutes very much the largest part of all the sales of stocks, gold, and some other property made in this country (and it is expressly proved that it constituted much the largest part of the plaintiffs' business), namely, speculation in the very manner of the transactions I am considering; and I think a just interpretation of the statute does include them. It follows, from these views, that the plaintiffs were, during the period, "doing business as brokers," and were, therefore, taxable for these sales.

II. If thus taxable, was the tax rightfully assessed upon all their sales, whether of their own property, or of the property of others coming to their possession, and held, for advances made by them as bankers, or purchased and sold on speculation for the account of others, on commission?

The supreme court have, I think, relieved me of any responsibility or embarrassment in deciding this question. The section imposing the tax is explicit, that "all brokers, and bankers doing business as brokers," shall pay the tax on the sales enumerated. In U. S. v. Cutting, 3 Wall. [70 U. S.] 441, the supreme court decided, that the sales of stocks, bonds, gold, &c., made by brokers for themselves, are subject to the same duties as those made for others. The statute places bankers doing business as brokers in the same condition in which it places brokers. In that respect, the terms are explicit, and this decision seems to me conclusive. It is true, that, in United States v. Fisk, Id. 445, at the same term, the supreme court decided that bankers who only sell for the United States, and for themselves, and who do not sell for others for a commission, are not liable to the taxes or duties imposed on sales. But the court is careful to discriminate between bankers who only sell for themselves and the United States, and bankers who sell for others for a commission, that is, bankers who do business as brokers. The plain implication from this case is, therefore, in exact accord with the case of U. S. v. Cutting [supra], and confirms the above statement of the effect of the decision therein.

III. The foregoing views necessarily result in a decision that the tax imposed upon and paid by the plaintiffs was legal, and that, for that reason, this action cannot be maintained. In acting upon that conclusion I do not find it necessary to consider the other grounds upon which the defendant urges a defence. The argument is certainly entitled to consideration, that, where a tax is paid to the defendant, as collector, without objection, or notice, in any form, that the party paying deems it erroneous, and the collector pays over the money to the government, he is not thereafter liable in an action to recover it back; and that objection or remonstrance made to the assessor, or his assistant, will not suffice. But, as to that, and as to the necessity of a formal appeal, I express no opinion, because, whether the defendant is or is not right on these points, the conclusion above stated disposes of the whole case.

IV. On the trial, evidence was offered by the defendant tending to show that it was a part of the regular and accustomed business of brokers in this country to purchase, carry and sell stocks for others upon commission, in the manner in question herein. That evidence was objected to by the plaintiffs, and was received subject to their objection, with the suggestion, that the consideration of the case would disclose the views entertained respecting its materiality. A witness, who, for twenty-five years, had been doing business as a broker, and who, I think, showed a sufficient acquaintance with the business of brokers in the leading cities in which the business of brokers is carried on, was examined on the subject. The act of congress not having, in terms, defined what it is to act or negotiate "as a broker," I deemed it competent evidence for the purpose of more clearly showing the general acceptation of the term which the legislature must have had in view.

The foregoing discussion, however, leads to the same conclusion, whether this testimony be received and considered, or not. I think the meaning of the term "broker" is well settled, independent of such evidence. The testimony, therefore, can be of no prejudice to the plaintiffs, even if it be held immaterial, and, if material, it is competent. Judgment must be entered for the defendant, with costs.

Case No. 10,330.

NORTH SHORE STATEN ISLAND FERRY CO. v. The HUGUENOTS.[1]

District Court, D. New York. April 1, 1863.

DAMAGES FOR COLLISION — DETENTION FOR REPAIRS—INTEREST—COMMISSIONER'S REPORT.

1. The owner of a vessel damaged by collision may recover for the necessary detention to make repairs when it is made to appear that she could have been profitably chartered or employed during the period of detention. Following Williamson v. Barrett, 13 How. [54 U. S.] 101.

2. He is also entitled to recover interest on the actual cost of the necessary repairs from the time payment therefor was actually made.

3. The report of a commissioner to assess damages in admiralty must be sustained unless it is quite apparent that he has erred.

This was a libel by the North Shore Staten Island Ferry Company against the steamboat Huguenots to recover damages for collision. A decree was heretofore rendered in favor of libelants. Case No. 10,323. The case now comes up on exceptions to the commissioner's report. The exceptions raised the question whether the libelants could

[1] [Not previously reported.]

recover for the detention of their vessel while being repaired; whether they could recover interest on the amount of repairs; and what amount they should recover.

Clark & Hale, for libelants.
Mr. Williams, for claimants.

HELD BY THE COURT (HALL, District Judge): That the right of a libelant in a cause of damage to recover for the necessary detention of his vessel, if it shall appear that his vessel could have been profitably chartered or employed during such detention, is firmly established. [Williamson v. Barrett] 13 How. [54 U. S.] 101; 2 W. Rob. Adm. 279; 3 W. Rob. Adm. 232. That interest should be allowed on the actual cost of the necessary repairs from the time the payment therefor was actually made. The libelant is entitled to full indemnification for the injury sustained, and interest must be allowed, or he will not receive such indemnification. 2 W. Rob. Adm. 130; [St. John v. Paine] 10 How. [51 U. S.] 573, 574. That as to the sum allowed for repairs, although the evidence for the libelant is not as precise and definite and reliable as it might have been made by keeping a proper and separate account of the particular repairs rendered necessary by the collision, yet that of the claimants is still more unreliable. That as to all questions of fact the report of the commissioner must be sustained, unless it is quite apparent that he has erred. That as to the rate of demurrage, although the libelants' evidence is not of the most satisfactory character, yet the claimants offered no evidence in contradiction; and, in the absence of such evidence, the report should not be disturbed. Exceptions overruled and report confirmed.

Case No. 10,331.

The NORTH STAR.

VANDERBILT v. REYNOLDS et al.

[8 Blatchf. 209] [1]

Circuit Court, S. D. New York. Feb. 6, 1871.[2]

COLLISION — APPROACHING STEAMERS — PORTING HELM—PROPERLY SCREENED SIDE LIGHTS—DIVISION OF DAMAGES.

1. Two steamers, A. and B., were approaching each other, at night, so nearly end on as to involve danger of collision, and A., instead of porting her helm, starboarded it, and a collision ensued; *Held*, that she was in fault.

2. She was also in fault in not seeing the lights of B., and in not slowing, stopping and backing when the danger of collision was manifest.

3. B. was in fault in not having her side-lights properly screened, which tended to mislead A. in regard to the course of B., and prevented an early discovery by A. of her own mistake in the movement she made.

[Applied in The Santiago de Cuba, Case No. 12,333.]

4. Both vessels being in fault, the loss was divided.

[See The Albemarle, Case No. 135.]

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

[These were libels by William H. Reynolds and others, owners of the Ella Warley, against Cornelius Vanderbilt, claimants of the North Star, and Cornelius Vanderbilt against William H. Reynolds and others. From a decree of the district court holding the Ella Warley in fault (case unreported), an appeal was taken to this court.]

Edwin W. Stoughton and Erastus C. Benedict, for the Ella Warley.

Charles Donohue and William A. Beach, for the North Star.

WOODRUFF, Circuit Judge. The libellants in the first named cause are the owners of the steamship Ella Warley, and the libellant in the second cause is the owner of the steamship North Star. Each seeks to recover damages caused by a collision between these two steamships, at about a quarter before nine o'clock in the evening of February 9th, 1863. This collision occurred at sea, off the coast of New Jersey, opposite, or a little below, Long Branch, at a distance from the shore in respect to which witnesses and parties differ. No testimony in the case tends to show that it was less than five miles, and none warrants the belief that it was more than seven and one-eighth miles. In a smooth sea, a night not very dark and the wind light, with full opportunity to each to see and watch the lights of the other, and when, in fact, according to the testimony of those who were upon the respective vessels, each was seen at such distance from the other as would furnish ample opportunity for any manoeuvre called for by the exigency, the two collided, and the Ella Warley was sunk, with her cargo, and some lives were lost.

That a collision occurring under such circumstances was the result of mismanagement, and was due either to carelessness or incompetency, is indisputable. The Ella Warley was on a voyage from New York to New Orleans, and the North Star on a voyage from Key West to New York. The testimony of the witnesses called and examined by the respective parties tends to irreconcilable conflict; and any endeavor to harmonize the testimony on either side with that on the other, and with the conceded or uncontroverted facts, would be utterly fruitless. It cannot be done. The counsel for the owners of the Ella Warley, arguing from the testimony on their behalf, present a very strong case, while the counsel for the owner of the North Star, arguing from the

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

[2] [Affirmed in 106 U. S. 17, 1 Sup. Ct. 41.]

testimony of those on board that vessel, with great force cast the blame upon the former. On each side, it is necessary to impeach the truth of the testimony on the other. I shall content myself with stating my conclusions from all the evidence, without criticizing the witnesses or their testimony in detail, and without professing to make an argument to support the convictions which, after much time spent in studying and comparing the evidence on both sides, rest upon my mind.

In such a case, the witnesses who are concerned in the management of the respective vessels, conscious that the serious consequences which ensued must be imputed to the fault of some of them, and feeling the heavy responsibility under which they acted, have a very strong motive to represent their conduct most favorably to themselves; and it is not doubtful, I think, here, that, in some particulars, that feeling has either led to untruth or has made the memory inaccurate. To whom, in particular, this is, in my judgment, most applicable, I shall leave to be inferred from my conclusions.

It is first to be observed, that the general course of the two voyages was precisely opposite, the Ella Warley going from the port of New York down the Atlantic coast, and the North Star coming up the coast, bound for the port of New York. The course of each was over the track of a large coastwise commerce, where inward bound and outward bound vessels were to be expected, and where, for that reason, great watchfulness and diligence were demanded from both. There is testimony tending to show that it was usual for vessels bound down the coast to take an outside track or course and for inbound vessels to keep somewhat nearer the shore; but the proof on this subject is not such as to show that there was any such rule of navigation as would make it, per se, a fault in either vessel to choose her course as her master, in his discretion, might see fit, whether nearer or more remote from the land.

The general rule of navigation is not disputed, that, when two steamers are meeting each other on courses directly opposite, or on courses so nearly opposite as to involve danger of collision, it is the duty of each to port the helm and pass the port side of the other. The general course of the vessels in question would suggest that they were meeting, within the proper construction of that rule. As the Ella Warley, after she saw the North Star, starboarded her helm and attempted to pass the starboard side of the North Star, the effort on her behalf is to show that her position and her observations upon the position and course of the latter vessel were such as to withdraw her from the obligation of this rule and justify what she did.

The testimony, I think, shows, that the North Star, at six o'clock in the evening, was off Barnegat, and five or six miles from the shore. Her master first states, in his testimony, five miles, and afterwards six miles. From that place, her course was taken "north by east half east, magnetic true course, north-east," and that course was maintained until she saw the lights of the Ella Warley, the intent being to steer on a direct course for the light-ship, about seven miles off Sandy Hook. The Ella Warley left port in charge of a Sandy Hook pilot, in the afternoon, and proceeded down the bay. When, according to the testimony of her second officer, outside the outer bay, abreast of the Highlands, or, according to the testimony of the pilot himself, about a length inside the bar, the pilot left her. He instructed the master to keep her on a south-east course for a quarter or half an hour, and that would carry her near the light-ship, outside of all vessels bound in, and then he could shape his course as he pleased, or, as the master states the instructions: "Keep her south-east, and it will clear you of everything. It will take you outside of the light-ship." Taking the testimony of the witnesses from the Ella Warley for the present to be correct, she did proceed out on a south-east course, to and a little beyond the light-ship, and, at eight o'clock, took her course south half west, and afterwards changed to south, very shortly after which the light of the North Star was reported. If these courses be assumed, it is true that the two vesssels were not approaching each other on precisely the same line, but on two lines which converged to a point at or near the light-ship, and varying only one point from each other; and it is clear, I think, that, as they approached each other, if there seemed any doubt of their passing in safety, they were within the rule above stated, and each should have ported the helm and passed to the right. For, be it observed, that, in the night, if there be no other decisive indication than the approach of lights in the direction stated, neither vessel is likely to know the precise point to which the courses converge, and the rule stated is the rule of safety, if any change is made. Was there, in the present case, any other indication of the position and course of these vessels, and, if so, what manoeuvre on the part of either or both did it teach? The manoeuvre actually made by each resulted in the collision. That is to say, the North Star, after she saw the Ella Warley, ported, conforming, in that respect, to the rule, and went more to the eastward. The Ella Warley, departing from the rule, starboarded when she saw the North Star, and went also to the eastward, and the collision followed.

It is perfectly certain that the above courses of the two vessels and their relative position are not precisely accurate, if the witnesses who were on the North Star, and testify to seeing the light of the Ella Warley

before the North Star ported, are to be believed, for, they are distinct and unqualified in their statement, that, when they first discovered her, she bore a little over the port bow of the North Star. If she was to the eastward of the light-ship, and the North Star was on a direct course to that ship, she would be seen a little on the starboard bow; and it follows, that the course of the North Star was a little more to the east at that time, or the testimony from the Ella Warley is erroneous in the representation that she was to the eastwardly of the light-ship. But it is to be here observed, that the difference is not great. The witnesses do not assign to her bearing more than a slight variation from directly ahead. Those who are called on behalf of the Ella Warley, from the North Star, concur with those called by the latter, in saying that the former was seen from the North Star, right ahead, or a little on the port bow, or, as one expresses it, "as near ahead as you could make it." Considering the general conformity of the line of the two courses, a very small allowance from precise accuracy, of course, in either of the two vessels, would harmonize with this evidence. This, again, confirms the circumstances before mentioned, showing the applicability of the rule referred to, to vessels in such relative positions.

On the other hand, three witnesses on the Ella Warley are equally positive, that, when the North Star was first seen from the former vessel, she was seen over the starboard bow. If that was before either changed the courses above first stated, that testimony is not irreconcilable with the testimony from the North Star. If a vessel on a course northeast sees another vessel over her port bow, such other vessel, being on a course south or south half west, may see the first over her own starboard bow, if she be, at the time of observation, to the eastward of a line due north, or north half east, from the first named vessel. This, however, involves the condition which is denied by the owners of the Ella Warley, namely, that she was to the westwardly of the course of the North Star. It is, nevertheless, very important, because it reduces the points of contradiction between the witnesses. It was argued with earnestness, that the numerous witnesses from the North Star, including those called by the Ella Warley in her own behalf, who testify that the latter was first seen over the port bow of the former, must be mistaken, because the North Star was seen over the starboard bow of the Ella Warley. There is no necessary inconsistency, as will readily be seen by drawing the lines above suggested. On the contrary, if, at the moment of observation, the Ella Warley was not to the eastward of the course of the North Star, and was to the eastward of a line drawn from the latter in the direction which corresponds with the Ella Warley's course reversed, then the North Star must have been seen over the starboard bow of the Ella Warley, and the Ella Warley must have been seen over the port bow of the North Star. To my mind, the weight of the evidence is preponderating, that this was the actual relative position and course of the two vessels, when each was first seen by the other, which was at or very nearly the same time. It makes the witnesses on both sides not only harmonize but corroborate each other.

This, however, leaves unexplained the testimony tending to show that the Ella Warley had passed beyond the light-ship, and had not drawn any more near to the shore afterward, for that testimony tends to show that, when seen from the North Star, she was to the eastward of the course of the North Star. That testimony is not sufficient to overcome the large preponderance of the evidence that she was in fact seen over the port bow of the North Star, or very nearly or quite ahead, which latter goes still further to harmonize all the witnesses. Indeed, one of the witnesses thought, that, for a moment, the Ella Warley seemed a little to the starboard of that bow, though but for a moment, which might readily happen if she was very nearly ahead and any unsteadiness attended the motion of either. If I were to attempt an explanation, I should say, that the proofs above adverted to reduce the inquiry to two questions: Did the Ella Warley pass beyond the light-ship, and preserve such a course thereafter, that, when first seen from the North Star, she still was to the eastward of the course of the North Star, above stated? or, on the other hand, had the North Star, before she saw the Ella Warley, so fallen off to the eastward, that the line of her course would pass to the eastward of the latter? If the latter question be answered affirmatively, then the explanation is made, and the North Star would see the Ella Warley on her port bow, while the latter must see the North Star on her own starboard bow. No witness, however, testifies that the North Star did so fall off, and the suggestion is not to be made, unless as a possible explanation in the midst of conflicting testimony not otherwise to be harmonized. To answer the former question in the negative requires the assumption that the master and mate and look-out of the Ella Warley have testified untruthfully, or that, in the night, they did not judge correctly of their actual position and course, or, from some cause, were rendered temporarily incompetent to determine with exact precision their position and subsequent course. If I were driven to that, I must say, as I have already said, that the proofs satisfy me that the Ella Warley was first seen very nearly ahead, but a little on the port bow of the North Star, and the doubt created by the testimony of the master, look-out and mate of the Ella Warley is not sufficient to overcome those proofs.

I concur with the learned judge of the district court, that the testimony of the mate of

the Ella Warley, who navigated her at and before the collision, and who made the erroneous manoeuvre, if any was made, is not satisfactory. Whether the collision occurred five or seven and one-eighth miles from the shore, neither he nor his look-out made any proper observation of the lights of the North Star. In the first place, it is very clearly shown, that, when the vessels respectively sighted each other, they were not less than eight miles distant, and, judging by the combined speed of the two, (from 18 to 20 miles an hour,) and the interval which elapsed, thirty-five minutes, I think the distance not less than ten. Now, the witnesses from the Ella Warley would have the court believe that they saw the light of the North Star, and watched it, down to the time of the collision, and that the light they saw was a green light. True, Prendergast says he did not at first discover what color it was, but he watched it, and, in a few minutes, it proved to be green. Now, it is, I think, certain, that he could not see a green light at all at that distance. If not, then he saw the white light; and two necessary inferences flow therefrom—first, the charge that the white light of the North Star was so placed as not to be visible, fails, and Prendergast and his men were wholly remiss in not seeing both lights during nearly all the time of their observation; and, second, if they are at all to be credited, or, if, in fact, the North Star went to starboard, as she certainly did, not the white only but the red light of the North Star came fully into view, and yet they represent that they saw neither until the instant before the collision. Whether this is because there was no proper look-out, or because, under the pressure of the motive to justify the movements of the Ella Warley, Prendergast does not tell the whole truth, the failure to see, or the statement that he did not see, the lights of the North Star, which must have been visible, warrants great distrust of his vigilance or of his veracity.

Another circumstance has great significance, in its bearing upon the question whether Prendergast, in navigating the Ella Warley, exercised proper care, and is especially important in view of the rule invoked for his justification, to wit, that, when he saw a green light over his starboard bow, the rule requiring him to port his helm does not apply, but, on the contrary, it was his duty to starboard and pass under the stern of the vessel so seen. At ten minutes past eight, thirty-five minutes before the collision, when the North Star was from eight to ten miles distant, he changed his course to starboard, as he distinctly swears, for "fear of a collision." Now, in the first place, he could not have seen a green light at so great a distance, and he did not, therefore, act upon the assumption which makes the rule invoked applicable, namely, that he saw a vessel that was headed to the westward of his course. Next, he made a change for fear of a collision, at a time when, according to his own testimony as to the time, he could not determine the course of the vessel he proposed to avoid. And, further, and what seems to me of great importance, he thus admits that he saw the North Star at ten minutes past eight, in such a position, in fact, that there was, in his judgment, danger of collision. He makes for himself, in very decided terms, the very case to which the rule first herein referred to applies, namely, two vessels approaching each other from opposite courses, so as to involve danger of collision, when each should port the helm, at the very time, when, making his observation, he was impressed with the danger, and changed his course from fear, and changed it in the direction forbidden by the rule. That he afterwards saw the green light would be the effect of his change, when the vessel came nearer; and I think it most probable, that the bringing of that light into view, by reason of the change and the want of attention to the North Star afterwards, has led him and the other two witnesses from the Ella Warley to the belief, that the North Star was to the westward of the Ella Warley from the beginning.

The observations above made, the conflict of testimony in the case touching the precise position and bearing of the two vessels when they respectively sighted each other, and the difficulty of judging, upon each vessel, when necessarily ignorant of the precise situation and course of the other, and of the view presented to the eye there, if an unregulated discretion was to determine the movements of each, all suggest the reason for the rule first above stated, and illustrate the importance of carefully observing it. It is just such conflict of testimony, complication of manoeuvres, and danger of an error in supposed discretion, that the rule guards against, and that its framers contemplated. It is easy of observance and perfectly safe.

But, the mismanagement on board of the Ella Warley was not confined to the violation of the rule referred to. When the danger of collision became imminent, her officer knew it, or he was so careless in his observations as not to see what became obvious. His failure to see the red or white lights of the North Star countenances the last alternative. He ran his vessel at full speed to the destruction which was impending. He should have slowed his engine, stopped and backed. Even fault on the part of the North Star did not relieve him from that duty. The witnesses from the Ella Warley represent, that, to them, the North Star appeared to be following them up, as they changed their course more and more to port; and Prendergast represents that he was in continual fear of collision, from the time he sighted the North Star. If he tells the truth, he should have stopped when he had time to do so. At all events he should, even at the latest moment, have done what he

could to avert the blow or lessen its force, but he did absolutely nothing. On the other hand, the North Star ported and ran to starboard in obedience to the rule, and, when the danger became imminent, slowed, stopped, and backed, as was her duty to do. My conviction of the fault of the Ella Warley is very decided.

If the North Star was without fault contributing to the collision, the decree of the district court was right and should be made the decree of this court. But, the lights of the North Star were not properly screened. They were grossly in violation of the rule. The board which should have projected forward several feet and hidden the green light from view across the bow, was, at the top, not more than two inches forward of the light. It is palpable, that, for this reason, the projecting bull's eye threw the light in such direction that it could be seen from two to four points over the port bow of the vessel, when it should only be visible from ahead or from starboard. Indeed, the master of the North Star seems to have been fully aware of this, and to have become so accustomed to the fact, as to have concluded, that it is proper to carry the green light so screened that it may, nevertheless, be seen from four points off the port side. At five points, he thinks, it ought not to be visible. This fault in the screens I regard as wholly inexcusable, and the allegation that the vessel passed inspection does not justify it.

It was suggested, that, because the lantern itself was opaque on two sides, therefore, screens were not necessary. All that need be said of that is, that the screens are intended to project forward on the line of the keel, for the purpose of shutting the light from an oblique view over the port bow, and the back of the lantern could serve no such purpose. It would be nothing more than a screen which did not project at all beyond the light.

Now, although it is clear that those on board the Ella Warley did not use proper vigilance in observing the lights of the North Star, and did not, as they should, observe and watch the red and white lights, I think it proved that they did, after they made their erroneous change to port, see the green light, and that such green light continued visible, after the North Star ported her helm, longer than it should. Seeing the green light, and, as one of the witnesses says, seeing the green light follow them, was calculated to mislead. It was calculated to encourage them in the idea that their best chance of avoiding collision was by going further to the eastward. While I do not regard this as a sufficient excuse to the Ella Warley, it was a clear fault of the North Star, contributing to the result. If the screen had been of proper length, it is doubtful whether the green light would have been seen at all on the Ella Warley, and, after the North Star ported, it would have been shut out from view. The duty to carry lights properly screened is as peremptory as the rule to port the helm when vessels are meeting, or any other rule. It may have been a fault, it was a fault, in the Ella Warley, not to observe the latter; but it was also a fault in the North Star not to observe the former. Both faults contributed to the collision, and, in my judgment neither fault, without the cooperation of the other, would have produced it. If I were at liberty to apportion the fault according to my estimate of the degrees of culpability, I might conclude that the largest blame rested on the Ella Warley. Indeed, I think that quite clear; but the court cannot enter into such an estimate of proportions. The general rule of contribution must be applied.

My conclusions hereupon are: The vessels were approaching each other on a line or lines so nearly coincident that the rule requiring each to port the helm and pass to the right, if any change was made, operated upon them. Before the Ella Warley had made the proper observation upon the lights of the North Star, and yet acting upon the idea that there was danger of collision if she held her course, she starboarded, in violation of the rule. The North Star ported at the proper time, and was justified in doing so. The Ella Warley was in fault in not seeing the lights on the North Star, red and white, which were visible, and observation of which would have enabled her to correct her first error. The Ella Warley was grossly in fault in not slowing, stopping and backing when the collision was imminent, and so averting or diminishing the injury. The North Star did what was proper in this respect, and all that it was her duty to do. The North Star was in gross fault in not having her lights properly screened. This kept her green light in view when it ought not to have been visible. It contributed to mislead the Ella Warley, and tended to confirm her in her error and prevent the discovery by her that she was wrong. If the Ella Warley had not starboarded, in violation of the rule, the collision would not have occurred. If the lights of the North Star had been properly screened, the error of the Ella Warley would have been discovered and the accident would not have happened.

Under the influence of mutual fault, loss has been suffered, which, under the law governing courts of admiralty, must be shared by both parties. Let a decree to this effect be entered.

[Appeals were then taken by both parties to the supreme court, where the decree of this court was affirmed. 106 U. S. 17, 1 Sup. Ct. 41. For a hearing to determine the value of the Ella Warley, see Case No. 10,332. For a final apportionment of the damages, see Id. 16,839.]

Case No. 10,332.

The NORTH STAR.

[15 Blatchf. 532.] [1]

Circuit Court, S. D. New York. Feb. 1, 1879.

PRACTICE IN ADMIRALTY—VALUE OF VESSEL SUNK BY COLLISION.

1. Mode of arriving at the value of a vessel sunk by a collision.

2. The value of a vessel is not necessarily her purchase price, with repairs added.

[Cited in Leonard v. Whitewill, 19 Fed. 548; Pettie v. Boston Tow-Boat Co., 44 Fed. 384.]

[These were libels by William H. Reynolds and others, owners of the Ella Warley, against Cornelius Vanderbilt, claimant for the North Star, and Cornelius Vanderbilt against William H. Reynolds and others, in which the district court decreed the Ella Warley to be solely in fault. (Case unreported.) An appeal was taken to the circuit court, where both vessels were held to be in fault, and the loss divided. (Case No. 10,331.) An appeal was then taken to the supreme court, where the decree of the circuit court was affirmed. 106 U. S. 17, 1 Sup. Ct. 41. It is now heard to ascertain the value of the Ella Warley.]

Erastus C. Benedict, for libellants.
Augustus C. Brown, for claimants.

BLATCHFORD, Circuit Judge. There is a marked difference between the values put upon the Ella Warley by the witnesses for the respective parties, as her value at the time she was sunk, February 9th, 1863. William Boardman, a builder and repairer of engines, who made repairs on her after the libellants bought her, values her at from $130,000 to $140,000, after the repairs. This he does on the idea that the repairs amounted to from $40,000 to $50,000, and that she was worth, before the repairs, from $75,000 to $80,000.

Joseph Belknap, the superintendent of Mr. Boardman's establishment, values the vessel, after the repairs, at $125,000. E. Freeman Poole, foreman for Ezra Bucknam, a shipwright, who repaired her after the libellants bought her, values her, after such repairs, at $75,000, outside of her engines and boilers. Merritt Woodhull, who says he knew her but knew very little about her, values her, judging from other vessels, at from $115,000 to $120,000.

John H. Clark, who knew of her, but does not remember that he ever saw her, puts her at from $75,000 to $100,000. Frederick C. Schmidt, who examined her casually after the libellants bought her and before they repaired her, puts her value after she was repaired at from $75,000 to $100,000, on the basis that $18,000 of repairs were put upon her.

The above are the libellants' witnesses as to value.

George W. Roosevelt, a shipwright, who had seen the vessel but would not say he had been on board of her, values her at from $35,000 to $40,000. Jeremiah Simonson, a shipbuilder, who knew her, and saw her while she was being built, fifteen years before she was lost, and was afterwards on board of her a number of times, but did not examine her, puts her extreme outside value at $40,000.

Charles H. Mallory, an owner and builder of steamers, who had been on board of her before the libellants bought her, values her at not over $40,000. Arthur Leary, who never saw her, says her full value would be $50,000. Richard Poillon, a shipbuilder, who had seen her, but does not recollect having been on board of her, judges that she would be worth about $45,000.

Charles H. Haswell, a surveyor for the marine underwriters, who had known her from the time she was built, and had surveyed her on eight different occasions, by examining her, and had rated her, and had examined her in December, 1862, after she was repaired, testifies that he formed an opinion at that time that she was worth $25,000.

Henry J. Bullay, who had seen her a good many times but had never been on board of her, values her at not above $30,000. R. P. Lugar, who had seen her and knew her age and condition, but had never been on board of her or examined her, says she was worth about $35,000. Nathaniel L. McCready, who had never seen her, puts her value at from $40,000 to $50,000.

The above are the claimants' witnesses as to value.

All the witnesses on both sides gave their testimony, none of them less than 8½ years after the loss, and some of them as much as 12 and 13 years after it. The libellants bought the vessel, in October, 1862, at an auction sale by the United States marshal, for $28,600. The amount they expended in repairing her and for expenses was $18,122.37. All that was saved from her was some boats, amounting to $153.57. The commissioner reported, as her value, the amount of the purchase money and repairs and expenses, less the salvage, making the value $46,578.80, a computation too much by $10, according to the above figures. The libellants except to this value as insufficient and because it was not reported at, at least, $100,000. The claimants except because the mode adopted to arrive at the value by taking the purchase price and adding the repairs and expenses, was erroneous; and because the vessel was worth much less than the sum reported.

William Sparks, who was chief engineer of the vessel on one voyage from New York to Havana and back, after the libellants had bought and repaired her, which was her

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

only voyage on which the libellants sent her before the one on which she was lost, represents her as limber and weak and worked by the sea, and with insufficient boilers for her engine. George W. Palmer, who was mate of her on the same voyage, testifies as to her being limber and weak. Haswell testifies that she was very badly hogged when he last examined her, after she was repaired. The witnesses for the libellants do not contradict these statements of her condition. Boardman's estimate of her value is based on a very extravagant statement of the amount of repairs put upon her. Belknap dwells on the fact, that, at the time she was lost, there was a government demand for vessels for transport service. But, Mallory testifies that the government demand did not commence till June or July, 1863, and he is confirmed as to this by McCready.

It is quite clear, on the evidence, that the value reported is high enough. The only question is, whether it is not too high. It is manifest, that the value of a vessel is not necessarily her purchase price with repairs added. McCready so testifies, and he adds, that the value of a vessel depends upon her condition and her soundness and the business that may be offering for her in the market at the time she is for sale. I think the evidence shows that the $18,122.37 includes the 12 items of the year 1862 in the exhibit "Suydam," amounting to $4,567.96. These 12 items are for bedding, table linen, chairs, upholstery, carpets, stationery, medicine chest, scales, hose, chandlery, crockery, lamps and charts. These are mostly articles of permanent furniture and outfit, as distinguished from consumable supplies, but they do not form part of the vessel, except as to some of the chandlery, so as to come under the head of repairs to the vessel. They were all purchased before the voyage prior to the voyage on which the vessel was lost. Suydam, the agent of the vessel, says that he did not attend to the payment of the bills for those 12 items. The testimony is, that the $18,122.37 includes what was paid for "repairs and expenses." Even on the principle adopted by the commissioner, the $4,567.96, or a large part of it, should be deducted from the $18,122.37. If all were deducted, it would leave $13,554.41. Adding to that the $28,600 would make $42,154.41. Deducting from this the $153.57 would leave $42,000.84.

But, on the whole evidence, and disregarding the mode of computation adopted by the commissioner, the fair value of the vessel, at the time of her loss, cannot be put at over $40,000, and I fix it at that sum, over and above the value of the boats saved, $153.57.

I concur with the commissioner, that there is no sufficient proof as to what the net amount of the freight and passenger money would have been. It is not shown how much of the $3,207.94 of supplies bought in January and February, 1863, would have been consumed in earning the freight and passenger money. It is, therefore, proper to disregard the claim for freight and passenger money, and it is proper to allow the entire amount of the exhibit "Suydam," $7,775.90, as outfit and stores on board at the time of the collision, less $100 for coal and stores consumed up to the time of the loss.

Let a decree be prepared on the above basis. The libel alleges the "loss of the vessel, &c.," and claims damages for such loss to the amount of, at least, $75,000. The record does not show that the testimony as to the loss of stores and outfit was objected to because not alleged in the libel. But, the libellants may amend the libel in that respect, and, also, as to freight and passenger money, if desired.

[For the final apportionment of the damages, see Case No. 16,839.]

NORTH STAR, The. See Case No. 16,839.

NORTHUMBERLAND, The (HINCKLEY v.). See Case No. 6,511.

NORTHUMBERLAND BANK (BANK OF THE UNITED STATES v.). See Case No. 931.

Case No. 10,333.

The NORTHWESTER.

[10 Adm. Rec. 415.]

District Court, S. D. Florida. March 25, 1873.

SALVAGE—MISCONDUCT OF SALVORS—COMPENSATION.

[1. The action of salvors, after saving most of the cotton from a burnt and stranded vessel, in quitting the work, leaving forty-six bales of cotton in the wreck and undiscovered, *held* to show remissness in their duty, although there was no intentional wrong, but merely a failure to use proper and sufficient means to ascertain the true condition of affairs; but this cotton having been afterwards saved by vessels which returned to the wreck, after the original enterprise was abandoned, *held*, that the original salvors should not be punished except by losing the salvage thereon.]

[2. Failure or refusal of salvors to interrupt the work of saving cotton from a hulk for the purpose of rescuing an anchor and chain, and sails, rigging, and spars, which are in a badly damaged condition, at the request of the master, is not to be regarded as misconduct.]

[3. Where twenty-five vessels and two hundred and twenty-nine men were engaged fifteen days in extinguishing fire and saving cotton from a burnt and stranded hulk, near the harbor of Key West, most of it by diving, and under conditions rendered peculiarly disagreeable and injurious, both above and below water, by reason of burnt bales of tobacco in the wreck, the weather being part of the time cold and boisterous, *held*, that twenty per cent. should be allowed upon the value of cotton saved dry; thirty-three and one-third per cent. upon that wet and burnt; forty per cent. of the proceeds of cotton, stores, and material so badly damaged as to necessitate their sale; fifty per cent. of the pro-

ceeds of small lots of cotton picked up adrift and saved from total loss; and fifty per cent. of the proceeds of iron, bolts, rings, etc., saved by diving from around the hulk.]

[Cited in Baker v. The Slobodna, 35 Fed. 543.]

[This was a libel by Joseph Roberts and others to recover salvage from the cargo and materials saved from the ship Northwester.]

L. W. Bethel, for libellants.

W. C. Maloney, Jr., for respondent.

LOCKE, District Judge. This ship, laden with 2,979 bales of cotton, a few hogsheads of tobacco, and 45 tons of bonedust, while on a voyage from New Orleans to Liverpool, took fire in the vicinity of the Tortugas. Every effort was made to keep the flames under and was partially successful until she was coming in the harbor of Key West, when a violent and sudden squall caused the fire to break out with renewed force, and the vessel, which had been run aground, was soon in flames. She was first boarded by several boats containing officers and men from the naval vessels in the harbor, but their efforts to save her were ineffectual, and she was soon necessarily abandoned. In this condition the libellants and petitioners, licensed wreckers of this district, on the evening of the 23d February, 1873, arrived at the vessel. She was deserted, the master having been worn out by constant exertions to subdue the fire for over 40 hours, and the pilot, in whose charge she had been left, having gone for assistance. Under these circumstances they at once began to throw overboard and take to their vessels cotton from the deck and main hold of the ship until driven off by the approaching flames, when they retreated to their vessels and lay by her through the night. In the morning the vessel was burned nearly to the water's edge in some places, and below the line of the main deck all around the main deck was burned completely off. Much cotton between decks was entirely consumed, the lower deck burnt through in several places, and the fire still progressing. The sides of the ship and the entire surface of the cotton exposed were in a blaze, and the fire working around and under the bales where there was the least space. The salvors that first arrived at the ship scuttled her, and permitted her to fill in order to prevent the fire from penetrating below the water line, and endeavored by all means within their power to put out the fire by throwing water with pails, buckets, and tubs, and finally succeeded in getting a foothold 15 or 20 feet square on the cotton at the bow. At this time the lighthouse steamer Arbutus, which had been employed by the master, arrived with a powerful steam pump and one hand pump, which, with a hand force pump procured by the libellants, commenced to play upon the burning cotton, and finally succeeded in extinguishing the flames, although fire still continued under the surface, and would occasionally break out anew. The Arbutus remained by the ship a day and a half, and for this service has been paid $1,400. The libellants continued playing on the burning cotton, and at the same time loading their vessels with the cotton in which the fire had been extinguished. They continued this work almost constantly, when the weather would permit, until they had, as they thought, saved all in the vessel, when they abandoned the service. After the salvors who had been first consorted left the work, two of the vessels returned by themselves and found, by repeated diving, 46 bales, which have also been saved and brought into port. These are the principal facts alleged and proven. In reply, the energy and activity of the salvors is not denied, neither their good faith nor the value of their services to the property; but it is urged that they were remiss in their duty when they abandoned the work, leaving the number of bales afterwards found in the bottom of the vessel; that they neglected to get and save an anchor and chain, when requested to by the master, and also to save the sails, spars, and rigging, lying alongside the ship. Considering these objections to the conduct of the wreckers as made by the master in his answer:

First. In regard to the fact of leaving 46 bales of cotton, I consider that the principal salvors were remiss in their duty. Not that any actual loss has come to the property, but that there might have been. The representation of the salvors that there was no more cotton was calculated to mislead the master, and had he not been able to raise the bottom of the vessel, but had sold it where it was, there would have been great injustice done the owners. I cannot ascertain that there was any intentional wrong; but I am not satisfied that proper and sufficient means were used to ascertain the true condition of the case. This the master wrecker should certainly have provided for. But they losing the salvage on these bales which were found by other parties I consider a sufficient penalty. The evidence shows that the sails, or nearly all of them, and the running rigging, were burned off before the masts went over the side; that many of the spars were somewhat burned; that the standing rigging was wire, and the masts so fell that it was almost impossible to save anything during the weather such as there was all of the latter part of the service. Under those circumstances, I cannot say that the salvors should have abandoned the saving of cotton for the purpose of saving that of much less value and in no more danger of rapid deterioration. Nor can I say it was their duty to leave the salving of cotton to go to get an anchor and chain. It would have been their duty to have procured it before giving up the service, but before this the master had obtained it by other assistance. The only remaining question is what, under these circumstances, would be a just and reasonable amount to decree for salvage. The

property was in a most perilous and exposed condition,—first to destruction from fire, then from water. The cotton saved dry on the first night was snatched, as it were, from the very flames and from certain destruction, and it was due alone to the energy and immediate activity of the salvors that any of it was saved. Had it not been saved at the very time it was, it would have been entirely consumed. Pieces of the burning sails and rigging were dropping all around while the parties were engaged in this work, and it was not until one of the masts had fallen over the side, and the flames actually drove them from the vessel, that night, that they abandoned the labor. After the burning off of the upper portion of the ship and cargo, the filling of the ship with water and the active exertions of the officers and men of the steamer Arbutus and the salvors saved the entire remaining portion of the cargo from total loss by fire. It is claimed that the steamer Arbutus put out the fire, and saved the cotton above the water line from burning, and, as she was employed by the master, her labor should not inure to the benefit of the wreckers. Without doubt this steamer rendered most valuable aid, and was instrumental in checking the fire, so that more cotton was saved than would otherwise have been, yet without the immediate and constant exertions of the wreckers in breaking out, throwing overboard and removing the still burning bales, and continuing the playing of the stream upon it whenever any sign of fire appeared, I can but believe that the saving would have been but temporary, and the fire would have again broken out. It is in evidence that on Wednesday, the day after the Arbutus left, the flames broke out anew, and, I am fully convinced, would have spread and consumed all above the water line but for the presence of the libellants. After the fire had been entirely subdued, and all dangers from that had ceased, the risks of the property had been but partially removed. Both decks, together with the beams, had been entirely burned, and the hull was liable at any time, with an increase of wind and sea, to fall apart from the weight of the cargo, and the cotton to go adrift. Although the ship was lying inside the points of the reef which form the harbor, she was in a great degree exposed to the force of wind and sea with the wind in some directions. The peril to which the property was still exposed was very great, and the danger of total loss imminent. The labor by which the property has been saved has been extremely laborious, and accomplished with considerable risk to the health, if not to life. The ship contained a few hogsheads of tobacco, some between decks, and some in the lower hold. The burning of that between decks rendered the labor in the smoke while putting out the fire particularly unpleasant and injurious to the eyes, and that in the hold rendered the water peculiarly disagreeable to dive in. About if not quite two-thirds of the entire amount saved was saved from under water, and much of it by diving. The testimony shows that although some of it floated when broken out, very much of it did not, and every bale had to be secured by diving, the tobacco and bonedust making the water peculiarly disagreeable and noxious. The bales were very heavy, weighing, when wet, as they were, from 1,400 to 1,600 pounds, which rendered the handling of them with such appliances as could be used necessarily slow, tedious, and laborious. The ship's spars were gone, and there were no means for hoisting except what were rigged from the salvors' vessels. The weather during the service part of the time was moderate, but some of it was particularly boisterous, cold, and windy. The service continued through 15 days, the first four of which the wreckers worked both day and night. During the entire time there was but one day but what the work was going on, and then it was suspended on account of the inclemency of the weather. There were 25 vessels and 229 men consorted in the service,—a force though, larger, probably, than was necessary. Considering the peril in which the property was, the exposure and risk to the health of the libellants, the amount of labor, and the unpleasant circumstances under which it was performed, this must be considered as salvage services of far more than ordinary merit. The bark Delphos,—Union Towboat Co. v. The Delphos [Case No. 14,400],—laden with cotton, while coming down the Mississippi river, preparatory to going to sea, was discovered to be on fire. She was towed back to an anchorage, scuttled, and sunk. She was then pumped out, taken up, and carried to New Orleans. There were five towboats engaged five days in the service, but the court considered three to have been sufficient. In this case the court declared 45 per cent. to be a reasonable salvage, and decreed 15 per cent. to one-third of the salvors. The steamer T. P. Leathers,—Montgomery v. The T. P. Leathers [Id. 9,736],—about 60 miles above New Orleans, took fire and ran aground. Another steamer, the Robb, came to her assistance and saved the boat and a part of the cargo, although damaged. The court decreed 33⅓ per cent. 6 Ad. R. In this harbor the ship Otseonthe took fire, while loaded with cotton and corn, and was scuttled and sunk. The master made a contract to recover and save the property. This was done by means of a powerful steam pump, appliances for hoisting, etc., and the contracting party claimed, in conformity with the provisions of the agreement, $10,000. This contract and amount the court approved, and declared that it was the opinion of the court that this amount was reasonable, and no more than a fair compensation for the work and labor performed. This amounted to a little over 35 per cent. of the gross value saved, and about 40 per cent. of the net. In the last case cited the vessel

was immediately in the harbor, and the fire entirely extinguished before the contract was made or the service commenced; so it was but a salvage from impending perils from water, although fire was the original cause. The value saved was very much less than in this case, although the bulk nearly equals. There is one other peculiarity of this case which demands our attention, and that is the proximity of the property to port. I have heretofore spoken of the circumstances in connection with which this fact would vary the amount of compensation to be given, but it might be well to consider the amount of variation to be made on that account. The last case cited is parallel in this respect with the one under consideration. In addition to that, I find others decided in which this fact is similar. In 1853, the Sampson [unreported] got aground at the entrance of this harbor on Whitehead Point, and but a very short distance from where this vessel lay. The wreckers went to her assistance, helped her off, and brought her into the harbor. The court decreed 27 per cent. salvage. The Argus [Case No. 521] went to pieces on Charleston bar, and the cotton was driven ashore on the contiguous islands. 33⅓ per cent. net was given for saving and bringing it to the city. In this case the decks of the ship were burned away, and the hold open and exposed, so that the diving was neither as dangerous or difficult as under decks. The divers receive by agreement an additional compensation of 25 cents a bale, to be paid from the salvage. In the case of The Ocean Belle [Id. 10,402], the court says that the most usual rate of salvage in this court, where the vessel was lost and cargo saved, has been 25 per cent. on the dry, 40 per cent. on the wet, and 50 per cent. on that saved by diving, although this has not been followed at all as a rule, as the cases of The Crown [Id. 3,450], The Emigrant [unreported], and many others show. It may be considered that an increased salvage may be due on account of extinguishing the fire, but the danger from fire and water is merged in the general question of peril, and I cannot consider that after the efforts of the steamer Arbutus the peril of the property was greater than in a stranded ship exposed to a rough sea on an open beach or reef. In both cases immediate assistance is required. In this case I consider that the danger of the property, the danger encountered by the salvors, and the necessary labor have been materially diminished by the proximity of the vessel to the port, and it would be but reasonable that the compensation should be diminished correspondingly. The property saved has been partly appraised and partly sold, at an aggregate value of $85,747.39, and the appraisement accepted and sale confirmed; and I consider that after paying the costs, expenses, and charges, 20 per cent. of the appraised value of the cotton saved dry, 33⅓ per cent. of that appraised and classed as wet and burnt, and 40 per cent. of the proceeds of stores and cotton and materials so badly damaged as to be sold, and 50 per cent. of the proceeds of many small lots of cotton that went adrift and have been picked up a considerable distance from the vessel, which have been recovered from a total loss, as well as 50 per cent. of the proceeds of iron, bolts, rings, etc., picked up by diving around the ship, and where she was since her removal, is adjudged to be a reasonable salvage. And the decree will follow accordingly. The amounts will not give a very liberal sharing among the number engaged, but I consider would have liberally rewarded a number no larger than absolutely necessary to have rendered the service.

And the decree follows: "This cause having been fully heard, and the court being duly advised in the premises, and the materials and stores saved from the said ship Northwester sold for one thousand and sixty dollars and four cents, and the cargo, badly damaged and perishing, saved, sold for ten thousand two hundred and fifty dollars and thirty-five cents, and the remainder appraised at seventy-four thousand four hundred and thirty-seven dollars, and the appraisement having been accepted, and no objection made thereto by either party, it is now ordered, adjudged, and decreed that said sales be confirmed and said appraisement accepted and adopted, and that there be deducted from the values thus found the costs, charges, and expenses herein incurred, including the marshal's, clerk's, and appraiser's fees, the libellant's proctor's docket fee, the wharfage, and labor, shortage for one month, and that the libellants and petitioners herein have, receive, and recover in full for their services herein alleged and proven, twenty per cent. upon the net value of the cotton saved dry, thirty-three and one-third per cent. upon that saved wet, but not so badly damaged as to be sold, forty per cent. of the net proceeds of sale of the stores and materials and cargo saved so badly damaged as to be sold, except as hereinafter provided, and fifty per cent. of the net proceeds of sale of sundry small lots of cotton picked up adrift and such small portions of the rigging and materials as were picked up adrift or dived up from the bottom. That this include all claims for salvage on property saved, and the prayer of petitioners Saunders and Griffin for a distributive share be denied. And that it be referred to the clerk of the court, as commissioner, to compute said salvage under the direction of the court, in accordance with this interlocutory decree."

And on the 9th day of April, 1873, a further decree was rendered: "Upon further consideration of this cause, in pursuance of the decree heretofore pronounced, it is ordered, adjudged, and decreed, that the libellants have, receive, and recover, in full for compensation rendered in saving cargo, ma-

terials, and stores from said ship Northwester twenty-four thousand, eight hundred and two dollars and seventy-eight cents; that petitioner D. A. Walcott have, receive, and recover five hundred and thirteen dollars and twenty-six cents; that petitioner James C. Sands have, receive, and recover sixty-three dollars and fifty-five cents; that petitioners Saunders and Griffin have and recover two hundred and thirty-four dollars and thirty-four cents; that petitioners John Russell and George Sweeting have and recover seven hundred and fifty-four dollars and seventy-six cents, to be divided according to their respective interests; that petitioner George Bethel have and recover one hundred and fifty-nine dollars and thirty-nine cents; and that there be paid to sundry parties for salving small lots of materials and cargo picked up adrift and dived up from the bottom, and delivered by them to the marshal, and by him sold, according to their several amounts as shown by the account sales, three hundred and nine dollars and eighty-eight cents,—making together the sum of twenty-six thousand eight hundred and thirty-seven dollars and ninety-six cents for salvage. And that upon the payment of said sums, together with the costs, charges, and expenses, against said property as taxed and allowed herein, amounting to five thousand nine hundred and seventy-nine dollars and fifty-two cents, less the costs and salvage paid from proceeds of materials and stores, and less the proceeds of said cargo already received by the marshal, amounting to ten thousand two hundred and fifty dollars and thirty-five cents, into the registry of the court, the marshal restore said cargo now in his custody to the claimant for the benefit of the true owner or owners thereof. And it is further ordered that the salvage herein awarded be divided and apportioned among the salvors entitled thereto, according to the provisions hereof, the standing rules of this court, and the terms of consortship between them, and that the clerk pay said salvage, costs, and expenses to the several persons entitled thereto."

Case No. 10,334.

NORTHWESTERN CAR CO. v. HOPKINS et al.

[4 Biss. 51;[1] 5 Am. Law Reg. (N. S.) 44.]

Circuit Court, N. D. Illinois. Oct. Term, 1865.

ADMIRALTY—PETITION FOR REVIEW—WHEN MAY BE FILED.

A petition for review, filed after the term at which the decree was rendered, and after it had been executed, will be entertained by a court of admiralty, when actual fraud is charged, and the libellant is without fault, and would otherwise be without remedy.

[Cited in Re Dupee, Case No. 4,183; Snow v. Edwards, Id. 13,145; Jackson v. Munks, 58 Fed. 599.]

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

In admiralty. This was a petition for review, charging actual fraud, and setting up that the libellant was without fault, and would be without remedy unless his petition were allowed. Respondents [John W. Hopkins and others] demurred on the ground that the petition was not filed until after the term at which the decree complained of was rendered, and that the decree had been already executed.

Scammon, McCagg & Fuller, for petitioner.

Robert Rae and John A. Jameson, for respondents.

DAVIS, Circuit Justice. This petition presents this question: Has a court of admiralty a right to entertain a petition for review after the term has passed, and after the decree has been executed? The right is denied, and chiefly on the ground of a want of precedent. The authority of precedent is very strong, but not always conclusive. I can perceive no good reason why a court of admiralty, in a proper case, should not exercise the power of reviewing its own proceedings. It may be necessary for the proper administration of justice, and especially in cases where important rights are adjudicated without personal notice, which is permitted under our rules. The court could not entertain a petition on the grounds of mere oversight or neglect. But where actual fraud is charged, and the petitioner is without fault and without remedy, it would be a denial of justice to dismiss it.

Lord Stowell and Judges Story and Sprague all thought that there were cases in which petitions for review should be retained, although conceding the absence of precedent. Judge Story said that "where, by after-acquired evidence, it were plain that the merits had not been considered, it was right to entertain a bill for review." The New England [Case No. 10,151]. The remedy by petition for review, in the case before the court, is a proper one, and the demurrer will be overruled.

NOTE. The cases referred to as containing the opinions of Lord Stowell and Justices Story and Sprague, are: The Fortitudo, 2 Dod. 58; The New England [supra]; and Janvrin v. Smith [Case No. 7,220],—in which cases it was held that the power of granting a review by libel in the nature of a bill of review is not limited to the term at which the original decree was rendered.

In the case of The Martha [Case No. 9,144], however, Judge Betts ruled that the court had no right to reverse a decree, subsequent to the term at which it was entered, and that a re-

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

hearing could not be granted except with the free consent of all parties to be affected by it.

Consult, also, The Monarch, 1 W. Rob. Adm. 21; 2 Conk. Adm. 360, 367; The Enterprise [Case No. 4,497].

Case No. 10,335.

NORTHWESTERN DISTILLING CO. v. CORSE.

[4 Biss. 514.] [1]

Circuit Court, N. D. Illinois. April, 1869.

REMOVAL OF CAUSES—EFFECT UPON INJUNCTION PREVIOUSLY GRANTED.

An injunction issued by a state court is dissolved by the removal of the cause into the federal court.

[Cited in Rigg v. Parsons, 29 W. Va. 526, 2 S. E. 83.]

[This was a bill in equity by the Northwestern Distilling Company against John M. Corse, collector.] This was one of several similar bills, originally filed in the superior court, to restrain the collector from paying over money deposited by distillers for Tice meters, which had not been furnished, and which the parties did not desire to take and had no use for. The question was raised whether the injunction issued from the superior court was still subsisting as against the collector to prevent him from paying over the sums involved in the litigation. The cases were removed from the state court under section 67 of the act of congress of July 13, 1866 [14 Stat. 171], which provides that any suit or prosecution against internal revenue officers, etc., in a state court may be removed to the United States circuit court at any time before trial, upon petition, etc.: "And the cause shall thereupon be entered on the docket of said court, and shall be thereafter proceeded in as a cause originally commenced in that court; and it shall be the duty of the clerk of said court, if the suit were commenced in the court below by summons, to issue a writ of certiorari to the state court, requiring said court to send to the said circuit court the record and proceedings in said case," &c., "and thereupon it shall be the duty of the said state court to stay all further proceedings in such cause, and the said suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial or judgment therein in the state court, shall be wholly null and void. * * * All attachments made, and all bail and other security given upon such suit or prosecution, shall be and continue in like force and effect as if the same suit or prosecution had proceeded to final judgment and execution in the state court." It was argued for the United States that the removal vacated the bond and dissolved the injunction.

DRUMMOND, District Judge. The only difference in the language of the laws of 1789 [1 Stat. 93] and of 1866 is that in the law of 1866, the words are: "All attachments made, and all bail and other security given upon such suit or prosecution, shall be and continue in like force and effect as if the same suit or prosecution had proceeded to final judgment and execution in the state court." Section 67, Act July 13, 1866 [14 Stat. 171)]. If the word "attachments" did not apply to the case of an injunction as is conceded, do the words "bail or other securities" apply?

There was a very serious question connected with this originally, and good deal of doubt, at the time, in the minds of the profession, I think, as to the correctness of the decision of Judge McLean, upon the point. McLeod v. Duncan [Case No. 8,898]. The profession was not inclined to acquiesce altogether in that decision, and I recollect that it struck the profession with some surprise. They had taken it for granted that the injunction was not necessarily dissolved; but the more that they reflected upon it, I think, the more they became convinced that, on the whole, the decision was sustainable. It has now been generally acquiesced in and followed in this court, and even if there is a doubt as to its correctness, I should not feel inclined at this time to change the practice unless upon directions from a higher court. The principle of that decision, under that law and under this, is applicable to the particular point. All attachments and all bail or other securities given upon the suit or prosecution shall be and continue in like force, etc. Judge McLean, it is clear, did not think that the term attachment was sufficiently comprehensive to include injunction. The question is, whether if "attachment" did not include injunction, "bail or other securities" did. I do not see upon what principle.

Geo. C. Bates, Esq.: Suppose there had been a hearing on the motion to dissolve the injunction and a hearing on testimony taken and the court had made it final, and the case was then brought here, would the injunction be dissolved?

THE COURT: I do not see how there could be such a case without a final hearing. There would be a trial quoad hoc, and this law requires that it should be removed before trial. The language is "at any time before trial." That is, the trial must not have commenced for the final disposition of the cause. If it is, it is too late under this law. I have to treat the injunction as ipso facto dissolved by the removal of the case.

See further Hatch v. Chicago, R. I. & P. R. Co. [Case No. 6,204].

NORTHWESTERN FERTILIZING CO. (GAUGHAN v.). See Case No. 5,272.

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

Case No. 10,336.

NORTHWESTERN FERTILIZING CO. v. HYDE PARK.

[3 Biss. 480;[1] 5 Chi. Leg. News, 313.]

Circuit Court, N. D. Illinois. March, 1873.

JURISDICTION—CORPORATION A "PERSON"—ACT OF APRIL 20, 1871—WRONGS BY AND TO CORPORATION.

1. A corporation is included in the word "person," in the act of April 20, 1871 [17 Stat. 13].

[Cited in Railroad Tax Cases, 13 Fed. 759.]

2. The fact that persons hold their rights or property under the name of a corporation does not deprive them of the right and remedies conferred by law and the constitution.

3. Where the statute gives a remedy for a wrong if done by a corporation, the same right is given if the wrong is done to the corporation.

This was a bill in equity filed by the Northwestern Fertilizing Company against the town of Hyde Park and its corporate officers and agents, to restrain them from interfering with what were claimed to be its chartered rights, by the passage and enforcement of certain town ordinances then passed or threatened. This company was organized under a special statute of the legislature of the state of Illinois, passed March 8, 1867 (1 Priv. Laws 1867, p. 927), granting to certain parties the right to manufacture a fertilizer out of the offal of the animals slaughtered in the city of Chicago. [The act created a corporation and authorized the location of the manufactory.][2] Under this act they located their works about twelve miles south of the city of Chicago, on the Calumet river, near its mouth, and commenced the manufacture of the fertilizing material. The place at that time was not within the corporate limits of the town of Hyde Park, but was afterwards included within them, and the authorities of the town were proceeding against the works as a nuisance, and endeavoring by town ordinances and police regulations to stop their operations or compel them to be carried on in such a way as not to be offensive to residents of the neighborhood. The defendants moved to dismiss the bill on the ground of want of jurisdiction of the court.

Bentley, Swett & Quigg and Beckwith, Ayer & Kales, for complainant.

Hitchcock, Dupee & Evarts, Sidney Smith, and Leaming & Thompson, for defendants.

DRUMMOND, Circuit Judge. The question is, whether this court has jurisdiction of the bill. There is no doubt that, under the decisions of the supreme court of the United States, when a state creates a private corporation, and clothes certain persons with rights under the charter, that it may be to some extent a contract protected by the constitution of the United States. While there has been more or less of a struggle in relation to that, still it must be considered the settled law of the supreme court of the United States, and, of course, is the law of this court; and, therefore, the charter granted by the legislature of Illinois, in March, 1867, to the persons constituting the Northwestern Fertilizing Company must be considered in some respects in the nature of a contract which the legislature had no right by subsequent laws to interfere with. And where any constitutional right is sought to be affected by the legislation of a state, it is competent for congress in such case to clothe the federal courts with original jurisdiction, or with jurisdiction by transfer from the state courts.

The first section of the act of the 20th April, 1871 (17 Stat. 13), declares "that any person who, under color of any law, statute, ordinance, regulation, custom or usage of any state shall subject, or cause to be subjected any person within the jurisdiction of the United States, to the deprivation of any rights, privileges, or immunities, secured by the constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage to the contrary notwithstanding, be liable to the party injured, in any action at law, suit in equity, or other proper proceeding for redress."

One of the objections made to the jurisdiction of the court is that this law refers to persons, and it is said they must be natural persons, and that—this being a statute passed under the provisions of the fourteenth amendment of the constitution—congress did not intend to include corporations by this language; and this objection is certainly not without force. But I am inclined to think that it ought not to prevail, provided certain facts appear in the case to show that they are persons who have "rights, privileges or immunities secured by the constitution," and which are affected "by color of any law, statute, ordinance, regulation, custom, or usage of any state." It seems to me that the fact that these persons hold their rights or property under the name of a corporation, cannot deprive them of the rights and remedies which the constitution and the law sought to confer. It is true that the supreme court of the United States has decided, in the case of Paul v. Virginia, 8 Wall. [75 U. S.] 168, that where the constitution declared that the citizens of each state shall have the same immunities and privileges as the citizens of the several states; that is to say, there should be no law of discrimination made by any state against the citizens of another state; that meant persons and not corporations, and, therefore, that it did not prevent a state from declaring that a corporation of another state should not have the right to transact business except on special terms, as by obtaining a license. In that case, and in the

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2 [From 5 Chi. Leg. News, 313.]

one that went up from this state, Ducat v. Chicago, 10 Wall. [77 U. S.] 410, the state imposed upon a foreign corporation certain restrictions as conditions precedent to the transaction of business in the state, and the corporators endeavored to protect themselves under the principle that they were, as a corporation, a citizen of the United States, and therefore, they had the same immunities as the citizens of the state which attempted to impose penalties or burdens upon them different from those that were imposed upon the citizens of those states. In that case, the court held that these acts of the state were within the authority of the constitution, and that they did not violate that provision, because the language referred to citizens—to persons, and not to corporations; and although it was true that for the purpose of the jurisdiction of the federal courts, a corporation was a citizen, still it was not true that they were protected in the same way precisely as a natural person who was a citizen of another state.

It is to be observed that the question in this case is whether the court has jurisdiction in order to protect the rights of the corporation and its property, and therefore, the rights, privileges and property of the persons who constitute the corporation. It is then a question of jurisdiction here, and in the same way as it was a question of jurisdiction whether a corporation was a citizen within the meaning of that term in the constitution, so as to authorize the federal courts to take jurisdiction in controversies between a corporation and an individual. It seems to me it would be "sticking in the bark" to hold that the rights of a person in relation to his property should be protected under these provisions of the constitution and law where he was simply an individual, and the rights of the same person as to property, as a member of a corporation, should not also be protected. Why, for example, if a corporation as such, under color of any law, statute, ordinance, regulation, custom or usage, should subject or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges or immunities secured by the constitution of the United States, should not the individual have redress against the corporation? And yet the language of the law is "a person," and not a corporation. Why should a party be protected if the wrong was done by a person, and not protected if it was done by a corporation, where it is a question as to the jurisdiction of a court? Why, in other words, cannot the court treat a corporation, if that does the wrong, as a person, precisely as the courts have always treated a corporation as a citizen, for the purpose of maintaining jurisdiction where rights are affected? It seems to me if the bill shows that the rights of the corporators are affected within the terms of this law they may seek the redress which is there pointed out. They claim that as individuals constituting the corporation, they possess certain privileges secured by the constitution of the United States, of which they are to be deprived, or which are to be affected under color of a law, statute, ordinance, regulation, custom or usage, within the terms of this provision of the law, and, inasmuch as I think where if the wrong was done by a corporation there would be a remedy under the statute, I also think that where the wrong is done to the corporation (or the individuals of which it is composed), the same right is given to the corporation. See act of February 25, 1871, § 2 (16 Stat. 431).

The statute of April 20, 1871, declares that such proceedings are to be prosecuted in the several district or circuit courts of the United States with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in said courts. I think, therefore, upon a proper showing, a bill may be maintained in this court by the Northwestern Fertilizing Company. Motion to dismiss overruled.

[NOTE. This cause was again before the courts when John Gaughan, a property owner in the town of Hyde Park, sought to restrain the Northwestern Fertilizing Company from carrying on its business. It was heard on motion by complainant to remand the cause to the state court. The motion was granted. Case No. 5,272. The whole matter was considered in the supreme court in the case of Northwestern Fertilizing Co. v. Hyde Park, in error to the supreme court of the state of Illinois. Here the judgment of the state court against the company was affirmed. 97 U. S. 659.]

Case No. 10,337.

NORTHWESTERN FIRE EXTINGUISHER CO. et al. v. PHILADELPHIA FIRE EXTINGUISHER CO.

[1 Ban. & A. 177; 6 O. G. 34; 10 Phila. 227; 31 Leg. Int. 148; Merw. Pat. Inv. 346; 6 Leg. Gaz. 132.] [1]

Circuit Court, E. D. Pennsylvania. April 6, 1874.

PATENTS—EFFECT OF ERROR IN NAME OF PATENTEE—PATENT TO ADMINISTRATOR OF INVENTOR—TRUST FOR HEIRS—IMPEACHMENT OF ADMINISTRATOR'S APPOINTMENT—WHAT CONSTITUTES INVENTION—PUBLIC TRIAL—ANTICIPATION—PATENTABILITY.

1. A patent will not be void, because of an error in the Christian name of one of the patentees, provided it contains a description of him, by which he can be identified.

[Cited in Bignall v. Harvey, 4 Fed. 337.]

2. Where the Christian name of one of the patentees was erroneously stated in the patent, but he was described in it, as a joint inventor with another, and was identified as such, the patent was *held* to be valid, notwithstanding such error.

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[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. 10 Phila. 227, and Merw. Pat. Inv. 346, contain only partial reports.]

3. The decree of a court of probate, appointing an administrator, cannot be impeached in a suit upon a patent granted to him as the representative of the inventor; such a decree must be treated as valid, until it is reversed or annulled by some direct proceeding to that end. It cannot be attacked in a collateral proceeding.

4. A patent, granted to an administrator of a deceased inventor, is a grant in trust for the heirs of the inventor, but it is not essential to the validity of the patent, or the efficacy of the trust, that the beneficiaries should be named upon the face of the patent. Citing Stimpson v. Rogers [Case No. 13,457].

5. In a suit upon a patent, granted to the administrator of a deceased inventor, the heir of the inventor, being the beneficiary of the trust raised by the grant of the patent to the administrator, is a necessary party to the suit, unless the inventor, prior to his death, had parted with all of his inchoate or equitable title to the invention; in which case, the administrator would take and hold the patent for the use of those upon whom the beneficial ownership of it was devolved by the inventor's own act before it was granted, and the heir, having no beneficial interest, would not be a necessary party to the suit.

6. A description of an invention, contained in an application for a patent which was rejected, cannot be given the effect which the act of congress gives to a publication, because it lacks the essential quality of a publication, in that it was not designed for general circulation, nor made accessible to the public generally.

[Cited in Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co., Case No. 8,453; Lyman Ventilating & Refrigerator Co. v. Lalor, Case No. 8.632; Westinghouse v. Chartiers Val. Gas Co., 43 Fed. 588.]

7. Although a written description of a machine, illustrated by drawings, which has not been given to the public, does not constitute an invention, still, rejected specifications and drawings may be received in evidence, after the invention is perfected, to ascrtain the date of the invention, the design of the inventor, and the principle, intended functions, and the mode of operation of the mechanism.

[Cited in Westinghouse v. Chartiers Val. Gas Co., 43 Fed. 588.]

8. A trial of a machine in public, which proves the capacity of the machine to effect what its inventor proposed, entitles him to the merit of having produced a complete invention, and cannot be regarded as a mere experiment, entitling a subsequent inventor to a patent for the same invention. Gayler v. Wilder, 10 How. [51 U. S.] 477, and Parkhurst v. Kinsman [Case No. 10,757], distinguished.

[Cited in The Fire-Extinguisher Case, 21 Fed. 41.]

9. A patent for an apparatus, in which the alkaline solutions for forming carbonic acid gas were kept separate until required to extinguish a fire, when they could be readily mingled, *held* void, on it appearing that similar apparatus had been employed in soda fountains for the supply of beverages.

10. Where an effect or result has been before produced, the mechanical agencies by which it is reproduced, if they are not in themselves new, are not the subject of a patent.

11. The reissued patent, for an improvement in extinguishing fires, granted July 16th, 1872, to Dawson Miles, as administrator of P. F. Carlier, and to Alphonse A. C. Vignon, adjudged void for want of novelty in all the devices claimed.

[Cited in Platt v. Fire-Extinguisher Manuf'g. Co., 8 C. C. A. 357, 59 Fed. 898.]

In equity.

Edmund Burke and Keller & Blake, for complainant.

Chas. B. Collier and D. L. Collier, for defendant.

McKENNAN, Circuit Judge. Suit brought on letters patent, reissued to Dawson Miles, administrator of P. F. Carlier, deceased, and Alphonse A. C. Vignon, No. 4,994 dated July 16, 1872 (original patent No. 88,844, dated April 13, 1869), for improvement in extinguishing fires.

The claims of the reissued patent are as follows: "1. The improvement in the art of extinguishing fires, hereinbefore described, by throwing upon the fire or conflagration, a properly directed stream of mingled carbonic-acid gas and water, by means of the pressure or expansive force exerted by the mass of mingled gas and water from which the stream is derived. 2. We claim a strong vessel, provided with proper plug or lid, by which an orifice in it can be closed, and a stop-cock, through which its contents can be ejected, and a flexible tubing or hose for directing the stream as ejected at the will of the operator, these parts being substantially as described, and capable of operating as specified. 3. We claim a strong vessel provided with a proper plug or lid for closing an orifice in it, and also with a stop-cock, in combination with another vessel or tube, the combination being substantially such as specified, and the construction being substantially such as described, so that the vessels may keep separately the ingredients for making carbonic-acid gas, and that when their contents are mingled, they may be discharged in a stream of carbonic-acid gas and water. 4. We claim, in combination with the vessel's lid or plug and stop-cock combined, and capable of operating as in the above third claim, a hose and nozzle, so applied, as described, that the mingled stream of carbonic-acid gas and water may be suitably directed, as hereinbefore set forth. 5. As the preferred arrangement of our apparatus, we claim a strong vessel, provided with a lid or plug and a stop-cock near the bottom thereof, in combination with a vessel or tube arranged in the interior thereof, the arrangement being substantially as described. 6. We claim a strong vessel provided with a lid or plug and a stop-cock, in combination with a vessel or tube arranged in the interior thereof, and a rod passing through the wall of the outer vessel, and capable of operating substantially as described. 7. We claim a strong vessel provided with a lid or plug and a stop-cock, in combination with a vessel or tube arranged in the interior thereof, and a rod and cock or valve, the whole being and operating substantially as described. 8. We claim the elements of parts of a whole apparatus specified in the fifth claim, and arranged as therein specified, in combination with a flexible hose and nozzle, and with handles or

locps, whereby the apparatus may be supported and the stream directed, substantially as specified. 9. We claim, in combination, a strong vessel, a lid or plug for closing the same, a stop-cock near the bottom of the vessel, a hose and nozzle, and handles or loops, whereby a volume of water charged with carbonic-acid gas may be confined and transported, and a stream thereof directed, in the manner and for the purposes described. 10. The keeping of the acid and alkali or alkaline solution in separate and distinct vessels, but in such proximity to each other that they may be immediately brought into contact when the apparatus is required for use, one mode of accomplishing which we have above set forth. 11. A closed receptacle, made of suitable material, containing one of the gas-generating ingredients, placed within the main reservoir, containing the other gas-generating ingredient, to be discharged of its contents in the manner herein set forth, or by other equivalent means."

This bill is founded upon a reissued patent to Dawson Miles, administrator of the estate of Phillipe F. Carlier, deceased, and Alphonse A. C. Vignon, as joint inventors of an "improvement in extinguishing fires." They are described as residents of the city of Paris and subjects of the emperor of France at the time of the invention. The answer denies that there was any person named Phillipe F. Carlier, and avers that Francois Phillipe Carlier was the name of Vignon's associate in the alleged invention; and for this misnomer it is urged that the patent is void.

It was the opinion of the judges in Humble v. Glover, Cro. Eliz. 328, that an omission or mistake of the Christian name of a grantee rendered the grant void; and so the rule is stated by Lord Bacon. Maxims, 107. But even then a different rule prevailed with regard to wills; for extrinsic evidence was admitted to ascertain the person, when two were of the same name, or when there had been a mistake in the Christian name of the devisee. Cheyney's Case, 5 Coke, 68; Ulrich v. Litchfield, 2 Atk. 372. Lord Coke, however, held—2 Co. Litt. (Thomas' Ed.) p. 255—that a misnomer of a grantee would not avoid the grant, where he was so otherwise described as to individuate him; and he says: "So it is, if lands be given to Robert, earl of Pembrook, where his name is Henry; to George, bishop of Norwick, where his name is John; and so of an abbott, etc., for in these and the like cases there can be but one of that dignity or name."

Chief Justice Kent refers approvingly, in Jackson v. Stanley, 10 Johns. 137, to this statement of Lord Coke, and says: "In all the cases which I have seen, where there was a misnomer, there was some description connected with the name, and there was no other person who set up a title in competition, under the erroneous name." But he does not hold the admission of parol evidence to identify the grantee to be erroneous. Indeed it is the obvious sequence of his argument, that such evidence would have been held admissible, to show the person intended by the patent in question, if any description had been connected with his name. So, therefore, in the subsequent case of Jackson v. Goes, 13 Johns. 524, Chief Justice Thompson says: "The identity of the grantee, as well as of the thing granted, must, generally speaking, partake, more or less, of a latent ambiguity, explainable by testimony dehors the grant. It cannot be that this inquiry is restricted to the single case of ambiguity occasioned by there appearing to be two persons bearing the name of the patentee."

It may, therefore, be stated, as the result of these and numerous other judicial decisions, that a grant is not necessarily void by reason of an error in the Christian name of the grantee, and that where it contains any other matter descriptive of the person for whom it was intended, extrinsic proof of such matter is admissible to identify the grantee, and, if he is thus indentified, effect will be given to the grant accordingly.

Whatever may have been Carlier's proper Christian name—Phillipe Francois or Francois Phillipe, or only Francois—the patent contains a further designation of the patentee, by which his identity can be certainly determined; and so it is not necessarily void. It describes him as a joint inventor with Alphonse A. C. Vignon of the specific invention set forth in it, and thus it is clear upon the face of the patent, that a person named Carlier, who sustained that relation to Vignon, was the intended patentee. Now, there is no evidence, that there ever was but one person named Phillipe Francois or Francois Phillipe Carlier, and there is no controversy, that a person bearing one or the other of these Christian names was associated with Vignon in the invention claimed. Indeed the answer concedes this, for it admits that Francois P. Carlier, either conjointly with Vignon, or separately, did discover and invent improvements, in connection with apparatus, for extinguishing fires. Assuming, then, that the Christian name of Carlier, was Francois P., he is demonstrated to be the same with Phillipe F., by conclusive proof of his connection with the subject of the patent, and of the impossible applicability of the additional description to any other than Vignon's associate. There is, therefore, no doubt of the personal identity of the patentee, and the most that can be said is that, by a transposition of his double Christian name, he is not thereby accurately designated. But this, according to the rule before stated, will not void the patent, where it supplies upon its face an added description, by which the patentee may be certainly identified. The patent must, therefore, be treated as valid.

It is a familiar rule of law, that the validity of a judgment of a court of competent jurisdiction, is not open to inquiry in a col-

lateral proceeding. A judgment without authority to render it is certainly a nullity, but an erroneous judgment is to be treated as valid, until it is reversed or annulled by some direct proceeding to that end. If the court which pronounced it has jurisdiction over the subject matter, a proper case for its exercise must be presumed to have been sufficiently presented, and the adjudication to have been right. Accordingly, the judgment of the probate court of Massachusetts, awarding to Dawson Miles letters of administration upon the estate of Carlier, must be taken as conclusive of his legal right to the grant of them. That court has undoubted general jurisdiction over the subject, and we must assume that all the facts which the laws of the state prescribed as essential to its judgment, were sufficiently shown to exist. We certainly have no authority to revise or disregard its decision.

And the same principle applies to the granting of letters patent by the commissioner of patents. It must, therefore, be taken for granted that the person in whose name the patent was issued, established his legal right to it before that officer, and we cannot go behind it to ascertain whether this was so or not.

But it is urged that the commissioner could only grant the patent to the administrator of Carlier in trust for his heirs, and that, therefore, his surviving daughter is a necessary party to the suit.

There is no doubt that the act of congress [5 Stat. 117]—Brightley, Dig. p. 729, § 39—imposes upon a patent, issued to the administrator of a deceased inventor, a trust in favor of his heirs. But it is not essential to the validity of the patent, or to the efficacy of the trust, that the persons to whose benefit the patent will inure should be named upon the face of it. Stimpson v. Rogers [Case No. 13,457]. Primarily, therefore, the patent must be considered as a grant to the heir-at-law of Carlier, Miles holding it simply as her trustee. Under these circumstances, Carlier's heir would undoubtedly be a necessary party to this suit, because a decree in favor of the present complainants would adjudge the profits claimed from the defendant to them, irrespective of the beneficial right of Carlier's heir, and would leave the defendant exposed to another suit for the same profits at her instance.

But the act of congress further provides that the administrator of the deceased inventor shall hold the patent granted to him, "under the same conditions, limitations, and restrictions, as the same was held, or might have been claimed or enjoyed," by the inventor in his lifetime. The import of this provision is that, while the legal title to the invention is devolved upon the administrator, he must take and hold it subject to any equities existing as against the inventor in his lifetime. Now, the documentary proofs exhibited show that Carlier in his lifetime parted with his inchoate or equitable title to the invention, and that this title is vested in the American Fire Extinguisher Co. If he had lived, and obtained the patent, he would unquestionably have held it for the use of those upon whom the beneficial ownership of it was devolved by his own act before it was granted. And his administrator holds it under exactly the same conditions and subject to the same limitations of his interest in it. Carlier's heir, therefore, thus forestalled by his assignment, has no actual interest in the controversy, and to make her a party would be only a superfluous form. The main inquiry in the cause relates to the novelty of the invention claimed by Carlier and Vignon. I have no doubt they were original inventors; but were they the first?

The earliest date to which their invention is carried back is June, 1862. Although there is no evidence in the cause fixing this date, yet, from what incidentally appears and for the purpose of determining the priority of the invention, it may fairly be taken as the time when their invention was completed.

What, then, did they claim to have invented? This is very clearly described in the reissued patent in controversy. "It consists," says the specification, "first, in the process or method of extinguishing fires by means of a jet or stream of mingled water and carbonic acid ejected from a closed vessel in a suitable direction by means of the pressure or expansive force of the mixture contained in the vessel; and, secondly, in the construction of apparatus for containing and delivering this extinguishing medium, which apparatus may be made of an exceedingly portable nature, and kept always charged and ready for use at a moment's notice, at the particular locality which it is desired to protect." The patent, then, seeks to appropriate two things, first, a method of extinguishing fire, by throwing upon it a stream of mingled carbonic-acid gas and water, by means of the pressure or expansive force excited by the mass of mingled gas and water from which the stream is derived; and, second, the specific mechanical devices described in the specification, by which this method is made practically effective.

To show that the invention thus claimed is not novel, the defendants have exhibited in evidence a rejected application of Dr. William A. Graham. It appears on the 23d of November, 1837, Dr. Graham applied for a patent for a method of extinguishing fire, by projecting upon it a stream of mingled carbonic-acid gas and water, and filed a specification, in which he fully described the mechanical devices to be used in effectuating this method, and the process of operating them. On the 25th of November, 1837, his application was rejected, for reasons stated by the examiner, which now seem strange enough. This decision was reaffirmed on the 16th of December following. On the 29th of

December, 1837, an amended specification was filed, and thus the case stood until December, 1851, when a model and drawing and a third specification were filed, and the application was renewed and finally rejected. These several specifications and the drawings are all in evidence in the cause; and it is urged that they of themselves are effective proof of prior invention by Graham.

The argument claims too broad an effect for them. It puts them upon the footing of a publication, and ascribes to them the effect which the act of congress gives to that. But they cannot be so treated, because they lack the essential quality of a publication, in that they were not designed for general circulation, nor were they made accessible to the public generally. They were placed in the custody of the commissioner of patents, not that they might thereby become known to the public, but for the special purpose of being examined and passed upon by him.

Although they might incidentally become known to any one whose researches in the patent office might disclose their existence, they are not, therefore, published within the meaning of the act of congress. But, it is said, they established the fact of invention, and so disprove the novelty of an invention subsequent in date. It is needless to refer to authorities to show what is so well settled, that a written description of a machine, although illustrated by drawings, which has not been given to the public, does not constitute an invention, within the meaning of the patent laws. It may be so full and precise as to enable any one skilled in the art to which it appertains, to construct the machine described, but, until it has been embodied in a form capable of useful operation, it has not attained the proportions or the character of a complete invention. However suggestive and valuable it may be as an untried theory, it is ineffective against the practical and useful product of inventive skill.

But it does not follow that rejected specifications and drawings, are, under all circumstances, inadmissible as evidence. By themselves they are inconsequential, but when the inventor's idea is perfected by a practical adaptation of it, in the form of mechanism, they are valuable guides in ascertaining the date of the invention, the design of the inventor, and the principle, intended functions, and mode of operation of his mechanism, and they must, therefore, necessarily be considered in connection with it.

So in the present case, Dr. Graham embodied what he supposed he had discovered in a practical form; for, the proofs establish, beyond question, that as early at least as 1853, he constructed apparatus, which he then exhibited. We may then consult his several specifications to ascertain the nature and object of his invention, and how he proposed to effectuate it.

While it was well known that carbonic-acid gas was heavier that atmospheric air, that it had great compressibility, and was incombustible, yet, no method had been devised of making it available for extinguishing fires. Dr. Graham seems to have been the first—as he certainly was prior to Carlier and Vignon—to conceive the practicability of this application of it, and his specifications show that he had an intelligent comprehension of the subject. In one of these he says:

"What I claim as my invention or discovery, and desire to secure by letters patent, is the invention or discovery how carbonic gas, condensed in water (in the proportion of more than two of the former to one of the latter), in movable or portable fountains, or fixed reservoirs, can be usefully applied to extinguish fire, the gaseous water passing along the hose-tube to the discharge-pipe, from whence it issues at a number of termini, through small tubes, holes, or apertures; the distance to which a stream of gaseous water can be projected depending upon the size and form of the holes or apertures from which it issues. In other words, I claim, and specify to have invented or discovered, how carbonic gas incorporated and condensed in water, and connected with machinery, can be projected the necessary distance by its own elasticity, issuing through and from syringe-formed tubes, with small holes or apertures, and with the necessary uniformity of efflux to produce a useful effect, a new result—that of arresting, at small expense, and quickly, the conflagration of houses, ships, boats, railroad cars, and all combustibles on fire."

Now, it is very clear that this extract is identical in import with that portion of the specification of Carlier and Vignon, which describes and claims as part of their invention, "the process or method of extinguishing fires by means of a jet or stream of mingled water and carbonic acid, ejected from a closed vessel in a suitable direction, by means of the pressure or expansive force of the mixture contained in the vessel." So Dr. Graham proposed the condensation of carbonic acid in water contained in a closed vessel, either portable or stationary, and the application of it to the extinguishment of fires, by ejecting the mixture from the vessel in a suitably-directed stream, by means of its expansive force.

But did he devise mechanical appliances to practise his method? The answer to this is to be found also in his specifications. He says: "The machinery or apparatus consists of a generator, gasometer, forcing-pump, fountain or fire-extinguisher, and a hose-tube." He then directs the manner of generating the carbonic-acid gas and of charging the fountain, and proceeds: "The fountain or fire extinguisher may be of any capacity, commensurate with the wants of the place or situation where it is intended to be used. It may be made of wood, or it may

be a very strong cylindrical copper vessel, with hemispherical extremities, and tinned on the inside, similar to the mineral fountains above alluded to. The mouth of the fountain should be accommodated with a screw, B and B; to fit it to the screw is a stop-cock D D, connected with a tube, E and E, one end of which passes nearly to the bottom of the fountain. The hose-tube is connected to the fountain in the ordinary way, F; it may be of any required length, and should be strong, and made of some flexible material, with a screw at one end, and this end should have nearly the same diameter with that of the fountain-tube, to which it is to be connected. The hose-tube, from the end to be attached to the fountain-tube, should approach gradually to a very small orifice at the farther or outer end. For an eighteen or twenty gallon fountain, the outer orifice or aperture should not be more than the twentieth of an inch in diameter. When the carbonic acid is to be applied to extinguish fire, the hose-tube must be attached to the fountain tube O. The condensed contents of the fountain, you command by a stop-cock. By turning the stop-cock the carbonic acid, from its elasticity, will pass rapidly along the hose; and the gas combined with the water, issuing from an extremely contracted orifice, as indicated above, is projected to a great distance, and, striking the fire or flame with a gaseous energy and elasticity, it is instantly extinguished. The water serves the double purpose of enveloping the gas and of reducing the temperature, so as to prevent rekindling."

As early, at least, as 1851, a model and drawings of the apparatus described in the specification, were filed by Dr. Graham in the patent office. With the aid of all these, there certainly could be no difficulty in constructing the necessary apparatus for the practical application of the invention. Indeed, such apparatus was constructed by Dr. Graham as early, at least, as 1853, and it was produced at the hearing, with the immaterial substitution of a piece of new hose for the old piece originally attached to it—its identity having been incontestably established.

Having thus fully and intelligently expounded the theory of his invention, and described the constituent parts and functions of the mechanism by which it was to be reduced to practice, it remains to inquire whether the apparatus constructed by him was capable of practical operation and use.

Upon this point I think the proof is plenary. It appears that, in 1852 or 1853, Dr. Graham made a trial of his apparatus near Lexington, Virginia, in the presence of a large number of witnesses, by setting fire to a large pile of straw, and then throwing upon it a stream of mingled water and carbonic-acid gas projected from his extinguisher by the expansive force of the gas; that this trial was successful is apparent from the fact that the progress of combustion was promptly arrested, and the failure to extinguish the fire entirely, was manifestly due solely to the insufficient capacity of the extinguisher, as compared with the magnitude of the ignited material. The incompatibility of carbonic-acid gas with fire needed no proof, because it was an indisputable fact; the problem to be demonstrated was the practicability of the proposed method of discharging and directing carbonic-acid gas in combination with water upon an ignited mass, whereby the well-known properties of both these substances could be made usefully available. So far as this result was concerned, the trial made must be considered as having proved the utility and efficiency of the invention.

But, equally, if not more, satisfactory proof on this point was furnished at the hearing of this case. The same appliances, used by Dr. Graham on the occasion referred to, had been made exhibits in the case, were produced in court, and were subjected again to the test of trial. They consisted of a metallic fountain, or closed vessel, charged with carbonic-acid gas and water, to which was attached leather hose ending in a bunch of nozzles, and alternately a single nozzle. When the stop-cock opening into the hose was turned, a stream of mingled gas and water at once issued from the nozzle, and, by means of the expansive force of the contents of the vessel, was projected to a distance exceeding that stated by Dr. Graham in his specification, until the vessel was emptied.

Against the pressure of all these proofs, I cannot resist the conclusion, that Dr. Graham devised an original method of extinguishing fires, by the combined agency of carbonic-acid gas and water, and that he "perfected and adapted" his invention by embodying it in the form of mechanical appliances capable of operative and successful use.

It was urged, however, that the efforts of Dr. Graham are to be treated as abandoned experiments. An experiment may be a trial, either of an incomplete mechanical structure, to ascertain what changes or additions may be necessary to make it accomplish the design of its projector, or of a completed machine to illustrate or test its practical efficiency. Obviously, in the first case, the incompleteness of the inventor's efforts, if they were then abandoned, would have no effect upon the rights of a subsequent inventor.

But if the experiment proves the capacity of the machine to effect what its inventor proposed, the law assigns to him the merit of having produced a complete invention. It is hereinbefore shown that the theory of Dr. Graham attained this practical condition; and there, apparently, his efforts ceased. But why? Repulsed from the patent office by the arbitrary assumption that his

enterprise was impracticable with the employment of any mechanical auxiliaries whatever, without pecuniary resources, his "poverty, not his will, consented" to an abandonment of further efforts to secure the full benefit of his invention to himself and to the public. But this will not help the complainants. The most that can be predicated of his inaction, is, that he abandoned his invention to the public, although I do not affirm this hypothesis. But, if he did, it will not reduce his matured invention to the grade of a mere experiment, and open the way to the complainants to appropriate the title of first inventor.

Nor do the facts in this case bring it within the principle of Gayler v. Wilder, 10 How. [51 U. S.] 477; or of Parkhurst v. Kinsman [Case No. 10,757], or of Roberts v. Reed Torpedo Co. [Id. 11,910]. In the first of these cases, the alleged prior invention had not been subjected to any trial to test its essential utility—it had disappeared; and the fact was found that, "there was no existing and living knowledge of the improvement or of its former use," at the time the subsequent inventor made his discovery. It was thereupon held that, "a prior construction and use of the thing patented, in one instance only, which had been finally forgotten or abandoned, and never made public, so that, at the time of the invention by the patentee, the invention did not exist, will not render a patent invalid;" and at least one passage of the opinion of the court is of marked significance in its application to the facts proved in this case. The court says: "We do not understand the circuit court to have said that the omission of Conner to try the value of his safe by proper tests, would deprive it of its priority; nor his omission to bring it into public use. He might have omitted both, and also abandoned its use and been ignorant of the extent of its value; yet, if it was the same with Fitzgerald's, the latter would not upon such grounds be entitled to a patent, provided Conner's safe and its mode of construction were still in the memory of Conner, before they were recalled by Fitzgerald's patent."

In Parkhurst v. Kinsman, the alleged prior invention was rejected, upon the ground "that it was neither so far perfected by experiment, or by a reduction to practical operation, as to entitle it, in judgment of law, to the character or attribute of an invention," and that, the "evidence of the abandonment of the thing as a failure," was decisive.

So far as to Roberts v. Reed Torpedo Co. [supra], the experiments of Reed had failed entirely of producing any useful result, and were abandoned; and for this reason they were treated as insufficient to establish priority over Roberts, whose patented invention had been "perfected and adapted" to successful use.

There is, therefore, in my judgment, no sufficient reason why the merit of having invented a complete and practical method of extinguishing fires by the combined agency of carbonic-acid gas and water should not be awarded to Graham. This necessarily limits the scope of the complainant's patent to the devices and combination of devices described in it, which are not substantially embraced in Graham's extinguisher.

At the hearing of this case, the discussion was confined, to the first, second, third, fourth, ninth, and tenth claims of the complainant's patent, because it was these claims only which the defendant was alleged to have infringed. The present inquiry, therefore, need not be extended beyond them.

From what has been already said, the first claim of the patent cannot be sustained. Graham was prior to Carlier and Vignon in devising the "improvement in the art of extinguishing fires," embraced in this claim, and the merit of novelty cannot, therefore, be accorded to the latter. The other claims are for mechanical combinations.

Considering the second and third claims together, the intended meaning of the proper construction of the second seems to be, that it is to be limited to a combination of a strong vessel, a plug or lid, by which an orifice in it can be closed, a stop-cock, through which its contents can be ejected, and a flexible tubing or hose for directing the stream as ejected at the will of the operator, without reference to any other functions of which any of these elements are capable, than those indicated by the terms of the claim. In other words, the claim is for a strong vessel to contain carbonic acid and water in intermixture, with an orifice in it, a suitable plug to stop this orifice, a stop-cock to regulate the discharge of the contents of the vessel, and a flexible hose to direct the ejected contents of the vessel at the will of the operator. Thus construed, all the elements of the combination co-exist in Graham's apparatus, and are employed to perform the same functions. The claim must, therefore, be rejected for want of novelty.

The third claim, however, stands upon a different footing. It is for a combination of a strong vessel, "provided with a proper plug or lid for closing an orifice in it, and also with a stop-cock," with another vessel or tube; "the construction being substantially such as described, so that the vessels may keep separately the ingredients for making carbonic-acid gas, and that, when their contents are mingled, they may be discharged in a stream of carbonic-acid gas and water." The precise import of this claim will be better understood by a reference to the detailed description in the specification. The complainant's apparatus, so far as it is embraced by this claim, consists of a metallic vessel of suitable size and strength, in the top of which is an aperture and a plug to be screwed in-

to this aperture, to which is attached a cylinder extending into the metallic vessel, and at the bottom of which also is an orifice closed by a cock; this plug has an opening for the insertion of another perforated plug, which extends to the bottom of the cylinder and above the top of the metallic vessel, so as to permit the attachment of a perforated stem leading to a pressure-gauge, with a stop-cock in it to control the operation of the pressure-gauge. The combination, then, consists of these elements constructed as described and adapted to perform the several functions stated in the specification, viz., 1, a vessel to hold an alkaline solution, with an orifice in its top; 2, a plug, with its complex appendages, to confine the contents of the vessel, to cause the intermixture of the ingredients for making carbonic-acid gas by removing the obstruction to their contact; 3, a stop-cock to control the discharge of the mingled contents of the vessel, and, 4, a tube encased by the vessel containing the alkaline solution, and extending down into it, to retain separately a quantity of acid, until it is desired to mingle it with the contents of the inclosing vessel by opening the orifice in the bottom. This construction of the claim necessarily results from the distinct reference in it to the peculiar construction, relations, functions, and arrangements of the elements of the combination, as described in the specification.

The fourth claim, if it is at all susceptible of an intelligible construction, merely adds to the combination set forth in the third, the element of a hose and nozzle.

The ninth is for a combination of a strong vessel, a lid or plug, a stop-cock near the bottom of the vessel, a hose and nozzle, and handles or loops; "whereby a volume of water charged with carbonic-acid gas may be confined and transported and a stream thereby directed, in the manner and for the purposes described."

The tenth is for "the keeping of the acid and alkali or alkaline solution in separate and distinct vessels, but in such proximity to each other that they may be immediately brought into contact when the apparatus is required for use."

All these claims, except the last, are for combinations of devices, none of which devices are alleged to be new, and while the coefficiency of all of them is necessary to effectuate the ulterior design of the patentees, they are subdivided into groups and claimed as several inventions. Indeed the specification is a notable example of ingenious multiplication of claims, so as, it must be presumed, to embrace and protect the invention in every possible aspect of it.

It is not to be doubted, however, that a valid combination may consist of old elements, which have not been before similarly arranged, or, if they have, that a novel result is produced by their conjunction. Either the instrumentalities employed or the effect caused by their operation must be new to constitute a patentable combination. If substantially the same devices have been used before for a like purpose, or if they are applied merely to effectuate a method known and practised before, such employment of them will not be protected by a patent.

Now, applying these principles to the patent in question, I am constrained to the conclusion that the invention claimed in it, is not a novel one. As before stated, its object is to render available for the extinguishment of fires, carbonic-acid gas and water in mechanical union with each other, and propelled by the elasticity of the gas. This is accomplished by means of a mechanical structure, consisting of a strong metallic vessel containing a solution of an alkali in water; a plug or lid fitting into an opening in the top of this vessel, with which is combined a tube extending into the alkaline solution and containing an acid suitable for evolving carbonic-acid gas, and provided with a smaller tube or rod, extending above the top and down to the bottom of the acid chamber, by lowering which an orifice in the bottom of the acid chamber may be opened and the acid and alkali be brought immediately into contact; a stop-cock to control the discharge of the contents of the strong vessel; a hose and nozzle to give direction to them; and handles or loops to facilitate the transportation of the apparatus.

Now, the complainants cannot rest the validity of their claims, for the various combinations of their elements, upon the novelty of their use, and of the result produced by them, because Graham was before them in devising a method of applying the same natural agencies to the same end.

Were these elements, then, similarly combined before, and used for an analogous purpose? I am convinced that an inspection and analysis of some of the defendant's exhibits, and especially of Nichols' "portable soda water fountain," patented in 1854, must result in an affirmative answer to this question. The devises which compose the combinations claimed in the complainant's patent are substantially embodied in Nichols' apparatus, and in it they are arranged and operated in substantially the same way as in the complainant's.

The object of Nichols was to construct apparatus in which acid and an alkali could be kept in separate vessels, but in such proximity to each other that they could, at the will of the operator, be brought into immediate contact; carbonic-acid gas thereby generated, and a body of water contained in an inclosing vessel impregnated with it; and that the acidulous water could be discharged through a suitable opening by the elastic pressure of the gas and used as a beverage. The essential elements of his apparatus are a strong metallic vessel of portable dimensions, to be filled with water, with an opening in its top; a plug to be screwed into this opening; an-

other vessel inclosed within the strong one to contain diluted acid, and connected with it by an exterior pipe which extends into and to the bottom of it; a tube or smaller vessel, for holding an alkali within the acid-chamber, with an open bottom, which is provided with a tight fitting lid attached to a rod extending up through the top of the vessel, by which the bottom can be opened and closed at pleasure; and a stop-cock to permit and direct the discharge of the contents of the strong vessel in a mingled stream of carbonic-acid gas and water. To operate this apparatus, the strong metallic vessel is nearly filled with water through the opening in its top, the alkali chamber is taken out of its place within the acid chamber, into which latter is poured a quantity of diluted acid, an alkaline substance is put into the alkali chamber, against the bottom of which its metal covering is tightly drawn by means of the rod attached to it, and it is then replaced and tightly screwed into the acid chamber. By a revolution and slight pressure of the rod, the bottom of the alkali chamber is opened, and the alkali is brought into contact with the acid in the chamber below. Carbonic-acid gas is at once generated and is conducted through the pipe, provided for that purpose, to the bottom of the water-vessel, where it is intermixed with the water and from which it is driven, as desired, through the discharge-pipe by the expansive force of the gas.

The primary purpose of both structures is the prompt generation of carbonic-acid gas and the impregnation of a small body of water with it. This is obviously effected in both cases by keeping the acid and alkali, in the words of the tenth claim of the complainant's patent, "in separate and distinct vessels, but in such proximity to each other that they may be immediately brought into contact, when the apparatus is required for use," and by the employment of mechanical devices which are notably similar in their construction, functions, and mode of operation. And when the water is acidulated, the elastic pressure of the carbonic-acid gas is employed by both, to expel it through a stop-cock, so that the structures can be interchangeably used either to supply it as a beverage or to extinguish fire. It is plain to my mind that it is only necessary to add a hose and nozzle to the discharging stop-cock in the Nichols fountain, to make it as effective a fire-extinguisher as the complainant's. It may be more cumbrous by reason of its purifying attachment; but in so far as the projection from it of a mingled stream of carbonic-acid gas and water by the elasticity of the gas is concerned, which is the ultimate function of the complainant's machine, it would, undeniably, operate just as effectively as the complainant's. Nor can they be distinguished by the fact that a hose and nozzle constitute part of the devices originally employed in the one and not in the other. The obvious addition of so simple an element to the devices which co-existed in the old machine and perform all the fundamental functions of the subsequent one, cannot constitute the combination of a new and patentable one.

But it is urged, that the prior construction of structures of this class cannot affect the question of novelty here, because they were not applied to the extinguishment of fires, and their use and that of a fire-extinguisher are entirely diverse. It must be observed that there is a marked analogy in the means employed and the result produced by both machines up to the point of divergent application. The function of both is the prompt generation of carbonic-acid gas and the impregnation of water with it, and the same projectile force is employed to expel the acidulous water from the vessel containing it. In the one case, a stream of this water is directed into a vessel where it may be used as a beverage, and, in the other, upon a mass of ignited matter. This difference, then, in the ultimate application of the same agencies, marks the line of distinction between them.

Now, the art of extinguishing fires by means of carbonic-acid gas and water intermingled, was not new, for it had previously been practised by Graham; and the real question, therefore, is: Does the application of old mechanical devices, without material change, to a use in which they were not employed before, but which was known and had been practised, constitute a patentable invention? A decisive answer to this question is furnished by Mr. Justice Story in Bean v. Smallwood [Case No. 1,173], where he thus states the law: "Now, I take it to be clear that a machine, or apparatus, or other mechanical contrivance, in order to give the party a claim to a patent therefor, must in itself be substantially new. If it is old and well-known and applied only to a new purpose, that does not make it patentable."

And in Curtis on Patents (3d Ed. § 56) the result of the authorities is thus accurately stated: "Of course, if any new contrivances, combinations, or arrangements are made use of, although the principal agents employed are well known, those contrivances, combinations, or arrangements may constitute a new principle, and then the application or practice will necessarily be new also. But where there is no novelty in the preparation or arrangement of the agent employed and the novelty professedly consists in the application of that agent, being a well-known thing, or, in other terms, where it consists in the practice only, the novelty of that practice is to be determined, according to the circumstances, by applying the test of whether the result or effect produced is a new result or effect never before produced."

It is apparent, therefore, that where an effect or result has been before produced, the mechanical agencies by which it is reproduced, if they are not in themselves new, are not the subject of a patent. This rule is de-

cisively applicable to the present case, both as to the result achieved and the means employed to effectuate it, and the claims for both being thus invalid for want of novelty, the bill must be dismissed with costs.

NORTHWESTERN NAT. INS. CO. (MARSH v.). See Case No. 9,118.

NORTHWESTERN INS. CO. (SAYLES v.). See Cases Nos. 12,421 and 12,422.

NORTHWESTERN MUT. LIFE INS. CO. (GRIDLEY v.). See Case No. 5,808.

Case No. 10,338.

NORTHWESTERN MUT. LIFE INS. CO. v. OVERHOLT.

[4 Dill. 287;[1] 6 Cent. Law J. 188.]

Circuit Court, D. Colorado. 1878.

CONFLICT OF LAWS—POWER OF CORPORATIONS TO TAKE MORTGAGES IN OTHER STATES—STATUTE OF COLORADO CONSTRUED.

1. The rule that a contract shall be judged by the law of the place in which it is made is not applicable to real estate, which can be conveyed only according to the law of the place in which it is situated.

2. The statute of the late territory of Colorado provided that foreign corporations should file a copy of the charter, or other evidence of their incorporation, within thirty days after commencing business in the territory, but contained nothing to indicate that this was a condition on which they might continue in business. But it did provide a penalty against the officers for a failure to file such evidence: *Held*, that, though the complainant had failed to comply with the statute in respect to such filing, it was yet capable of taking a mortgage on real estate in the late territory, and that no prohibition to continue in business could be implied from these enactments.

[Cited in Kindel v. Beck & Pauli Lith. Co., 19 Colo. 310, 35 Pac. 539.]

Bill to foreclose a mortgage given to plaintiff by defendants, April 14th, 1874, to secure a bond for $2,000, given by one Abraham to plaintiff, payable in five years. The bond has become due by reason of a default in the payment of interest. Other facts are in the agreed statement.

Frederick W. Pitkin, for complainant.
Symes & Decker, for defendants.

HALLETT, District Judge. The mortgagee is a foreign corporation, which had not, at the date of the mortgage, filed a copy of its charter in the office of the county clerk, as required by the act of 1868. Rev. St. 1868, p. 150. The company had then been doing business in the territory for more than thirty days, and the question is whether the omission to comply with the act makes void the mortgage.

Plaintiff claims that the contract was made in Wisconsin, and is for that reason subject only to the law of that state. But the fact is that the bond and mortgage were executed and delivered in this state; and the circumstance that the negotiation for the loan was with the officers of the company in Milwaukee, apparently by mail, is not controlling. The situs of the contract, and the place of payment named in the bond, are, however, of little weight in determining the question presented, for, without capacity in the plaintiff to take and hold real property in this state, the mortgage must be void. The rule that a contract shall be judged by the law of the place in which it is made, is not applicable to real estate, which can be conveyed only according to the law of the place in which it is situated. Story, Confl. Laws, § 430. Whether the mortgage was made in Wisconsin or here, the plaintiff cannot take anything by it if it was incapable of holding real estate under our law. In this particular the contract will be tested by the law of this state, wherever it may have been made, for the plaintiff could do nothing with this property except by the permission of the local government. Paul v. Virginia, 8 Wall. [75 U. S.] 168. If, then, the statute prohibited the company from doing business in the territory until the charter of incorporation should be filed, we cannot doubt as to the effect of it, but such prohibition should appear with reasonable certainty. It cannot be assumed that the legislature intended more than is expressed, and I cannot find in the act any prohibitory words whatever. Recognizing the existence of foreign corporations, and their right to do business in the territory, the legislature requires them to file a copy of the charter, or other evidence of incorporation, within a period of thirty days after commencing business; but there is nothing to indicate that this is a condition on which corporations may continue in business. On the contrary, a penalty is given, which was probably thought to be sufficient to secure a proper observance of the act. In the possible case, of which this may be an illustration, where a corporation may do business without an officer or agent in the state, the punishment would fail; but this will not authorize the addition of another penalty to that which is prescribed. The language of the act is in marked contrast with others which have been regarded as establishing conditions on which foreign corporations may do business.

In Oregon, corporations must comply with the act before doing business in the state, and there is no way of enforcing the command except that of holding contracts, made in defiance of the act, to be void. In re Comstock [Case No. 3,078]; Oregon & W. Trust Inv. Co. v. Rathburn [Id. 10,555]. In Illinois, it is not lawful to make contracts until the act has been obeyed. Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85. Our act does not go so far, but merely enjoins a duty, and punishes disobedience to its command—not by avoiding the contracts of the company,

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

but by holding its officers, agents, and stockholders liable for such contracts. It is as if the company had been required, under a penalty, to publish a statement of assets, or a list of its officers, for the information of the public, and had failed therein. No one would contend that the company, by such failure, had become incapable of making contracts, although it had, in fact, violated the law. The decree must be for the plaintiff.' Decree accordingly.

Case No. 10,339.

NORTHWESTERN MUT. LIFE INS. CO. v. PERRILL et al.

[4 Civ. Law Bul. 196.]

Circuit Court, S. D. Ohio. 1879.

INTEREST — PAYABLE SEMI ANNUALLY — INTEREST ON UNPAID INSTALLMENTS.

The complainant filed its bill in equity against Zebulon H. Perrill and others, to foreclose a mortgage given to secure the payment of the amount stipulated in the fulfillment of the terms and conditions contained in a certain bond. The said bond, among other things, contained the following provisions, viz.: "That if said bounden, Zebulon H. Perrill, his heirs, executors, administrators, or any of them, shall well and truly pay, or cause to be paid, unto the above mentioned, the Northwestern Mutual Life Insurance Company, or to its certain attorneys, successors or assigns, the full and just sum of eight thousand dollars at the expiration of five years from date of these presents, with interest thereon until paid at the rate of eight per centum per annum, payable semi-annually on the first day of January and of July in each and every year," etc. It was conceded that the terms of the mortgage had been broken, and that the complainant was entitled to a decree of foreclosure for the amount stipulated for in the bond, with interest from January 1, 1877, the manner of computing the interest being submitted to the court.

Sayler & Sayler, for complainant.
B. H. Bostwick, for respondents.

SWING, District Judge. By the terms of the bond, the principal is to be paid at the expiration of five years, with interest thereon until paid at the rate of eight per centum. Following the case of Monnett v. Sturges, 25 Ohio St. 384, we hold that the contract is to pay interest at the rate of eight per cent. until the principal debt is paid, and not merely for the time the bond is to run. It is stipulated that this interest is payable semi-annually. Where semi-annual installments of interest have become due, and are not paid, each such installment of interest will bear interest from the time it is due, at the rate of six per cent. Dunlap v. Wiseman, 2 Disn. 398; Monnett v. Sturges, 25 Ohio St. 384; Cramer v. Lepper, 26 Ohio St. 59. The complainant will therefore be entitled to interest on the principal debt at the rate of eight per centum from January 1st, 1877, until the time of taking the decree, and interest at six per cent. per annum upon each semi-annual installment of interest from the time when they respectively fell due. Decree accordingly.

NORTHWESTERN NAT. INS. CO. (CASHAU v.). See Case No. 2,499.

Case No. 10,340.

In re NORTHWESTERN RY. CO.

[20 Int. Rev. Rec. 18.]

Circuit Court, W. D. Wisconsin. July 4, 1874.

CONSTITUTIONAL LAW—RESERVATION OF POWER TO ALTER RAILROAD CHARTER—VALIDITY.

1. The Wisconsin Railroad Law constitutional.

2. The clause in the constitution providing that the charters of railroad companies "may be altered or repealed by the legislature at any time after their passage" construed.

3. The effect of the law upon inter-state commerce not decided.

In equity.

Before DAVIS, Circuit Justice, DRUMMOND, Circuit Judge, and HOPKINS, District Judge.

DRUMMOND, Circuit Judge. We have not had time to prepare any opinion in the case, but, as it was thought desirable that there should be a decision upon the motion for an injunction, I am instructed by the court to present the following as its conclusions upon the points made for a preliminary injunction.

1. On the assumption that the act of the 11th of March, 1874 [Laws 1874, p. 599], "relating to railroads, express and telegraph companies in the state of Wisconsin," is invalid, we think the court has jurisdiction of the case. The bill is filed on behalf of citizens of Europe and of other states to enforce equitable rights, and to prevent action by the railroad commissioners which may result, as alleged, in serious injury to those rights. It was not necessary to wait until the commissioners had put the law in full operation, and its effects upon the railroad company had become complete, before the application against them was made to a court of equity. A very important function of that court is to prevent threatened wrong to the rights of property.

2. We are of opinion that the act of the 11th of March mentioned above was not repealed by the act of the 12th of March, 1874 [Laws 1874. p. 693], the second section of which declares "all existing corporations within this state shall have and possess all the powers and privileges contained * * * in their respective charters;" and the act of

the 12th of March, 1874, the ninth section of which imposes a penalty for extortionate charges. There are apparent inconsistencies between these last two named acts and that of the 11th of March; but it becomes a question of intendment on the part of the legislature. On the same day a joint resolution was passed (March 12) directing the secretary of state not to publish the act of the 11th of March until the 28th of April. In this state no general law is in force until after publication. We may consider the joint resolution in order to determine whether the legislature intended that the two acts passed on the same day should repeal the act of the 11th of March, and from that it is manifest such was not the intention of the legislature. Of the three acts, that of the 11th of March took effect last.

3. The charters of railroad corporations under the constitution of Wisconsin "may be altered or repealed by the legislature at any time after their passage." In legal effect, therefore, there was incorporated in all the numerous grants under which the Northwestern Railway Company now claims its rights of franchise and property in this state, the foregoing condition contained in the constitution. It became a part, by operation of law, of every contract or mortgage made by the company, or by any of its numerous predecessors, under which it claims. The share and bond holders took their stock or their securities subject to this paramount condition, and of which they, in law, had notice. If the corporation, by making a contract or deed of trust on its property, could clothe its creditors with an absolute, unchangeable right, it would enable the corporation, by its own act, to abrogate one of the provisions of the fundamental law of the state.

4. This principle is not changed by authority from the legislature of the state to a corporation to consolidate with a corporation of another state. The corporation of this state is still subject to the constitution of Wisconsin, and there is no power anywhere to remove it beyond the reach of its authority.

5. As to the rates for the transit of persons and property exclusively within the limits of this state, the legislature had the right to alter the terms of the charter of the Northwestern Railway Company, and the fact that such alteration might affect the value of its property or franchises cannot touch the question of power in the legislature. The repeal of its franchises would have well-nigh destroyed the value of its tangible property; and while the latter, as such, could not be taken, still its essential value for use on the railroad would be gone.

6. The fact that grants of land were made by congress to the state cannot change the rights of the corporation or of the creditors. If the state has not performed the trust it must answer to the United States.

7. The act of the 11th of March, 1874, while not interfering with the rates of freight on property transported entirely through the state to and from other states, includes within its terms property and persons transported on railroads from other states into Wisconsin, and from Wisconsin into other states. This act either establishes or authorizes the railroad commissioners to establish fixed rates of freight and fare on such persons and property. The Case of State Freight Tax, reported in 15 Wall. [80 U. S.] 232, decides that this last-described traffic constitutes "commerce between the several states," and that the regulation thereof belongs exclusively to congress. It becomes, therefore, a very grave question whether it is competent for the state arbitrarily to fix certain rates for the transportation of persons and property of this inter-state commerce, as the right to reduce rates implies also the right to raise them. There may be serious doubts whether this can be done. This point was not fully argued by the counsel, and scarcely at all by the counsel of the defendants, and, under the circumstances, we do not at present feel warranted, on this ground alone, to order the issue of an injunction. If desired by the plaintiffs, it may be further considered at a future time, either on demurrer to the bill or in such other form as may fairly present the question for our consideration.

The motion for an injunction is overruled.

NORTHWESTERN RY. CO. v. CHICAGO & P. RY. CO. See Case No. 2,665.

Case No. 10,341.

NORTHWESTERN UNION PACKET CO. v. ATLEE.

[2 Dill. 479; 12 Am. Law Reg. (N. S.) 561; 7 Am. Law Rev. 752; 18 Int. Rev. Rec. 157.] [1]

Circuit Court, D. Iowa. 1873. [2]

ADMIRALTY — JURISDICTION — RIPARIAN RIGHTS — PIERS IN THE NAVIGABLE CHANNEL.

1. The district court, as a court of admiralty, has jurisdiction of a cause wherein the libellant seeks to recover damages caused to his vessel by a pier erected by the respondent, without legal authority, within the navigable channel of the Mississippi river.

[Cited in The Maud Webster, Case No. 9,302; Leonard v. Decker, 22 Fed. 743.]

2. A riparian proprietor on the Mississippi, although he be the owner of a saw mill thereon, has no right, without legislative authority, to erect a solid pier of masonry within the navigable channel of the river, in order to fasten thereto a boom for the protection of logs; and such a pier comes within the legal notion of a nuisance.

[Cited in Rutz v. St. Louis, 7 Fed. 440; Ladd v. Foster, 31 Fed. 834; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 563.]

[Cited in Providence Steam-Engine Co. v. Providence, etc., S. S. Co., 12 R. I. 368.]

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[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 7 Am. Law Rev. 752, contains only a partial report.]

[2] [Reversed in 21 Wall. (88 U. S.) 389.]

3. The respondent *held* to be in fault for failing to keep such a pier lighted at night, in consequence of which libellants' vessel was sunk, and her cargo injured.

4. Extent of riparian rights on the Mississippi river considered.

This is an appeal by the libellants from the decree of the district court in admiralty, holding that there was mutual fault, and ordering an apportionment of the damages. The packet company above named filed a libel in admiralty in the district court, against the respondent, Atlee, to recover damages for injuries to the barge Reaney and cargo, by reason of its running against a pier placed in the Mississippi river by the respondent. The accident, or collision, as it is termed in the record, happened about eleven o'clock on the night of the 23d day of April, 1871. The steamboat Sheridan, with the barge Reaney in tow, lashed to her starboard side, was descending the river from St. Paul to St. Louis, this being her first trip during the season, and struck the upper pier of the respondent. The night was dark, and there was no light upon the pier at the time. The respondent had for many years been the owner of a tract of land bordering on the Mississippi river, just below the town of Fort Madison, Iowa. Upon this land, and near the bank of the river, he has erected extensive mills for the purpose of sawing logs, mostly pine, which come down in rafts from the pine regions of the upper Mississippi, into lumber. These rafts or logs, coming down during the high water, or the rafting season, the respondent has for years been in the practice of mooring in the water opposite his land, and near his mill, and in the neighborhood of the piers built by him and presently to be described. These rafts remained in the water until the logs were sawed, and frequently extended further out into the stream than the location of the pier with which the barge collided. As the respondent found his rafts somewhat insecure when fastened in this manner, he built, in the winter of 1870–71, in the river, near his mills, two piers (one several hundred feet below the other), to which he attached a boom, for the better protection of his logs. The injury complained of was occasioned by the upper pier. During the summer of 1870 the respondent had placed in the river a pile of rock, covered with water when the river was high, and exposed to view when it was low. The upper pier was constructed by building on this rock pile a crib, which was filled with stone. The pier is twenty-nine feet by twenty-two feet in size, and is about twenty-five feet high, above the bed of the river. Whether it is in the channel or not, is a disputed question, in relation to which a great mass of testimony was taken. The following facts are not controverted, or are clearly established: The upper outside corner of the pier is about one hundred and forty-nine feet from the bank of the river, and about one hundred and twenty feet from the bank at the stage of water which existed at the time of the collision, and at low water about ninety-nine feet from the bank. The water is about twelve feet deep along the outside of the pier at a low stage of the river; at the time of the collision, the water was about twenty feet deep at the pier. About six or seven hundred feet above is a bar, or delta, from a creek, which projects into the river about three hundred feet, from which point the bank of the river recedes, so that the complainant's land on the bank is about two hundred feet in from where a straight line drawn from the point of the delta to the shore below would come. Outside of this pier there is a free passage way for boats several hundred feet in width. The pilot of the Sheridan was skillful and competent, and fully acquainted with the river, but he had no knowledge of the existence of the pier. He was employed as a pilot during the entire season of 1869 on the upper Mississippi, but not in 1870. The pier was constructed in the winter of 1870–71, and the Sheridan at the time of the collision was making her first trip for the season. He did not keep the boat to the middle of the channel, but ran, or allowed the boat to run, where the pier stood. The barge struck the upper outside corner of the pier (which projected above the water only a few feet), and sank almost immediately. After the collision, the respondent kept lights burning upon the piers. The water is deep enough. even in a low stage, to allow steamboats to pass inside the piers erected by the respondent, and the testimony of more than a dozen pilots is to the effect that before the erection of the piers they had often run their vessels over and about the place where these piers stand. The district court decided that both parties were in fault—the respondent for failing to keep lights on the pier, and the boat for not keeping more in the middle of the stream—and divided the damages in accordance with the admiralty rule. [Case unreported.] The total damages reported by the commissioners were $2,147.86, and from the decree confirming this report the libellants appeal.

Howell & Rice and J. H. Davidson, for libellants.

McCrary, Miller & McCrary, for respondent.

DILLON, Circuit Judge. The respondent, who is an extensive manufacturer of lumber from logs, and the proprietor of land on the Mississippi river, upon which his saw mills are situate, the better to carry on his business erected the piers and boom mentioned in the statement of the case. This boom is several hundred feet in length, and is attached to two piers built in the river. The piers are twenty-five feet in height above the bed of the river, and a few feet in height above the surface of the water, and are in size twenty-nine feet by twenty-two feet. They are from

one hundred to one hundred and fifty feet from the bank, the distance depending on the stage of water, and the water, even in a low stage, is twelve feet deep at the piers. Boats of the largest size, and at any stage of water, can pass inside of the piers if the way be not obstructed by logs or artificial erections.

The jurisdiction of the district court in admiralty of the case made by the libel, is settled by the supreme court of the United States, and need not be further noticed. 23 How. [64 U. S.] 209.

The right of the respondent to erect and maintain these piers, at the place, and under the circumstances, stated, presents the main question in the case, and it is a question of great importance. The court may properly take notice that a large portion of all the lumber which is supplied from the pine regions of Wisconsin and Minnesota is floated down the Mississippi in log rafts, which are owned by, or sold to, owners of mills located upon the banks of the river. It is the almost invariable practice of the mill owner to moor the logs in the stream in front of, or near, his mill, and the logs, in general, remain in the stream until they are taken therefrom, one by one, into the mill to be sawed.

The more effectually to secure or protect his logs, the respondent built the piers and boom in question. It is conceded that there is no statute of congress, or of the state, authorizing the erection. Its rightfulness depends, therefore, upon the general principles of the law. The respondent claims the right as riparian proprietor, and it follows, of course, that if he has the right, every other like proprietor has the same right.

Notwithstanding the able argument contained in the opinion of his honor in the court below, I have not been able to reach the conclusion that the right claimed for the respondent exists; and although, on a question of this kind, which he has so thoroughly considered, I may well distrust the correctness of my own views, still it is my duty to decide it according to my own judgment. It is not my purpose to enter upon any extended argument against the right which is set up by respondent, but only to indicate briefly the grounds of my opinion.

The paramount right attaching to the Mississippi river is the right to its free and unobstructed navigation. This is a public right. It exists in favor of the whole public, and for all vessels, small as well as large, and for rafts equally with boats. Any erection or obstruction not authorized by competent legislative enactment, which materially interferes with the paramount right of navigation, is unlawful, and comes within the legal notion of a nuisance. The analogy between the river and a highway or street, as respects public rights, is very close. The river is a highway, or waterway, for the use of the public, just the same as a street or highway; and individuals, for their own convenience, have no more right, without legislative authority, to obstruct the one than they have to encumber or obstruct the other. Their rights in both cases are confined to a reasonable use of that which is common to all, and which may not be exclusively appropriated by any.

Telegraph poles, or gas posts, or market houses, in the public streets, are, or may be, convenient and useful, not only to individuals, but to the public; but if put there without legislative sanction, they are, in law, nuisances. And so with any unauthorized individual appropriation of any part of a street. Much more clearly would the law pronounce illegal any exclusive appropriation of a portion of the public way by individuals, for their own convenience, by erections or acts which would, or might, endanger the safety of the public.

The same principles apply to the rights of the public in the river. The adjacent owner may make a reasonable use of the river and the banks. He may, doubtless, land his rafts, and fasten them to the bank in front of his property. How long he might keep his logs stationary in the water, we need not inquire, for the injury to the libellant's vessel was not caused by coming in contact with logs thus moored by the riparian proprietor, but by piers of solid masonry, built at a point which the evidence establishes to be within the navigable channel of the river, even at its lowest stage. No individual can, of his own motion, and for his own advantage, abridge or infringe the rights of the public in respect to the navigation of the river. A pier built within the navigable channel, that is, at a point in the river where vessels may go, and where they have the right to go, is an unlawful structure in the eye of the law. Indeed, any permanent structure which interferes with, or which may endanger or obstruct, navigation, is unlawful, and cannot be legalized by any considerations of utility, or otherwise, except by direct legislative authority.

Accordingly, it has been held that the erection and maintenance, without legislative permission, of a dam in the Wisconsin river, at a place where it is navigable in fact, is unlawful, whether it does or does not interfere with the navigation of the river. Wisconsin River Imp. Co. v. Lyons, 30 Wis. 61.

It is suggested that there is an analogy between piers like those erected by respondent and bridges across navigable streams. But, though bridges across such streams may be of great private convenience and public utility, still legislative sanction is necessary to legalize their existence.

Again, it is argued that the right of the respondent to build and maintain the piers in question rests, or may be rested, upon the same grounds upon which rests the right of the riparian proprietor to erect wharves and landing places for his own and the public use. Structures of the character just named, connected with the shore, when not

erected in violation of legislative regulations, when they do not obstruct the paramount right of navigation, and are not nuisances in fact, have the sanction of long usage in this country, and, under the qualifications suggested, may be lawfully erected; but the right, it is said, must be understood as terminating at the point of navigability. Dutton v. Strong, 1 Black [66 U. S.] 23, 32; Yates v. Milwaukee, 10 Wall. [77 U. S.] 497.

The reason why wharves and landing places are thus sanctioned is, that they are aids to navigation, and necessary for the reasonable enjoyment of the respective rights of the public and the riparian proprietor. But the right to erect piers in the navigable channel, in order to construct a boom for the protection and detention of logs until the riparian proprietor may manufacture them, rests upon no such usage; nor can such be justly said to be aids to navigation, which, it is to be remembered, is the paramount right—not in the least to be infringed, without legislative sanction.

If the piers in question be considered unlawful, the liability of the defendant is clear. The pilot of the libellants' boat had no knowledge of the piers, and there was no light upon them to warn him of their existence. In my judgment, he is not to be held in fault for not knowing that there was an unlawful obstruction in the river, and standing further out in the stream. Undoubtedly, if he had known of the piers, and if they had been lighted so that he could have seen their location, it would have been his duty, if practicable, to have kept his boat away from them. In my opinion, the fault lies wholly with the respondent. This is clearly so, if the pier on which the boat was injured was not lawfully there. But suppose I am in error in the above view, I still think the fault is with the respondent, because of the failure to have lights upon it. The river was high; it was at a season of the year when usually there were no rafts moored in the stream, and it was not unlikely that boats might run against it. I cannot think the pilot is in fault, under these circumstances, for not having run his boat farther out in the stream. So that, in any view of the case, I consider the respondent liable for all the damages.

It is suggested that these views will occasion alarm to mill owners upon the Mississippi; but I perceive no cause for apprehension. If it should be deemed of sufficient importance, congress would doubtless concede all necessary rights, and regulate the mode of their enjoyment. This may, perhaps, be also done by the state, in the absence of action by congress. But, without such legislative action, it is not probable that mill owners will be disturbed in the exercise of their accustomed privileges so long as they are reasonably enjoyed, and do not essentially interfere with or endanger the paramount right of a navigator. The decree below will be reversed, and a decree entered here for the appellant against the defendant for the $2,147.86 reported by the commissioners. Reversed.

[NOTE. An appeal was then taken to the supreme court, where the decree of this court was reversed, with instructions to render a decree on the basis of the commissioner's report, for half the damages which he found the libellants to have suffered. 21 Wall. (88 U. S.) 389.]

NOTE. As to obstructions in navigable rivers, Add. Torts, p. 169, c. 4, § 1, and cases cited.

Since the appeal in the foregoing case was taken, congress, on the 3d day of March, 1873 (18 Stat. 606), authorized "the owners of saw mills on the Mississippi river, under the direction of the secretary of war, to construct piers or cribs in front of their mill property, on the banks of said river, for the protection of their mills and rafts against damage by floods and ice: provided however, that the piers or cribs so constructed shall not interfere with, or obstruct, the navigation of said river," etc. This enactment implies that piers built in the river, and which interfere with, or obstruct, its navigation, are illegal.

The supreme court of Michigan, at the July term, 1873, decided the following points: 1. Where a brig bound for Chicago broke a boom in passing out of Manistee river, and was proceeded against under chapter 210 of the Compiled Laws of 1871, relating to "proceedings for the collection of demands against water-craft," it was held that while the act cited was meant to give relief where the vessel was at the time navigating the waters of the state, and where no remedy could be had in admiralty, it was not confined to water-craft intended for use only in the waters of this state. Judge Campbell, dissenting from a majority of the court, held that the act was designed to authorize proceedings analogous to those in admiralty, and to create a lien not enforceable in any other way. The City of Erie v. Canfields [27 Mich. 479]. 2. A boom that extends no farther into the water than the landowner, with due regard to navigation, might extend it, is a structure pertaining to the adjacent land, as much as any wharf or building erected thereon, and a wrongful injury to it is not a marine injury, and the tort cannot, therefore, be redressed in admiralty. Id. 3. The right of navigation is not so far paramount as to make booming facilities a nuisance wherever they encroach on navigable waters, and in any case the question of nuisance must depend on the particular facts. The necessity and convenience of the floatage of lumber in the Manistee river, in the region of which the manufacture of lumber is the prime industry, must be considered in any rules laid down for the public use of the stream. Id.

Case No. 10,342.

NORTHWESTERN UNION PACKET CO. v. CLARKSVILLE.

[4 Dill. 18, note.] [1]

Circuit Court, E. D. Missouri. 1876.

WHARFAGE DUES.

[This was an action against the city of Clarksville to recover back wharfage dues. See Cases Nos. 10,344 and 10,345.]

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

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

TREAT, District Judge. The same ruling must obtain as in the case of The City of Louisiana [Case No. 10,344], it being agreed that the facts are substantially the same. Judgment for defendant.

[See Cases Nos. 10,343 and 10,346.]

Case No. 10,343.

NORTHWESTERN UNION PACKET CO. v. HANNIBAL.

[4 Dill. 18, note.] [1]

Circuit Court, E. D. Missouri. 1876.

WHARFAGE DUES.

[This was an action against the city of Hannibal to recover back wharfage dues. See Cases Nos. 10,342, 10,344, and 10,345.]

Duncan & Davidson, for plaintiff.
Thomas H. Bacon, for defendant.

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

TREAT, District Judge. The ordinance of the city of Hannibal provides for wharfage, at rates to be determined by tonnage, for every landing of a steamboat, etc., and by the time the steamboat continues at the landing. The remarks made in the suit against the city of St. Louis cover this case. There is a doubtful provision in the ordinance, perhaps, concerning the anchoring at the landing for barges, etc., but no question in this case arises under that provision.

[See Case No. 10,346.]

Case No. 10,344.

NORTHWESTERN UNION PACKET CO. v. LOUISIANA.

[4 Dill. 17, note.] [1]

Circuit Court, E. D. Missouri. 1876.

WHARFAGE DUES—RATE DEPENDENT ON—TONNAGE.

By its charter the city of Louisiana has power to erect public wharves, and fix the rates of wharfage thereat. The rates of wharfage for steamboats and boats in tow are fixed by section 3 of an ordinance of said city of Louisiana, in relation to the wharf, etc., entitled, "An ordinance in relation to the wharf; regulating the duties of city marshal, ex-officio wharf master, and prescribing and fixing the rates of wharfage," approved February 19, 1867, as follows: "Section 3. There shall be charged and collected from each and every steamboat, water-craft, raft, or float, landing at or touching the landing, and delivering or receiving any freight or passengers, within the corporate limits of the city, the following sums as wharfage, to wit: First. All steamboats landing and delivering or receiving freight or passengers, shall be charged and pay as wharfage three dollars for each and every landing, whether ascending or descending." The action is to recover back wharfage tax paid in 1870, 1871, and 1872, under written protest. The plaintiff's boats used the improved wharf made by the city. If the tax is legal, it is admitted that the amount is reasonable. [See Case No. 10,345.]

Duncan & Davidson, for plaintiff.
Dyer & Emmons, for defendant.

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

TREAT, District Judge. The ordinance of the city of Louisiana covers the entire corporate limits of that city; and, if the plaintiff had paid the so-called wharfage for landing where there was no artificial or improved wharf, there might be ground of complaint. But the fact is that the plaintiff's boats chose to take the benefit of the improved wharf, built at the expense of the city, when it was well known what compensation was required for such use. The rates were not made dependent on tonnage. Judgment for defendant.

[See Cases Nos. 10,342, 10,343, and 10,346.]

Case No. 10,345.

NORTHWESTERN UNION PACKET CO. v. ST. LOUIS.

[4 Dill. 10; 23 Int. Rev. Rec. 33; 4 Cent. Law J. 58; 15 Alb. Law J. 107.] [1]

Circuit Court, E. D. Missouri. Jan., 1877.[2]

WHARFAGE — COMMERCE — WHEN FEES VALID — JUST COMPENSATION—POLICE POWERS OF MUNICIPALITY—CONSTRUCTION OF STATUTES.

1. A city cannot levy a tax in the nature of a tonnage duty upon vessels or commerce, nor can it do so by way of discrimination. But a city, under legislative authority, can lawfully charge reasonable compensation for the use of expensive and artificial conveniences, which a vessel may use at its option; there being ample space elsewhere for it to land within the harbor, where no artificial or expensive improvements have been made.

[Cited in Leathers v. Aiken, 9 Fed. 681.]

2. The ordinance of the city of St. Louis prescribing certain wharfage dues at the improved wharves constructed by it, graduated according to the size of the vessel, to be ascertained by its tonnage, is not in conflict with the provisions of the federal constitution in respect to inter-state commerce, nor with the prohibition that "no state shall, without the consent of congress, lay any duty of tonnage."

3. Taxes or dues paid under protest may be recovered back if the taxes or assessments were illegal, and the payment thereof involuntary.

4. Whether the payment of the taxes, under a mere written protest, delivered from time to time, without any process being issued by the city, and where the mode of enforcing the wharfage dues, as prescribed by the ordinance, is by

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

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 15 Alb. Law J. 107, contains only a partial report.]

[2] [Affirmed in 100 U. S. 423.]

action against the owner or person in charge of the boat, in which it is provided that, if convicted, the judgment shall be a fine in a sum double the amount of wharfage due the city, payment of which fine and costs shall operate as a discharge in full of the demand, is such an involuntary or compulsory payment of the taxes as will give the party so paying the right to recover back the amount, even if the ordinance under which the tax was demanded is illegal—quaere?

5. If fees be authorized by a municipality on commerce, etc., amounting to a tax upon commerce and beyond just compensation for the use of improved wharves, they cannot be collected. To be valid, they must be within the limits of just compensation.

6. A municipality in the exercise of its police powers may control the landing of boats by designating the place where they shall receive or discharge freight or passengers, and charge a reasonable compensation therefor.

7. Statutes partly in conflict with the constitution will be *held* void only as to those parts which are unconstitutional. This rule is extended to the case of a statute or ordinance authorizing two or more acts, one of which is within and the other without legislative authority.

8. The judgment of the supreme court of Iowa on the constitutionality of the ordinance was affirmed by the supreme court of the United States at the October term, 1877. [Keokuk Northern Line Packet Co. v. Keokuk] 95 U. S. 80.

9. As to recovery back of wharfage taxes paid under a void ordinance, see Kyle Steamboat Co. v. New Orleans [Case No. 7,354], U. S. Circ. Ct. La. before Billings, J.; Dill. Mun. Corp. § 751; Keokuk v. Keokuk Northern Line Packet Co., [45 Iowa, 196], 4 Cent. Law J. 280, note, and cases cited.

This action against the city of St. Louis is to recover back wharfage dues, collected by the city in 1870, 1871, and up to March, 1872, from the plaintiff's boats. The payments were made under "written protest, without waiving the right of the owners of the boats to recover the same from the city by an action at law."

D. D. Duncan and James H. Davidson, for plaintiff.

E. T. Farish, for city.

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

TREAT, District Judge. This case involves the right of the plaintiff to recover back money paid under protest. Within adjudicated cases, the right of action exists if the taxes or assessments were illegal, and the payment thereof was involuntary. The main proposition, therefore, requires a determination of the question as to wharfage tax proper—what it is, and where it ends. Under the decisions of the United States supreme court as to tonnage duties, regard being had to dicta concerning wharfage tax, the rules of law may be thus stated: 1st. The general power of a state to tax property must, in its exercise, impose the tax, not on the tonnage of the vessel, but on the money value of the vessel. 2d. It is beyond the power of a state or municipality to tax a vessel, foreign or domestic, for the privilege of landing or anchoring in any port, whether the tax is upon the tonnage of the vessel or otherwise. 3d. It is in the power of a municipality, under legislative authority, to exact reasonable wharfage for the privilege of landing at an improved wharf, care being had to prevent the municipality from imposing tonnage or other prohibited rates or taxes, under the pretence of collecting wharfage dues. It is very difficult, in the light of adjudicated cases, to draw the precise line, in general terms, between the various classes. The foregoing rules must suffice for a guide.

It appears from the facts agreed that the city claims to be proprietor of most of the river front, a part of which has been improved, graded, and paved by the city, at large cost. Under the supposed authority vested in it by charter, and under ordinances pursuant thereto, it has made many regulations of a police nature, not only as to the parts of the harbor where vessels, rafts, etc., may land, but also as to the safety of the inhabitants dependent upon the character of the cargo—whether explosive, dangerous, etc. It is admitted that, under said regulations, the plaintiff used the improved part of said landing, or the so-called wharf, thus artificially made and designed for specific purposes. The rates of wharfage charged were not in all cases a specific sum for a specified time, but a rate dependent on the tonnage of the vessel.

If the city had a right to charge wharfage, then the sole question is, whether it is prohibited from making its rates dependent on the tonnage of the vessel, eo nomine, instead of its length, denoting the space it would occupy, or whether the city should fix its rate of wharfage, arbitrarily, upon every craft landing, irrespective of tonnage, size, etc. It would be a narrow view of the question to admit that wharfage is collectible, and to hold at the same time that the amount of wharfage dues is not collectible because that amount, though reasonable, is, instead of a sum certain upon every craft, adjusted to the size of the craft, to be ascertained by its tonnage. It may be conceded that no municipality can forbid the entry, anchoring, or landing of a vessel engaged in foreign or inter-state commerce, unless it pays a tonnage duty for said privilege. It must also be held that, when there is ample space for landing within a harbor outside of the improved part thereof, or wharves, if a vessel is desirous of receiving the benefit of said improvements for the purpose of the extra facilities thereby furnished for mooring safely and conveniently, and loading and unloading cargoes, and also for the accommodation of passengers, said vessel thus availing itself of the extra facilities to secure which the municipality has made large expenditures, should pay therefor a reasonable compensation. The case might be very different if a city, claiming the entire river front, forbade anchoring or landing within its limits without payment of tonnage duty. It could not stop the right

to navigate and trade from port to port, but it could lawfully designate, within its police powers, at what part of the port the landing should be made. This might be as important for sanitary as other useful purposes. To hold otherwise would be to decide that the population of every town and city is deprived of the right of self-protection, and is absolutely at the mercy of every vessel which arbitrarily chooses to bring infectious diseases and consequent death with it.

There is a rational limit in all questions of this kind. No city, under pretence of wharfage dues, is permitted, in order to replenish its treasury, to levy a tax in the nature of a tonnage duty upon vessels of commerce; nor can it do so by way of discrimination. Each city under legislative authority, or riparian owner, can lawfully charge a reasonable compensation for the use of expensive and artificial conveniences, which a vessel may use or not at its option, there being ample space elsewhere for it to land within the harbor, where no artificial or expensive improvements have been made. In such instances there is no impediment to commerce—no tonnage or other exactions restrictive upon navigation, but merely facilities furnished, which, if used, ought to be paid for. The vessel is not bound to use such facilities; but if it does, why should it not contribute to the costs and maintenance thereof?

Although the St. Louis ordinance prescribes wharfage dues at the improved wharves by it constructed—graduated according to the size of the vessel, to be ascertained by its tonnage—such wharfage dues are not tonnage duties within the inhibitions of the constitution.

DILLON, Circuit Judge. 1. I concur in the conclusion, and mainly in the reasoning of the foregoing opinion. I have some doubt whether the payment of the taxes, under a mere written protest, delivered from time to time, without any process being issued by the city, and where the mode of enforcing the wharfage dues, as prescribed by ordinance, is by an action against the owner or person in charge of the boat, in which it is provided that, if convicted, the judgment shall be a fine in a sum double the amount of wharfage due the city, payment of which fine and the costs shall operate as a discharge in full of the demand (City Harbor Ordinance, § 36), is such an involuntary or compulsory payment of the taxes as will give the party so paying the right to recover back the amount, even if the ordinance under which the tax was demanded is illegal. But as the counsel for the city does not press this point in the argument submitted, I pass it without decision—the more readily because the parties evidently desire a determination of the validity of the ordinance, and because the conclusion reached on this subject renders it unnecessary to decide whether the payments were compulsory in such a sense as to give the right to recover them back, if the tax was not legally demandable or enforceable by the city.

2. Part of the river bank in front of the city of St. Louis has been graded, rip-rapped, and macadamized or paved, at "an enormous expense to the city," for the purpose of affording facilities for the landing, loading and unloading of steamboats at the city. Boats landing within the harbor of the city, but away from the paved or improved wharf, are not required to pay wharfage (Ordinance, § 35); but boats landing at the paved and improved wharf are required to pay wharfage dues or tax. Section 28 of the ordinance prescribes the time that "shall be allowed to boats to discharge and take in cargo at the paved wharf, according to their respective tonnage"—i. e., the more tonnage a vessel has, the longer the time allowed to occupy the wharf. Section 30 of the ordinance, which is attacked by the plaintiff as in conflict with the constitution of the United States, is in these words: "There shall be collected from each and every boat, of whatever kind, except such as are hereinafter excepted, for each and every time the same shall come within the harbor of this city, and land at any wharf or landing, or be made fast thereto, or to any boat thereto fastened, or shall receive or discharge any freight or passengers in this city, five cents for each ton of said boat's burden, by custom-house measurement, as wharfage dues: provided, that any boat making regular daily, semi-weekly, tri-weekly, or weekly trips, may pay wharfage dues at a different or special rate, as may be provided by this chapter."

The charter of the city authorizes it "to charge and collect wharfage and tonnage dues," and section 30 of this ordinance is not claimed to be invalid, unless it is in conflict with the provisions of the federal constitution in respect to inter-state commerce, and the prohibition that "no state shall, without the consent of congress, lay any duty of tonnage." It may be admitted that the right to the free navigation of the Mississippi river is, under the provisions of the constitution relating to commerce, and the prohibition upon the states to levy duties upon vessels as the vehicles of commercial intercourse (Steamship Co. v. Port-Wardens, 6 Wall. [73 U. S.] 34, 35), inconsistent with the right of a state absolutely to prohibit steamboats from landing at a city or port without paying for the privilege. The ordinance of the city (section 2) defines the harbor of St. Louis to extend "from the mouth of the Missouri river to the southern boundary of the city." The city has not undertaken to demand of the plaintiff wharfage for all boats landing at any point within its corporate limits. But a city is under no legal obligation to provide, at its own expense, an improved wharf, and to allow all vessels to use the same without compensation. It may be that a city cannot, even under authority from the state, compel

vessels to land at its improved wharf, and levy a toll or tax therefor. No such thing has been here attempted. The case before us shows that the city has improved a wharf for the convenience of commerce. It demanded compensation from such boats as saw fit to avail themselves of the improved wharf. The plaintiff's boats voluntarily used this wharf. It is expressly admitted in the stipulated facts "that the several sums demanded and collected by the city are a reasonable compensation, provided the city was entitled to collect any dues from steamboats under the ordinance and laws" in that behalf. Congress has not seen proper to legislate on this subject, and the many provisions of the ordinance of the city of St. Louis "establishing and regulating the harbor department" of the city show the necessity for regulations in respect to the landing of boats and vessels of all kinds, and the desirableness of appropriate facilities therefor. Unless, therefore, the ordinance of the city provides for a tax or duty on tonnage, it would seem to be free from any constitutional objection.

It requires of boats landing, or making fast to the wharf or landing, or receiving or discharging freights or passengers in the city, to pay five cents for each ton of the boat's burden as wharfage dues. Other sections of the ordinance show that the city does not demand wharfage dues for landing away from the improved wharf; and it is expressly agreed in this case that "the boats of the plaintiff only landed at the improved wharf, where accommodations existed therefor." Under the facts of this case, the words of section 30, requiring wharfage dues from any boat which "shall receive or discharge any freight or passengers in the city," have no application, and it is not necessary to construe them in connection with other parts of the ordinance, nor to affirm their validity.

As the plaintiff voluntarily used the improved wharf for its boats, and as it is admitted that the compensation therefor prescribed in the ordinance is reasonable, I am of opinion that the ordinance is not invalid merely because it fixes and graduates the amount by reference to the tonnage or capacity of the boat. A previous section makes the time which the paved wharf may be used by the boats depend on their tonnage, which is obviously a reasonable provision, and by section 30 the amount of compensation is graduated in the same way. If it appeared that the city was attempting, under the cover of a wharf tax, to levy duties on the tonnage of vessels, or to exact payment for the mere privilege of landing within the city, its pretensions could not be supported.

Upon the case before us, my judgment is that the city is not liable to pay back the money for which this action is brought. Judgment for defendant.

[The judgment of this court was affirmed by the supreme court, where it was carried on writ of error. 100 U. S. 423.]

Case No. 10,346.

NORTHWESTERN UNION PACKET CO. v. ST. PAUL.

[3 Dill. 454;[1] 7 Chi. Leg. News, 331; 21 Int. Rev. Rec. 221.]

Circuit Court, D. Minnesota. June 28, 1875.

WHARFAGE TAX—CONSTITUTIONAL LAW—RECOVERY BACK OF ILLEGAL TAX.

1. An ordinance of the city of St. Paul imposing a wharfage tax each trip, upon every boat and vessel landing or anchoring at or in front of the landing or wharf of the city, measured by the capacity of the boat or vessel, not to exceed twenty dollars a trip, is in conflict with the federal constitution and void.

[Cited in Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 86.]

2. A tax thereunder not paid voluntarily may be recovered back.

The plaintiff is a corporation duly organized under the laws of the state of Iowa, and was engaged during the years 1870 and 1871 in running its boats and barges on the Mississippi river for the transportation of freight and passengers. This action is brought to recover money illegally demanded and paid under protest, for the privilege of stopping in the port of St. Paul. The defendant urges that being a municipal corporation, authorized by its charter to build, control, and manage wharves and levees within the city limits, it collected money claimed by the plaintiff by virtue of the following ordinance passed by the city council: "The common council of the city of St. Paul do ordain as follows: ["Sec. 1. That the first section of an ordinance entitled Wharfage, approved October 9, 1869, be, and the same is hereby repealed and said section one shall be and is hereby reordained as follows:][2] That every steamboat or other vessel which may land or anchor at or in front of any landing, wharf or pier within the limits of the city of St. Paul, shall for each and every trip be charged and shall pay the city of St. Paul the sum of four and a half cents per ton for each and every ton such steamboat or other vessel may register or measure: provided, that no boat shall pay more than twenty dollars for each trip, and all boats may remain at the wharf, landing or pier three days from the date of her arrival without extra charge: provided, said boat or other vessel does not interfere with the landing or departure of any other vessel." And the city alleges that the amount collected was a compensation for the use of the levee or wharf built by the city, and was paid voluntarily by the plaintiff. The suit was tried by the court without a jury.

[See Cases Nos. 10,342–10,345.]

J. Ham Davidson, for plaintiff.

W. A. Gorman and H. J. Horn, for defendant.

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

[2] [From 7 Chi. Leg. News, 331.]

NELSON, District Judge. The question involved here, aside from that of voluntary payment, is: Does this ordinance of the city of St. Paul conflict with that clause of the constitution of the United States which forbids a state to levy any duty of tonnage without the consent of congress? In the case of Cannon v. City of New Orleans, 20 Wall. [87 U. S.] 577, the United States supreme court laid down a rule of decision which covers this case. The New Orleans ordinance charged a rate per ton "on all steamboats which shall moor or land in any part of the port." The ordinance of the defendant fixes the rates per ton on all vessels which may land or anchor at or in front of any landing within the city limits: provided, no boat shall pay more than twenty dollars for each trip. The latter ordinance fixes the tax upon a vessel, whether at a landing or anchored in the middle of a stream in front of a landing, and imposes the tax for the trip. It is, therefore, not a charge for the use of a wharf, but for the privilege of arriving at and departing from the port. The supreme court said, "Whatever more general or more limited view may be entertained of the true meaning of this clause of the constitution, it is perfectly clear that a duty or tax or burden imposed under the authority of the state, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition." The ordinance, by its terms, imposes the tax upon every vessel that stops in the port in front of any landing.

The testimony is conclusive that the payment was not made voluntarily. The following notice was served upon the defendant at the time the tax imposed was enforced, and under an arrangement made between the city attorney and the secretary of the company, it was to continue during the year 1870, and was renewed and continued during the year 1871.

"(Name of steamboat.) Wharfmaster, etc. Sir: You and the officers of the city under whose direction you act, are hereby notified that the wharfage this day paid to the city by the above named steamboat is paid under protest, and all that may hereafter be paid is here protested against, and the payment is now made and will hereafter be made without waiving the right of the owners of said steamboat to recover the same from the city by an action at law. (Signed,) ——, Clerk of Steamboat."

The supreme court of the United States, in the Tonnage Tax Case, 12 Wall. [79 U. S.] 209, said . . . "If the tax is illegal . . and paid . . under protest" or with notice that the party intends to bring "a suit to test the validity of the tax, he may recover it back in such an action." The plaintiff occupies the position defined by the court, and is entitled to recover. Judgment will be entered in its favor and against the defendant for the sum of five thousand nine hundred and seventy-eight dollars and ninety-seven cents, with costs. (Mr. Justice MILLER, although not sitting in this case, stated his approval of this decision.) Judgment accordingly.

Case No. 10,347.

NORTH WISCONSIN RY. CO. v. BARRON COUNTY.

[8 Biss. 414.][1]

Circuit Court, W. D. Wisconsin. Feb., 1879.

LAND GRANTS — PATENTS — TITLE — TRUSTS — TAXATION.

1. Under a government land grant to a railway company, the patents for the land were to be issued, pro tanto, on the completion of any twenty consecutive miles of road, and it was provided in the grant that the lands thereby granted should, when patented, be subject to the disposal of the company, for the purposes of construction and equipment and no other: *Held*, that this did not create the relation of trustee and cestui que trust, between the railroad company and the government as to lands so patented, but that the patents when issued vested the complete title in the company.

2. Such lands upon the issuing of the patents become subject to taxation.

3. It seems that the remedy of the government in case of misapplication of such lands, or their proceeds, would be by proceedings against the company or its officers, and that the titles of purchasers or mortgagees of the lands could not be affected.

In equity. Motion for temporary injunction to stay collection of tax, etc.

Isaac C. Sloan, S. U. Pinney, and J. C. Spooner, for complainant.
Vilas & Bryant, for defendant.

BUNN, District Judge. The complainant's counsel to sustain their application for an injunctional order restraining the collection of the taxes upon the railway company's lands, have pressed with great and persistent force the argument, that these lands are held by the company in trust for the building of the road which the company by the acceptance of the grant from the state has undertaken to construct. And though it may be difficult to answer satisfactorily the complainant's argument, I must say that the court is not convinced by it that the lands are exempt from the ordinary burdens of taxation incident to land in general.

If the lands are held in trust for the government, then I think there is no escape from the conclusion that they cannot be taxed, for I cannot see, in such a case, that it makes any difference whether the United States hold the legal title or hold the beneficial interest, the legal title remaining in the company which holds it as trustee for a certain purpose. In either case the land could not be taxed by the state. But I think the true and only answer

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

to the complainant's argument is that the lands are not held in trust either for the United States or for the state. The law, by force of which the exemption is claimed, is found in sections 7 and 8 of the act of congress of May 5, 1864 [13 Stat. 66], which are as follows:

"Sec. 7. That whenever the companies to which this grant is made or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turn-outs, watering places, depots, equipments, furniture and all other appurtenances of a first class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed: provided, however, that no patents shall issue for any of said lands unless there shall be presented to the secretary of the interior, a statement verified on oath or affirmation by the president of said company and certified by the governor of the state of Wisconsin, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end, which oath shall be taken before a judge of a court of record of the United States.

"Sec. 8. That the lands hereby granted shall, when patented, as provided in section 7 of this act, be subject to the disposal of the companies respectively entitled thereto, for the purposes aforesaid and no other, and the said railroads be, and shall remain public highways for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States."

My opinion is that this language should not and cannot be construed as creating the relation of trustee and beneficiary or cestui que trust between the railway company and the United States as to the lands conveyed by patent to the company under section 7.

If the railway company holds the lands as an ordinary trustee, it takes a bare legal title, the real beneficial interest still remaining in the government. But it seems to me this is not the necessary or fair construction of the language of the two sections.

It will be noticed that the construction, completion and full equipment of twenty consecutive miles of road by the company is a condition precedent to its right to a conveyance of any portion of the land, and that upon such completion and equipment the law gives the company a right to a conveyance of just such proportion of the entire grant as the distance completed bears to the entire line of road; and upon a similar completion of another like number of miles a further conveyance of a like proportion of the land granted. So that it is evident that the company before it is entitled to any conveyance of the land must in an important sense earn a right to the land by a performance of the necessary labor and an outlay of the necessary amount of money. And it seems to me that this condition being performed and the conveyance made the company takes something more than a bare legal title—that it takes the legal title coupled with the beneficial interest in the property; but the company being subject, of course, to all the conditions of the grant; one of which, in my judgment, is to faithfully apply the proceeds of the sales of the lands patented to the further construction of the road.

I trust I do not misapprehend the real question, which is, I take it, not so much whether the technical relation of trustee and beneficiary exists between the company and the government, as whether the government, as to the lands patented to the company, still retains a substantial and beneficial interest in the property, or whether that has gone with the legal title to the company which has earned it by a compliance pro tanto with the conditions of the grant. And the conclusion which I have come to is, that the government after the patent issues to the company has no longer any property interest, legal or equitable, in the land.

This, it seems to me, is the fair construction of the language, and best comports with the spirit and purpose of the act. The language of section 7 is, that "patents shall issue conveying the right and title to the said lands to the said company entitled thereto." The "right and title" to the lands includes the beneficial interest as well as the legal title, and is just what is ordinarily conveyed by a patent from the government or from the state.

Again, section 8 says: "The lands hereby granted shall, when patented, be subject to the disposal of the companies respectively entitled thereto, for the purposes aforesaid, and no other." It is upon this provision mainly that the claim for exemption is based. It is evident, however, that the exemption from taxation of so large a quantity of land for an indefinite period should not be sustained upon any doubtful construction of the statute. And the construction which finds in this language the creation of a trust in the ordinary legal sense, and which leaves the beneficial interest in the land, after the issuing of the patent to the company, in the United States, is, in my judgment, not only not at all necessary, but is not the result of a fair interpretation of the language used.

It seems to me what the language fairly means is this: That upon the conveyance by patent of the lands to the company upon its earning the right to such conveyance by the completion of the required section of road, the company has the absolute right to dis-

pose of the lands, either by sale or mortgage, for the purpose of raising money to prosecute the enterprise of building the remainder of the road, and for this purpose has all the power and right that any owner of land in his own right has to convey the entire interest, as well equitable as legal, to the purchaser, who takes a perfect and full title to the land discharged of any claim or interest which the state or United States had in it previous to the issuing of the patent. And that the company is then under firm and solemn obligation, by accepting the grant subject to all the conditions contained in the act of congress, to faithfully apply the proceeds of sales to the purposes aforesaid; that is to say, to the construction of the road according to the terms and conditions of the grant.

Just what is the extent of the remedy which the state or general government might have against the company in case of a misapplication or attempted misapplication of the funds arising from sales of lands, whether a suit in equity to restrain such misapplication, or a proceeding to take away the chartered privileges of the company, or both these with others, it is not necessary here to determine.

Probably both of these remedies might be resorted to, and in case of disobedience to the orders of the court, the officers and agents of the corporation so offending might be attached. It is enough to say that in the opinion of the court the remedy would be of some such personal character rather than one reaching to and affecting the title to the land after it should have been sold by the company and gone into the hands of purchasers who had paid full value for it.

The obligation on the part of the company to faithfully apply the proceeds of sales to the construction of the road, is of the same character as the one to keep the railroad forever open to the use of the government as a public highway, free from all toll or other charges, for the transportation of the property and troops of the United States. Both, in my judgment, are personal and corporate obligations, to be enforced as other obligations of like character, and do not confer a property interest in the land after it is sold to the company, or in the road itself when completed. The legislative and judicial powers are ample for the enforcement of these several obligations, and for the protection of the rights of the government growing out of them.

It was urged, on the argument by complainant's counsel, that a purchaser of the lands from the company would take with full knowledge of the law, and of the conditions upon which the title vested, and of the claim upon the land which the government would retain until the road should be completed. It is undoubtedly true that the purchaser would take with full notice of the law and of the company's title, but instead of this being an argument to sustain the complainant's position, I think it is one against it. Because the purpose of the grant being the construction of the road, and the means of carrying out that purpose being mainly the sale or mortgaging of the lands to raise the necessary funds, it is not to be supposed, without the clearest evidence, that congress would provide for the company's conveying an imperfect title or one which should be liable to be defeated by the subsequent misconduct of the officers of the corporation, or a failure on their part to comply with the conditions of the grant.

Of course, no sane business man would pay the full value for land on a purchase, or loan money upon a mortgage of the land, when he knew that his title was subject to be defeated by the subsequent acts or misconduct of persons, over whom he had no control, in misappropriating the proceeds of the sale or otherwise failing to comply with the law. If such were the law, no person would buy or part with money on a mortgage, and so the very object of the grant, which is the building of the road, would be defeated.

The purchaser could not be supposed to know what the secret intent of the officers of the corporation or their successors in office might be, and that intent even might be formed after the sale was made.

The law expressly provides that the land patented shall be subject to the disposal of the company, and it was undoubtedly intended that the sale or mortgaging of the lands patented for the purpose of raising money should constitute a part of the means by which the road was to be constructed.

I take it, then, to be clear that the purchaser or mortgagee for value would take a full and complete title. And this is entirely incompatible with the idea of the government having any beneficial interest or property right of any kind in the land. This same question was made in West Wisconsin Ry. Co. v. Board of Sup'rs, 35 Wis. 257, and the same view taken.

The application for a temporary injunction is denied. But in view of the importance of the question involved, the restraining order heretofore made may be modified, so as to apply only to proceedings on the taxes levied previous to the year 1877, and so as not to affect any re-levy or re-assessment under the state laws of any of the taxes heretofore levied. And so modified, such restraining order may stand until the beginning of the June term, 1879, to the end that the cause may be heard on bill and answer by a full bench.

At the December term, 1879, the same cause came on to be heard on the merits, upon bill and answer, before Judges Drummond and Bunn, and the same conclusion was reached, and the complainant's bill dismissed. [Case unreported.]

Case No. 10,348.

In re NORTON.

[6 N. B. R. (1873) 297.] [1]

District Court, N. D. New York.

BANKRUPTCY — FIRST MEETING OF CREDITORS — OPPOSITION TO APPOINTMENT OF ASSIGNEE.

There can be only one first meeting of creditors, and all adjournments are but continuance of the same, and if there appear any opposition or opposing interest to the appointment of a particular assignee, at any stage of the meeting, such opposition is to be considered as continuing until the termination of such first meeting, whether upon the day first appointed, or any other day to which such meeting might be continued, unless it affirmatively appeared that such opposition was withdrawn. In such cases it is the duty of the register to report the facts and return the matter for the action of the court.

Proceedings in bankruptcy case [In re C. H. Norton] referred to Register Comstock, of Utica. Notice of the first meeting being duly served, on the return day, the register being absent, the meeting was adjourned. On adjourned day the petitioning creditor appeared by attorney, and a number of other creditors appeared by another attorney. An informal viva voce vote was taken before the register, the attorney for petitioning creditor voting for one assignee, and the other creditors for another; the other creditors expressly opposing the selection of the assignee desired by the petitioning creditor. On application of petitioning creditor the meeting was adjourned by the register. At the adjourned session, by reason of telegrams of the attorney of petitioning creditor, the attorney for other creditors was not present, and they were not represented, when the petitioning creditor, voting viva voce for the assignee which the other creditors had before opposed, the register made a report that at such meeting, there appearing no opposing interest, he had appointed the person so voted for as assignee. Such report being received in the usual manner, was approved by the court. Motion made to set the appointment aside by the opposing creditors. Held:

HALL, District Judge. That there was no legal vote of the creditors for assignee ever had under the bankrupt act [of 1867 (14 Stat. 517)]; that there can be only one first meeting, and all adjournments are but continuance of the same, and there appearing any opposition or opposing interest to an assignee, at any stage of such first meeting, that such opposition is to be considered as continuing until the termination of such first meeting, whether upon the day first appointed, or any other day to which such meeting might be continued, unless it affirmatively appeared that such opposition was withdrawn. On this ground the register could not properly return that there was no opposing interest, and as there was an opposing interest, the register had no authority to make any appointment under the bankrupt law; that in such case as this it was the duty of the register to have reported the facts, and returned the matter for the action of the court; that the appointment made in this case by the register was unauthorised.

Ordered: That the appointment of assignee be vacated, and the court will appoint.

G. W. Adams, for petitioning creditors.

C. D. Prescott, for other creditors.

[1] [Reprinted by permission.]

Case No. 10,349.

NORTON v. BARKER et al.

[1 Wkly. Notes Cas. 29.]

Circuit Court, E. D. Pennsylvania. Oct. 19, 1874.

CONSTRUCTION OF BANKRUPTCY ACT OF 1867, § 2 [14 STAT. 517]—LIMITATION OF ACTIONS BY OR AGAINST ASSIGNEE.

This was an action of assumpsit commenced July 10, 1872. The narr. contained the common counts, the date of promise laid therein being August 31, 1867. The defendants pleaded that the cause of action had not accrued to the assignee within two years of action brought. The replication admitted the truth of the plea, but alleged that said action was not brought for any cause of action which had accrued for said plaintiff against any one claiming an adverse interest touching any property or rights of property of said bankrupt, but for the collection of certain sums of money due the estate of said bankrupt by said defendants. The defendants demurred to the replication.

Mr. Hollingsworth (with whom was George W. Biddle), for defendants, in support of the demurrer, cited—

1. As to the meaning of the words "any person claiming an adverse interest": Mitchell v. Great Works Milling & Manuf'g Co. [Case No. 9,662]; McLean v. Lafayette Bank [Id. 8,885]; Cleveland v. Boerum, 24 N. Y. 613; Pritchard v. Chandler [Case No. 14,436]; Smith v. Mason, 14 Wall. [81 U. S.] 419.

2. As to the construction of the act so as to make the limitation of two years apply to all actions by or against an assignee: Comegys v. M'Cord, 11 Ala. 932; Harris v. Collins, 13 Ala. 388; Pike v. Lowell, 32 Me. 245; Peiper v. Harmer, 8 Phila. 100.

Page & Bispham, for plaintiff, cited—

1. As to confining the concurrent jurisdiction of the circuit court, under this section of the bankrupt act, to cases where the opposite parties to a suit claim by a title different from, or adverse to, each other: Bachman v. Packard [Case No. 709]; Morgan v. Thornfield, 11 Wall. [78 U. S.] 65; Sherman v. Bingham [Case No. 12,762]; Beecher v. Bininger [Id. 1,222]; Bank v. Campbell [14 Wall. (81 U. S.) 87]; Ex parte Bank of New Orleans, 3 Law Rep. 553; Woods v. Forsyth [Case No. 17,992]; Coit v. Robinson [19

Wall. (86 U. S.) 274]; Sedgwick v. Casey [Case No. 12,610]; Davis v. Anderson [Id. 3,623]; In re Alexander [Id. 160]; Bump, Bankr. 201-309.

2. On the point that the statute only applies in cases in which the said section of the bankrupt act confers a concurrent jurisdiction in the circuit court: Morgan v. Thornhill, 11 Wall. [78 U. S.] 65; Bank v. Ogden, 2 Wall. [69 U. S.] 70; Clark v. Clark, 17 How. [58 U. S.] 321; In re Conant [Case No. 3,086]; Freelander v. Holloman [Id. 5,081]; Davis v. Anderson [supra]; In re Krogman [Case No. 7,936]; Bump, Bankr. 314; Union Canal Co. v. Woodside, 1 Jones [11 Pa. St.] 179.

3. They also argued that the statute applied only to hostile claims or those by which the whole of the property, which was the subject thereof, was claimed, and not to claims which only asserted a right to a dividend.

THE COURT entered judgment for defendants on the demurrer.

NORTON (BORK v.). See Case No. 1,659.
NORTON (CHAPIN v.). See Case No. 2,599.

Case No. 10,350.

NORTON v. DE LA VILLEBEUVE.

[1 Woods, 163;[1] 13 N. B. R. 304; 2 N. Y. Wkly. Dig. 4.]

Circuit Court, D. Louisiana. Nov. Term, 1871.

BANKRUPTCY—LIMITATIONS—FAILURE OF ASSIGNEE TO DISCOVER HIS RIGHTS FOR TWO YEARS—ACT OF 1867.

1. The fact that an assignee in bankruptcy did not discover his right to certain property of the bankrupt, until after the expiration of two years from the time an action accrued to him therefor, does not remove the bar prescribed by the second section of the bankrupt act [of 1867 (14 Stat. 518)].

[Cited in Miltenberger v. Phillips, Case No. 9,621; Walker v. Towner, Id. 17,089; M'Can v. Conery, 12 Fed. 318; Phelan v. O'Brien, 13 Fed. 657.]

2. The bar prescribed by that section applies to causes of action which had accrued to the bankrupt before his bankruptcy as well as to those which accrued to the assignee after the bankruptcy.

[Cited in Phelan v. O'Brien, 13 Fed. 657.]

Action at law for the recovery of certain real estate in the city of New Orleans.

E. C. Billings, Wm. Grant, and Allan C. Story, for plaintiff.

C. Roselius and Alfred Phillips, for defendant.

WOODS, Circuit Judge. This is a petitory action brought to establish title to and recover possession of certain lots of ground in the city of New Orleans of which defendant is in possession claiming title. The parties have filed their written stipulation waiving a jury, and submit the cause to the court on the issues of fact and law. The defendant pleads, among other defenses, the statute of limitations of two years, found in the second section of the bankrupt act. The clause of the section on which defendant relies is in these words: "But no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property or rights of property aforesaid in any court whatsoever, unless the same shall have been brought within two years from the time the cause of action accrued for or against such assignee; provided, that nothing herein contained shall restore a right of action barred at the time such assignee is appointed." The plaintiff and defendant both claim title from the same source, to wit: from Person, the bankrupt; the plaintiff by virtue of his office as assignee and the transfer to him of all the property of the bankrupt, and the defendant by virtue of a sale made by order of this court before the bankruptcy of Person, on a mortgage executed by him upon the property in dispute.

The bar of the statute of limitations relied on by defendant, seems to be perfect and effectual, unless there is some circumstance pleaded and proven to take the case out of the operation of the statute, for on the 9th of March, 1868, Person, under whom both parties claim, was adjudicated a bankrupt, and the plaintiff was appointed his assignee on the 22d day of April, 1868, and this action was not brought until the 21st day of August, 1871, a period of three years and four months, lacking one day, after the appointment of the assignee. The plaintiff claims, however, to be relieved from the bar of the statute by the averment which he has sustained by proof that he did not discover said property and his right thereto until about the first day of July, 1871, one month and twenty-one days only before the commencement of this action.

The question is therefore presented, does the fact that the plaintiff was ignorant of his rights relieve him from the bar of the statute? No case has been cited sustaining the plaintiff's view, nor do I think any can be found. If it had been the purpose of the law making power, that the limitation should begin to run from the time the plaintiff discovered his right of action, and not from the time his right of action accrued, it would have said so in unmistakable terms. To introduce such an exception into the statute, would be an act of legislation on the part of the courts, and would, it seems to me, be directly contrary to the policy of the bankrupt act, which looks to the speedy settlement of the bankrupt's affairs. It might be equitable

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission. 2 N. Y. Wkly. Dig. 4, contains only a partial report.]

in some cases that this view of the plaintiff should prevail, but it is not competent for the courts to engraft other exceptions on the statute, even on the ground that they are within the equity of these expressed. Bank of Alabama v. Dalton, 9 How. [50 U. S.] 522. On this point the case of McIver v. Ragan, 2 Wheat. [15 U. S.] 25, is pertinent. The plaintiffs brought ejectment for 5,000 acres of land in possession of defendant, and gave in evidence a grant from the state of North Carolina, comprehending the lands for which the suit was instituted. The defendant claimed under a junior patent and a possession of seven years held by Ragan, which, under the statutes of North Carolina and Tennessee constituted a bar to the action.

To repel this defense, the plaintiffs proved that no corner or course of the grant, under which they claimed, was marked except the beginning corner; that the beginning and nearly the whole land and all the corners except one were within the Indian Territory. These lands were not ceded to the United States until 1806, within seven years from which time the suit was brought. The land in possession of Ragan, however, did not lie within the Indian Territory. Upon these facts the plaintiffs requested the circuit court to charge the jury that the act of limitations would not run against the plaintiffs for any part of the tract, although outside the Indian boundary until the Indian title was extinguished to that part of the tract which included the beginning corner, and the lines running from it, so as to enable them to survey their land and prove the defendants to be within their grant. This instruction the court refused, and the cause was taken to the supreme court on writ of error, when Marshall, C. J., delivered the opinion of the court. He said: "The case is admitted to be within the act of limitations of the state of Tennessee, and not within the letter of the exceptions. But it is contended that as the plaintiffs were disabled by statute from surveying their land and consequently from prosecuting their suit with effect, they must be excused from bringing it, and are within the equity though not within the letter of the exceptions. The statute of limitations is intended, not for the punishment of those who neglect to assert their rights by suit, but for the protection of those who have remained in possession under color of title believed to be good. The possession of defendants being of lands not within the Indian Territory and being in itself legal, no reason exists as connected with that possession why it should not avail them and perfect their title as intended by the act. The claim of the plaintiffs to be exempted from the operation of the act is founded, not on the character of the defendants' possession, but on the impediments to the assertion of their own title. Whenever the situation of a party was such, as in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far for the court to add to those exceptions." The judgment of the court below was affirmed. A discharge under an insolvent law does not take from the debtor the protection which is afforded by the statute, even by virtue of the equity of the exception of being "beyond seas," or "out of the state," although the reason why such absence of a defendant excuses the plaintiff from prosecuting is, that he cannot be reached by process of the courts. Ang. Lim. 487.

It was contended in the supreme court of New York that the cause came within the equity of the statute; that the defendant had been discharged under an insolvent act, and that the discharge would prevent the statute from running against an action of assumpsit upon a contract made before the passage of the insolvent act, and the money not falling due until after the debtor's discharge. But the court held otherwise, and said: "Though the defendant's virtual protection from prosecution by the discharge produces the same result as his absence from the state, yet we are not warranted by any rule of construction in deciding that any cause which produces the same effect as the one mentioned in the act comes within it. It is not for the court to extend the law to all cases coming within the reason of it so long as they are not within the letter. It has been holden that no exception can be claimed unless expressly mentioned." Bucklin v. Ford, 5 Barb. 393.

So A. B. made his promissory note on the 17th of April, 1812, in favor of C. D., who indorsed it to E. F. An act of assembly was passed in Pennsylvania on March 13, 1812, which was in fact a bankrupt law. On the 31st of March, 1817, the supreme court of Pennsylvania held that said act was constitutional, and a discharge under it a bar to a recovery. The case on which the decision was made was removed to the supreme court of the United States, and there reversed on February 13, 1821. More than six years after the cause of action arose on the note, E. F., the indorser, brought a suit on it against A. B., the maker, and on a case stated, the following question was submitted for the opinion of the court: "Did the act of limitation run against the plaintiff while the act of March 13, 1812, was held by the supreme court of Pennsylvania to be constitutional?" It was held by the court that these circumstances did not stop the running of the statute. Hudson v. Carey, 11 Serg. & R. 10; Ang. Lim. 487. It would be unreasonable to require a case more directly in point to the question under discussion. The principle decided in the cases cited disposes of the claim of plaintiff. He has been under no disability to sue; the courts have at all times been open to him, and the defendant at all times liable to be sued by him. The limitation provided by the statute had run against the

plaintiff before he brought his action. He falls within the terms of the act, and the law makes no exceptions. The court cannot legislate for his benefit and make an exception in his favor, when the law has made none. I am of opinion therefore that the plea of the limitation in the second section of the bankrupt act is a good and sufficient answer to the plaintiff's cause of action. Upon that issue the finding and judgment of the court is for defendant.

Upon the rendition of the foregoing decision the plaintiff entered a motion for a new trial, on the ground that the court erred in the effect given to the limitation of actions in the last clause of the second section of the bankrupt act. The theory now urged is that the limitation only applies to new causes of action, arising in favor of the assignee after the bankruptcy, and not to those which had existed before the bankruptcy and had come to the assignee by the assignment; as, for instance, damages for trespass to the property in the hands of the assignee, or a conversion of the property assigned, to him, and such like cases. To support this view attention is called to certain provisions found in the 14th and 16th sections of the bankrupt act. The 14th section declares that the assignee "may sue for and recover the said estate, debts and effects, and may prosecute and defend all suits at law or in equity pending at the time of the adjudication in bankruptcy in which such bankrupt is a party in his own name, in the same manner and with like effect as they might have been prosecuted by such bankrupt." The 16th section provides that "the assignee shall have the like remedy to recover all said estate debts and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made."

The argument is, that by applying to the assignee the brief limitation of two years, we do not give him the same remedy which the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made, and that we do not allow him to sue for and recover the estate, debts and effects of the bankrupt in the same manner and with like effect as they might have been if sued for by the bankrupt. I think this construction claimed for the limitation of the second section of the bankrupt act is too narrow. The general policy of the bankrupt act is to hasten the final settlement of the bankrupt's affair. The proceedings in bankruptcy are speedy, and in many cases summary. In the bankrupt act of 1841 it was provided (5 Stat. 447, § 10) that "all the proceedings in bankruptcy in each case shall if practicable be finally adjusted, settled and brought to a close by the court within two years after the decree declaring the bankruptcy." While this provision is not re-enacted by the bankrupt act of 1867, it is clear that the policy of the law is the same as if it were. By the twenty-eighth section of the act, provision is made for a final dividend at the end of six months from the adjudication unless an action at law or suit in equity be then pending, or unless some other estate and effects of the debtor afterward come to the hands of the assignee, in which case the assignee shall as soon as may be convert such estate or effects into money, and within two months thereafter the same shall be divided in like manner. We think the limitation in the second section was enacted to carry out this policy of a speedy settlement of the bankruptcy.

In order to arrive at the true interpretation of the law upon the question in hand, the provisions of the second, fourteenth and sixteenth sections of the act must be construed together, as if they were all contained in the one section and stood side by side. So considering them, their meaning appears plain, and the effect of the three sections is this: The assignee may sue for and recover the estate, debts and effects of the bankrupt in his own name, and have like remedy to recover all said estate, debts and effects as the bankrupt might have if the decree in bankruptcy had not been rendered and no assignment had been made, provided his suit for that purpose is brought within two years from the time the cause of action accrued to him. This construction gives reasonable effect to all three sections and upholds the policy of the act looking to the rapid settlement of the bankruptcy. The clause in the bankrupt act of 1841 (5 Stat. 446, § 8), corresponding to the provision in the second section of the law of 1867, under consideration, is in these words: "And no suit at law or in equity shall in any case be maintainable by or against such assignee or by or against any person claiming an adverse interest touching the property or rights of property aforesaid, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall have first accrued." This phraseology excludes completely from the act of 1841 the construction which plaintiff attempts to put upon the act of 1867, for by the act of 1841, it is clear that if the cause of action accrued before the bankruptcy, the action must be brought within two years from the decree, and if after the bankruptcy, within two years from the time the action accrued. We think it clear that the effect of the provision under consideration is the same, and that the change in the words used in the act of 1867 was not intended to accomplish an entire and radical change in the effect of the limitation.

The consequences which must follow the construction claimed by the plaintiff are so absurd as to demonstrate its incorrectness. Thus: no cause of action accrues upon a promissory note until its maturity; from that date only the statute of limitations begins to run. Now, according to the theory of plaintiff, if a promissory note, the property of the

debtor, falls due the day after the bankruptcy, the assignee must bring his action within two years, but if it falls due the day before the bankruptcy, he is allowed the full term of the general limitation laws, six, ten or fifteen years, as the case may be, in which to bring his action. Such, we are convinced, is not the true interpretation of the law. In our view, on all matured claims and demands, the cause of action accrues to the assignee at the date of the assignment; all others from their maturity or at the time when an action will lie, and he must sue within two years from these dates respectively. We are therefore unable to see any error in our finding and judgment, and the motion for a new trial must be overruled.

NORTON (HEWETT v.). See Case No. 6,-441.

NORTON v. The ISLAND CITY. See Case No. 10,306.

NORTON (McCAN v.). See Case No. 8,677.

Case No. 10,351.

NORTON v. MEADER et al.

[4 Sawy. 603.] [1]

Circuit Court, N. D. California. Oct. 4, 1866.[2]

WHEN HOLDER OF LEGAL TITLE WILL BE CHARGED AS TRUSTEE—SCOPE OF CALIFORNIA STATUTE OF LIMITATIONS—PLEADING—OBJECT AND PURPOSE OF UNITED STATES LAND COMMISSION—PROTECTION AFFORDED PURCHASERS IN GOOD FAITH FOR VALUE AND WITHOUT NOTICE—SERVICE OF PROCESS—OMISSION OF SHERIFF'S RETURN—MARRIED WOMAN CANNOT CONTRACT PERSONAL OBLIGATION—MARRIED WOMAN'S ACKNOWLEDGMENT OF DEED—ACQUAINTANCE OF CONTENTS THROUGH INTERPRETER—EXCEPTION IN DEED OF LAND DESCRIBED IN ANOTHER DEED—PURCHASE OF LAND—NOTICE OF ADVERSE CLAIM.

1. Wherever property is acquired by fraud, or under such circumstances as to render it inequitable for the holder of the legal title to retain it, a court of chancery will convert him into a trustee of the true owner.

2. The statute of limitations of California applies as well to equitable as to legal remedies, being directed to the subject-matter and not the form of the proceeding, or the form in which it is presented. It would seem therefore that, where the objection is not raised by demurrer, parties claiming its bar should plead it, or insist upon it in their answer in equity suits as in actions at law.

3. The object of the government in creating the board of land commissioners, was to separate the public lands from those which constituted private property, and discharge its treaty obligations to protect private claims; the only question, therefore, in which it is concerned is, what had the former sovereignty parted with; not what had transpired between private parties subsequent to the action of that sovereignty.

4. Whilst equity will reach the holder of the legal title of lands, who has obtained it by fraud, and also parties acquiring it under him without consideration, or with notice of the rights of the real owner, it will extend its protection to purchasers in good faith for valuable consideration without such notice.

5. Where a sheriff made two certificates of service of a copy of summons and certified copy of complaint, according to one of which he served "a true —— of this writ attached to a certified copy of complaint," and according to the other he served "a true —— of the complaint attached to a true copy of the summons:" *Held*, that the certificate of service was good; and that the omission in one certificate was cured by the statement in the other.

6. If a person declines to receive from an officer a paper presented for service, the officer may deposit it in any convenient place in the presence of the party, and the service will be good.

[Cited in Borden v. Borden, 63 Wis. 377, 23 N. W. 574.]

7. The recitals in a judgment or decree by a competent court that the defendants had been legally summoned are prima facie evidence thereof.

8. A married woman in California is incapable of contracting a personal obligation, except in certain special cases provided by statute; her uniting in the execution of such obligation with her husband will not render it any more than his individual obligation.

[Cited in Manning v. Hayden, Case No. 9,043; U. S. Trust Co. v. Sedgwick, 97 U. S. 309.]

9. A court cannot render a personal judgment against a married woman on a contract purporting to be her personal obligation. Such a judgment may be attacked collaterally, although the court may in other respects have had jurisdiction over her person and the subject-matter of the suit.

[Cited in Galpin v. Page, Case No. 5,206; U. S. Trust Co. v. Sedgwick, 97 U. S. 309; Canal Bank v. Partee, 99 U. S. 331.]

[Doubted in McCurdy v. Baughman, 43 Ohio St. 83.]

10. Where a certificate of acknowledgment to a deed by a married woman stated that she was made acquainted with the contents of the conveyance through a sworn interpreter: *Held*, that it was not necessary to show that the contents were made known to her by the officer himself, such information being imparted by the interpreter in the officer's presence and by his direction.

11. Where a deed of a tract of land excepted from its operation a parcel conveyed by another deed, the exception is not void for uncertainty, if the parcel in the deed mentioned is described with definite boundaries.

12. Though a person pays full value for land, and after inquiry supposes he is getting a good title, yet if he is aware of an adverse claim, which afterward proves to be valid, he cannot protect himself on the plea of having been a bona fide purchaser.

This is a suit on the equity side of the court to charge the defendants [Moses A. Meader and others] as trustees of certain real property, situated in the county of Santa Cruz, and to compel a transfer of the legal title held by them to the complainant [Charles E. Norton]. It was heard on the pleadings and proofs in September, 1866, but was decided at the subsequent October term. As thus presented, the case was substantially this:

On the thirteenth of February, 1839, three sisters, Maria Candida, Maria Jacinta, and Maria de los Angeles Castro, presented a petition to Alvarado, then governor of the department of California, for a grant of a tract of land known as El Refugio, situated in the

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

[2] [Affirmed in 11 Wall. (78 U. S.) 442.]

present county of Santa Cruz. On the same day the petition was referred to the administrator of the adjoining mission, and upon his favorable report, the governor, on the sixteenth of March, 1839, made "to the parties interested" a provisional concession of the land—a concession subject to his further action in the premises, and also gave them permission to occupy the land pending the proceedings. Under this permission the petitioners entered into the possession of the premises. At the same time the governor, to obtain the proper information to guide his further action, directed the prefect of the district to report upon the subject of the petition. The prefect reported that a grant could be made of the tract solicited, as it was vacant land and not claimed by any one. Accordingly, on the eighth of April, 1839, the governor made a formal concession of the tract to the three sisters by name, referring to their petition and the report of the prefect, and declaring them "owners in fee of the land known by the name of El Refugio," and directing that the proper grant or title papers (titulo) issue to them, and that the proceedings in the case (the expediente) be retained for the knowledge and approval of the departmental assembly. These proceedings are designated by the number 131. In this concession the name of one of the sisters, Maria de los Angeles, is now erased and over the erasure is written the name of Jose Bolcoff. On the twenty-second of May, 1840, this concession was approved by the departmental assembly. The approval, as entered on the journals of the assembly, has upon it the number of the expediente, 131, and mentions the date of the concession, and designates the three sisters by name as the parties to whom it was made. On the thirteenth of June following, the governor, referring to the action of the assembly, directed a certificate of the approval to be issued to the three sisters. At the time the concession was made, Jose Castro was prefect of the First district, and as such officer kept a record of the grants of land made in the district. The grants made by himself, as prefect, he entered at length, but of the grants made by the governor he entered only a memorandum, designating their date, the parties to whom issued, and the land granted. A book purporting to be the original registry kept by him is now in the archives in the custody of the surveyor-general of the United States. It bears on its face evidence of its genuineness, and is verified in every particular, which is susceptible of verification by documents in the archives. It contains a memorandum of nine grants of the governor; eight of these grants are found in the archives. Each of them has indorsed on it a memorandum directing its entry by the prefect in his registry, and a minute by the secretary of the prefect that it has been so entered with reference to the page of the registry. The minutes on these grants of the entries in the registry correspond. Of the nine grants noted in the registry, the eighth is not found in the archives. This eighth is the one which the complainant contends was issued to the three sisters. The entry in the registry is that on the eighth day of April, 1839, the governor granted to them the place called Refugio. This entry was made on the day following. There is also in the archives an index of grants which was prepared between 1838 and 1845, by a clerk in the office of the secretary of state of the department, and under his direction, and is commonly known as Jimeno's Index. This index gives the number of the expedientes, the names of the grantees, and the designation of the land granted. Upon the index there is found against No. 131 the entry of a grant of land designated as "El Refugio," and the name of Jose Bolcoff written over an erasure. It is admitted that originally the names of the three sisters were written here. This was the documentary evidence which the complainant produced to show that a grant of the rancho El Refugio was issued to the three sisters, under whom he claimed by sundry mesne conveyances. The parol evidence produced by him related chiefly to the possession of the premises since the concession of the governor, and certain alleged admissions, verbal or by conduct, of the sisters.

The defendants claimed title to the premises through Jose Bolcoff; and of some portions of the premises they also alleged a conveyance or release from the sisters. As documentary evidence of title they produced: First, a paper purporting to be a grant of El Refugio to Jose Bolcoff, by Governor Alvarado, bearing date the seventh of April, 1841; second, a certificate of Governor Alvarado, dated July 28, 1841, stating that the grant made on the eighth of April, 1839, in favor of Jose Bolcoff, was approved on the twenty-second of May, 1841, by the departmental assembly, and purporting to quote the language of the proceedings of that body. The certificate concludes by stating that it was issued to the party interested for his security, in consequence of the decree of the thirteenth of June preceding, existing in the expediente; third, a document purporting to be a record of juridical possession, given to Bolcoff, July 26, 1842; fourth, a diseno or sketch of the tract El Refugio; and, fifth, a patent of the United States, bearing date on the fourth of February, 1860, issued to Francisco and Juan Bolcoff upon the confirmation of the alleged grant to Jose Bolcoff. In 1822, one of the sisters, Maria Candida, intermarried with Jose Bolcoff, and in 1839, Maria de los Angeles intermarried with Joseph L. Majors. The three sisters lived together as members of the family of Bolcoff upon the land granted—Los Angeles until her marriage, and Jacinta until 1850, when she became a member of a religious order in the Catholic Church, and has not since resided upon the premises. Since some time in 1850, Majors and wife had occupied a portion of

the tract, claiming their right to the possession under the grant to the sisters. In 1852, Francisco Bolcoff and Juan Bolcoff, sons of Jose Bolcoff, presented their petition to the board of land commissioners, created under the act of March 3, 1851 [9 Stat. 631], for a confirmation of the claim to El Refugio, asserted by them under the alleged grant to their father. In support of their claim they relied upon the grant of Alvarado, the certificate of approval by the departmental assembly, the record of juridical possession, and the sketch mentioned, with parol evidence of possession and cultivation. No question was raised before the board as to the genuineness of these documents, and in January, 1855, the claim was confirmed. An appeal from the decision was dismissed, and on the fourth of February, 1860, as already stated, a patent was issued thereon. In 1852, Majors presented for himself and on behalf of his wife a petition to the board for a confirmation of her claim to one-third of the tract, under the grant to her and her sisters. In support of the claim they produced the petition to the governor, the reports thereon, the provisional grant of March 16, 1839, the formal concession of April 8, 1839, and the order of the governor of June 13, 1840, to issue to them a certificate of the approval of the assembly. The board rejected the claim, holding, in substance, that no evidence was offered that any grant was issued to the three sisters; that the decree of concession was of itself insufficient; that until a document as evidence of his rights was issued and delivered to the grantee, a decree of concession and even favorable action of the departmental assembly did not pass any title, legal or equitable, and the property continued part of the public domain, subject to the disposition of the authorities of the government, and observed that this was the view of the governor and departmental assembly, as he had, notwithstanding the concession to the sisters, issued two years subsequently a grant of the same land to Bolcoff, and the assembly had approved it.

The whole decision proceeded upon the supposed genuineness of the documents offered as evidence of Bolcoff's title and the supposed authority of the officers of Mexico to regrant lands once granted, without previous surrender by the first grantee. It is true, the opinion of the board also spoke of a want of proof of compliance with the usual conditions of cultivation and inhabitation, but this view could only have been entertained upon the idea that the residence and cultivation of Bolcoff and his wife, and that of her sisters, were under different grants. The commissioners held, in confirming his claim, that cultivation and residence were sufficiently established. Since the action of the board upon these petitions, the registry of the prefect has been discovered, and the new light it throws upon the question of the issue of a grant to the sisters, and other circumstances, mentioned in the opinion of the court, led to a careful examination of the documents upon which the claim of Bolcoff rested and finally to the institution of the present suit.

John B. Harmon, for complainant.

R. F. Peckham, Wm. Matthews, T. A. Fabens, J. M. Seawell, and W. T. Wallace, for defendants.

Before FIELD, Circuit Justice, and HOFFMAN, District Judge.

FIELD, Circuit Justice. There is no doubt in our minds that a formal grant—a titulo—was issued to the sisters. The decree of concession entered on the eighth of April, 1839, directs the issue of such a document, and no reason is alleged why the direction should not then have been carried out. The entry in the prefect's registry must have been made from such a document. The decree itself remained, and always has remained, in the archives of the government. The issue of a certified copy, as inaccurately averred upon information and belief, would have been an unusual proceeding, and no ground is suggested for its adoption in this case rather than the proceeding directed, and the latter document could have been prepared with equal facility. Nor is there any other instance where the prefect made an entry from any document other than the titulo. The object of the entry by him was not the preservation of evidence of preliminary proceedings of the governor towards grants, but of grants actually made. As the prefect himself could also grant land under some circumstances, it was important for him, for the proper exercise of his authority, to know what part of the public domain had been disposed of by others.

The approval of the departmental assembly in May, 1840, more than a year afterward, and the order of the governor in June, 1840, directing a certificate of the approval to be issued to the sisters, show that at those periods there was no information possessed by the assembly or governor of any abandonment by the sisters of their interest in the concession. On the contrary, the action of the governor proceeded upon the ground that no other evidence of title, except what had already been delivered, was needed by them. If any other had been needed it would undoubtedly have been then ordered; and if no right remained in the sisters it is hardly to be supposed that the issue of the certificate to them would have been required.

There is also evidence, clear and convincing, that in 1839 or 1840, juridical possession of the land was given to the sisters, and that in this proceeding Jose Bolcoff appeared and represented them. The testimony of the assisting witnesses is direct upon this point, and also that no juridical possession was ever given in their presence or to their knowledge to any other person. It would be difficult to produce more satisfactory evidence of the ex-

istence of a formal grant to the sisters than is thus furnished, for the official delivery of possession was the final act in the Mexican land system for the investiture of a perfect title.

The grant, when issued, without doubt went into the possession of Bolcoff. As already stated, he was the husband of one of the sisters, and all of them resided with him; they were ignorant women, not capable of reading; he would therefore, almost as a matter of course, become the custodian of their title papers.

Were there any doubt upon the question of a grant to the sisters, and of its destruction by Bolcoff, we think it will be removed by a consideration of the documents produced in support of a title in himself. The decree of concession to the sisters is not denied, but it is insisted by the defendants—and this was the pretense set up by Bolcoff himself—that the interest of the sisters was exchanged for an interest in a tract of land of which he had obtained a grant, and that in consequence of this exchange the grant of El Refugio was issued, at their request, to him instead of being issued to them. The agreement is stated in this wise: That Majors and wife should relinquish to Bolcoff their interest in El Refugio, and allow him to obtain a grant therefor in his own name; and in exchange for this, that Bolcoff should relinquish to Majors his interest in a ranch known as St. Augustine, of which he had obtained a grant in 1833, and allow Majors to obtain a grant for the same, he paying Bolcoff, in addition, the sum of $400. It is alleged that this agreement was made after the intermarriage of Majors and Maria de los Angeles, and immediately carried into execution; that Majors and wife took possession of St. Augustine, and that afterward, on the seventh of April, 1841, Maria Candida went personally to the governor and stated the agreement, when the governor, at her request, issued the grant to Bolcoff alone, and that the erasures in the decree of concession and in the index were at that time made by Jimeno, the secretary of state.

Unfortunately for the defense, this statement is not only contradicted by Majors, but is inconsistent with almost every fact disclosed by the records. Majors did, indeed, obtain the ranch St. Augustine from Bolcoff, but it was by direct purchase, and not by an exchange of any interest in other lands. The transfer to him was made months before his marriage, and before even the petition of the sisters for El Refugio had been presented. The transfer to him is indorsed on the expediente of St. Augustine in the archives, and bears date on the fourteenth of January, 1839.

The alleged grant to Bolcoff makes no allusion to any pretended purchase or exchange with the sisters, or of any abandonment of their rights. It recites that he himself had petitioned for El Refugio, a recital which is inconsistent with his statement.

Of this document there is no trace to be found in the archives of the department, if we except the mutilated index of Jimeno. The absence of any such evidence of itself throws a strong suspicion upon the character of the document, for it was an essential part of the system of Mexico to preserve full record evidence of all grants of the public domain, and of the proceedings by which they were obtained. Pico v. U. S., 2 Wall. [69 U. S.] 282. It is incredible that in a matter of so much importance no minute was preserved of the grant, or of the relinquishment of the sisters. The loss of the Toma de Razon of that year does not account for the absence of all trace of either one or the other. No other instance is found in the archives of the department where a tract once granted had been relinquished or abandoned and a new grant made, without written evidence of the relinquishment or abandonment, and it is not believed that any such exists.

The certificate by the governor of the approval, by the departmental assembly, of a grant to Bolcoff is inconsistent with the alleged grant produced. It states that the grant made on the eighth of April, 1839, in favor of Jose Bolcoff, was approved on the twenty-second of May, 1841, yet it is not pretended by the defendants that any grant to Bolcoff was made on that day. The grant produced bears date the seventh of April, 1841. The certificate purports further to quote the language used by the departmental assembly in this approval. There was no session of the assembly in 1841; at least there is no evidence in the archives of the department that there was a session in that year, and if the year is erroneously given, and the approval of May 22, 1840, is intended, that relates only to the grant to the three sisters, who are therein designated by name, and no such language as that given is found on the journals of the assembly.

The document purporting to be a record of juridical possession given to Bolcoff, July 26, 1842, bears the signature of the prefect of the district and two attesting witnesses. One of the witnesses is unable to write, and the body of the entire document is in the handwriting of Bolcoff. The other witness testifies that he added his signature in 1851, when the document was presented to him by Bolcoff, with a request that he should sign it, inasmuch as he had not done so when the possession was given; that at this time the document had not the signature of the prefect or of the other witness, and Bolcoff stated that he was going to them for their signatures. Both of these witnesses testify emphatically that there never was but one juridical possession of the premises, and, as we have already stated, that this was delivered to the sisters. Yet, Bolcoff testified before the land commission that the document was signed by all the parties in the year 1842. The erasures in the decree of concession and in Jimeno's Index are not identical. The erasure in the decree is

only of the name of one of the sisters; but the erasure in the index is of the names of all of them.

From this examination of the documents it is difficult to resist the conclusion that they are all false, and were fabricated by Bolcoff, or some one at his instigation, to defraud the sisters of their property and secure the title to himself. Nor do we find any relief from the conclusion by the support given to his statements from the testimony of his wife, and of Alvarado and Castro. No such irreconcilable inconsistencies as are found between his statements and the documents, and between the different documents themselves, would exist if the statements were true and the documents were genuine.

By the false and fabricated documents and the suppression or destruction of the grant to the sisters, a confirmation of the claim under the alleged grant to Bolcoff has been obtained, and the legal title secured to his children; when in truth and fact the real title was in the three sisters and should have been adjudged to them. Under these circumstances, upon obvious principles of justice, the patentees and all persons holding under them with notice of the claim to the sisters, should be decreed to surrender up the title. The right of the complainant to a decree of this character rests upon the established doctrine, that whenever property is acquired by fraud, or under such circumstances as to render it inequitable for the holder of the legal title to retain it, a court of chancery will convert him into a trustee of the true owner. 1 Spence, Eq. Jur. 4; Hardy v. Harbin [Case No. 6,060].

This is not the case of a confirmation and patent upon an independent grant having no relations to the proceedings of the sisters, but upon a grant alleged to have been given by agreement to Bolcoff, as a substitute for the one decreed to the sisters. The case proceeds upon the ground that the confirmees obtained by fraud a confirmation in their names of the rights granted to the sisters, and by reason of the confirmation have secured the possession of the legal title to the premises. It is the possession of this legal title which prevents the complainant from maintaining ejectment for the premises, and drives him into a court of chancery for relief.

In addition to insisting upon the genuineness and authenticity of the alleged grant to Bolcoff, and other documents produced in support of his title, the defendants rely to defeat this suit upon several grounds, the principal of which are: First, that the claim of the complainant is a stale claim and barred by the statute of limitations; second, that the complainant has no standing in court, by reason of the non-presentation of the claim of two of the sisters to the board of land commissioners for confirmation, and the rejection, by the board, of the claim of the other sister; and, third, that the defendants are bona fide purchasers of some portions of the property for a valuable consideration, without notice of the claim of the sisters, and for other portions have conveyances or releases from them.

1. In this state the statute of limitations, as we have had occasion to observe, differs essentially from the English statutes, and from statutes of limitation in most of the other states. Those statutes in terms apply only to particular legal remedies; and courts of equity there are said to be bound by them only in cases of concurrent jurisdiction, and in other cases to act only by analogy to the statutes, and not in obedience to them. But in this state the statute applies as well to equitable as to legal remedies. It is directed to the subject-matter, and not the form of the proceeding, or the forum in which it is prosecuted. Lord v. Morris, 18 Cal. 486; Hardy v. Harbin [supra].

There would seem, therefore, to be as good reason for requiring parties claiming the bar of the statute to suits in equity in this state, when the objection is not raised by demurrer, to plead such statute, or insist upon it in the answer, as there is for a similar rule where the bar of the statute is invoked in actions at law. In some cases such is the rule now, as in suits to have an account of rents and profits of land. See Prince v. Heylin, 1 Atk. 493. And were it necessary, we should not hesitate to hold that the rule in this state applies to all cases in equity; but it is not necessary now to go so far. For even where it was not essential by the old rules to plead the statute or to refer to it in terms, yet to claim any benefit of the statute, the pleader was required to state facts sufficient to bring the case within its operation, and then to insist that by reason of those facts the remedy of the complainant was barred. This has not been done by the defendants in this case; their claim, made in argument only, that the relief is barred will not answer. 2 Madd. 309; Van Hook v. Whitlock, 7 Paige, 381.

2. The presentation or non-presentation by the sisters of their claim under the grant to the board of land commissioners has nothing to do with the equitable relations between them and third parties. Such relations were never submitted to the board for adjudication. The object of the government in creating that tribunal was to separate the public lands from those which constituted private property, and to discharge its treaty obligations by protecting private claims. As we said in Hardy v. Harbin, the only question in which the government was concerned was, what interests in land had the former sovereignty parted with, not what had transpired between private parties subsequent to the action of that sovereignty; and so the supreme court of the United States "have frequently determined," to quote its own language, "that the government had no interest in the contests between persons claiming

ex post facto the grant." Castro v. Hendricks, 23 How. [64 U. S.] 442. And the supreme court of California, whilst holding that the legal title was vested in the confirmee, has in repeated instances declared that equities between him and third parties remained unaffected. See Hardy v. Harbin, where this subject is considered at length; also, Estrada v. Murphy, 19 Cal. 272; and the recent decision in Salmon v. Symonds, 30 Cal. 301.

If, in this case, after the sisters had obtained their grant, Bolcoff had fabricated a deed from them of the property, and presented the claim in his own name, and obtained a confirmation and patent, no question could be made against their right to demand a transfer to them of the legal title. He could not be heard to say that they would have lost the property by non-presentation, and that therefore he should be left alone in his fraudulent acquisition. His mouth would be stopped by his fraud. Nor, indeed, could it be in truth affirmed by any one that the property would have ultimately been lost to the sisters, and that relief might not have been afforded them by appropriate legislation. As observed in the Hardy Case, the finder of personal property might with equal propriety justify its detention on the ground that the true owner would never have found it.

Now the case supposed is, in all its essential features, the case at bar, the only difference being the presentation of a fabricated grant from the governor instead of a fabricated deed of the sisters, with a representation that the grant was issued to Bolcoff, by agreement with the sisters, as a substitute for the one decreed to them, and, in fact, issued to them. It would be a reproach to the administration of justice if a court of equity could afford no remedy to the injured parties.

3. But whilst equity will reach the perpetrator and parties acquiring the property under him without consideration or with notice of the rights of the real owners, it will extend its protection to purchasers in good faith for a valuable consideration without such notice; and there are several of the defendants who occupy this position. Some of the defendants have also conveyances or releases of the interest of two of the sisters. We have looked enough into the large folio volume of two hundred and twenty-seven pages, containing an abstract of the different conveyances by the sisters and parties claiming under them, and by officers of the law, and into the circumstances attending the execution of such conveyances, to satisfy us that only an undivided portion of the tract granted to the sisters can be decreed to the plaintiff under the views expressed in this opinion; and that the remaining portions will rest with the defendants—with some of them as bona fide purchasers, without notice; with others, as grantees of the interest of two of the sisters. An interlocutory decree in favor of the complainant will be entered and reference ordered to a master to report which of the defendants are bona fide purchasers, without notice of the claim of the sisters; and what parcels were so purchased, and also of what parcels the interest of the sisters, or any of them, has been conveyed to the defendants, with all necessary particulars; and upon the coming in and confirmation of his report, a final decree will be entered directing the defendants to transfer to the complainant their title to all parcels and undivided interests in parcels, not thus acquired and held.

In accordance with the foregoing decision an interlocutory decree in favor of the complainant was entered, and a reference ordered to a master, who, after hearing the proofs, made an elaborate report upon the matters referred. To this report various exceptions were taken by counsel. These exceptions were argued and all but one were overruled, and a final decree entered. The following opinion was delivered when the decision on the exceptions was made.

FIELD, Circuit Justice. The exceptions are numerous, and not always consistent with each other. We shall not undertake to pass upon them separately, but will consider the principal matters objected to in the report in the order in which they are treated by the master. The first matter of exception is the ruling upon the proof of service of the summons in the case of Moses A. Meader v. Jose Bolcoff and Maria Candida, his wife, and others.

It appears in evidence that on the nineteenth of March, 1853, Bolcoff and his wife and two sons executed a mortgage to Meader upon a portion of the premises, being a tract of about three miles square, to secure their joint and several promissory note of $8,073, drawing interest at the rate of three per cent. a month. The case referred to was a suit to foreclose this mortgage. The proof of service consisted in two certificates of the sheriff—one indorsed upon the summons, and one upon a certified copy of the complaint. The first certificate was as follows: "Personally served the within summons on Maria Candida Bolcoff, by delivery of a true —— of this writ, attached to a certified copy of complaint. The said defendant refused to take the writ. I laid it on a chair in the presence of said defendant and in the presence of one Frank Roan. Santa Cruz, June 13, 1855." The second certificate is dated June 19, 1855, and is to the effect that on the thirteenth of June the sheriff served the complaint on the defendant by personally delivering to her, in the town of Santa Cruz, a true —— of the complaint attached to a true copy of the summons.

Two objections are taken to these certificates: (1) That they do not show a service of

a copy of the summons; and (2) that a deposit of the paper designated on a chair in the presence of the defendant, upon her refusal to receive it, was not a sufficient delivery.

We do not think either of the objections well taken. The blanks in both certificates should have been filled with the word "copy," but no one could possibly be misled by the omission, or hesitate as to the word to be supplied. Were this otherwise, the omission in one certificate is cured by the statement in the other. The two certificates taken together show a compliance with the requirements of the statute. See Billings v. Roadhouse, 5 Cal. 71; and Moore v. Semple, 11 Cal. 360.

The second objection is no better than the first. If a defendant declines to receive from the proper officer a paper presented by him for service, he may deposit it at any convenient place in the presence of the party. The objection that the officer did not explain the character of the paper cannot be heard from the defendant. She should have received it, and examined it herself, or if unable to read, sought an explanation of its purport from those who could. Had she desired it, the officer would have given her the necessary information. The ruling of the master upon the sufficiency of the proof of service was correct.

But independent of the certificates, the service is sufficiently shown by the decree itself. That recites, among other things, that it appeared to the court that all of the defendants had been legally summoned. The fact was an essential preliminary to the entry of the decree, and of facts of that nature the recital is prima facie evidence. Comstock v. Crawford, 3 Wall. [70 U. S.] 396; Barber v. Winslow, 12 Wend. 102; Potter v. Merchants' Bank, 28 N. Y. 641.

In the foreclosure suit a decree was rendered July 3, 1855, directing that the mortgaged premises be sold; that the complainant recover against the mortgagors the amount of the promissory note, principal and interest, which was stated, besides the costs; that the proceeds of the sale be applied to the payment of that amount; that any surplus remaining be paid to the mortgagors, and that execution issue against them for any deficiency. Under this decree, the mortgaged premises were sold, and were bid in by Meader, to whom a deed was subsequently executed by the sheriff. The proceeds received did not pay the amount due on the mortgage. A deficiency of over $7000 remained. For this deficiency an execution was issued, and a sale was made thereunder of the separate property of Candida in the balance of the rancho El Refugio, which at that time consisted of two undivided thirds. At the sale, Meader became the purchaser, and in due time received the sheriff's deed. The master held the present judgment against Candida and the sale under it void, and this ruling constitutes the second matter of exception to his report.

We think the ruling was clearly correct. Except in certain special cases, to which we will presently refer, a married woman is incapable of contracting a personal obligation. Her disability, arising from her coverture, prevails in all its force in this state as at common law. By no form of acknowledgment, or mode of execution, can this disability be overcome. Her signature will not impart validity to the contract; nor will her uniting in its execution with her husband render it any more than his personal obligation.

It is true that in some states equity will impose, as a charge upon her separate estate, the payment of a debt contracted for the benefit of such estate, or for her own benefit upon its credit, but this liability of her separate estate does not exist even there, according to the later and better considered cases, unless the engagement of the wife specifically relate to such estate, or indicate an intention specifically to charge it. Yale v. Dederer, 18 N. Y. 269, 22 N. Y. 451. In this state her separate estate cannot be charged except by instrument in writing executed both by herself and husband. Maclay v. Love, 25 Cal. 367.

The special cases referred to, where this disability does not exist with a married woman, are those where she acts as sole trader by the custom of London, or in this country by special legislation, or where she is obliged from necessity to act as a feme sole, as where her husband has absconded and abjured the country, or has been exiled, or has been imprisoned for life or years. In these last-mentioned cases, the husband is regarded as civilly dead, and the wife as being in a state of widowhood. Except in such cases as these common law rule prevails.

The case at bar is not one of the exceptional cases. It does not rest upon any valid obligation of Candida. The promissory note, for the security of which the mortgage was executed, was not binding upon her. It was only binding upon her husband and her sons. The execution of the mortgage created an incumbrance upon her interest in the property described therein, but it did not relate to or affect her interest in any other property.

The general doctrine, as we have stated it, is not controverted by counsel. Their position is, that the court which rendered the decree and ordered execution for the balance, had jurisdiction over the parties and the subject-matter of the suit—the enforcement of payment of the debt by directing a sale of the mortgaged premises and execution for any deficiency in the proceeds; and that its decree, however erroneous, cannot be questioned collaterally.

The general binding force of judgments and decrees of courts, where they have jurisdiction over the parties and the subject-matter, is admitted. Such judgments and

decrees are binding until reversed by regular proceedings; but the very question presented here is, had the court, which acted in this case, any jurisdiction to render a personal judgment upon the contract of a married woman, and to direct the enforcement of the judgment by execution against her property, except in the special cases mentioned.

To this question we think that there can be only one answer, and that this answer must be in the negative. All courts, even such as are designated courts of superior or general authority, are more or less limited in their jurisdiction; they are limited to a particular kind of cases, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise upon the high seas, or to the use of particular process in the enforcement of their judgments.

Now, by the general law a married woman cannot be personally bound by her contract; nor can she, by the general law, be subjected on her contract to a personal judgment. It matters not upon what consideration the contract is made; that inquiry cannot be had, nor the further inquiry, whether equity may not furnish some relief from the separate property of the party. However these inquiries might result, no personal judgment could follow; for such judgment upon the contract no court is competent to render. In this respect the jurisdiction of every court is limited. Various reasons are assigned for this limitation, some of which would not be applicable under our altered laws. Reeves, in his treatise on Baron and Femme, states "that no action at law can be maintained against her. For the judgment in that case would subject her person to imprisonment; and thus the husband's right to the person of his wife would be infringed, which the law will not permit in any case of a civil concern." "And for the same reason," he continues, "there can be no personal decree against her in chancery. It must be one that reaches her property only."

Whatever may have been the reason originally assigned for the limitations upon the authority of the courts, the existence of the limitations is unquestionable.

In Wallace v. Rippon, 2 Bay, 112, judgment had been taken against the wife jointly with the husband upon a bond, signed by both, and on the execution issued she was arrested. On a motion for her discharge her counsel contended that as she was under coverture at the time the bond was given, it was absolutely null and void, and that all proceedings upon it were equally so. On the other hand, it was argued that she was a feme sole dealer, and had the right, under a special agreement of her husband, pursuant to an act of the state, to make such contracts, and that having done so she was bound in her person and estate to fulfill them. But the judges were all of opinion that the bond was "originally void as to her, and consequently all the proceedings upon it were void also. That a feme covert may be made a sole trader under the act of assembly, and even in some cases by the common law, but then that must always be set forth in the original contract, and specially shown in the legal proceedings, and alleged in the record, as it is a deviation from the general law of the land. In the present case there is no such allegation; consequently all the proceedings upon the face of them are absolutely void as against her, but are good and valid against the husband." She was accordingly discharged.

In Griffith v. Clarke, 18 Md. 457, a bill was filed to enjoin the enforcement out of the separate estate of the wife of a personal judgment entered by default against herself and husband upon a note signed by both. The lower court of Maryland having refused to dissolve an injunction issued, the case went to the court of appeals of the state. It was there urged that the judgment could not be impeached on the ground of coverture or any other ground which could have been used as a defense at law. But the court said that the note signed by the wife could not be enforced by any proceedings at law, and that the judgment entered against her by default was a nullity.

In Morse v. Toppan, 3 Gray, 411, it was held by the supreme court of Massachusetts that a judgment recovered against a married woman was void, though founded upon a contract made by her in carrying on business on her own account and while living separate from her husband. The action was brought upon the judgment which had been recovered against her by default upon a note given by her for articles necessary to carry on her business, which was that of a keeper of a boarding-house. The court said: "The fact that the defendant was a married woman when the judgment was rendered against her, would alone be a good bar to this action. It would be the same as if she had entered into an obligation by bond at the same time, to which she must have pleaded non est factum. A judgment is in the nature of a contract; it is a specialty and creates a debt, and to have that effect it must be taken against one capable of contracting a debt."

In Dorrance v. Scott, 3 Whart. 309, the supreme court of Pennsylvania held that a judgment which had been entered upon a bond and warrant of attorney executed by a married woman with her husband was void, and that a judgment obtained upon a scire facias issued thereon was also void as respects her and her estate. The case of Caldwell v. Walters, in the same court, is of similar import. 18 Pa. St. 79.

The cases cited by counsel from the Reports of the supreme court of Texas would appear to be opposed to this view. By that

court it has been held that a personal judgment against a married woman is valid until reversed on appeal, and that under the execution issued thereon her separate estate may be sold. This was held in Howard v. North, 5 Tex. 290, where the judgment had been rendered against husband and wife for fraudulent representations in the sale of land. "The acts of femes covert in pais," said the court, "may be, and frequently are, void; yet this does not impair the conclusive force of judgments to which they are parties; and if they be not reversed on error or appeal, their effects cannot be gainsaid, when they are enforced by ultimate process, or where they are brought to bear on their rights, in any future controversy." And the same doctrine has been applied there to personal judgments entered upon contracts of married women; such at least we infer to be the fact, from the refusal of that court to reverse, on appeal, such judgments, when rendered by default or consent. Laird v. Thomas, 22 Tex. 276; Bullock v. Hayter, 24 Tex. 9. These decisions are exceptional, and proceed upon the peculiar statute of Texas respecting the rights and powers of married women, and do not affect the general rule of law which prevails here.

The claim of the defendant Courtis covers about two-thirds of the entire rancho. He deraigns his title from Bolcoff and wife through their conveyance to Augustus Le Plongeon, dated November 21, 1857. The master held that the certificate made by the county clerk of the acknowledgment of the wife, Candida, of the execution of this conveyance was radically defective; and this holding constitutes another ground of exception to his report. The certificate was held defective in two particulars: (1) That it does not state that the contents of the deed were made known to her by the officer himself, but only through a sworn interpreter; and (2) that it does not state to whom the acknowledgment was made.

The certificate states in the first place the personal appearance of the grantors before the officer; his knowledge that they were the persons described in, and who executed the conveyance; and the acknowledgment of both to him of their free and voluntary execution of the instrument, for the uses and purposes therein mentioned. It then proceeds to give the separate acknowledgment of the wife, and states that on an examination separate and apart, and without the hearing of her husband, on being made acquainted with the contents of the conveyance "through Frank Alzine, an interpreter duly sworn," acknowledged that she executed the same, without fear or compulsion, or undue influence of her husband, and that she did not wish to retract the execution of the same.

The certificate is sufficient in all particulars. The officer taking the acknowledgment of a married woman to a conveyance is directed to see that she is made acquainted with the contents of the instrument. He is thus authorized and required to use the ordinary and customary mode of communicating the information to her. If she understands our language, that would be the appropriate vehicle of communication; if a foreigner, ignorant of our language, the employment of a sworn interpreter would be the natural means in analogy to the course pursued in taking testimony in the courts of justice; if deaf and she reads writing, the information might be given by the pen; or, if she understood them, by the signs employed by mutes. The officer will comply with the law when he avails himself of the common means used by men in the ordinary transactions of life, exacting from the agents employed the security of an oath. It is not necessary, however, for him to state in his certificate in what manner the information is imparted.

The second objection is without force. The certificate first states the fact of acknowledgment by both husband and wife to the officer, and then proceeds to give the character of the separate acknowledgment; which means of course the separate acknowledgment to himself, not to any other person.

The deed of Plongeon to Touchard, through which the defendant Courtis traces his title, in terms excepts from its operation several tracts of land—among others a tract conveyed to Ignacio Castro, by deed dated September 3, 1856. The counsel of Courtis objects to the exception as void for uncertainty, and cites the case of Jackson v. Hudson, 3 Johns. 387, where the court said: "An exception in a deed is always to be taken most favorably for the grantee, and if it be not set down and described with certainty, the grantee shall have the benefit of the defect." In that case two deeds were in evidence, containing exceptions; one of them was for one-half of certain patented premises, and the exception was of "one thousand acres before conveyed to David Schuyler." The other deed was for one-fourth of the patent, and the exception was of "five hundred acres before conveyed" to the same person. It did not appear in what part of the tract covered by the patent these two parcels had been located, and there was sufficient land to supply them without touching any part of the premises in controversy. As the deeds were not explicit in this respect, the court held that the grantee was at liberty to locate the excepted tracts on whatever part of the patent he pleased as against any other person but Schuyler; observing that where a deed may inure in different ways the grantee shall have his election which way to take it, and then lays down the general rule cited by counsel. There is nothing in this decision which supports the objection taken in this case. Here the deed to Ignacio, which is referred to, does locate the excepted tract and give with

precision its boundaries. There is no uncertainty in an exception in the sense of the rule, where reference is made to the deed of the property for a description of the excepted tract. Here the only uncertainty is as to the deed mentioned; but the name of its grantee and its date being given, enough is presented to lead to inquiry; and slight inquiry would have furnished all required information.

The defendants, the Santa Cruz Petroleum Oil Works Company, hold two undivided thirds of the tract of five hundred acres claimed by them, through sundry mesne conveyances from two of the sisters. They insist, moreover, that they are entitled to hold the entire interest as bona fide purchasers for value without notice. We think it very clear, from the evidence presented, that the parties purchased in the belief that they were acquiring a good title; and they were advised, and acted upon the opinion, that the patent to Bolcoff settled adversely to the claims of the sisters all question as to the title of the land, and that they paid a full price for the premises. That they acted honestly there is no doubt; but still it is clear that they acted with full knowledge of the pretensions made by the sisters. The question, therefore, is not as to the good faith of the parties—mere good faith cannot transfer title from one who does not possess it—but whether they constitute in the sense of the law such bona fide purchasers as will entitle them to hold the apparent title which they acquired against the true owner. The law does not intend to give one man's property to another, though the latter may have ignorantly paid to a stranger its true value. But there are certain evidences of ownership, upon which it is important, for the interests of society, that parties in the purchase of property should be able to rely with confidence. Whoever purchases for a valuable consideration, relying solely upon these evidences, without notice of other claims, is protected in his purchase. But the position of the purchaser is entirely changed when he has at the time notice of the claims of others to the property. He is then put upon inquiry as to the nature and extent of the claims, and must act at his peril. He cannot afterward invoke the protection of the courts against what he knew existed at the time, however thorough may have been his investigations as to the grounds of such claims, or complete his conviction of their worthlessness.

Now, in the present case, it is clear, as we have already stated, that the defendants, the Petroleum Oil Works Company, were informed of the pretensions made by the sisters; that they knew that these pretensions had been asserted in the courts; that they were not abandoned; that for one parcel at least a recovery had been had upon the title of the sisters; and that conveyances had been made by the sisters to the grantee of the complainant. The abstract of title furnished these defendants before completing their purchase, gave them the information. They, therefore, purchased with notice, and must take the consequences of their error of judgment.

The defendant Ryan asserts a claim to one undivided third of a league in the rancho, under Joseph S. Majors and Maria de los Angeles, his wife, one of the three sisters. The claim is founded upon two instruments: 1. A deed from Majors of his interest in the undivided third, for legal services to be rendered in the recovery of, or in defending the claim of Majors to one third of the rancho. 2. An instrument executed and acknowledged by Los Angeles purporting to ratify the contract and deed of her husband. Neither instrument bears any date, but the first was acknowledged on the seventeenth of October, 1855, and the second was acknowledged on the sixteenth of June, 1858, and also on the twenty-seventh of August of the same year. The two instruments are attached together, and it is contended that they are to be regarded as one instrument, and to have the effect of a joint conveyance.

There is nothing in the position; Majors never had any interest to convey. A ratification by his wife of his deed would have been ineffectual to pass her title. But a married woman cannot, by an instrument executed by herself alone, ratify an instrument which she never executed. She cannot ratify an act confessedly done in disregard of the requirements of the statute, by a second act in which all the formalities essential to the validity of the original act are omitted. A valid act cannot be accomplished by two illegal attempts at its execution.

This concludes our examination of all the matters objected to which are deemed of sufficient importance to require special notice. The alternative report of the master, made upon the hypothesis that his own view of the certificate of acknowledgment to the deed of Plongeon might be erroneous, and that such certificate might be held valid, will be adopted in lieu of the report made. All the exceptions of the defendants, which are not sustained by this opinion, are disallowed.

An order in conformity with the views here expressed will be entered; and the case will be referred to the master to prepare the draft of a final decree to be entered in the cause. In settling the form of the decree, the master will fix a day for the hearing of the parties.

This case was appealed to the supreme court under the title of Meader v. Norton, where the decree was affirmed. 11 Wall. [78 U. S.] 442.

Case No. 10,352.

NORTON v. RICH.

[3 Mason, 443.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1824.

APPEAL—WHEN TAKEN.

An appeal from a decree of the district court must be taken in open court before the adjournment sine die, unless a different period be prescribed by the court.

[Cited in U. S. v. Haynes, Case No. 15,335; U. S. v. The Glamorgan, Id. 15,214; The New England, Id. 10,151; The Martha, Id. 9,144; The Enterprise, Id. 4,500; Otis v. The Rio Grande, Id. 10,614; The Oriental, Id. 10,570; The Brantford City, 32 Fed. 325.]

[Cited in The Zephyr v. Brown, 2 Wash. T. 44, 3 Pac. 187.]

Libel for seamen's wages. The district court on the hearing decreed wages to the libellant; and no appeal being taken in court, the court adjourned without day. Three days afterwards, the respondent claimed an appeal in the clerk's office; but the district judge refused to allow it, upon the ground, that the party was bound to make his appeal before the final adjournment of the court sine die, or within such other period as the court should, upon his application, prescribe. A petition was addressed to the circuit court in behalf of the respondent for relief by J. K. Smith.

STORY, Circuit Justice. The only modes of appeal, which are known in courts of admiralty, (at least as far as my researches have enabled me to ascertain,) are appeals made in open court, sedente curiā, immediately after the decree, and then they are apud acta, or appeals made, within ten days after the decree, before a notary. 1 Browne, Civ. & Adm. Law, 494–498; 2 Browne, Civ. & Adm. Law, 435–439; Ought. Ords. Judi. tit. 277, 289, 294; Clerke, Praxis, tit. 53, and note; Cod. lib. 7, tit. 62, § 6. This latter mode has never been in use in America, and has been expressly declared to be inadmissible by the supreme court. [Glass v. The Betsey] 3 Dall. [3 U. S.] 6, note. The judiciary act of 1789, c. 20 [1 Stat. 73], has expressly prescribed a period of five years, within which appeals may be made from the decrees of the circuit court to the supreme court, and the mode in which it is to be done, by a citation to the adverse party, &c., &c. (section 22). But it has provided no mode as to appeals from the decrees of the district courts to the circuit courts confining the appeal only to the next circuit court (section 21). This omission seems to indicate a difference of intention in congress as to appeals from the circuit and district courts, leaving appeals from the latter to be regulated by the discretion of the court, or to be made only at the time of the decree. The case, therefore, being untouched by statute, must be decided upon general principles. Acts 1792, c. 36 [1 Stat. 275], and 1793, c. 22 [Id. 333], have given to all the courts of the United States authority to make such regulations for their practice and business, as they may deem expedient; and doubtless under these acts, as appeals from the district courts are unprovided for by statute, these courts may by rule prescribe the times and modes of making them. They may require appeals to be made in open court before an adjournment sine die, or afterwards, within a fixed time, in the clerk's office. It would be unreasonable to suspend the execution of a decree during a whole vacation; and after execution once authorized and carried into effect, it would be inconvenient to allow appeals to the circuit court. In this district no regulations as to appeals have ever been made by the district court. The uniform course, from the earliest period, has been to make the appeal in open court, apud acta, before the adjournment of the court. This course of practice is equivalent to a rule of the court; and must be considered as directory to all parties. Wherever a desire for further time to consider of an appeal has been asked for, it has been readily acceded to by an adjournment of the court for this purpose. If I were to grant the petition in this case, it would be assuming the right to regulate the proceedings of the district court in a matter plainly within its general jurisdiction and authority. The decision of the district judge is in conformity to the general practice. No evil has hitherto grown out of it; and I do not feel myself at liberty to disturb it. If any inconvenience should arise, it can easily be obviated by a special application to, or a general rule of, the district court. Petition dismissed.

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

Case No. 10,353.

NORTON v. SHELBY CO.

[Cited in Kelly v. Milan, 21 Fed. 862. Nowhere reported; opinion not now accessible. The decree of the circuit court was affirmed by the supreme court in 118 U. S. 425, 6 Sup. Ct. 1121.]

Case No. 10,353a.

NORTON v. STEVENS.

[1 Hayw. & H. 94.] [1]

Orphans' Court, District of Columbia. July 22, 1842.

EXECUTORS AND ADMINISTRATORS — PREFERENCE GIVEN TO JUDGMENT CREDITORS.

The act of Maryland of 1798, giving preference to judgment creditors, does not embrace foreign judgments.

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

R. S. Coxe, for plaintiff.
Richard Wallach, for defendant.

CAUSIN, J. The administrator of Thomas H. Stevens, deceased, protested against a preference being given to the judgment of George Norton against said intestate, rendered in Philadelphia county, in the state of Pennsylvania, and claimed that the act of assembly of Maryland of 1798 (chapter 101. subc. 8, § 17)[2] does not give or contemplate a preference to debts of this character. The court was of the opinion that the law of 1798, giving preference to judgment creditors, did not embrace foreign judgments, and therefore decided that the judgment of George Norton against Thomas H. Stevens, obtained in Philadelphia county, in the state of Pennsylvania, did not take preference over other creditors. From which order of the orphans' court the counsel for George Norton prayed an appeal. The plaintiff did not prosecute his appeal, and it was dismissed by his attorney.

NORTON, The SENATOR MIKE. See Cases Nos. 12,666 and 12,667.

NORVELL (HILL v.). See Case No. 6,497.

NORVELL (POSTMASTER GENERAL v.). See Case No. 11,310.

NORWALK, The. See Case No. 7,981.

Case No. 10,354.

NORWALK BANK v. ADAMS EXP. CO.

[4 Blatchf. 455;[1] 19 How. Prac. 462; 17 Leg. Int. 325; 43 Hunt, Mer. Mag. 710.]

Circuit Court, D. Connecticut. Sept. 19, 1860.

CARRIERS—RESPONSIBILITY FOR GENUINENESS OF NOTE FORWARDED TO DISTANT BANK FOR DISCOUNT.

1. Where J., representing himself to be F., delivered to an express company a promissory note, which had been drawn payable three months after date, and, in that shape, had been signed by F., but which J. had fraudulently obtained possession of and altered to a two months' note, to be taken to a distant bank and discounted, and the proceeds to be returned by the carrier to J., he, at the same time, writing a letter to the bank, subscribed with the name of F., directing the proceeds of the note to be returned by the carrier, and giving it to the carrier to be delivered with the note, and the note and the letter were delivered, and the bank, on the faith of the note, discounted it, and gave to the carrier the proceeds, after deducting out of them the carrier's charge, in a package addressed to F., and the carrier delivered the money to J.: *Held*, in an action brought by the bank against the carrier to recover the amount of the money, that the carrier was not liable.

2. The only undertaking on the part of the carrier was to deliver the proceeds to the person who employed the carrier.

3. The note being, by its alteration, a forged note, not binding on F., and having been delivered to the carrier by the forger, the carrier did not become responsible to the bank for its genuineness.

This was an action originally brought in a court of the state, and removed by the defendants into this court. The case came on for trial before NELSON and SHIPMAN, JJ., and a jury. The facts were as follows: In December, 1859, F. A. Williams, of the city of New York, sent from that city a promissory note, payable three months after date, for $3,000, to the Norwalk Bank, at Norwalk, Connecticut, to be discounted. The cashier returned the note to Williams through the mail, with a letter, stating that the note had too long to run, and that, if he would make it a two months' note, the bank would discount it. That letter was advertised by the post-office in New York. One J. S. Williams called for the letter and obtained it. Acting upon the suggestion of the cashier, he altered the note to a two months' note, and then took it to the Adams Express Company in New York, and, representing himself to be F. A. Williams, gave the note to the company, to be transmitted to the Bank of Norwalk, and directed the company to bring back the proceeds to him. He also wrote a letter to the cashier, requesting him to return the proceeds by the express company, and signed the letter "F. A. Williams." That letter he gave to the express company, who forwarded it to the bank with the note. The bank discounted the note and gave to the express company its proceeds, (less $1.50 express charges,) amounting to $2,971, in a package addressed "F. A. Williams, New York City." The bank took from the company a receipt for the money, and paid the company $1.50 out of the proceeds of the note, for express charges. The money was returned to New York and there delivered by the company to J. S. Williams. On the discovery of the fraud, the bank brought this action against the express company [in a state court in Connecticut][2] to recover the money. [The action was removed by the company into the federal court.][2] The bank claimed, that, by the receipt of the $1.50, and by the giving of the receipt for the money, the express company had undertaken to deliver the money to F. A. Williams, to whom the package containing the money was directed. It also claimed that the officers of the bank did not observe

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[2] "In paying the debts of the deceased, an executor or administrator shall observe the following rules: Judgments and decrees against the deceased shall be wholly discharged before any part of other claims; after such judgments and decrees shall be satisfied, all other just claims shall be admitted to a distribution, on an equal footing, without priority or preference; if there be not sufficient to discharge all such judgments and decrees, a proportionable division or dividend shall be made between the judgment and decree creditors, but no executor or administrator shall be bound to discover what judgments or decrees have been passed against the deceased, unless in the high court of chancery, or the general court of the shore, or the court of the county where the deceased last resided." 2 Maxcy, Laws Md. 478.

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

[2] [From 19 How. Prac. 462.]

the letter accompanying the note; that the express company was guilty of negligence in not discovering the fraud; that it was an insurer of the genuineness of the paper which it carried for collection; and that the bank had acted upon the faith of the directions given by the express company to the bank, to transmit the money for the note through it to New York.

Henry Dutton & Mr. Carter, for plaintiffs.
Ralph I. Ingersoll, Samuel Blatchford, and Clarence A. Seward, for defendants.

NELSON, Circuit Justice, after the evidence was in, and the counsel for the plaintiffs had stated the grounds upon which they relied for a recovery, said:

We are of opinion, that the question involved in this case is wholly a question of law, as there is no dispute as to the facts.

It is agreed, at least the facts warrant the conclusion, that both of these parties, the bank and the carrier, are innocent parties, so far as regards this transaction—equally innocent, perhaps; and the question is, which of the two innocent parties must suffer the loss. This will depend upon the application of the rules of law to the admitted facts of the case.

Now, the obligation that is charged upon the carrier by the bank is this, that he received the proceeds of the note and undertook to deliver them to F. A. Williams, the maker of the original note, the genuine F. A. Williams. That is the undertaking set out and charged upon the carrier, and it is the breach of that duty or undertaking upon which is founded the claim to recover the loss. The ground of the action against the carrier is the breach of duty in not delivering the proceeds of the note to the genuine F. A. Williams, according to the undertaking; that the carrier violated his duty in delivering to the fictitious F. A. Williams instead of the genuine F. A. Williams.

It appears, that the carrier had no knowledge of the F. A. Williams who was the maker of the original note, and no knowledge that he was in any way connected with the transaction, and no knowledge that there were any transactions existing between him and the bank. So far as it respects the carrier, as connected with the transaction, F. A. Williams, the original maker of the note, was a perfect stranger. The note was delivered to the carrier by a person representing himself by the name of F. A. Williams. He was in possession of the note, and, when he delivered it to the carrier, representing himself to be F. A. Williams, he, at the same time, wrote a letter directed to the cashier of the bank, subscribing his name, "F. A. Williams," to it. This note and this letter he delivered to the carrier, for the purpose of conveyance to the bank, with a view to the note's being discounted, and with directions to bring back the proceeds, provided the note was discounted. The note was received by the carrier in the usual way, and the only connection that the carrier had with the transaction was as a carrier of the package. The package, containing the note and the letter, was delivered to the bank. The bank received it and, upon the faith of the note, discounted it, and delivered the proceeds, according to the direction, to the carrier, to be remitted back to the person who employed the carrier.

Now how, upon this state of facts, can a duty, or an undertaking, be predicated on the part of the carrier, to deliver these proceeds to F. A. Williams, the original maker of the note, a stranger to the company, of whom they had no knowledge, and for whom they had transacted no business? He was not their employer, in the transmission of the package to the bank. We are unable to see how, upon this state of facts, a promise or a duty can be raised, either express or implied, that they would deliver the proceeds to a stranger whom they never knew, and who had no connection with the transaction.

It seems to us, that, upon the facts as they appear, the note being delivered to the carrier, accompanied by a letter, by a person representing himself to be F. A. Williams, to be carried to the bank by the carrier, and delivered there, the whole employment being performed according to the undertaking, the bank receiving the paper signed by this man representing himself to be F. A. Williams, discounting it, and returning the proceeds to the company, the only implied undertaking on the part of the carrier, would be an undertaking to deliver the proceeds to the person who employed the carrier. The company must have naturally supposed and believed that the bank and this person who delivered this note to them understood each other. The bank having discounted the note and sent back the proceeds according to the directions, the carrier must have supposed that it was a fair and ordinary transaction, and one in which the bank and this person understood each other. Therefore, the duty raised by implication was to deliver the proceeds to the person who had sent the note to the bank, and who had procured the discount of the note.

As respects this letter, if it is of any importance at all, it seems to us that the most material fact is, that the carrier performed his whole duty in regard to it. The letter was delivered to the bank. Their omission to notice it, whether from neglect or carelessness or misfortune, is certainly not to be charged upon a carrier who has performed his whole duty with respect to it. If, therefore, it is a material fact to influence the court in their judgment, we are bound to assume that the bank had full knowledge of the letter accompanying the note. And, with respect to the endorsement upon the back of the package delivered to the bank, without regard to the purpose for which it was put on, it was the authority that the proceeds should be deliv-

ered to the express company. The letter directing that the proceeds should be returned by the carrier was the authority from the person who wrote the letter.

We are of opinion, therefore, that, on the facts of the case, looked at simply with reference to the application of the rule of law that should determine the rights of the parties, no duty or promise could be raised or implied, on the part of the carrier, to deliver the proceeds to F. A. Williams, the original maker of the note, the genuine F. A. Williams; but that, on the contrary, the only duty or promise that could be raised, upon these facts, against the carrier, was to deliver the proceeds to the person who employed the carrier.

But there is another view of this case, which is independent of the view we have taken, and that is this: After the alteration of the note by the pretended F. A. Williams, it was no longer the note of the genuine F. A. Williams. It was a forged note. F. A. Williams was not under any obligation, by virtue of his signature to that note. As it respected him, it was the same as a note entirely fabricated, for three thousand dollars, payable in two months. It was, therefore, a forged note, delivered by the guilty party to the carrier, to be conveyed by it, as carrier, to the bank for the purpose of discount. That note was taken to and received by the bank, and, on the faith of itself, was discounted, and the proceeds were returned. Now, is the carrier responsible for the conveyance of forged papers? Is the carrier an insurer of the genuineness of all papers that are put into his hands for the purpose of transmission or conveyance? We think not. This would be an alarming doctrine to lay down, as it respects the common carrier. This business, carried on through the medium of the express companies, has become a very extensive business. The common carrier is only a mode of communicating with banks, transmitting notes for discount, and carrying back their proceeds. The carrier has no earthly interest in such transaction, but as a mere vehicle of conveyance, is not connected at all with the party procuring the discount, or with the bank, does not influence the bank to discount the paper, and makes no representations in that regard, and the bank knows that the carrier has no other connection with the paper than as a mere vehicle of conveyance. It would be a very strange doctrine to hold that, under such circumstances, the carrier should be responsible to the bank for the genuineness of the paper—that the mere carrying of it, the mere conveyance of it from the party employing the carrier, to the bank, should operate as a guarantee of the genuineness of all the paper put into the hands of the carrier for conveyance. That principle cannot be sustained. Now, that is this case. The note here was as much a forged note as if it had been fabricated throughout. There was no obligation on the part of F. A. Williams, the original and genuine maker of it, under the alteration. It must be regarded, therefore, as forged.

We are quite clear that the case has not been made out on the part of the plaintiffs, and that the defendants are entitled to a verdict.

The jury found a verdict for the defendants.

Case No. 10,355.

NORWALK LOCK CO. v. BERGER et al.

[13 O. G. 47.]

Circuit Court, E. D. Pennsylvania. Jan. 17, 1878.

PATENTS—REISSUE—VALIDITY.

Reissue letters patent No. 3,909, granted April 5, 1870, to the Norwalk Lock Company (assignees) for "improvement in reversible knob-latches," declared valid.

[This was a bill in equity by the Norwalk Lock Company against Berger, Mathes, and others, to enjoin the infringement of reissued letters patent No. 3,909, granted to H. H. Elwell April 5, 1870, the original letters patent No. 39,280 having been granted July 21, 1863.]

Charles Howson, for complainant.
A. H. Evans, for defendants.

McKENNAN, Circuit Judge. And now, to wit, this 17th day of January, 1878, this cause having been brought to final hearing upon the pleadings and proofs, and counsel for the parties respectively having been heard thereupon, and the same having been duly considered by this court, it is found, and hereby ordered, adjudged, and decreed, that letters patent reissued April 5, 1870, numbered 3,909, to the Norwalk Lock Company, assignees of Henry H. Elwell, for improvement in reversible knob-latches, and set forth in the bill of complaint filed, are good and valid, and that the title thereto is duly vested in the complainants. And it is further ordered, adjudged, and decreed that the defendants have disturbed, violated, and infringed the exclusive right of the complainants under the said letters patent, as in said bill set forth. And it is further ordered, adjudged, and decreed that the complainants do recover of the defendants the profits, gains, savings, and advantages made by the said defendants in consequence of the said infringement and violation of the exclusive rights of the complainants under the said letters patent, together with the damages the complainants have sustained thereby, and the costs, charges, and disbursements in this suit to be taxed. And it is further ordered, adjudged, and decreed that it be referred to Robert N. Willson, Esq., as master, to ascertain and take, and state and report to the court, an account of the gains, profits, savings and advantages which the said defendants have received, or which have arisen or

accrued to them from infringing the said exclusive rights of the said complainants under the said letters patent, as well as of the damages the complainants have sustained thereby. And it is further ordered, adjudged, and decreed that the complainants, in such accounting, have the right to cause an examination of said defendants, ore tenus or otherwise, and also the production of the books, vouchers, and documents of defendants, and that the said defendants attend for such purposes before said Robert N. Willson, Esq., master, from time to time, as said master shall direct. And it is also further ordered, adjudged, and decreed that a perpetual injunction be issued in this suit against the said defendants, according to the prayer of the bill.

Case No. 10,356.

The NORWAY.[1]

Superior Court, S. D. Florida. Dec. 11, 1840.

SALVAGE—COMPENSATION.

[Cited in Baker v. The Slobodna, 35 Fed. 542, as an instance in which 45 per cent. of the cargo saved was allowed as a salvage compensation.]

[This was a libel in rem by John H. Geiger and others against the cargo and materials of the ship Norway for salvage.]

Adam Gordon, for libellants.

S. R. Mallory, for respondent.

MARVIN, District Judge, decreed that of the proceeds of the sales of the property saved by the schooners George Washington, Sally Ann, and sloop Huron from the wrecked ship Norway, the clerk first pay the duties thereon, the bills against said property for wharfage, storage and labor, and the proportion of clerk's, marshal's, and witnesses' fees properly chargeable to it, and then pay to the salvors forty-five per cent. of the residue in full compensation for their services in saving the same. Further, that the baggage appraised and marked in the return of the appraisers H. Dennis, C. Derbigny, H. Hamilton be charged with the payment of Mr. Tiff's bill of $45.00, its proper proportion of the clerk's, marshal's, and witnesses' fees, and with the salvage of forty-five per cent. upon the appraised value, after deducting from such appraised value, the above enumerated charges, and upon the payment thereof it be restored to Captain Eldridge for the benefit of the owners. Further, that of the property saved by the sloop Globe from said ship Norway, the duties, wharfage, storage, labor bills and its proportion of the clerk's, marshal's, and witnesses' fees be first paid by the clerk, and that he pay one moiety of the residue to the salvors for saving the same. Further, that of the proceeds of the property saved by the schooners William and Rome there be paid the duties, wharfage, storage, and labor bills, due upon the separate proceeds, and their respective proportions, of clerk's, marshal's, and witnesses' fees, and fifty-five per cent. of the residue, to the respective salvors for saving the same.

1 [Not previously reported.]

Case No. 10,357.

The NORWAY.

[1 Ben. 493.][1]

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

REVIVING SUIT—LACHES—STAY OF PROCEEDINGS.

1. Where a suit to recover for materials furnished to a vessel was commenced in September, 1857, and, in December, 1857, the cause being then at issue, the claimants procured an order for a commission to examine a witness, with a stay of proceedings till its return, and direct interrogatories were served in June, 1858, but no cross interrogatories were ever served, and the commission was never sent, and the libellant died in May, 1859, and no further steps were taken by either party till October, 1867, when the libellant's executors applied to the court to be substituted as libellants, and to have the stay of proceedings set aside: *Held*, that, as no time was fixed by statute within which executors must apply to be substituted, no laches could be predicated of the mere lapse of time, and inasmuch as the claimants could have at any time compelled the executors to be substituted, the claimants were as open to the charge of laches as the libellant, and the application to substitute the executors must be granted.

2. As the delay had arisen apparently from the fact that both parties understood that the suit was not to be further prosecuted, and as the witness to be examined under the commission was material, and was now in the East Indies, and a commission to examine him could not be executed in less than a year, the claimants were entitled to a continuance of the stay.

The libel [by Anthony J. Allaire] against the Norway in this case was filed on the 29th of September, 1857, and a monition issued, under which the vessel was attached. She was bonded by the claimants, and their answer was put in on the 9th of November, 1857. The action was noticed for trial, and put on the calendar for the December term, 1857. The claimants then procured an order for a commission to examine a witness, with a stay of proceedings until the return of the commission. That order and stay had never been vacated. Direct interrogatories to be attached to the commission were served on the proctor for the libellant on the 5th of June, 1858; but no cross interrogatories were served by the libellant, nor had the commission ever been sent. Nothing had been done in the suit since the service of the interrogatories. The libellant died on the 13th of May, 1859, leaving a will, which had been duly proved before the surrogate of the city and county of New York, and on which letters testamentary had been issued to two executors named in the will, one of

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

whom resided in the city of New York, and the other in the county of Westchester. The executors had duly qualified, and now applied to the court to be substituted as libellants in the suit, in place of the original libellant, and for an order vacating the stay of proceedings.

J. Van Vleck, for executors.

Benedict & Benedict, for claimants.

BLATCHFORD, District Judge. The action is one founded on contract, being brought to recover the amount of certain materials alleged to have been furnished for the building of the vessel. The cause of action, if there was any, therefore survived the libellant. Under such circumstances, the right of the executors to have the suit continued in their names is one conferred by statute. Act Sept. 24, 1789, § 31 (1 Stat. 90). No period of time is prescribed by the statute within which they must come in voluntarily and apply to be substituted. Therefore no laches can be predicated on the mere lapse of time. If the claimants desired the suit to proceed, they could, under the same statute, have at any time compelled the executors to come in within twenty days and be substituted. The provision of the statute is as follows: "Where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment, and the defendant or defendants are hereby obliged to answer thereto accordingly; and the court before whom such cause may be depending is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where such suit is depending, twenty days beforehand, shall neglect or refuse to become a party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party to the suit." So, also, the claimants had it in their power to secure the issuing of the commission, without any cross interrogatories, if the libellant was remiss in furnishing them. Therefore, so far as laches is concerned, the claimants are, in any point of view, as open to the charge as is the libellant. The motion to substitute the executors must, therefore, be allowed.

The motion to vacate the stay is denied. The executors have permitted so long a time to elapse before taking steps to revive the suit, because both parties seem to have understood that the cause would not be further prosecuted. And yet neither has done anything to turn himself, or the other party, or the cause, out of court. It appears that the witness, who was to be examined under the commission, is a material witness for the claimants, and now resides in the East Indies, and that the commission cannot be executed and returned in less than a year. Under the circumstances, I think that the claimants are entitled to a continuance of the stay.

[NOTE. Subsequently motion was made by the libellants to appoint a commissioner to examine the witness residing in the East Indies. The motion was granted. Case No. 10,358. In 1869 the libel was dismissed, with costs. Id. 10,359.]

Case No. 10,358.

The NORWAY.

[2 Ben. 121.] [1]

District Court, S. D. New York. Jan., 1868

PRACTICE—MARRIED WOMAN AS A COMMISSIONER.

Where an application was made for a commission to examine a witness in the East Indies, it appearing that no one was known who could be named as commissioner, except the wife of the witness, she was named as commissioner.

This was an application on the part of the claimants for a commission to examine a witness. The affidavits showed that the witness was residing near Goa, in the East Indies, and that, after diligent inquiry, the claimants had been unable to find the name of any official or merchant residing there, or any one else whom it would be proper to name as commissioner, except the wife of the witness, who was a lady of intelligence and education, and the motion was made to appoint her as commissioner. After hearing counsel, the court granted the motion.

J. Van Vleck, for libellants.

Benedict & Benedict, for claimants.

[For motion to stay proceedings, see case No. 10,357; and for the final decision in this libel, see Id. 10,359.]

Case No. 10,359.

The NORWAY.

[3 Ben. 163.] [1]

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

LIEN—BUILDING CONTRACT—JURISDICTION.

A court of admiralty has no jurisdiction of a suit in rem against a ship, to recover for work, labor and materials done and furnished towards the building of the ship, even though the law of the state gives a lien upon the ship therefor.

[Cited in Re Glenmont, 32 Fed. 704; The Glenmont, 34 Fed. 403.]

[Cited in The Victorian (Or.) 32 Pac. 1042, 1043.]

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

[In admiralty. For the hearing upon order to vacate stay of proceedings, see Case No. 10,357; and for motion to appoint a commissioner to examine a witness residing in the East Indies, see Id. 10,358.]

John Van Vleck, for libellants.
R. D. Benedict, for claimants.

BLATCHFORD, District Judge. This is a libel filed in September, 1857, by Anthony J. Allaire, since deceased, against the ship Norway, to recover the sum of $2,608.20, for materials furnished and labor performed by Mr. Allaire, as a plumber and coppersmith, between June and September, 1857, towards the building of the ship. It is averred in the libel, that the ship is and was a domestic vessel, owned by residents of the state of New York; that such materials and labor were necessary and proper to the building and constructing of the ship, and went into the ship and became part of her, and were furnished and done on the credit of the ship; and that the amount due for them is, by the laws of the state of New York, a lien on the ship. The principal point urged in defence is, that this court has no jurisdiction of the action.

In a suit brought by the same libellant against The Francis A. Palmer [Case No. 203], for materials furnished and labor done by him, as a plumber and coppersmith, in and towards constructing such ship, decided by Mr. Justice Nelson, on appeal, in the circuit court for this district, in May, 1859, the ship being a domestic vessel, owned by residents of New York, it was held that the district court had no jurisdiction of the suit. In his opinion in that case, Mr. Justice Nelson, citing the case of People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393, decided by the supreme court at the December term, 1857, says: "It was there held, that the admiralty jurisdiction did not extend to cases of liens claimed for work done or materials furnished in the construction of ships; that the contract for building was not a maritime contract, nor did it involve rights and duties appertaining to commerce and navigation, in the sense of the law giving jurisdiction to the admiralty. This case was decided after full argument, and a careful consideration of the question, and we must regard it as settling the point of jurisdiction in the case before us. For, if the court had no jurisdiction of the principal contract for building the vessel, and this on account of its nature and character, not being a maritime contract, it had not of the collateral and incidental contracts arising out of the construction. They must be regarded as partaking of the nature of the principal one, or, certainly, as of no higher character in this respect. It may be said, however, that the statute of New York gives a lien to the material man and workman in this case, which distinguishes it from the case referred to. It is true, that there was no statute in the state of New Jersey, where that vessel was built, giving a lien to the builder; but that circumstance in no way influenced the judgment of the court. The result would have been the same if a local lien had been given by the state law. The local lien attaches in no case within the admiralty law, as heretofore expounded by the courts of this country, except where the contract is maritime in its nature and character. This was so decided soon after the courts recognized the local liens and enforced them in the admiralty. It was so decided in the case of a libel by the master of a ship for his wages. The lien was denied, though given by the local law." The case referred to is that of The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175. This construction of the case of People's Ferry Co. v. Beers [supra], and the soundness of the principle of the decision of the circuit court for this district in Allaire v. The Francis A. Palmer [supra], were affirmed by the supreme court, in Roach v. Chapman, 22 How. [63 U. S.] 129, decided at the December term, 1859. That was a suit against a vessel for the price of machinery furnished to build her, and a lien was given therefor by the law of the state where she was built. Mr. Justice Grier, in delivering the opinion of the court says: "A contract for building a ship, or supplying engines, timber or other materials for her construction, is clearly not a maritime contract. Any former dicta or decisions which seemed to favor a contrary doctrine were overruled by this court, in the case of People's Ferry Co. v. Beers, 20 How. [61 U. S.] 400." He then overrules the point that the jurisdiction can be maintained because the state law gives a lien, and cites the case of The Orleans v. Phoebus [supra], to show that the contract for which the state law gives the lien must be a maritime contract, in order to be enforceable in the admiralty.

The libel in this case must be dismissed, with costs.

Case No. 10,360.

In re NORWICH & N. Y. TRANSP. CO.

[8 Ben. 312.] [1]

District Court, E. D. New York. Dec., 1875. [2]

LIMITATION OF LIABILITY—VALUE OF VESSEL—WHEN TO BE TAKEN—STIPULATION FOR VALUE—INSURANCE MONEYS.

1. A steamboat, by a collision with a schooner in Long Island Sound, was set on fire and sunk. Her owners filed a petition in limitation of their liability, and a reference was had to ascertain the value of the steamboat. Exceptions were taken to the report, which fixed such value at $2,500: *Held*, that the value to be taken was the value of the boat as she lay sunk; and that that value was correctly arrived at, by taking the

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

[2] [Affirmed in Case No. 10,362.]

value of the wreck when raised and deducting therefrom the expense of raising.

2. Neither the expense of raising her, nor of the repairs subsequently put upon her, nor of the insurance moneys received by her owners, under policies of insurance against fire, was to be added to such value so ascertained.

[Cited in The Peshtigo, Case No. 11,018.]

3. The valuation of the boat, in a stipulation for value, given in the suits brought against her after she had been repaired, was immaterial.

The steamboat City of Norwich, while on a voyage from New London to New York in April, 1866, came in collision with a schooner, was seriously injured thereby, and set on fire, and presently sank. She was afterwards raised and repaired. The owners of the schooner brought suit to recover their damages in the district of Connecticut. The owners of the steamboat in their answer claimed the benefit of the limited liability act of 1851 (9 Stat. 635). The case went to the supreme court of the United States, and is reported in 13 Wall. [80 U. S.] 126. Freighters of cargo on board the steamboat also filed libels against her in this district, and the owners of her were allowed to substitute for her a stipulation for value (see Llewellyn v. Two Anchors & Chains [Case No. 8,428]), and interlocutory decrees in favor of the libellants were afterwards rendered (see The City of Norwich [Id. 2,760]). After the decision of the supreme court that the owners were entitled to the benefit of the act of 1851 [13 Wall. (80 U. S.) 104], the owners of the steamboat filed a petition in this court to obtain the benefit of the act, in accordance with the rules adopted by the supreme court in that behalf; whereupon an order was made by this court, staying all proceedings in the other suits, and referring it to the clerk, to ascertain and report the amount or value of the interest of the petitioners as owners of said vessel and her freight pending for the voyage upon which she was employed. See [Case No. 2,762]. The clerk reported that value at $2,500. Exceptions were taken to his report on behalf of the various libellants. [For a complete history of the case, see Id. 10,362.]

BENEDICT, District Judge. This was a proceeding taken on behalf of the owners of the steamboat City of Norwich, to obtain the benefit of the provisions of the act of March 3d, 1851, limiting the liability of shipowners. Upon presenting the petition, an order was made referring it to the clerk to ascertain the amount or value of the interest of the parties, as owners of said vessel and her freight pending for the voyage upon which she was employed. The report having been made, exceptions were taken thereto, which during the present month have been presented to the court for determination.

By some of these exceptions, the question is raised whether the value of the boat was to be ascertained as of a time after the collision and not before. In respect to this question it is sufficient to say, that it has been decided by the supreme court of the United States, in reference to this very collision, that the value of the boat after the collision was the limit of the owners' liability [Norwich Co. v. Wright] 13 Wall. [80 U. S.] 127. The exceptions to the report, on the ground that it was error to ascertain and report the value of the boat, as it was after the collision, must therefore be overruled.

No error appears in determining that value to be the sum of $2,500. The vessel was sunk and was of some value as she lay submerged. That value was properly ascertained, by taking what she was proved to be worth after she had been raised and deducting therefrom the expenses of raising her. The exceptions upon that subject must therefore be overruled.

Equally unfounded is the proposition that the expenses of raising the boat and the expenses of her subsequent repairs should be added to the aforesaid value. The exceptions which claim that such expenses should have been added to the amount reported, are therefore also overruled.

The fact that this boat had been libelled by various parties seeking to enforce, by proceedings in rem, their claims arising out of this collision, in which action, a stipulation for value in the sum of $70,000 was taken and the vessel released, has been also relied on here; and it is contended that the value of the vessel, as fixed by the stipulation taken in the suits in rem, must be taken as her value for the purpose of this proceeding, and furnish the limit of the owners' liability. The question here raised was passed on by this court when the order of reference was made. I can only repeat here, that the value, fixed in the stipulation for value taken in the suits in rem, was the value of the vessel at the time of her seizure in those actions. It did not pretend to be her value immediately after the collision; moreover, that stipulation was taken by virtue of the general powers of a court of admiralty, and not under the statute. See the stipulation, Place v. City of Norwich [Case No. 11,202]. The practice of taking such a stipulation, adopted in the case of this vessel, has so far proved convenient, and has since been resorted to in several cases, without objection made. I see no reason for rejecting the practice, arising out of the law since declared by the supreme court [Norwich Co. v. Wright] 13 Wall. [80 U. S.] 127. It proves a great convenience to parties to be able to give such a stipulation for value under the admiralty rules, and thus obtain immediate possession of the vessel, although it be intended afterwards to take proceedings to obtain the benefit of the statute. A stipulation so given holds good, until the actions in which it was given are made ineffectual by means of proceedings

taken under the statute, which proceedings, when concluded, afford foundation for the discharge of the stipulation for value. In no other respect do the two proceedings have any connection with each other; and the amount, for which the stipulation for value was given in the suits in rem, is wholly immaterial in a proceeding taken under the statute. In cases of maritime abandonment, under the general maritime law, neither the seizure nor a judicial sale of the ship, procured in opposition to the owner, but without contestation on his part, had any effect in determining the limit of the owner's liability, or prevented a resort to abandonment. Trib. of Commerce, Marseilles, 1828; Id. Aix, 1825; 2 Pouget, Droit Mar. p. 412. Nor would the case be changed if such a stipulation for value, as was taken for this vessel in the actions in rem, be deemed to be the substitute for the ship herself in court, and to which resort might be had in this proceeding; for it is plain that nothing in the stipulation itself estops the owners from showing what was the value of the ship at the time of the collision; and it is certain that the court would have power to require only so much of the amount of the stipulation to be brought into court as would be necessary to discharge the owners from their liabilities, and, upon the bringing in of such part, the court could direct the stipulation to be cancelled. The exceptions raising this question are, therefore, overruled.

No freight was earned. The freight then pending was entirely lost. The exceptions on this subject are, therefore, overruled.

The remaining and main question to be considered is, whether the amount of money, paid the owners by insurance companies in performance of their policies of insurance upon the boat, is to be taken as forming part of the value within the meaning of the statute. The facts bearing upon this question are, that the boat was so injured by the collision that water rushed into her hull, whereby the flames were driven out from her fires, and she at once commenced to burn, and was to a great extent consumed before she sunk.

There was an insurance upon her against fire, on which the owners have secured the sum of $49,283.07, and this money, it is insisted, must be accounted for by the owners before they can be held to have complied with the statute. The insurance was reported by the commissioner, and he declined to include that sum in his report. I am of the opinion that his conclusion is right.

It might be said that this question had been removed from the case by the form of the order of reference, which was settled with care upon notice, and which confines the inquiry to the value of the vessel. But I do not rest my decision upon that point, nor do I consider the question to have been disposed of by the decision of the supreme court of the United States, where the value of the vessel alone is spoken of as the limit of the owners' liability. The words "value of the vessel" have, doubtless, been thus used without any reference to the question of insurance money; and the most that can be said is, that the use of those words by the supreme court, and in the order of reference, shows that the question under consideration here did not present itself as a question to be raised. Indeed, the language of the statute seems to render it impossible to raise such a question. Plainly, the words of the act do not cover the insurance money, and the absence of any allusion to insurance is significant. It is difficult to believe that such money would not have been distinctly mentioned, if there had been any intention to include it. It is, nevertheless, argued that the right of action of those freighters attached at the instant of the collision, by reason of the negligence whereby a collision resulted and put it out of the power of the boat to carry and deliver the goods; that the value of the boat, at the time of the attaching of the liability—that is, at the blow, and before the fire—is, therefore, the limit of the owners' liability; that any assignment made in pursuance of the statute would relate back to this time, and cast upon the freighters the risk of all subsequent perils; and that to the freighters must also be transferred all claims and rights of action arising from, or out of, the vessel by reason of any occurrence subsequent to the attaching of the liability; that the owners, at the instant of the collision, became trustees of the vessel for those who suffered damage by reason of the negligence, and any compensation or indemnity received by the owners is received for the benefit of the sufferers, and must, therefore, be accounted for in a proceeding like this.

But with this argument there are two difficulties. In the first place, the fire was part of the original disaster, and not a subsequent occurrence. It was, in this instance, a necessary result of the blow. It is impossible, therefore, to separate the fire from the collision so as to say that the risk of fire was upon the freighters. All that was left in existence by the blow of a colliding schooner was a vessel at once to be burned up and sunk from the necessities of the case. The value of such a vessel consists in the value remaining after the fire and sinking, and that value the sufferers have, by the report under consideration.

In the second place the amount received for the insurance did not arise from or out of the vessel, but out of certain contracts of indemnity made by the owners of the vessel, to which contracts the freighters were not parties. Those contracts were not, and, without the consent of the insurers, could not be, transferred to the freighters, nor does the statute make any provision for such a transfer. The assignment provided for by the statute, if possible to be made after the collision and before the fire, would pass no right

of action upon the policies of insurance, but would simply determine the interest of the insured in the property and discharge the insurer from the risk. Moreover the law does not compel the ship-owner to take the benefit of the statute. He may elect whether or no to take proceedings to limit his liability; and until such election is made what interest can the freighters have in the vessel?

This question, although new in this country, because the statute is recent and has been seldom resorted to, is in truth an old question, long considered as settled in other lands. It cannot be doubted that our statute limiting the liability of ship-owners was intended, so far as it goes, to confer upon the American ships the benefit of the law of abandonment long recognized as part of the general maritime law, among the maritime nations of the continent, and so the supreme court declared. [Norwich Co. v. Wright] 13 Wall. [80 U. S.] 121, 127. In respect to the question under consideration, I see no difference in principle between a proceeding under our statute and one under the general maritime law. Certainly the words of the statute make no difference in favor of the freighters. The exercising of the right of abandonment under the maritime law has often brought up for consideration the question, whether the owner must surrender insurance money in order to limit his liability by an abandonment; and it appears to be the settled law that in such case a surrender of the insurance is not required.

Says Caumont (Dict. Droit Mar. tit. "Abandon Maritime," § 54): "So, if the ship-owner has judged it prudent to effect insurance by means of a premium more or less in amount, which he has paid, it is evident that the charterer and the shippers cannot take from him the fruit of a wise forethought and receive the advantage of a contract to which they are strangers." The possibility of fraud which, upon this argument, has been urged as a reason for requiring a surrender of the insurance, is considered and rejected by the same authority (Dict. Droit Mar., tit. "Abandon Maritime," § 55). So also it has been adjudged (Aix, 8th Feb. 1832) "that the ship-owner, who, in order to free himself from loans contracted by the master during the voyage, abandoned the ship and freight, is not bound also to abandon the product of insurance effected upon the ship." The same was adjudged at Rennes, Aug. 12, 1822. See, also, 1 Boulay Paty, p. 297. The Code de Commerce is in substance a declaration of the general maritime law, and section 216 of the Code has been adjudged to be identical with the rule of the maritime law as declared by the ordinance. The construction given to the Code affords then a plain indication of the intent of our statute, which, as the supreme court has justly remarked, was passed in the light of the law existing in other countries, including the amendments of the law of France in 1841. And it was never supposed that either the ordinance or the Code de Commerce compelled a ship-owner to surrender his insurance money in order to effect a maritime abandonment. In 1841 the effort was made in France to amend the Code de Commerce so as to require a surrender of the insurance as well as of the ship's freight. The considerations affecting both sides of the question were then pointed out and discussed, and the amendment was rejected, with the declaration that by the existing provision of the Code the ship-owner is not bound to account for the ship's insurance in order to effect the maritime abandonment. 2 Pouget, Droit Mar., pp. 415, 419.

It must be said that some of the considerations, then urged in favor of the rule as declared, have a greater force in France than here, because of the provisions of the Code, which forbid insurance upon freight, and thus, by rendering it impossible for the ship-owner to protect himself against all risk of loss, in a measure protect the freighter against collusion. Still, the weight of the argument appears to be greatly upon the side of the rule as declared, and such, without doubt, was the law, in the light of which our statute of 1851 was enacted; and the rule of the maritime law must be considered as having been intended to be adopted by that statute. The exceptions upon this question must, therefore, be overruled.

I have now considered all the questions raised by the exceptions which seem to be of sufficient importance to be noticed. I do not consider the point now first made in this court, that the statute of 1851 cannot be taken advantage of by a corporation, for the reason that the supreme court of the United States has, in respect to these same petitioners, plainly declared them to be entitled to the benefit of the act. It is true that no allusion is made, in the opinion of the court, to the fact that a boat was owned by a corporation; but that fact was proved, and the question can hardly be supposed to have been overlooked.

Let an order be drawn in accordance with this opinion.

[On appeal to the circuit court, the decree rendered in this court was affirmed. Case No. 10,362.]

Case No. 10,361.

In re NORWICH & N. Y. TRANSP. CO.

[10 Ben. 193.] [1]

District Court, E. D. New York. Dec., 1878.

LIMITATION OF LIABILITY OF SHIP OWNERS — INJUNCTION—COSTS.

1. The injunction granted in a proceeding to limit the liability of a ship owner restraining the prosecution of suits pending against the ship owner, should not prohibit the collection of the taxable costs in such suits.

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

2. In such a proceeding the costs and expenses of the proceeding are first to be paid out of the fund.

3. The petitioner in such a case is entitled to a docket fee for each creditor who comes in and proves his claim. But he has no preference for his costs over the costs of the creditor.

[For a history of this case, see Case No. 10,362.]

J. W. C. Leveridge, for petitioner.

J. Langdon Ward and R. H. Huntley, for creditors.

BENEDICT, District Judge. This case comes before the court upon a motion to settle the form of the decree and to retax the costs of this proceeding.

The first question to be disposed of is whether the injunction to be granted in this proceeding for the purpose of restraining the further prosecution of the suits mentioned in the decree, should prohibit the collection of the taxable costs in such suits. Upon this question my opinion is that the injunction should not prohibit the proctors from collecting the costs referred to.

The liability which the statute was intended to limit is that caused by the collision and not that arising out of proceedings taken in defence of suits brought against the owners or the vessel, and there is no language in the statute which authorizes an application of the value of the vessel to the discharge of any costs other than those of the proceeding taken to obtain the benefit of the act. The decree made by the supreme court of the United States in one of the actions sought to be enjoined, while not deciding the question, points to a liability for the costs of that action without regard to the result of the proceeding which for that reason has been entertained here. Norwich Co. v. Wright, 13 Wall. [80 U. S.] 128.

Under the English statute the rule seems to have been settled, and there the ship owner is held liable to pay the costs without regard to the value of the ship. Says Maclachlan: "The costs of suit form no part of the loss or damage to be compensated and the owner it therefore liable for them personally and without regard to the value of the ship and freight. A vexatious resistance to a just claim would be encouraged by any other rule." Macl. Shipp. p. 113. The reason suggested by this author has full force in the case of proceedings under our statute, and is sufficient to warrant the adoption of such a rule here.

A similar rule seems to be applied in cases of abandonment under the general maritime law. See Caumont, Dictionaire de Droit Maritime, p. 37, tit. "Abandon Maritime," § 92. See, also, 1 Bedarride, Commentaire du Code, § 297, where it is said that as, in the absence of an abandonment by the owner, the creditor who sues only exercises a plain legal right, such action on his part does not render him liable for the expense thereof.

The other questions presented for consideration relate to the costs of this proceeding.

By the 55th rule the costs and expenses of this proceeding are first to be paid out of the proceeds of the vessel and freight. Under this rule I understand that the taxable costs and expenses incurred by the ship owner in the proceeding taken to secure a distribution of the value of the vessel among the creditors and to relieve him from further liability are required to be paid out of the fund.

In this instance some seventeen different parties, claiming damages arising out of the collision in question, have, in answer to the citation issued in pursuance of rule 54, appeared before the court and made proof of their respective claims. Each of their demands is a distinct claim arising upon a separate bill of lading; and upon the proving of each one the proctor for the petitioner attended and was heard in regard thereto. In each such case there is a final hearing and a decree awarding payment out of the fund. The proctor of the petitioner is therefore entitled to a docket fee in each such case, both upon the hearing and upon the reference. I can see no ground for refusing him costs if any one is entitled to costs; and the right to costs of the parties who have come in and proved their claims has not been disputed here. Such costs I am informed have been allowed by Judge Choate in a similar case under the same statute.

But the petitioners' costs are not entitled to a preference over the costs of the creditors. All costs and expenses stand upon an equal footing, and in case of a deficiency in the fund, are to be paid pro rata.

Let the decree be settled and the costs, taxed in accordance with this opinion, be inserted therein.

Case No. 10,362.

In re NORWICH & N. Y. TRANSP. CO.

[17 Blatchf. 221.] [1]

Circuit Court, E. D. New York. Oct. 13, 1879. [2]

COLLISION — LIMITATION OF LIABILITY ACT OF MARCH 3, 1851 — LIBEL BY OWNER OF CARGO — APPRAISEMENT BEFORE AND AFTER COLLISION — PROCEEDS OF FIRE INSURANCE.

1. A collision occurred between a steamboat and a schooner, caused by negligence on the part of the former, without any design, neglect, privity or knowledge of her owners. She immediately took fire, and burned and sank in deep water, the fire being caused by the collision. She had a cargo, being carried on freight, which was totally lost. None of her pending freight was earned or received. She was raised and repaired. After that she was libelled, in admiralty, in the district court, by owners of part of the

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

[2] [Affirming Case No. 10,360. Decree of circuit court affirmed in 118 U. S. 468, 6 Sup. Ct. 1150.]

lost cargo. On a claim to her, she was appraised at $70,000, as her value after being raised and repaired, and she was released on a stipulation for that amount, purporting to be for the benefit of all persons having liens on her for losses by the collision. After decrees for the libellants, her owners petitioned the same district court, for the benefit of a limitation of liability under the act of March 3, 1851 (9 Stat. 635). That court appraised her value, as she lay immediately after the collision and fire and before she was raised, at $2,500, and ordered that amount to be paid into court. That was the value of the interest of the petitioners in her as she was immediately after the disaster. The value of that interest immediately before the collision was $70,000. At the time of the collision she was insured against fire and her owners received, on such insurance, over $49,000. She was not surrendered or transferred to a trustee: *Held*, that the value of the interest of the owner of the steamboat, to be taken, under said act, is not the value of her and her freight before the collision.

[Quoted in Thommasen v. Whitwill, 12 Fed. 897.]

2. The valuation of $70,000 is not to be taken as the measure of the liability of such owner. Such measure is the value of the steamboat in the condition in which she was immediately after the disaster, and not her value after she was raised and repaired. Such value in this case was $2,500, with nothing added for freight.

[Quoted in Thommasen v. Whitwill, 12 Fed: 897.]

3. After the collision, the value of the steamboat was not greater before the fire than after it.

4. The proceeds of the fire insurance ought not to be added to the appraised value of the steamboat.

[Cited in Insurance Co. of Pennsylvania v. The Waubaushene, 24 Fed. 560.]

5. It was proper for the district court to restrain the libellants in the suits in rem from further prosecuting those suits or suits against the stipulators for the $70,000.

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

This was a proceeding commenced in the district court, by the Norwich & New York Transportation Company, as petitioners, to obtain the benefit of the provisions of the act of congress, approved March 3, 1851 (9 Stat. 635), providing for the limitation of the liability of ship owners. The decisions of the district court in the matter are The City of Norwich [Case No. 2,762] and In re Norwich & N. Y. Transp. Co. [Id. 10,360]. After those decisions, appeals were taken to this court by several parties. This court found the following facts: "On the morning of the 18th of April, 1866, a collision took place between the steamboat City of Norwich, then owned by the petitioners, and the schooner General S. Van Vliet, then owned by William A. Wright and others. It occurred on Long Island Sound, nearly opposite Huntington, and it was caused by the negligence of the steamboat's officers or hands, without any design, neglect, privity or knowledge of her owners Very soon, within half an hour, after the collision, the boat took fire, her deck and upper works were burned off, and she sank in about twenty fathoms of water. The fire was a direct consequence of the collision and inseparable from it. It was caused by the rushing of the water through the broken hull of the boat, whereby the fire was driven out of the furnaces upon the wood work, and the boat sank by reason of her filling with water. At the time of the disaster the boat had a cargo of merchandise on board, belonging to different freighters, all of which was totally lost. The freight then pending amounted to six hundred dollars, but none of it was earned, or received, by the ship owners. Sometime after the steamboat was sunk, and her cargo destroyed, as aforesaid, she was raised by salvors, taken to the Long Island shore, where she was repaired, and she was subsequently brought to the port of New York. On the 9th day of May, 1866, William A. Wright and others, the owners of the schooner, filed, in the district court for the district of Connecticut, a libel against the petitioners, the Norwich & New York Transportation Company, the owners of the steamboat, to recover damages in personam, for the loss of the schooner and her cargo, caused by the collision. To this libel an answer was put in, denying any fault of the steamboat; and the respondents also preferred a claim to the benefits of the act of congress of March 3, 1851 (9 Stat. 635), limiting the liability of ship owners. On the 23d of April, 1867, a final decree was made by this court, in favor of these libellants, adjudging to them and to the owners of the schooner's cargo the sum of $26,657.28. Wright v. Norwich & N. Y. Transp. Co. [Case No. 18,086]. From this decree an appeal was taken to the circuit court, where it was affirmed [Id. 18,087], and it was subsequently affirmed by the supreme court of the United States (Norwich Co. v. Wright, 13 Wall. [80 U. S.] 104). The affirmance by the latter court was at its December term, 1871. On the 23d of August, 1866, while the suit in the district court of Connecticut was pending, and after the steamboat had been raised, repaired and brought into the port of New York, George and Charles Place, two of the appellants, filed their libel in rem against her, in the Eastern district of New York, claiming as owners of part of her cargo. Other libels in rem were also filed at the suit of other owners of cargo. In due course the steamboat was seized by the marshal, and, the petitioners having intervened as claimants, an appraisement was ordered, and, a stipulation for the appraised value, in the sum of $70,000, having been given, the steamboat was released to them. Place v. The City of Norwich [Case No. 11,202]. The stipulation purported to be for the security not only of the Messrs. Place, but also for the benefit of all persons who might, by due proceedings in said court, show themselves entitled to liens upon the vessel by reason of the said collision. The appraisement was of the value of the vessel as it was after she had

been raised and repaired. It was returned into the court on the 11th of March, 1867, and the stipulation in the amount of the appraisement was filed on the 29th day of the same month. On the 20th day of December, 1869, the district court ordered decrees to be entered in favor of the libellants. in all the suits commenced against the steamer, as aforesaid. The City of Norwich [Id. 2,760]. Such was the condition of the litigation when the present petition was filed, in July, 1872, after the rendition of the judgment by the supreme court, in the case of the libel of William A. Wright and others, in the district court of Connecticut. The petition prayed, that, in conformity with the act of congress, the decision of the supreme court, and the admiralty rules made in pursuance thereof (Yeagér v. Farwell, 13 Wall. [80 U. S.] xii.), the court would cause an appraisement to be made of the value of the interest of the petitioners in the steamboat and her freight for the voyage in which she was employed, for which they were liable, and that an order should be made for paying the amount of such valuation into court, or for giving a stipulation therefor with sureties. It prayed, further, for a monition against all persons claiming damages arising out of the said collision and fire, citing them to appear and make proof of their claims, and it prayed, also, for a restraining order against the further prosecution of all or any suits against the steamboat or the petitioners, for any damages caused by the collision, fire and loss. There was, also, a prayer for general relief. The monition was issued, the appellants appeared, and an order was made for an appraisement of the amount of the value of the interest of the petitioners, as owners respectively of said steamboat and her freight pending for the voyage upon which she was employed, for which the petitioners were liable. A restraining order, as prayed for, was also made. Pursuant to the direction of the court [Case No. 2,762], an appraisement was made. The appraiser ascertained and reported the value of the steamboat as she lay immediately after the collision and fire, and before she was raised, to have been $2,500, and the district court confirmed the report (In re Norwich & N. Y. Transp. Co. [Id. 10,360]), and ordered the amount to be paid into the registry, which was accordingly done. The value of the interest of the petitioners in the steamboat, as she was immediately after the disaster, was $2,500, and no more. The value of that interest immediately before the collision was $70,000. When the collision occurred the steamboat was insured against fire (not against marine disaster), and upon the several policies the petitioners, as owners, have recovered from the underwriters the sum of $49,283 07. The steamboat itself has never been surrendered or transferred to a trustee for the persons injured by her fault."

J. W. C. Leveridge, for Norwich & N. Y. Transp. Co.

J. Langdon Ward and Kittridge & Rice, for owners of cargo.

R. H. Huntley, for William A. Wright and others.

STRONG, Circuit Justice. In Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. [80 U. S.] 104, a case in which these petitioners, and some of the appellants, were parties, the act of congress of March 3, 1851 (9 Stat. 635), entitled "An act to limit the liability of ship owners, and for other purposes," was under consideration. Some things were then determined which I am not at liberty to disregard. Among them were the following: (1) The act adopts the rule of the general maritime law, as measuring the liability of ship owners for faults of the master, by which others are injured, and not the rules of the English statutes relating to the same subject; (2) the rule is applicable to the claims of all persons injured by a collision, as well as to claims by freighters of cargo on the offending vessel; (3) the present petitioners are entitled to the protection of the act against the owners of the colliding schooner; (4) they are not debarred by any laches of theirs; (5) the district court, sitting as a court of admiralty, has jurisdiction to administer the law. In that case, also, the proper mode of proceeding for obtaining the benefit of the act was pointed out, and the course directed has been substantially followed in the present case. An appraisement of the steamboat has been made, under the direction of the district court, and an apportionment has been ordered. The important question now, the question raised by these appeals, is, whether the sum to be apportioned has been correctly ascertained, and whether it is all that for which the petitioners, who are the owners of the steamboat, are liable.

The limit of liability prescribed by the act of congress is, that it shall in no case exceed the amount or value of the interest of the owner or owners in the offending ship or vessel, and her freight then pending. This presents the question—at what point of time is the value of the owner's interest to be taken? Is the measure of the owner's liability, or its maximum, the value of the ship and her freight before the injury was done? or the value at some time subsequent to the injury, when proceedings may be instituted to ascertain its amount? or is it the value immediately after the fault has been committed, as, for example, in a case of collision, immediately following the destruction caused by it?

Very clearly, it is not the former. The English statutes restricting the liability of ship owners do not adopt the measure recognized by the general maritime law. They measure the extent to which the owners of an offending vessel are liable, by the value

of that vessel immediately before the collision, adding the freight due, or to grow due, for and during the voyage; and they make no provision for the abandonment or surrender of the vessel. Such has been the construction given to them, first, by the courts of common law and chancery, and followed by the courts of admiralty: Brown v. Wilkinson, 15 Mees. & W. 391; Wilson v. Dickson, 2 Barn. & Ald. 2; Dobree v. Schroder, 6 Sim. 291; The Mary Caroline, 3 W. Rob. Adm. 101. The English courts have founded their judgments upon the statutes. They do not attempt to assert that such is the rule of the maritime law of the continent. Indeed, in England, the general maritime law has never been adopted, in all its breadth.

But it is the rule of that law which is to be applied to this case. Even if it were not the rule in this country, without the aid of any statute, (upon which I express no opinion,) it is the rule which congress has adopted and prescribed. By the maritime law, all that the sufferers by the misconduct of an offending vessel are entitled to is the vessel itself, after the injury has been committed, together with her freight. The liability of the owners is discharged by the surrender of the vessel and freight. Their loss, therefore, cannot exceed the value of the thing surrendered. What it may have been worth before the injury was committed is immaterial. Now, it is this measure of liability, recognized by the general maritime law, which the act of congress has adopted, instead of the English measure. It follows, necessarily, that the steamboat owners are not liable to the extent of the value of the vessel immediately before the collision. And such I understand to have been the decision in the case to which I have referred, reported in 13 Wall. 104.

The appellants contend, however, that, conceding the value of the vessel is to be estimated as it was after the collision, the measure of the owners' liability is not the value immediately after the collision, but the value at a subsequent time, when the vessel, or its equivalent value, shall be delivered into court by the owners, for the purpose of apportionment among the sufferers by its fault, or when, the vessel, or its value, being already in the custody of the court, the owners, or the persons injured by it, shall take the proper proceedings for an apportionment.

The collision occurred on the 18th of April, 1866. After the steamboat was raised, repaired and brought into the port of New York, she was libelled and seized, at the suit of sundry owners of her cargo. Having been claimed by her owners, an appraisement was ordered by the district court, and she was valued at $70,000, and released to her owners on their stipulating for that sum. This was in March, 1867, nearly a year after the collision. The appellants now insist that the sum ascertained to have been the value of the vessel at that time, by that appraisement, and then stipulated for, is to be taken as the measure of the owners' liability, and apportioned accordingly. To this I cannot assent. It is true, the present proceeding for an apportionment was not commenced until a later day; not, indeed, until the supreme court, by its decision and rules, had pointed out the course to be pursued to obtain the protection of the act of congress. But, the owners had claimed their right to the statutory limitation, alike in the libel in personam in the district of Connecticut, and in the suits in rem in the Eastern district of New York, though the right had not been accorded to them. But, independently of this, I am of the opinion that the sum at which the steamboat was valued in March, 1867, is not the measure of her owners' liability in these proceedings for an apportionment. That appraisement was in proceedings that had no relation to the question as to what is the extent of the owners' liability. Its purpose was to determine the value of the vessel at the time when she was seized, under the libels in rem filed by the freighters, and when she came into the custody of the court, and was claimed by her owners. It would have been unnecessary if the owners had surrendered her, and the stipulation for her appraised value was to enable them to recover possession of her. It was taken under the general powers and usage of admiralty courts, and not under the act of congress or the rules of the supreme court. Besides, the appraisement was one made of the value of the vessel at the time when she was seized by the marshal, after she had been raised at an expense of $22,500, and repaired at a cost of many thousand dollars more. It did not purport to be an estimate of her value at the time of the collision or immediately after. To hold that the owners are liable to the extent of that valuation, would be substantially to require them to surrender not only the ship and her freight, but also a sum of money equal to all they expended upon her in raising and repairs. Such, I think, would be a departure from the obvious meaning of the statute, and not required by the maritime law. Under that law, in cases of maritime abandonment, a seizure, or a judicial sale of the ship, if procured adversely to the owner, but without resistance by him, had no effect in determining the limit of his liability, and did not deprive him of his right to abandon, though the ship or its proceeds were thus brought within the jurisdiction of the court. 2 Pouget, Droit Mar. p. 412; Trib. of Commerce, Marseilles, 1828; Id. Aix, 1825. The stipulation for value given in March, 1867, cannot be said to estop the owners from showing what was the value of the vessel immediately after the collision. Nothing in it warrants such a construction.

I cannot doubt that the measure of liability recognized by the maritime law and by the act of congress is the value of the offending ship in the condition in which she was immediately after the disaster, adding the

freight. Then the claims of the persons injured arose, the claims which the statute limits. The extent of the limitation is not a shifting one, varying with the times when the protection of the act may be sought, any more than it can be enlarged or diminished by the choice of the mode of obtaining that protection. Certain it is, that if, immediately after the collision, the steamboat owners had surrendered the vessel and freight, or transferred them to a trustee, they would have been discharged. Her value and her freight then pending were then all that they were liable for. That was then the extent of their loss. I cannot see how their liability can be increased by anything that may have occurred thereafter. It is the vessel as she then was that could have been transferred in satisfaction of all claims, if the owners had elected that mode of obtaining their discharge. And it is the value as it then was, which is the equivalent of the vessel, that might then have been paid in pursuance of an apportionment made by the court. Had the vessel proceeded on her voyage after the collision, and had she met with a second disaster, occasioned by the fault of the master, by which her value had been greatly reduced, could she then have been surrendered or transferred, in full satisfaction of the claims against her, or her owners, arising out of her first fault? Would her value after the second disaster have been the measure of the owners' liability? I cannot think such a position can be maintained. Surely, such is not the spirit of the statute. And, if not, it seems equally plain, that the liability of the owners is not enlarged by the fact that, after the collision, the boat has been raised and repaired by them, at large expense, or, in other words, has increased in value. It may, perhaps, be conceded, that if, after the vessel was raised and repaired, the owners had sought the protection of the statutory limitation, by transferring her to a trustee, the creditors would have been entitled to her as she then was, in her improved condition. This, not because her value then was the value for which they were, at all events, responsible, but by force of the transfer. But they have made no such transfer. They never offered to make one. They elected the other course of proceeding allowed to them by the law. They retained the vessel, and asked the court for an apportionment of the amount for which they were liable. To hold them now to the value of the vessel when she had been repaired, would practically deny to them the advantages of that election which the statute accords to them.

It is to be observed, that the act of congress not only adopts the maritime rule or measure of limitation, but it prescribes two modes, in either of which the ship owners may secure the benefits of the rule. The measure of liability and the modes allowed for obtaining the limitation are not to be confounded. One of the modes is the transfer by the owners of the vessel in fault, with her pending freight, to a trustee for those who may be legally entitled thereto. This is substantially the course pursued under the maritime law. The other is an apportionment by the proper court, on their petition, of the sum for which they are liable, among the parties entitled thereto, when the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them. In other words, the liability of the owners is discharged, either by transferring the vessel and freight, or by paying their equivalent, that is, the value of what they might have transferred in discharge, according to the apportionment of the court. The owners have their option of these two modes. They may give up the vessel and freight, or they may retain them and pay their value. But, the measure or limit of liability in each case is the same. Very plainly, it is not intended that the creditors shall obtain more when one mode of proceeding is adopted than when the other is followed. But, as I have said, all that the owners are required to transfer is the ship in her damaged condition, as she was immediately after the injury was inflicted. Equivalent to that is her value at that time.

I am, therefore, of opinion, that the district court was correct in determining that the value of the steamboat immediately after the collision and fire, as she then was, lying at the bottom of the Sound, together with her pending freight, is the extreme measure of the owners' liability, and is the amount to be apportioned. That value has been ascertained to have been $2,500, and I see no reason to doubt the correctness of the appraisement. It is true, that sum is the value of the vessel alone, without any thing added for freight. But, no freight was earned. Six hundred dollars was the amount pending at the time of the collision, but it was of no value. Had the owners selected the other mode of discharging their liability—that of surrendering or transferring the vessel and freight to a trustee—the fact that there had been six hundred dollars of freight pending would have been of no importance. The value of the subject transferred would have been only that of the vessel, the same as that which the district court fixed for apportionment. The transfer of the freight would have been the transfer of a valueless thing. And, as I have said, the measure of liability is the same, whether the vessel and freight be transferred, or whether their value be paid into court for apportionment. In neither case do the owners have more at risk than their sea venture. I think, therefore, the owners are not answerable to any extent for freight wholly lost, though it was pending at the time of the collision, for it had no value immediately after.

It was suggested, though not pressed, during the argument before me, that, even if the value of the steamboat in the condition

in which she was directly after the collision is the maximum of the owners' liability, the appraisement should have been made of her value in the interval between the collision and the fire. But, if this were conceded, the result must have been the same. Plainly, the vessel was worth no more then than she was after she had sunk. She was then a vessel inevitably doomed to partial destruction by fire, and to immediate foundering. The fire was as much a part of the original disaster as was the breaking of the hull by the impingement of the schooner, and so was the sinking. It is impossible to separate them. By the collision, the hull of the steamboat was stoven, and water poured in, driving the fire out of the furnaces into contact with the woodwork, which was mostly destroyed before the hull had sufficiently filled to cause it to sink. Now, had the owners transferred to a trustee the boat, at the instant after she came into contact with the schooner, and before the water had risen within her sufficiently to drive her fires out from the furnaces, confessedly, they would have been discharged. But, what would the trustee for the sufferers, the owners of the schooner and the freighters, have taken? Surely, only a vessel in process of destruction by fire, and destined to sink. She would then have been worth no more than she was at the bottom of the Sound, and that value the sufferers have now, under the appraisement that was made. Besides, a transfer could not have been made before the fire, because no trustee could have been appointed by any court.

I come, then, to the more important question, whether the proceeds of the fire insurance should have been added to the appraised value of the steamboat. At the time of the collision her owners had policies insuring her against fire, upon which they have recovered the sum of $49,283 07; and it is strenuously insisted, that the sum thus recovered should be added to the value of the boat and brought into the apportionment. This presents again the question—what is the limit of the liability of ship owners, defined by the maritime law, and adopted by the act of congress? As I have said, the sum to be paid into court for apportionment is the equivalent of what would pass to the trustee by a transfer under the statute. In substance, then, the question is this—according to the rule of the maritime law, or the act of congress, (which is the same,) does the limit of the owners' liability extend, beyond the vessel and her freight, to the insurance which may be upon her at the time of the disaster? The language of the statute is, "it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer all claims and proceedings against the owner or owners shall cease." The subject to be surrendered is the interest of the owners in the vessel and freight. Not a word is said of transfer of insurance. A transfer of property insured is not, "ex proprio vigore," a transfer of policies of insurance thereon. Generally, indeed, it avoids the policies. It seems to have been held, in Lynch v. Dalzell, 4 Brown, Parl. Cas. 432, that insurances against fire do not attach on the realty, or in any manner go with the same, as incident thereto, by any conveyance or assignment, but they are only special agreements with the persons insuring against such loss or damage as they shall sustain. There is nothing in the act of congress to indicate that the transfer of the interest of the owner to a trustee was intended to have any different effect from that of an ordinary transfer of personal property, which neither in law nor in equity carries with it insurance, or any collateral contract. It seems to me, therefore, that, were I to hold that the owners are responsible, not only to the extent of the value of the vessel and her freight, but also for the insurance collected, I should, in effect, interpolate in the statute words which congress refrained from using, and extend the liability beyond the limits prescribed.

I do not feel the force of the suggestion, that, because the statute declares that the liability of the owner "shall in no case exceed the amount or value of the interest of such owner in such vessel" and her freight then pending, instead of declaring that it shall not exceed the value of the vessel and freight, something beyond the value of the vessel and freight, such as insurance, may have been intended; first, because a policy of insurance is no interest in the thing insured; and, secondly, because the words of the statute are plainly not designed to enlarge liability, but have, for their purpose, making provision for part owners of offending vessels. Instead of holding a part owner liable to the extent of the whole value of the vessel, they limit his liability to the value of his interest or share, leaving the other owners liable to the extent of the value of their shares. I cannot doubt such is the meaning of the statute.

There is nothing, then, in the act of congress, that extends the liability of the owners beyond that existing under the general maritime rule, and by that rule there seems to be no room for doubt that the liability does not extend to the surrender of insurance upon the abandoned vessel. Upon this subject the continental authorities are substantially in unison. Indeed, I have been able to find no one that asserts the rule is otherwise. Only one intimates an opinion to the contrary. I do not propose to quote these authorities at length. Copious refer-

ence was made to them by the learned judge of the district court, and I shall not repeat what he has said. His citations from Caumont (Dictionnaire de Droit Maritime, tit. "Abandon Maritime," §§ 54, 55), from the Code de Commerce, and from Pouget (2 Droit Maritime, 415, 419), are quite sufficient to show what the maritime measure of liability was, and long had been, when our act of congress was enacted, and to establish that it did not extend to insurance upon the abandoned vessel. I may add a quotation from Boulay-Paty, and one or two other sources. In his volume 1, p. 297, Boulay-Paty says: "The product of the insurance is the price of the premium which the ship owner has paid to insure the ship. This premium is not bound as a security for the debts and obligation of the captain. The law expressly binds only the ship and the freight to that. The Code of Commerce gives to shippers a lien only on ship and freight; consequently, they have none on the insurance. In general, the ship is not represented by the insurance, which, after the loss of the ship, becomes a right existing by itself, which gives a direct personal action in favor of the insured." "All these principles, besides, agree with equity and with the well understood interests of commerce." He says more to the same effect, and refers to Valin as sustaining him. So, in De Villenevee et Massé, Dictionnaire du Contentieux Commercial, word "Armateur," 20, it is said: "The surrender of the ship and freight does not extend to the insurance which the owner has put upon the ship." Other similar authorities might be cited. The subject has not been passed without debate. In 1841, an effort was made in the chamber of peers to amend the rule, so to make it require a surrender of the insurance procured by the owner, besides the ship and freight, in order to exonerate the owner. The proposition was much debated, but it was voted down. 1 Bédarride, du Com. Mar. 359. It was then declared, that, by the Code of Commerce, the ship owner is not required to bring in the insurance money, when he makes the maritime abandonment. Now it was in view of this rule limiting liability, and intending to adopt it, that the act of congress of 1851 was enacted, as was held by the supreme court in the case reported in 13 Wall. [supra]. The purpose of the act was to extend to American ship owners the benefits which the general maritime law gave, viz., to limit their liability as it was limited by that law. I find nothing in the act to enlarge the measure of liability. In the case in 13 Wall. 104, the court was not called upon to consider or decide whether the proceeds of insurance must be transferred, or accounted for, in addition to the vessel and freight. The question was not before the court, and it was not decided. Nor does Pardessus assert, as the doctrine of the maritime law, that insurance as well as vessel and freight must be abandoned to the freighters; certainly, not in the later editions of his work. At most he says, he had brought himself "to the belief, that, if the ship was insured, the creditors to whom the surrender was made would have the right to demand the amount of the insurance," for a reason, which he gives, that appears to me to be quite unsatisfactory. But he does not claim that such a right has ever been acknowledged (Droit Commercial, Ed. 1841); and, as I have said, I find no continental authority that recognizes it. I am, therefore, of opinion, that the petitioners in this case, who were the owners of the steamboat, are not bound to pay into the registry of the court the sum they received for insurance. I may add, that, after reflection, I am unable to perceive that the proceeds of fire insurance are any more liable for the claims of the creditors than those of marine would be.

Of the remaining questions presented by these appeals not much need be said. The appellants urge that they should not be restrained from the further prosecution of their suits against the steamboat, or against the stipulators for value in those cases. They argue, that, in the proceedings in rem the personal liability of the petitioners is not involved, and that the act of congress does not apply to such proceedings. The position thus taken cannot be sustained. It rests upon a very narrow view of the statute. A limitation of the liability of the owner of property is a limitation of resort to his property, at the suit of his creditors. Let it be conceded that the freighters had a lien upon the vessel. Yet, where the liability of its owner is discharged, the lien is gone. No liability can rest upon the vessel which does not exist against the owner. The Druid, 1 W. Rob. Adm. 398, 399. It would be a strange anomaly, and one which would defeat the object of the act of congress, if, after an owner of a vessel had taken all the steps required to release him from liability, his property, that is to say, his vessel, should still remain liable to the claim from which he had been discharged. Neither the statute, nor the 54th and 57th rules in admiralty, justify such a conclusion. A suit in rem is, in a very proper sense, a suit against the owner of the thing, even though he may be unknown, and may, in fact, have no knowledge of the suit. And especially is this true, when, as in the present case, the owner appears in the suit and claims the thing attached.

I have only to add, that the taxation of costs, to which some of the appellants object, appears to me to have been correct.

It must be admitted, that the appellants recover a very inadequate compensation for the injuries they have sustained. On the other hand, the injuries were inflicted without any "privity or knowledge" of the owners, by the fault of the master of the steam-

boat, who remains liable to the fullest extent. And the act of congress limiting the liability of the owners, together with the proceedings under it, rest upon a public policy recognized throughout the commercial world, the policy of encouraging investments in ships, by limiting the liability of the owners for wrongs done by the master, to the value of the sea venture. The decree of the district court is affirmed.

[On appeal to the supreme court the decree of this court was affirmed. 118 U. S. 468, 6 Sup. Ct. 1150.]

NORWICH & N. Y. TRANSP. CO. (FLINT v.). See Cases Nos. 4,873 and 4,874.

Case No. 10,363.

NORWICH & N. Y. TRANSP. CO. v. WESTERN MASSACHUSETTS INS. CO.

[6 Blatchf. 241;[1] 34 Conn. 561.]

Circuit Court, D. Connecticut. Nov. 24, 1868.

MARINE INSURANCE—WAIVER OF PROOFS OF LOSS—FIRE PERIL—RULE OF DAMAGES.

1. Where a policy of insurance, against loss or damage by fire to a vessel, contained a provision that the insurers should not be bound to pay until proper proofs of loss had been presented to them, and also a provision that no suit should be brought on the policy until after sixty days from the presentation of such proofs, and the insurers, after notice of a loss, inquired into the circumstances, and then, before the plaintiffs were bound to present proofs of loss, denied all liability under the policy, and refused to pay the loss, on the ground that the loss was the result of a marine, and not of a fire, peril, and no proofs of loss were presented, and a suit was brought on the policy before the expiration of sixty days from such refusal to pay, *held*, that the insurers had thereby waived the proofs of loss, and also the benefit of the provision in regard to the sixty days.

[Cited in Bennett v. Maryland Fire Ins. Co., Case No. 1,321; Timayenis v. Union Mut. Life Ins. Co., 21 Fed. 227.]

[Cited in Girard L. I. A. & T. Co. v. Mutual Life Ins. Co., 97 Pa. St. 24; State Ins. Co. v. Maackens, 38 N. J. Law, 571; Western Home Ins. Co. v. Richardson (Neb.) 58 N. W. 599.]

2. Where a steam vessel, insured against loss or damage by fire, was damaged by a collision, so that the water rose to her furnaces, and forced the fire out, and she was thereby set on fire, and, after burning for some time, she sank, *held*, that the insurers were liable, on the policy, only for such loss as naturally and necessarily resulted from the fire.

3. The rule of damages, in such a case, stated.

This was an action at law, founded upon a policy of insurance against loss or damage by fire. The case was tried before SHIPMAN, J., and a jury, and resulted in a verdict for the plaintiffs. The defendants now moved for a new trial, on the ground of alleged misdirection by the court, in its charge to the jury. [As there are a number of other cases depending in this court upon similar policies growing out of the loss of the steamer in question, it will be well to make a full statement of this one now before us, and settle, so far as this court is concerned, the legal principles applicable to the main features of the controversy.][2] The policy was for $5,000, and was issued by the defendants [and in force at the time the loss occurred.][2] The subject insured was the steamer City of Norwich, owned by the plaintiffs, and running between Norwich, Connecticut, and the city of New York, through Long Island Sound. On the morning of the 18th of April, 1866, while on her regular trip to New York, she met with a disaster, out of which the claim for indemnity set up in this suit arose.

At the trial, the plaintiffs, after proof of ownership, gave evidence tending to prove, that, on the trip named, the steamer came in collision with a schooner; that the stem of the latter cut her down below the water line on the port side, forward of her boiler, making a large breach in her; that through this breach she commenced taking in water, and was rapidly filling; that, in ten or fifteen minutes after she was struck, a fire broke out on board, caused by the water, which flowed into the breach made by the collision, rising to the furnaces, and blowing the fire out upon the surrounding woodwork, which made rapid progress, and soon enveloped her upper works in flames; that, in half or three-quarters of an hour after, she sank in twenty fathoms of water, going down bow foremost, ending completely over in her descent, and finally resting on the bottom with her keel up; that she was afterward raised, taken to New York, and repaired by the plaintiffs; that she was damaged, in all, to the extent of $84,000; that, of this amount, $69,000 was the natural, necessary, and inevitable consequence of the fire; that $15,000, and no more, was chargeable to the marine disaster; that, though, from the breach caused by the collision, she was rapidly filling with water, yet, but for the fire, she would have settled down only to her promenade deck, and would not have gone to the bottom; that, in this condition, she could easily have been towed to a place of safety, discharged of her water, the breach in her side repaired, for a sum not exceeding $5,000, and all the rest of the damage repaired, and the boat restored to her former condition, for a sum not exceeding $10,000 in addition, including towage, but the fire burnt off her light upper works, entirely consuming a portion of them, liberated her light freight, (which was stowed under her promenade deck, on her main deck, and entirely housed in at the sides,) so that it floated off; and that thus her floating capacity was reduced to such an extent that she finally went down. This evidence, tending to prove that the steamer would have

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

[2] [From 34 Conn. 561.]

floated or swum, after and notwithstanding the injury she received by the collision, had no fire intervened, was from the testimony of nautical men, who testified that they were practically acquainted with steamers of this character, and from a civil and mechanical engineer, who testified that he was well versed in his profession, and that he had made full and elaborate estimates of the materials and equipments of the boat and her cargo, upon data submitted to him by the plaintiffs, with special reference to the question, whether, or not, if simply filled with water, she would have sunk to the bottom, or only have settled to her upper or promenade deck, and still have floated or swum. The evidence tending to prove the time when the fire first broke out, the extent of the conflagration before the vessel sank, the length of time she floated after the commencement of the fire, and the other circumstances attending the fire, was mainly from eye-witnesses. There was also evidence to prove that the plaintiffs paid for raising the steamer $22,500, and that this was the precise value of the wreck, when raised. It was further in proof that it actually cost over $40,000 to raise the wreck. The plaintiffs also offered evidence to prove that, after the loss, and after the wreck was raised, and in a situation to be examined, she was examined by the defendants before they declined to pay the loss. The defendants offered no testimony on the trial, nor did they take any exceptions to the rulings of the court on the admission of evidence, except to the following question, put by the plaintiffs to the agent of the wrecking company which raised the sunken steamer: "What did the steamboat company (the plaintiffs) pay you for raising the boat?" To this question the defendants objected. The court overruled the objection, and admitted the evidence, to which ruling the defendants excepted. The plaintiffs offered evidence to prove the value of the steamer before the collision, to which the defendants objected, and the court thereupon excluded the evidence.

At the conclusion of the evidence, the defendants requested the court to charge the jury as follows: (1) The insurance effected in this case was against loss or damage by fire. The insurers took upon themselves no risk whatever, and are not liable for any loss, the efficient cause of which was a marine disaster. (2) In case of the concurrence of different perils, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is, or is not, in activity at the consummation of the disaster. (3) If, therefore, the jury shall find that the fire was simply the result of a marine disaster, and that that disaster, to wit, the collision, was the efficient predominating cause of the loss, then they are to regard the fire simply as incident to the marine disaster, and the insurers against fire alone will not be liable. (4) If the jury could, in any event, consider the burning as a risk within the terms of the policy, they are bound to return no greater damages than the actual cash value of the steamboat at the time the fire happened; and if the jury shall find that, at the time of the breaking out of the fire, the steamer had received her death wound, and that she would inevitably have perished from the collision, no damages are to be assessed against the defendants, since the fire would add no loss to that which was already total. (5) The defendants are liable only for damages actually proved to have been caused by the burning. They are not liable for damages done to the steamer in attempts to raise her; and the burden of proof is on the plaintiffs to show, not only that they received some damage from the burning of the steamer, but also the exact amount of that damage, separate and apart from the actual damage done by the collision, and also separate and apart from the damage in various attempts to raise her. If the plaintiffs show no such distinct and definite loss, then they must fail to recover. (6) In no event can the defendants be liable for the cost of raising the vessel, and the jury are to disregard that wholly in their calculations. (7) By the terms of the policy, the defendants are not bound to pay, until proper proofs of the loss have been made out and presented. There is no evidence before the jury that any such proofs of loss have ever been presented to the company. The plaintiffs rely on a waiver by the defendants of such proofs. A waiver is an intentional abandonment of a known right. In order to find a waiver in this case, the jury must find that the defendants intentionally abandoned all their right to demand proofs of loss. In any event, the defendants would have sixty days after the waiver took effect to pay the loss; and a suit brought within the sixty days is prematurely brought, and cannot be sustained, as a waiver would confer no greater right than would arise under the required proofs. (8) The rule of damages in the case has been determined by the parties in their contract of insurance. That rule is, the cash value of the subject insured at the time the fire happened; and, the plaintiffs having failed to show what was the cash value of the steamer at such time, the verdict must be for the defendants. (9) If the jury shall find that the fire was the result of the collision, they must return a verdict for the defendants, because, in such case, the collision would be the efficient and predominating cause of loss.

THE COURT charged the jury as follows:

"The contract upon which this suit is brought is one of indemnity against loss or damage by fire, on the steamer City of Norwich, owned by the plaintiffs. This contract was in force before and at the time of the fire. The plaintiffs claim that they suffered loss by the fire to an amount exceeding the

entire insurance on their boat, and that the defendants are liable to them on their policy. The questions for the jury are, whether the plaintiffs' loss was the result of the fire, and, if so, what was the extent of that loss. Before noticing the main fact in controversy, I will dispose of two questions of law raised by the defendants, and which rest upon undisputed facts. The defendants object: (1) That proofs of loss were not furnished by the plaintiffs, in compliance with the condition to that effect in the policy. (2) That the suit was brought before any right of action had accrued under the policy, sixty days not having elapsed, after the alleged waiver of proofs. As to the first question, it is true, in fact, that no formal proofs of loss were furnished in accordance with the terms of the condition in the policy. But this point need not trouble the jury. The plaintiffs gave the defendants proper and timely notice that the loss had occurred, and the latter, after examining the wreck, and inquiring into the circumstances, and before the plaintiffs were bound to present proofs of loss, denied all liability under the policy, and refused to pay any loss resulting from the disaster, on the ground that it was a loss by a marine, and not by a fire, peril. This denial of all liability whatever by the defendants was, in judgment of law, a waiver of any further proofs of loss. The second objection, that the suit was instituted before any right of action had accrued by the terms of the policy, need not embarrass you. The defendants having denied all liability, and declined to pay, the condition fixing the time within which no suit should be brought, to wit, sixty days after proofs of loss should be furnished, was no longer binding, and the plaintiffs could bring their action at once. The main question for the jury to determine is, whether the loss sustained by the plaintiffs was the result of the fire; in other words, whether the damage they claim was the natural, necessary, and inevitable consequence of the fire. This depends upon the condition of the steamer after she was struck. A short time before the fire broke out, she came in collision with a schooner. The circumstances of the collision are not material here. According to the statement of several witnesses, she was cut through below the water line, immediately began to fill, in ten or fifteen minutes was discovered to be on fire, and, in half or three-quarters of an hour, went to the bottom, ending over as she descended, and resting on the bottom with her keel up. The question is—would she have gone to the bottom but for the fire? This is a vital question, and must be decided by the jury before the plaintiffs can recover. You will say, in view of the evidence, whether she would have gone to the bottom, or only have settled down to her promenade deck, and remained suspended in the water, but for the effect produced by the fire. If she would not have sunk, but only have settled in the water to the promenade deck, except for the effect of the fire in reducing her floating capacity, the plaintiffs are entitled to recover, not only damage for what was actually consumed, but all the damage which inevitably resulted from the burning. The plaintiffs have offered in evidence the opinions of nautical men acquainted with steamers, and of a civil and mechanical engineer, who testified that he had made a careful computation of the floating capacity of the boat and her contents, upon data submitted to him. These witnesses give it as their opinion, that she would not have sunk below her promenade deck, had not the fire consumed a portion of her upper works. The question is one of fact for the jury. If they find, upon the evidence, that the boat would have continued to float, so that she could have been towed to a place of safety had the fire not occurred, they will find a verdict for the plaintiffs. But, as I have already intimated, if you find she would have sunk to the bottom from the effects of the collision, and without the intervention of the fire, the plaintiffs cannot recover. The remaining questions relate to the damages. You must distinguish between the damage resulting from the collision and that resulting from the fire; and, in estimating the latter, you will take the boat in the condition she was in after the collision, and before the fire had commenced its work. The plaintiffs claim, upon the evidence, that the damage done by the blow of the schooner did not exceed $5,000. To this they admit should be added a sum not exceeding $10,000 to get her into port, free her from water, and restore her to as good a condition as she was in before the injury. The calculation is based upon what they claim the evidence shows would have been the state of things had no fire occurred. These two sums, amounting to $15,000, the plaintiffs insist is the extent of the damage resulting from the marine disaster. The plaintiffs also claim that the whole damage done by the collision and fire was $84,000. Deducting the $15,000, as chargeable to the marine disaster, there remains $69,000, as directly chargeable to the fire. On the accuracy of these claims you are to decide, upon the evidence before you. If the defendants are liable at all, they are liable for one-fifteenth of the loss which the plaintiffs suffered from the fire. To repeat what I have already said: If the steamer would have sunk to the bottom had no fire broken out, the plaintiffs cannot recover. On the contrary, if she would have settled only to her promenade deck, the defendants are liable for one-fifteenth of the damage. The mode in which the damages should be estimated has occupied my attention. You will remember that the court excluded evidence of the value of the steamer before the collision took place, upon objection being made by the defendants' counsel, as her condition the moment the fire took place is the one to be considered. The plaintiffs' estimate of the damage is based

upon the cost of repairing her and restoring her to her former condition, exclusive of the amount they admit as properly chargeable to the collision. You will determine, upon the evidence, whether, in your judgment, the repairs that were put upon her enhanced her value beyond her cash value before the commencement of the fire. If they did, you will deduct from the damage you find proved a sum equal to such increase of value. If, on the other hand, you find that her restoration was only to her former condition, and did not enhance her value beyond what it was when the fire commenced its work, you will, if you find for the plaintiffs, give one-fifteenth of the cost of restoring her to the condition she was in when the fire took place.

"Where I have not charged you in conformity with the requests of the defendants, they may consider their requests denied."

Charles Chapman, James A. Hovey, and Jeremiah Halsey, for plaintiffs.

John T. Wait, Townsend Scudder, and George Pratt, for defendants.

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

SHIPMAN, District Judge. The disputed facts, in this case, lie within a very limited range, and were all distinctly submitted to the jury. The only matter now for consideration is, whether the court correctly instructed the jury on the questions of law applicable to the facts.

1. As to the waiver of proofs of loss. This point was raised on the trial, and, although not insisted on upon the argument of the motion, we will notice it here. It is conceded, that there were no formal proofs presented to the defendants, as provided for in the policy. But the written admission of the defendants, produced on the trial, conclusively proves, that the plaintiffs gave the defendants timely and proper notice that the loss had occurred, and that the latter, after examining the wreck, and inquiring into the circumstances, denied all liability under the policy, on the ground that the loss was the result of a marine, and not of a fire, peril. This was all done before the time within which the plaintiffs were, by the terms of the policy, bound to present the formal proofs, had expired. The court charged the jury, that this denial of all liability whatever, by the defendants, was, in judgment of law, a waiver of any further proofs of loss. On this point, the authorities are numerous and decisive, and fully sustain the rule laid down by the court. The denial, by the defendants, of all liability in the case, expressly conceded that there was a loss, and was a notice to the plaintiffs that they would not be bound, in any event, though formal proofs were furnished. The presentation of proofs, under such circumstances, was of no importance to either party, and the law rarely, if ever, requires the observance of an idle formality, especially after the party for whose benefit the original stipulation was made, has rendered conformity thereto unnecessary, and practically superfluous. Schenck v. Mercer County Mut. Fire Ins. Co., 4 Zab. [24 N. J. Law] 447; Allegre v. Maryland Ins. Co., 6 Har. & J. 408; McMasters v. Westchester County Mut. Ins. Co., 25 Wend. 379; Francis v. Ocean Ins. Co., 6 Cow. 404; Tayloe v. Merchants' Fire Ins. Co., 9 How. [50 U. S.] 390; O'Neil v. Buffalo Fire Ins. Co., 3 Comst. [3 N. Y.] 122; Maryland Ins. Co. v. Bathurst, 5 Gill & J. 159; Graves v. Washington Marine Ins. Co., 12 Allen, 391.

2. There was no error in that part of the charge which instructed the jury that the suit was not prematurely brought. There was a provision in the policy, that the loss should be payable after sixty days from notice and the furnishing of preliminary proofs of loss to the underwriters. If the matter had gone through the formal stages provided for in the policy, and the proofs had been made, without any denial of all liability on another ground, no suit could have been sustained on the policy, until the sixty days had expired. This clause was for the protection, or convenience, of the underwriters; but, when they waived the preliminary proofs, they also waived the benefit of this stipulation, and rendered it nugatory. It would be absurd to say that they still retained the right to have sixty days within which to pay a loss which they had declared they would not pay at any time, or under any circumstances. Columbian Ins. Co. v. Catlett, 12 Wheat. [25 U. S.] 383; Allegre v. Maryland Ins. Co., 6 Har. & J. 408; Phillips v. Protection Ins. Co., 14 Mo. 220.

3. We discover no error in that part of the charge in which the court submitted to the jury the question, whether or not the proximate cause of the loss for which a recovery was sought, was to be found in the fire which followed the collision. There was little or no controversy about the facts which characterized the disaster, up to the time the fire broke out. The boat was struck on her port side, forward of her wheel house, and her hull was stove in below the water line. She immediately began to fill, and, in ten or fifteen minutes after the collision, the water rose to her furnaces, and forced the fire out upon the wood-work. It made rapid progress, and soon enveloped her in flames. She continued to float for half or three-quarters of an hour, and until a considerable portion of her upper works was consumed, when she went down, bow foremost, ending completely over, and resting on the bottom, keel up, in about twenty fathoms of water. Up to the time the fire broke out, all the damage the boat had received was the wound in her side, and the injury resulting from the water, which rushed in. And here an important question of fact arose, and that was, wheth-

er the consequences resulting from the collision alone, without the intervention of the fire, would have gone beyond her filling, and settling in the water to her promenade deck, and there remaining suspended in the water, until she could be towed to a place of safety, her side be repaired, and the whole boat be restored to her former condition. The uncontradicted evidence was, that, had she so remained, suspended in the water, she could easily have been towed to a place of safety, her wound repaired, and every part of the boat, including her furniture, which would have been injured by the water, restored to the condition it was in before the collision, for a sum not exceeding $15,000. The actual loss proved, however, was about $84,000. On this point, there was no conflicting evidence. The difference between these sums is $69,000, and this latter sum was claimed by the plaintiffs to be the amount of their loss naturally and necessarily resulting from the fire, and which, but for the fire, would not have happened. They offered evidence to show that, from the predominance of the floating over the sinking materials, in her structure and cargo, in connection with the fact that she was so housed in, from stem to stern, between her main and her upper or promenade deck, that her cargo would have been kept in its place, although immersed in water, her sinking was impossible, as a result of the collision merely. They also offered the testimony of eye-witnesses of the conflagration, to prove that she did actually float for half or three-quarters of an hour, and that it was not till her upper works were all on fire, and nearly consumed, by which her light freight was liberated, and enabled to float away, and her floating capacity thus greatly reduced, that she finally sank. To overcome this evidence, no proof was offered by the defendants. The court instructed the jury, that the contract upon which the plaintiffs sought to recover, was one of indemnity against loss by fire only, and that, therefore, whether her sinking was the natural and necessary result of the fire, became a vital question; and that, if the jury found this question in the negative, the plaintiffs could not recover. This instruction was more favorable to the defendants than they had a right to demand, for it was conceded, that a considerable portion of the steamer's upper works was actually consumed. The other injuries resulting after the fire broke out, for which the plaintiffs sought to recover, were occasioned by her sinking to the bottom. But, in order to simplify the question to the jury, they were instructed, that, if they found the boat would have finally sunk, had no fire broken out, their verdict must be for the defendants. They must, therefore, have found, by their verdict, that she would not have sunk, but for the fire, and, consequently, that all the damage which naturally resulted from the marine injury, was $15,000, and that all the rest was the natural and necessary result of the fire. This part of the charge may not have been couched in the formal and technical language of the text-writers on this branch of the law, but it distinctly presented the question, as to the proximate cause of the loss for which a recovery was claimed. The effect of the verdict, therefore, is to bring the case within the scope of the sound proposition (1 Phil. Ins. 5th Ed., p. 679; subsec. 1136; Id., 4th Ed. p. 692) that "in case of the concurrence of two causes of loss, one at the risk of the assured, and the other insured against, or one insured against by A, and the other by B, if the damage by the perils respectively can be discriminated, each party must bear his proportion." In the case before us this was clearly done. The loss resulting from the fire was distinctly separated, by the evidence, from any loss resulting from the collision, and the jury were instructed that the plaintiffs could recover only for such loss as naturally and necessarily resulted from the former element. There was no conflict of evidence on this point, and the jury found no damages, except such as were chargeable to fire, as the proximate cause. It is well settled, by numerous authorities, that the proximate cause of loss is to be looked to. This rule prevails in both fire and marine insurance. Jewett, J., in Gates v. Madison County Mut. Ins. Co., 1 Seld. [5 N. Y.] 469, 478, and cases there cited.

4. The rule of damages was correctly stated, under the circumstances. The rule prescribed by the policy was the cash value of the boat just before the fire. The offer was made by the plaintiffs to prove her cash value, deducting the amount she was damaged by the collision, including all necessary consequences. To this mode the defendants objected, and the only other mode was, to ascertain what it cost to repair the damages necessarily resulting from the fire. The jury were instructed that, if the cost of the repairs exceeded the fire damage, and rendered the boat more valuable, they should deduct the excess. Under the instructions, the plaintiffs could obtain no more than indemnity for the loss by fire. This they were entitled to.

5. The objection to the allowance of $22,500 for raising the wreck is untenable. This was found to be the precise value of the wreck when recovered. It was in proof that it cost over $40,000 to raise it, but no more was allowed than the value of the same when raised. So much was saved from an otherwise total loss, and, as the defendants had the benefit of it, in the adjustment of the damages, they are chargeable with the necessary and reasonable cost of saving it. A new trial is, therefore, denied, on all the grounds.

NORWICH & N. Y. TRANSP. CO. (WRIGHT v.). See Cases Nos. 18,086 and 18,087.

NORWICH & W. R. CO. (BARNARD v.). See Case No. 1,007.

NORWICH & W. R. CO. (IMLAY v.). See Case No. 7,012.

Case No. 10,364.

Ex parte NORWOOD.

[3 Biss. 504.] [1]

District Court, N. D. Illinois. April, 1873.

FOREIGN RECEIVER MAY PROVE DEBT—WAIVER IN TIME IN MAKING PROOFS—LIABILITY OF RE-INSURER.

1. The receiver of a bankrupt corporation in another state can prove a debt against a bankrupt in this court.

[Cited in Wade v. Sewell, 56 Fed. 130.]

[Cited in Merchants' Nat. Bank v. McLeod, 38 Ohio St. 185.]

2. Any person authorized to give an acquittance of a debt is entitled to prove that debt in bankruptcy.

3. Where an insurance company furnished copies of the proofs of loss to a re-insuring company, and no objection was made to their form or substance, the company thereby waives the right to object that they were not furnished in apt time.

4. Objections to proofs of loss must be made by the company on their presentation, or within a reasonable time thereafter, or they will be considered as waived.

5. A clause in the policy of re-insurance, "loss, if any, payable at the same time and pro rata with the insured," merely gives the company the benefit of any defense, deduction, or equity which the first insurer may have, making the liability of the re-insurer the same as the original insurer. It does not limit such liability to what the original insurer may have paid or be able to pay.

In bankruptcy. This was a motion by Joseph R. Payson, assignee of the Republic Fire Insurance Company, to expunge the claim filed by Carlisle Norwood, as receiver of the Lorillard Insurance Company of New York, on certain policies of re-insurance on which there had been a total loss.

Tenneys, Flower & Abercrombie, for assignee.

A corporation has no existence beyond the territory of the power that created it. Day v. Newark India Rubber Co. [Case No. 3,-685]; Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 588; Ohio & M. R. Co. v. Wheeler, 1 Black [66 U. S.] 286; County of Allegheny v. Cleveland & P. R. Co., 51 Pa. St. 228. But its existence (if it does exist) may be recognized in other states. Union Branch R. Co. v. East Tennessee & G. R. Co., 14 Ga. 327.

A dissolved corporation cannot sue, having no existence. Commercial Bank v. Lockwood, 2 Har. (Del.) 8; Fox v. Horah, 1 Ired. Eq. 358; President, etc., Port Gibson v. Moore, 13 Smedes & M. 157; White v. Campbell, 5 Humph. 38; Bank of Louisiana v. Wilson, 19 La. Ann. 1; May v. State Bank of North Carolina, 2 Rob. (Va.) 56; Leathers v. Shipbuilders' Bank, 40 Me. 386; Leach v. Thomas, 27 Ill. 457. The Revised Statutes of Illinois (pages 95, 96) and the act of 1872 make no different rule in a case of this kind.

Foreign receivers have no title or authority by which they can sue. The statutory assignment to a receiver can only vest in him the title to property which is within the state that appoints him. The state has no power to pass the title to propery which is beyond its boundaries; neither can it create an officer whose official character will follow him into another state. So Mr. Norwood has no title to any property here, and he is no "receiver" here, and hence he cannot maintain a suit. Booth v. Clark, 17 How. [58 U. S.] 322; Hoyt v. Thompson, 1 Seld. [5 N. Y.] 320; Hope Mut. Life Ins. Co. v. Taylor, 2 Rob. (N. Y.) 278; Graydon v. Church, 7 Mich. 36; Wheat. Confl. Laws, § 359 et seq.

The assignee has, in effect, attached all the funds of the Republic Insurance Company for the benefit of domestic creditors.

The nature of the contract of re-insurance, when there are no express stipulations, is the policy. Hone v. Mutual Safety Ins. Co., 1 Sanf. 137, affirmed, 2 Comst. [2 N. Y.] 235; Philadelphia Ins. Co. v. Washington Ins. Co., 11 Harris [23 Pa. St.] 250; Yonkers & N. Y. Fire Ins. Co. v. Hoffman Fire Ins. Co., 6 Rob. (N. Y.) 316.

In all these cases the policy said, simply, "re-insure," instead of "insure." They all hold that the "re-insured" must make the same proofs of loss as the original insured. The words of one policy, "this company to pay pro rata, at and in the same time and manner as the company re-insured," were introduced for the very purpose of making a change from the law, as held in the above cases.

On the subject of "waiver" of the requirements of the policy, we make the following citations, showing that a waiver is not to be implied or guessed at without affirmative acts definitely indicating it. Columbian Ins. Co. v. Lawrence, 2 Pet. [27 U. S.] 25; Id., 10 Pet. [35 U. S.] 507; Klein v. Franklin Ins. Co., 1 Harris [13 Pa. St.] 247; Trask v. State Fire & Marine Ins. Co., 5 Casey [29 Pa. St.] 198; Phillips v. Protection Ins. Co., 14 Mo. 220; Taylor v. Merchants Fire Ins. Co., 9 How. [50 U. S.] 390; Beatty v. Lycoming Co. Mut. Ins. Co., 66 Pa. St. 9; St. Louis Ins. Co. v. Kyle, 11 Mo. 278; Patrick v. Farmers' Ins. Co., 43 N. H. 621.

Fuller & Smith, for receiver.

By the laws of New York under which the Lorillard Insurance Company was created, all property, choses in action, and effects, vested in the receiver. No assignment is essential to his title, and he may bring suit in his own name, either at law or in equity. Gillet v. Fairchild, 4 Denio, 80; Mann v. Pentz, 2 Sanf. Ch. 257; In re Eagle Iron

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

Works, 8 Paige, 386; Eldred v. Hall, 9 Paige, 640. The general principle is to permit the foreign assignee in bankruptcy to appear and sue in his own name, where there is no conflict with the assignor or with creditors. Hunt v. Jackson [Case No. 6,893]; Holmes v. Remsen, 4 Johns. Ch. 485; Alivon v. Furnival, 1 Cromp. M. & R. 296; Blane v. Drummond [Case No. 1,531]; Ingraham v. Geyer, 13 Mass. 146; Ball v. Claflin, 5 Pick. 305; Dickey v. Harmon [Case No. 3,894]. No conflict here, and certainly none affecting the capacity of the receiver to sue. Mere choses in action are transferable according to the law of the creditor's domicile—indisputably so if there payable. Guillander v. Howell, 35 N. Y. 660; Clark v. Connecticut Peat Co., 35 Conn. 303; Caskie v. Webster [Case No. 2,500]; Speed v. May, 17 Pa. St. 91. The foreign corporation is permitted to sue ex comitate. Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519. And so its assignee by operation of law. Hoyt v. Thompson, 1 Seld. [5 N. Y.] 339. Proceedings in bankruptcy are equitable in their nature. If the claimant is entitled to the proceeds, he is entitled to claim. It has been ruled that assignees by operation of law may prove up in their own names. In re Davenport [Case No. 3,586]; In re Murdock [Id. 9,939]. See Dawes v. Head, 3 Pick. 128; Story, Confl. Laws, § 429. Parties in a contentious proceeding, either present or prospective, may agree that the issue shall be decided according to a particular law. Whart. Confl. Laws, 309. Booth v. Clark, 17 How. [58 U. S.] 322, is inapplicable because (a) the question arose as to a receiver appointed upon a creditor's bill; (b) and as between such receiver and a claimant of another state, while here the assignee represents all the creditors; (c) the question was only mooted in relation to a receiver under statutes for the collection of debts, and not for the winding up of defunct corporations.

As to the attachments, they have all been dismissed, but were they pending it would make no difference. (1) Attachments and garnishee process in a state court, after suit in United States court, will not lie. Wallace v. McConnell, 13 Pet. [38 U. S.] 136. (2) The corporation having been dissolved upon suit brought, no suit against it can be maintained. Drake, Attachm. §§ 433, 434; Greeley v. Smith [Case No. 5,748]; Farmers' & M. Bank v. Little, 8 Watts & S. 207; Mumma v. Potomac Co., 8 Pet. [33 U. S.] 286. This is so in the state of the creation of the corporation, as also as to all creditors who have proved up before the receiver, and taken dividends, as is the fact in the case at bar. Clay v. Smith, 3 Pet. [28 U. S.] 411; Baldwin v. Hale, 1 Wall. [68 U. S.] 223, 234; Woodhull v. Wagner [Case No. 17,975]. This makes them parties to the litigation and bound by it. They cannot dispute the receiver's title. (3) Suit against the receiver admits the capacity in which he is acting. (4) The appointment vested all the property in the receiver. The decree of the New York court operated as a sequestration or forfeiture. 3 Pars. Cont. 473; Jewett v. Preston, 27 Me. 400; Burnside v. Merrick, 4 Metc. (Mass.) 537. (5) The claims of attaching creditors cannot defeat the allowance of the claim in the first instance, and as here presented.

As to the alleged defenses: (1) It is objected that the proofs of loss are insufficient, because they are only copies of the original proofs. This is all the re-insurer can require. 17 Wend. 359. And because not furnished in apt time. The answer is that they were furnished within a reasonable time, and the objection has been waived. Longhurst v. Star Ins. Co., 19 Iowa, 371; Peoria, etc., Ins. Co. v. Lewis, 18 Ill. 553; Peoria, etc., Ins. Co. v. Whitehill, 25 Ill. 466; Hartford Fire Ins. Co. v. Walsh, 54 Ill. 165; Owen v. Farmers' Joint-Stock Ins. Co., 57 Barb. 518. It is said there can be no waiver after time has expired, that is that it requires an express agreement to revivify the contract. If this were so as to defects in matter, it is not as to time. Patrick v. Farmers' Ins. Co., 43 N. H. 623. But conditions as to proofs may always be waived, because they are conditions precedent, not to the undertaking of the insurers, but to the right of action of the insured. The furnishing of any proofs may be waived. Taylor v. Mechanics' Fire Ins. Co., 9 How. [50 U. S.] 403; 9 Casey [33 Pa. St.] 397; Owen v. Farmers' Joint-Stock Ins. Co., 57 Barb. 520; Post v. Aetna Ins. Co., 43 Barb. 365; Bumstead v. Dividend Mut. Ins. Co., 12 N. Y. 81. (2) It is objected that the re-insurance clause means that the re-insurer will pay only what the primitive insurer pays, and evidence attempting to establish a usage to that effect is adduced. The answer is, that the clause is susceptible of no such construction. The design is to regulate the proportions if the re-insurance is less than the insurance, and the loss is not total. Though the original insurer becomes insolvent, the re-insurer is not released from payment in full by reason thereof. Herckenrath v. American Mut. Ins. Co., 3 Barb. Ch. 63; Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Storm v. Davenport, 1 Sandf. Ch. 137. Hence the evidence is incompetent. Mutual Safety Ins. Co. v. Hone, 2 N. Y. 240. It was also insufficient. The Reeside [Case No. 11,657]; Adams v. Otterbach, 15 How. [56 U. S.] 539; The Eddy, 5 Wall. [72 U. S.] 481.

BLODGETT, District Judge. The Lorillard Fire Insurance Company was a corporation created by and under the laws of the state of New York, for the purpose of doing insurance business. For some years prior to the 9th of October, 1871, it had an agency in the city of Chicago, at which a large amount of insurance business was transacted. In the due course of its business at Chicago said

company had obtained from the Republic Insurance Company of Chicago policies of re-insurance on its insured interest in certain property here, amounting in the aggregate to $19,500, which policies of re-insurance were in force on the 9th of October, 1871, at which time a total loss of the property thus re-insured occurred.

In consequence of losses sustained by fire in this city on the 9th of October, 1871, the Lorillard Fire Insurance Company became insolvent, and by proceedings instituted in the supreme court of the state of New York, pursuant to the statute of that state, said Lorillard Fire Insurance Company was, on the 23d of October, 1871, dissolved, and Carlisle Norwood appointed receiver of all the estate, debts, credits, effects, and choses in action of said company.

The Republic Insurance Company was also rendered insolvent by the fire of October 9th, and has, within a few months past, been adjudged bankrupt by this court.

On the 27th of December last, said Norwood, as receiver of the Lorillard Insurance Company, filed with H. N. Hibbard, Esq., register in bankruptcy of this court, his proof of a claim against the estate of the Republic Insurance Company, growing out of said policies of re-insurance, to the amount of $19,500, which claim was allowed by the register. The assignee of the Republic Insurance Company subsequently appeared before the register and filed objections to said claim, and his petition that the same be re-examined under the thirty-fourth rule. Proofs were thereupon taken, both on the part of the assignee and receiver, and the issues raised thereon, together with the proofs, have been certified to the court for decision.

From this proof it appears that said Lorillard Fire Insurance Company had issued six policies, amounting in the aggregate to $30,-000, on property in this city, on which it had obtained policies of re-insurance from the Republic Insurance Company to the amount of $19,500. All the property thus insured and re-insured was totally destroyed by the great fire in this city of October 9th, 1871, and a total loss proven and adjusted as such to the full amount of the respective policies against the Lorillard Insurance Company. The receiver of the Lorillard has paid dividends to the holders of its policies thus re-insured to the amount of 85 per cent.

The proofs of loss by the policy holders were presented to the adjusters of the Lorillard Insurance Company in November and December, 1871, and the losses adjusted as total losses in each case. These original proofs were forwarded by the adjusters to the receiver, Mr. Norwood, at New York, and copies thereof were, early in March, 1872, furnished to the proper officers of the Republic Insurance Company.

No objections were made to the form or substance of these proofs, but the officers of the Republic insisted, at the time these copies of proofs were presented and at subsequent interviews with the receiver and his agents, that the Republic was not bound to pay any more or any faster than payment was made by the receiver of the Lorillard, basing their refusal upon the clause in the policies of re-insurance which reads as follows: "Loss, if any, payable at the same time and pro rata with the assured." Some time after the fire several creditors of the Lorillard brought attachment suits in the superior court of Cook county against said company and said receiver, and garnished said Republic Insurance Company, which suits were subsequently removed into the United States circuit court in this district; but on the 19th of December last said suits were all dismissed by the respective plaintiffs therein, at their own costs—said suits having been dismissed in consequence of a ruling of the circuit court of this district upon the demurrer of plaintiffs to a plea by the defendant Norwood, alleging the dissolution of the Lorillard Fire Insurance Company by the supreme court of the state of New York.

The assignee of the Republic now urges eleven reasons or objections against the allowance of this claim, but they may all be grouped and considered under three heads. First—That the receiver of the Lorillard Fire Insurance Company has no authority to collect or receive the assets of said company outside of the state of New York; that his functions are limited by the jurisdiction of the court from which he received his appointment. Second—That the re-insured company, and the receiver who represents it, has failed to comply with the prerequisites and conditions of the policies, by giving notice and making proofs of loss in apt time as required by the terms of the policy. Third—That, even if liable at all, the liability of the Republic Insurance Company is limited to the amount which the Lorillard has paid on its re-insured policies.

The first objection raised, questioning the capacity of a receiver appointed by a state court to act beyond the jurisdiction of such court, opens a wide field for inquiry into the rights and powers of officers acting under the authority of foreign courts, but I have not time to discuss at length the interesting class of questions suggested by this branch of the case.

There is much apparent authority in support of the position taken by the counsel for the assignee. In Booth v. Clark, 17 How. [58 U. S.] 322, the supreme court of the United States held very broadly that a receiver appointed under the authority of a state court, could not sue in the courts of another jurisdiction.

The same principle was enunciated, although not so elaborately discussed, in Harrison v. Strong, 5 Cranch [9 U. S.] 289, and Ogden v. Saunders, 12 Wheat. [25 U. S.] 359. But it will be noticed that in all these cases there was a struggle for the property of the

estate between the officers of a foreign court and creditors who had acquired liens by attachment or other proceedings, in the jurisdiction where the property was situated. In Booth v. Clark, 17 How. [58 U. S.] 322, the supreme court, after discussing the various English cases and tracing the history of the principle in question, in the English courts, comes to the conclusion that the rule of comity which authorized a receiver of a foreign court, or an assignee in bankruptcy appointed in a foreign jurisdiction, to prove a claim in an English court, had been repudiated and denied through a long series of years, but that after the adoption of a general bankrupt law in England, and the adoption of the same policy in several of the commercial countries of Europe, the rule of comity required that the English courts should recognize the rights of assignees in bankruptcy appointed by foreign jurisdiction—and such has been the rule in England since that time, as the supreme court say, "Such is not the rule in this country," (that is, was not at the time of the decisions referred to,) "because we have no general bankrupt law;" plainly, as it seems to me, indicating that the rule in this country would be changed if the principles of the bankrupt law should be infused into its commercial law—an event which has occurred since the decision of Booth v. Clark [supra].

To my mind there is, to say the least, a strong analogy between the right of the receiver in this case to prove the debt due the estate he represents, and the right of the executor or administrator appointed in another state, to represent the right of a deceased creditor before this court and prove a debt due his testator or intestate, and such right has never been drawn in question.

Under authority of all the bankrupt laws which have been passed by the congress of the United States, the practice has been uniform, so far as I can ascertain, to allow guardians, executors, administrators, and all persons acting in a representative capacity, to appear before the bankrupt court and prove the claims pertaining to the estate which they severally represent. If the bankruptcy proceedings in this case were pending before a United States court in the state of New York, there can be no doubt that such court would recognize the rights of the receiver in this case, and allow him to prove this claim. Why should a federal court of the state of New York recognize the authority of this receiver appointed under the laws of the state of New York, without any relation to the federal laws or the bankrupt law, any more than this court should? Do state lines make any difference? The federal courts take judicial notice of the laws of all the states and of the powers of all state officers, whether executive or judicial. It seems to me it would be applying a very narrow rule to the provisions of the bankrupt law and limit the usefulness of that statute very considerably, if the federal courts should require all executors, administrators, guardians of minors, or conservators of insane or idiotic persons, as a condition precedent to the proving of their claims against the estate of their debtors, to take out auxiliary or supplemental letters of administration or guardianship from the state courts, within the jurisdiction of the court where the bankruptcy proceedings were pending. The bankrupt law is national in its application. It is intended to serve all creditors alike, and gives all creditors acting in a representative capacity, resident out of the district as well as those within the district wherein the proceedings are pending, all the rights to prove their debts which natural persons might exercise, and it seems to me that this court would do gross injustice to the principles of the law to hold that this receiver, clothed as he is with full powers by the laws of the state of New York to represent the estate of the Lorillard Insurance Company, and standing, by virtue of the decree of the supreme court of the state of New York in the shoes and place of the Lorillard Fire Insurance Company, should not be allowed to prove his debt here as fully as if he had been vested with those powers by virtue of a decree from any court within this district.

The bankruptcy law clothes the district courts, sitting as courts of bankruptcy, with all the powers of courts of equity. In several of the cases which have been cited in this case by the counsel for the assignee, reference is made to the hardship of the rule adopted in those cases, and it is suggested that a court of equity might afford a remedy where there was actual danger of injustice being done.

In most of those cases there was a struggle between resident and non-resident creditors—between the citizens of this country and citizens of foreign nations, as to who should have the benefit of assets found within the jurisdiction of our courts, and, by the application of a well known principle of international law, our courts have sustained our own creditors to the extent of the assets within our own boundaries. But anticipating that the application of this rule might work hardship and injury in many cases, the courts have intimated that it lay within the scope and powers of a court of equity to give relief where there was danger that the application of the rule might thus work injustice.

Inasmuch, then, as a court of bankruptcy, as I said before, is clothed with all the powers of a court of equity, it seems to me that even if this court did not feel itself justified in recognizing the authority of the receiver in this case, it would entertain a bill specially filed in the case setting up the authority under which the receiver was acting, and allow him, by special decree, the privilege of proving his claim.

But I do not deem it necessary, as I have already intimated, that he should resort to

that course. It seems to me that the equality of rights of all creditors under the bankrupt law—that principle of equality which runs through and forms the distinguishing characteristic of the bankrupt law—requires that bankruptcy courts shall recognize every person who represents by proper proceedings in the place where he receives his appointment, any creditor, and shall allow such representative to prove and recover his just claim.

There is no doubt—counsel admit it in their argument and in the briefs filed—but that if there had been a voluntary payment made to the receiver by the assignee in this case, such voluntary payment would be good, and the receipt of the receiver would be an acquittance of the debt. And I can comprehend no rule so salutary for the bankruptcy courts to adopt as to assume that any person who is authorized to give an acquittance of a debt, to receipt for a claim, is entitled to prove the debt in bankruptcy, if he be acting in a representative capacity, as trustee, assignee, receiver, executor, administrator, or in any other of the various representative capacities which the law provides for the administration of human affairs. Coming, then, to the conclusion that the receiver has a standing in this court, I dispose of the first objection raised by the assignee in this case, and hold that the assignee can rightfully prove the claim.

I now proceed, for a moment, to the discussion of the other objections which have been raised. The first is that proofs of loss were not furnished in apt time. The policies contained the usual provisions—that the assured shall, within a reasonable time, furnish the insurer with proofs of loss, and shall be subject to examination, etc.

The evidence shows that the persons holding the original policies issued by the Lorillard Insurance Company made their proofs of loss to the Lorillard Company; that those losses were adjusted by the Lorillard Company; that the proofs of loss were forwarded to the receiver, and that copies of those proofs of loss were furnished by him to the re-insuring company, the Republic; that those copies were presented to the officers of the Republic Insurance Company some time in March, 1872, long prior to its going into bankruptcy, and demand made for the payment of the money.

At the time the proofs of loss were presented and the demand made for the payment upon the policies, the secretary of the Republic Insurance Company, Mr. Payson, who was the managing officer of that company at the time, said to the agent of the receiver, "You don't expect us to pay any faster than you pay, I suppose?" and some discussion arose between the agent of Mr. Norwood and Mr. Payson as to the obligation of the Republic Company under these policies of re-insurance; but no exception was taken to the form of proofs. No doubt was expressed but what the losses had accrued to the full extent claimed, nor was any objection taken to the substance or subject matter in the claim, further than to the fact that by reason of the peculiar phraseology of the re-insurance policy, the Republic Company was not bound to pay any faster than the Lorillard, nor any more. During all the discussions between the receiver and the officers of the Republic, which involved several interviews between the receiver himself and the officers of the company, and also several interviews between the agents of the receiver and the officers of the Republic, no objection to the form or substance of these proofs was ever taken.

On the contrary, the evidence shows that, to a considerable extent, if it be not the universal custom in this city, the practice and usage among insurance men, in the settlement of re-insurance policies, is to furnish the re-insuring company with copies, merely, of the original proofs of loss, and notice of the amount at which the loss has been adjusted.

The loss, of course, is settled usually by the company that issues the original policy. It is to that company that the assured looks for his indemnity. He makes his proof to the company whose policy he holds, and that company, if re-insured, after adjusting the loss, submits copies of the proof of loss to the company so re-insuring it.

How far that custom has ripened into a binding usage, I am not prepared to state, nor do I deem it necessary to decide it now, because I think this case can be disposed of upon well known principles of law governing the rights and obligations of insurance companies.

It is a well settled principle, that where a party insured presents notice of his loss, together with proof, or what purports to be proof, and evidence of the extent of the loss which he has sustained, and no objections are taken thereto, objections are held to be waived, and it seems to me that the clear and obvious duty of the officers of the Republic Insurance Company, if they had any doubt of the authenticity of the copies which were presented, was to demand that the original proofs be submitted to them. If they had any doubt, or had any suspicion that a fraudulent claim was being attempted to be forced upon them by means of assumed copies of original proofs, they could have demanded the originals. They could have investigated the genuineness of the signatures; they could have determined whether such losses had been adjusted in good faith, by an examination of genuine proofs of loss submitted by the policy holders.

They make no such claim. They do not question the extent of the obligations of the Lorillard Insurance Company under their policies, but simply stand upon their denial of their liability until the Lorillard has discharged its liability to its policy holders.

This case comes within that large class of cases of which the books are full, in relation to which the principle has been established that an insurance company, if it has objections to a claim, or to proof of a claim, must make them known to the policy holder in such time that they can be remedied, or else the objections will be considered as waived.

The policies in this case all contain the clause which I have already quoted, and upon which the third objection is based, "Loss, if any, payable at the same time and pro rata with the insured." The objection under consideration is of minor importance, because the evidence shows that the Lorillard Company, or the receiver of the Lorillard Company, has already paid eighty-five per cent. of the adjusted losses against it, and has still assets in his hands.

But I do not think that the construction put upon this clause by the counsel for the assignee in this case is a proper one. It seems to me that the true meaning of this clause in the policies is this, that the re-insuring company stipulates that it shall not pay any more loss than the original company is liable for. "Loss, if any, payable at the same time and pro rata with the insured,"—that is, the re-insuring company is to have the benefit of any deductions by reason of other insurance or salvage, that the original company would have, and also to have the benefit of any time for delay or examination which the original company might claim, so that the liability of the re-insuring company shall be co-extensive only with the liability and not with the ability, so to speak, of the original company.

The original company may have re-insured for the purpose for which re-insurance is usually if not universally accomplished—for the purpose of supplying itself with a fund with which to meet its obligations. It may have placed its own funds entirely out of its control; it may have divided its capital among its stockholders, and may depend solely upon the re-insurance to make good its liability to policy holders.

The intention of this clause was to make the re-insuring company's liability co-extensive, and only co-extensive with the liability of the original insurance company. For instance, suppose an insurance company in the city of Chicago wishes to go out of business. It has money enough to re-insure all its risks, and does so, and goes out of the insurance business. That company does not keep a fund on hand any longer for the purpose of meeting losses as they fall in, but depends upon its re-insurance.

Now, it is to my mind absurd to say, if a loss occurs on one of those re-insured policies, that the company primarily liable is to have its claim against the re-insuring company limited by its ability to meet its obligations to its original policy holders. The very object of making the policy of re-insurance was to place the company in funds with which to make its policy holders whole, and that is defeated if the construction which is insisted upon by the assignee in this case is the true one.

The fair, liberal construction, it seems to me, of this clause, and the salutary one, is to assume that the true intent of it, the judicial meaning, is that the liability of the re-insuring company is to be no greater than that of the original company; that they are not to be compelled to pay any faster than the original company would be compelled to pay, that they are to have the benefit of any defense which the original company would have had. Any deduction—any equity—which the original company would have had against the original insured, is to inure to the benefit of the re-insuring company. I am of opinion that the Republic is liable on these policies to the extent of the adjusted losses, even if the Lorillard had not paid a cent.

Entertaining these views, I cannot do otherwise than hold that the claim of the receiver, proven in this case, must stand, and that the objections of the assignee must be overruled.

NOTE. The contract of re-insurance being one of indemnity, the re-insured should recover only for loss actually sustained. Eagle Ins. Co. v. Lafayette Ins. Co. 9 Ind. 443; Mutual Safety Ins. Co. v. Hone, 2 Comst. [2 N. Y.] 235. This loss includes costs incurred in defending suits, if the re-insured does not, on notice, appear and attend to such suit. Hastie v. DePeyster, 3 Caines, 190; New York Cent. Ins. Co. v. National Protection Ins. Co., 20 Barb. 468; New York State Ins. Co. v. Protection Ins. Co. [Case No. 10,216].

It is held that in case of loss the re-insurer is bound to pay the amount for which he insured, without reference to the fact that the original insurer may be unable to pay in full, or may have obtained an abatement from the insured. 1 Emerig. c. 8, § 14. The insurer may proceed at once against the re-insurer, or may await judgment by the insured. He need not pay the judgment first, but may recover all that the re-insurer has contracted to pay. Mutual Safety Ins. Co. v. Hone [supra]; 1 Sandf. Ch. 137; Herckenrath v. American Mut. Ins. Co., 3 Barb. Ch. 63. Chancellor Walworth, in this last case, thoroughly reviews the authorities.

The insurer must prove up the character and extent of his loss. Yonkers & N. Y. Fire Ins. Co. v. Hoffman Fire Ins. Co., 6 Rob. (N. Y.) 316; Hastie v. DePeyster, 3 Caines, 190. The insurer is bound to fulfill all the conditions of his re-insurance policy. New York Cent. Ins. Co. v. National Protection Ins. Co., 20 Barb. 468. Any benefit from salvage accrues to the re-insurer. Delaware Ins. Co. v. Quaker City Ins. Co., 3 Grant (Pa.) 71. As to priority of contract between the respective parties, consult, Carrington v. Commercial Fire & Marine Ins. Co., 1 Bosw. 152; Hastie v. DePeyster, 3 Caines, 190; Herckenrath v. American Mut. Ins. Co., 3 Barb. Ch. 63.

Case No. 10,365.

NORWOOD v. SUTTON.

[1 Cranch, C. C. 327.] [3]

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

CONTINUANCE—SUPPLEMENTAL AFFIDAVITS—PLEA IN ABATEMENT.

1. Supplemental affidavits will not be received upon a motion for the continuance of a cause.

2. To support a plea in abatement, for not naming all the joint promisors, it is not necessary for the defendant to prove that the plaintiff knew he was dealing with a copartnership.

Assumpsit for freight of goods. Plea in abatement, that the promise, if any, was made by the defendant jointly with one John Mandeville.

Mr. Jones, for defendant, moved for a continuance of the cause on affidavit.

THE COURT thought the affidavit not sufficient, and refused to receive a supplemental affidavit, on the ground that it is a practice leading to perjury. THE COURT referred to the case of Dawson v. Boyd [Case No. 3,667], at Washington, on a habeas corpus from Alexandria.

Mr. Jones prayed the court to instruct the jury, that it is not necessary for the defendant to prove that the plaintiff knew of the partnership. Rice v. Shute, 5 Burrows, 2611, and Abbott v. Smith, 2 W. Bl. 947; Wats. Partn. 240.

Mr. Youngs, contra. The plaintiff is not bound to know the partners, but if the plaintiff knew he was dealing with a company, then the defendant may plead partnership. The defendant must show that the plaintiff knew that the defendant was in partnership with somebody. Wats. Partn. 235.

THE COURT (nem. con.) instructed the jury, that upon this issue on a plea in abatement, it is not necessary for the defendant to prove that the plaintiff knew of a partnership between the defendant and any other person, nor that Mandeville was his partner at the time of the contract, that fact not being in issue.

NORWOOD (THOMPSON v.). See Case No. 13,970.

NOSTRA SENORA DEL CAMINO, The (SALDERONDO v.). See Case No. 12,247.

NOTNAGLE (GRAIGHLE v.). See Case No. 5,679.

Case No. 10,366.

NOTT v. The SABINE et al.

[2 Woods, 211; [1] 1 La. Law J. 175.]

Circuit Court, D. Louisiana. April Term, 1876. [2]

PRACTICE IN ADMIRALTY—JOINDER OF PROCEEDINGS IN REM AND IN PERSONAM.

The 19th admiralty rule was intended to prohibit a joinder of proceedings in rem and in personam in the same libel for the salvage of the same goods.

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

[This was a libel for salvage by Edgar Nott against the steamboat Sabine and cargo. Certain exceptions were filed by the consignees, which were sustained by the district court, and the libel was dismissed. Case unreported. From that decree, libellants appeal.]

C. B. Singleton and R. H. Browne, for libellants.

John A. Campbell and M. M. Cohen, for claimants.

BRADLEY, Circuit Justice. This case is not entirely like the cases which have been referred to on the argument. Those were cases in which property and its owners were proceeded against in the same libel, the former in rem, the latter in personam. And the weight of authority, as fairly reviewed by Judge Conkling, in his treatise on Admiralty (pages 25-42, 2d Ed.), is, that such a libel cannot be sustained. The 19th admiralty rule, which provides, that "in all suits for salvage the suit may be in rem against the property saved or the proceeds thereof, or in personam against the party at whose request and for whose benefit the salvage service has been performed," evidently recognizes this principle. In view of the remarks and discussions which had taken place on the subject in admiralty courts, before the rule was adopted, it seems almost certain that it was intended to prohibit a joinder of proceedings in rem and in personam in the same libel for the salvage of the same goods. This was more than hinted at in the case of Bondies v. Sherwood, 22 How. [63 U. S.] 216. The case of Newell v. Norton, 3 Wall. [70 U. S.] 266, has been referred to as adverse to this view. But I do not so consider it. That was a case of collision, in which the rule is, that the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone in personam. The libel had been originally against the ship and master, and pilot and owners. The court below had stricken out the pilot and owners, and had sustained the libel as against the ship and master, although the latter was a part owner. This was sustained by the supreme court as correct. The court say: "The objection, that the libel in rem against a vessel, and in personam against the owner (the word 'owner' being an evident misprint for 'master') cannot be joined, was properly overruled, as it was in conformity with the 15th rule in admiralty, as established in this court." But the case before this court is different from the ordinary case referred to in the cases and in the rule. This is not a libel in rem against property, and in personam against the owner of the same property. It is in rem against the vessel and

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

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

[2] [Affirmed in 101 U. S. 384.]

in personam against the consignees of the cargo. The joinder of actions against both vessel and cargo in rem, or against the owners of the vessel and the owners of the cargo in personam, in a suit for the same salvage service, is not contended to be irregular; but it is claimed, that if the actions be joined, they must be pursued in the same manner; either both in rem or both in personam. I am inclined to think that this is the correct view. Where a vessel and cargo have been saved, the latter belonging, perhaps, to a multitude of owners, the more convenient way would be, to libel the ship and cargo for the salvage, and let the parties interested intervene for their respective interests. No doubt the owners of the ship, by virtue of their special property in the cargo, could claim the whole; and, then, they could deliver out the cargo to its owners upon the ordinary general average bond. But to sue the ship in rem, and the owners of the cargo in personam, or vice versa, would be productive of confusion, and would involve all the inconveniences and embarrassments which were sought to be obviated in the ordinary case, by the adoption of the 19th admiralty rule. The decree of the district court is affirmed with costs, and the cause will be heard upon the libel as against the vessel alone.

[On appeal to the supreme court, the decree of this court was affirmed. 101 U. S. 384.]

NOTT (UNITED STATES v.). See Case No. 15,900.

NOUGUES (TRAFTON v.). See Case No. 14,134.

Case No. 10,367.

NOURSE et al. v. ALLEN.

[4 Blatchf. 376;[1] 3 Fish. Pat. Cas. 63.]

Circuit Court, S. D. New York. Oct. 13, 1859.

PATENTS — PLEADING IN EQUITY — BILL FOR INFRINGEMENT FOUNDED UPON FOUR PATENTS—MULTIFARIOUSNESS—AVERMENT OF TITLE.

1. A bill in equity, founded upon four patents for improvements in reaping machines, they being improvements intended to be used in all such machines, and not limited to any particular machine, and not being necessarily connected together in use, is not bad for multifariousness, on demurrer, where it appears that the machine sued contains all the improvements.

[Cited in Gillespie v. Cummings, Case No. 5,434; Horman Patent Manuf'g Co. v. Brooklyn City R. Co., Id. 6,703; Gamewell Fire-Alarm Tel. Co. v. City of Chillicothe, 7 Fed. 354; Hayes v. Dayton, 8 Fed. 704; Nellis v. Pennock Manuf'g Co., 13 Fed. 452; Pope Manuf'g Co. v. Marqua, 15 Fed. 400; Deering v. Winona Harvester Works, 24 Fed. 90; Griffith v. Segar, 29 Fed. 707.]

2. A deduction of title to the patents being set forth in the bill, with an averment that the title to them was vested in the plaintiffs, *held*, that the latter averment would have been sufficient, and that the deduction of title was unnecessary.

In equity. [This was a demurrer to a bill of complaint filed [by Joel Nourse and others] to restrain the defendant [Richard L. Allen] from infringing four separate patents for "improvements in reaping machines."] [2]

George Gifford, for plaintiffs.

J. C. Bancroft Davis, for defendant.

NELSON, Circuit Justice. I. The demurrer to this bill is grounded mainly upon the multifariousness of the matters set up in the bill, namely, four distinct and several patents for as many improvements entering into the construction of what is claimed to be a perfect reaper. These improvements, as patented, are not limited to the improvement of any particular machine, but are intended to be used in any or all of this class. Nor are the improvements, as they enter into the construction of the machine, necessarily connected together, in practical operation and use. Any one or more of them may be omitted. Hence, it is argued, that the bill sets up distinct and independent matters, wholly unconnected, by reason whereof the defendant is compelled, in his answer, to unite different and distinct matters, depending upon different and distinct proofs, thus complicating and embarrassing the defence. It is, undoubtedly, true, that the four different patents set forth in the bill, upon which the defendant is sought to be enjoined, and for the alleged infringements of which damages are claimed, call for separate and distinct defences; and the objection to the bill on the ground of multifariousness would, in a general sense, seem to be well founded, within the settled rules of equity pleading. But, on looking at the case made in the bill, I am inclined to think the objection not maintainable. The bill charges, that the machine made and used by the defendant, and sought to be enjoined, contains all the improvements embraced in the several patents, and, hence, the act of making, vending or using a single machine constitutes an infringement of all of them. The several improvements being capable of a connected use, and being thus connected by the defendant, the convenience of both parties, as well as a saving of expense in the litigation, would seem to be consulted in embracing all the patents in one suit.

A court of chancery allows distinct and separate causes of complaint between the same parties to be joined in one suit, in order to avoid multiplicity of actions, unless it is apparent that the defence will be seriously embarrassed by confounding different and unconnected issues and proofs in the litigation. In this case, although the de-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 4 Blatchf. 376, and the statement is from 3 Fish. Pat. Cas. 63.]

[2] [From 3 Fish. Pat. Cas. 63.]

fences, as respects the several improvements, may be different and unconnected, yet, according to the allegations in the bill, so far as the question of making, vending or using the machine is concerned, the infringement of all the patents is involved, and, to this extent, they are connected with each other. I agree that, if one of these improvements had been charged to have been used upon one machine, and another upon a different machine, there would have been much force in the objections taken to the bill. But, in the aspect in which the case is thus presented, I think they are not well founded. It has not been unusual, in actions at law, in cases of alleged infringements of patents, to count upon two or more patented improvements upon the same machine.

II. It is also objected, that the bill does not set forth a complete title in the plaintiffs to the several patents. The pleader has set out a deduction of the title by numerous assignments, which make the question of title exceedingly complicated; but, as far as I have been able to look into it, I have discovered no defect. I think this deduction of title unnecessary, and that a simple averment that the title to the patents was vested in the plaintiffs would have been sufficient. Such an averment is found in this bill, in addition to the special title set forth.

The demurrer is overruled, and the defendant is directed to answer.

NOURSE (GREER v.). See Case No. 5,793.

NOURSE (UNITED STATES v.). See Case No. 15,901.

Case No. 10,368.

The NOVELTY.

[9 Ben. 195.] [1]

District Court, E. D. New York. July, 1877.

CUSTODY OF VESSEL—NECESSARY EXPENSES.

The expense of dockage of a vessel, which was seized by the marshal while she was on a marine railway from which she could not be removed without danger of sinking, is not a disbursement which is limited by the provision of section 829, Rev. St. allowing the marshal $2.50 a day for the necessary expenses of keeping boats or vessels; but a reasonable bill for such dockage may be paid by him and is chargeable upon the property saved thereby.

In admiralty.

D. & T. McMahon, for libellant.

C. A. Hand, for claimant.

Owen & Gray, for the owner of the railway.

BENEDICT, District Judge. On the 27th day of February, 1877, the marshal received process in rem issued in this action, directing him to seize and safely keep the steamboat Novelty. That vessel was, at the time the process was issued, lying upon a marine railway, and she was there duly seized by the marshal under the process issued to him. It appears that the steamboat had been sunk off Staten Island, and had been raised by the Coast Wrecking Company and placed by them upon the dock, where she was seized by the marshal in this action. The vessel was in bad condition, and if removed from the dock without repairs would have sunk again.

The marshal received no other instructions than that contained in his process, and there was nothing for him to do but to keep the vessel upon the dock where he found her, for he had no funds in his hands to expend in repairs nor any authority to make repairs, and he could not remove the boat from the dock without danger of her destruction. Under such circumstances I see no other way but for him to pay whatever is proved to be a reasonable and proper sum for the use of the dock while the boat was in his custody. Section 829, Rev. St., has no relation to expenses of preserving a ship such as are here in question. Expenses like these may be allowed to be made when necessary, and are chargeable upon the property saved.

It has been shown that the bill presented is fair, and no witness is called to deny its correctness. I am of the opinion, therefore, that if paid by the marshal it may be taxed by him as a necessary item of the expense of preserving the vessel while in his custody. If the charge for raising the vessel is included in the bill, that I think should not be paid by the marshal, because the boat was not raised from the dock while in the marshal's custody.

It is to be regretted that the parties interested in this boat permitted her to remain upon the dock until a bill for dockage equal to her value had been incurred, when timely application for her sale as perishable would have saved the greater part of the expense. For this unfortunate result the parties who lose thereby are alone responsible, because although aware of the position of the boat they made no effort to save the expense. There may, however, be no hardship, as it would seem from the result that this vessel when proceeded against was worth little or nothing above the necessary expenses attendant upon her removal from the place where she lay. If this be the case, there may be reason for the course adopted, as if successful it would have resulted in giving to these libellants the benefit of the use of the marine railway without compensation, and if unsuccessful there would be nothing lost.

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

Case No. 10,369.

The NOVELTY.

The F. MERWIN.

[10 Ben. 349.] [1]

District Court, E. D. New York. March, 1879.

COLLISION IN NEW YORK BAY — STEAMER AND SCHOONER—CHANGE OF COURSE IN EXTREMIS —IMMATERIAL ALLEGATIONS.

1. A schooner and a steamboat came in collision in New York Bay in the day time. The wind was strong, about W. by S. The schooner was coming up the bay, heading up for the Narrows, and the steamboat was going down the bay to sea. The libel of the schooner alleged that while she was coming up the bay, heading about N., she discovered the steamboat about a quarter to half a mile off, she having been, till then, hidden from view by other vessels which were also coming up the bay; that the steamer, when seen, was a point or two on the schooner's starboard bow, heading about W. N. W., and backing her engines; that soon after the steamboat started ahead with a starboard wheel, on a course attempting to cross the schooner's bow, but so that a collision was inevitable; and that the schooner luffed to prevent the vessels from coming together head and head and was struck by the steamboat on her starboard side. The steamboat alleged that she, when going down the bay, and heading about S. by E., met several schooners coming up; that she was on the west side of the channel along by the west bank, and that while the schooner was on her port bow, apparently about to pass on the port side of the steamboat as a schooner ahead of her had done, the schooner without cause luffed across her bows and thus caused the collision. *Held*, that the turning points of the case were whether the schooner, at the time she luffed, had the steamboat on her port bow or on her starboard bow, and whether the luffing of the schooner contributed to produce the collision.

2. On the evidence, the schooner had the steamboat on her starboard bow.

3. The allegations of the schooner, as to the steamboat's heading to W. N. W. and backing, and going ahead again and coming into the schooner on a starboard wheel, were not proved, but were immaterial allegations inasmuch as it was not claimed that the schooner did anything wrong before she luffed.

4. On the evidence, it appeared that the course of the steamboat was on a line eastward of that of the schooner; and that her pilot, in endeavoring to get to the westward of the schooner, crossed her bows and undertook this manoeuvre when there was not time and distance for him to perform it.

5. On the evidence, the luffing of the schooner was a movement in extremis not contributing to produce the collision, and the steamboat was solely liable for the collision.

In admiralty.

R. H. Huntley, for the Merwin.

W. R. Darling, for the Novelty.

CHOATE, District Judge. These are cross libels, brought to recover damages caused by a collision between the steamboat Novelty and the schooner F. Merwin in the lower bay of New York, shortly before noon on the 28th of December, 1876. The Merwin was a three-masted schooner of about 340 tons, and was bound from Georgetown, D. C., to New York, with a load of coal. Her length was about 170 feet over all. The Novelty was a side-wheel steamboat, and was bound from Clifton Landing, Staten Island, to St. Johns, Florida. The length of the steamer was 216 feet. She was going out light, having on board about 100 tons of coal. The place of the collision was between Craven Shoal and the west bank. The wind was about W. by S. a strong breeze. The day was remarkably clear and pleasant.

The case, as stated in the libel of the schooner, is that she was heading north up for the Narrows and going about nine knots an hour; that while in this position, she discovered the Novelty off from one to two points on her starboard bow and at a distance of from a quarter to half of a mile, heading about W. N. W. and backing her engines; that other vessels coming up the bay had been between the schooner and the steamboat, covering the steamboat so that she could not be seen from the schooner, and when the obstructions passed away the steamboat was discovered in the position above stated and backing her engines; that soon afterwards the schooner noticed that the steamboat had stopped backing her engines and was moving them forward and making some progress through the water and making such a course as would take her directly across the bows of the schooner, and that if both vessels continued their courses a collision was inevitable; that the steamboat did not change her course, and thereupon the schooner, when at a distance of about 200 yards from said steamboat, put her helm hard down and luffed up to a westerly course; that the steamboat sheered further to the westward and southward and following the curve made by the schooner, though at the northward of it, and at this time being under full headway, she ran into the schooner, striking her on the starboard side just forward of the main chains, breaking the rail and seven of her bulwark stanchions, etc.; that the collision was caused by the mismanagement of the steamboat in starting ahead and keeping her course directly across the bow of the schooner and so that she would have been run over by the schooner, had not the latter changed her course, and in keeping under full headway and without porting her helm as she should have done, but, on the contrary, sheering on to the course of the schooner, and so continuing until the collision occurred, and in not having a competent lookout properly stationed.

The case of the steamboat, as stated in her libel, is that she took her course outward, going at about seven miles per hour, keeping close in to Fort Wadsworth, and, after passing Fort Tompkins on Staten Island, hauled down to a course S. one-half W., hauling close in towards the west bank and following

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

the course of the steamer Dictator, which was about 600 yards ahead and bound on the same voyage; that ample room was thus left for vessels to pass up or down on the port side of the steamboat; that at this time the Merwin, having the wind on her port side and about five points abaft the beam, and having her lower sails and one topsail set and going with the speed of about 12 miles an hour, was approaching on the port bow of the Novelty, being then about 600 yards ahead and 200 yards to leeward of her, and steering about N. by E. or half E. as if she was intending to pass the Novelty on her port side, as two other schooners were then also doing, and, in order to give her more room, the Novelty, putting her own wheel hard to port, hauled still further in to the west shore, heading inside of the upper buoy on the west bank below Fort Tompkins, and giving the schooner thereby the amplest room to pass the steamer on her port side; that suddenly, when about 100 yards ahead of the steamer, and without any apparent reason, the schooner put her helm hard to starboard, swinging to a course across the bows of the steamer about N. N. W.; thereupon immediately the steamer stopped and backed with all her force, but notwithstanding this the schooner struck the steamer a violent glancing blow on the port bow, knocking her stem and bow out; that the collision was caused wholly by the fault of the schooner, in suddenly and without reason changing her course so as to cross the bows of the steamer and when it was too late by any act on the part of the steamer to prevent the collision.

The evidence shows that there were four schooners standing up the bay for the Narrows at and just before the collision. They were nearly in a line. The Eva Bell was the foremost; she was about a quarter of a mile ahead of the Merwin. Then followed the Merwin. Astern of the Merwin, about a quarter of a mile, was the Georgia, and from half to three-quarters of a mile astern of the Georgia was the Kirk. The Dictator and the Novelty met this line of schooners as they went down the bay. The general position of this line of schooners was along the west bank and they were steering about north. I think that the testimony leaves no doubt whatever, that the Merwin was steering very nearly north; that she shaped her course for a point just clear of the bluff on the Staten Island side of the Narrows, and that she was running very near the west bank. This is not only shown by the testimony of those on board of her, but also by the evidence of those on the Georgia and the Kirk immediately astern of her and running for the same point. These parties had opportunity as well as motive in noticing the course she was making. It was also her proper course and there was no reason why she should deviate from it. She was outsailing the other schooners, had passed the Kirk and the Georgia, and was gaining on the Eva Bell. Her speed upon the proof was nine miles an hour. She had all her lower sails set.

Up to the time that the Merwin luffed, which is charged against her as a fault and which manoeuvre she admits and attempts to justify, it is clear that she was not at fault, and that the steamer was bound to keep out of her way. The pleadings and the proofs present but two questions: (1) What were the relative positions and courses of the schooner and the steamer when the schooner luffed? and (2) was the luffing of the schooner a fault which caused or contributed to the collision, or was it done when the collision had already become inevitable, and under circumstances justifying the movement?

It is the claim of the schooner that when she luffed, the steamer was approaching her upon her starboard bow, upon a course crossing the bows of the schooner, and so as to make a collision inevitable if both vessels kept on their respective courses, and that to avoid cutting the steamer down, as she must have done if she kept on her course, and to lighten the blow, she put her wheel hard down and came up in the wind; that this was the only movement she could make with any chance of safety to herself and the steamer; that if she had attempted to keep off, instead of luffing, she could not have kept off in time, but would inevitably have run over the steamer.

It is the claim of the steamer that when the schooner luffed there was not the slightest danger of a collision; that the vessels were approaching on courses very nearly parallel, the steamer being on the schooner's port bow and well to windward of the course of the schooner; that, to make all sure, the steamer ported, taking her still further away from the schooner's course; that then, suddenly and without reason, the schooner luffed across the steamer's bows when it was too late to do any thing to prevent the collision which this luffing and nothing else made inevitable. It is evident that it is a material and necessary part of the steamer's case that when the schooner luffed the steamer was not on her starboard bow.

(The court, having discussed at length the evidence of the witnesses from the several vessels on this point, then proceeded as follows:)

Upon the whole testimony, I think it is clearly made out that the vessels were in the relative positions testified to by those on the Merwin at the time the master of the Merwin ordered the wheel hard down; that they were brought into this position wholly by the fault of the pilot of the Novelty in attempting to go to windward of the Merwin when he was unable to execute the manoeuvre. It seems probable that he miscalculated the speed of the Merwin, and although he put his wheel hard-a-port, it was

too late for him to cross her bows in safety.

Great stress is laid by the counsel for the steamer on what is claimed to be the fact, that the steamer was not at any time heading north of west up by the mouth of the Narrows and backing, nor coming round upon the course of the Merwin on a starboard helm, nor at any time covered by the Eva Bell from the sight of those on board the Merwin:—and that the Eva Bell did not keep off to avoid the Novelty, all of which are alleged in the libel of the schooner and testified to by Capt. Pearce, as what appeared to him to be facts as to the movements and course of the Novelty. I think it is established by the testimony of the engineer of the Novelty and by the other testimony, that she did not reverse her engines till the four bells were rung just before the collision, and also by the preponderance of the evidence that she was not heading north of west after passing the Eva Bell and before the collision, and that she approached the Merwin on a port and not on a starboard wheel after passing the Eva Bell; and on these points, therefore, Capt. Pearce must be held to be mistaken. These circumstances are, however, not in themselves important, except as they may affect the credibility or accuracy of observation of Capt. Pearce. It is of no consequence how the Novelty got into the dangerous position and proximity in respect to the Merwin which she was in when Capt. Pearce gave the order to luff. The schooner having steadily kept on her course till that moment, it was the fault of the Novelty that she got there in any way by her own movements. And enough of the averments of the libel of the schooner are clearly proved to sustain her case and throw the responsibility of that position of the two vessels on the Novelty at that point of time. Whether Capt. Pearce's mistakes, noticed above, are owing to misrecollection of the incidents preceding that position of danger in which he found himself, or to carelessness of observation, is immaterial. Up to that time he had committed no fault, as is conceded. On the principal fact testified to by him of the position and general course of the steamer when he ordered his wheel hard down, he is fully sustained by other testimony of the strongest character, and these mistakes, if they are wholly such, cannot, in my opinion, be taken to impair his credibility or to call in question the reality of what he testifies was the state of facts when he gave this order to his wheelsman. Indeed, there cannot be the slightest doubt that it was a position of real danger that called forth the startling cry of Capt. Pearce, "What is that steamer doing?" etc., "Hard down your wheel!" The tone in which it was uttered startled the two men and the boy who were below and brought them instantly on deck, one of them almost naked and without waiting to put on his clothes. And yet, if the story of Hoffman, the pilot of the steamer, is true, there was not the slightest appearance of danger from the deck of the Merwin. The Novelty was passing her safely on the port side and keeping still further off. Hoffman's story does not in any way account for the alarm on the schooner, or for her luffing. His story is, on this ground, therefore, improbable in itself as well as unsustained by the testimony of witnesses.

In respect to the course of the Novelty from the time she passed Fort Tompkins till the moment the Merwin luffed, since we must reject as unworthy of credit the testimony of her pilot, and her lookout, if she had one, is not called, we have not sufficiently definite proof to determine whether the Eva Bell may not have at one time covered her from the sight of the Merwin; that she made a course considerably to the eastward of that of the Merwin is certain; that she was so far to the eastward that she was obliged to port in order to pass the Eva Bell, is, I think, also proved. Capt. Pearce may well have mistaken the change of course made by the Eva Bell to the eastward when about opposite the hospital on the west bank, for a movement of keeping off to pass the Novelty. It may be that he did not notice the Novelty till she passed the Eva Bell and then seeing her supposed she was uncovered by the Eva Bell, but this is a point of no importance.

The only remaining question is whether the luffing of the schooner contributed to bring about the collision. Some of the witnesses from the other vessels think that if she had kept her course she would have cleared the steamer. It was the judgment of her master, formed instantly, it is true, and without time for deliberation, that this was the only movement that afforded any chance of avoiding or easing off the blow that seemed inevitable; that if he kept his course the two vessels would come together head and head; if he ported and endeavored to keep off, with his vessel loaded as she was, and with the wind and her sails as they were, he could not keep her off quickly enough to clear the steamer, but would have cut her down and probably sunk both vessels. No doubt a sailing vessel which changes her course when meeting a steamer must justify her change of course, but where the change is made in a position of extreme peril, brought about by the action of the steamer herself, some weight is to be given to the judgment, formed on the instant, of those in command of the sailing vessel. Much depends, of course, on the evidence as to the extremity of the peril. It is a question of distances, relative courses and speed, and the probable effect of keeping on and of possible changes of course. Upon the whole, I think the schooner has made out a case on this point upon the testimony, and that the position of the vessels was such as justified her in luffing in order to prevent the great damage which the

movements of the steamer then apparently made inevitable; that her luffing did not cause nor contribute to bring about a collision, but prevented greater loss and damage than would otherwise have resulted from the fault of the steamer.

The libel of the Newark Transportation Co. against the Merwin dismissed with costs. Decree for libellants against the Novelty, with costs, and a reference to compute the damages.

[NOTE. The libelants in the case against the Merwin appealed from the clerk's taxation of costs. The court ordered the costs to be re-taxed. Case No, 4,893.]

Case No. 10,370.

In re NOYES.

[2 Lowell, 352;[1] 11 N. B. R. 111.]

District Court, D. Massachusetts. Nov., 1874.

BANKRUPT—EXAMINATION.

1. A bankrupt, under examination by a creditor, is entitled to make any explanation or additional statements which may be necessary to complete and make clear any matters concerning which he has been examined; and, to this end, may be questioned by his counsel. He is not bound to pay the fees of the register for taking this part of the examination.

2. The cases of Scofield v. Moorehead [Case No. 12,510] and In re Mealy [Id. 9,378] remarked on.

3. The question whether an examination is so far completed as to be admissible in evidence is not one which can properly be certified to the court for decision by the register taking the examination.

A creditor procured an order for the examination of the bankrupt [G. N. Noyes], and proceeded therewith before the register. In the course of his direct examination questions were asked about his books, and he testified that they were kept by his son, who could explain them. He agreed to produce certain books in addition to those already before the register, and to procure the attendance of his son. After an adjournment, the bankrupt attended with the books and with his son. The creditor, nor caring to examine further, the bankrupt desired to complete his answers to certain questions already put. Both parties refused to pay the fees for such additional examination, and the register certified the following questions: 1. Who, if any one, should pay, secure, or become responsible for the fees of the register, for the further examination of the bankrupt? 2. Has the creditor the right to use the examination, as it is, against the bankrupt?

G. W. Morse, for creditor, cited Scofield v. Moorehead [Case No. 12,510]; In re Mealy [Id. 9,378].

T. H. Talbot, for bankrupt.

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

LOWELL, District Judge. A bankrupt under examination has the right to be cross-examined, or further examined, in his own behalf, after the creditor or assignee is done with him, so far as may be necessary to explain or qualify any matters brought out on the direct examination, which may seem to bear unfavorably upon his conduct or dealings, or which are obscure. The statute, at section 4 [14 Stat. 519], provides that the fees of the registers shall be paid by the parties for whom the services are rendered. From this it has been ruled, by two learned judges, in the cases cited at the bar, that the bankrupt must pay for that part of his examination above referred to. But this conclusion seems to me unwarranted. In the sense of the statute, the creditor is the person for whom these services are rendered. It is he who procures the examination; and it is a part of it, essential to justice and fair dealing, that the party examined should not be left under unfounded imputations, arising out of an ignorant or a too subtile course of interrogatories. The same section which authorizes this proceeding gives a like power over every person within the jurisdiction; and can it be maintained for a moment that any person summoned to disclose his dealings with the bankrupt is to pay for the privilege? A bankrupt is presumed to have surrendered every thing, until the contrary appears; and I cannot assent to the proposition, that he is to pay out of his current earnings for the satisfaction of clearing up and making perfect his examination.

The danger that has been anticipated of a frivolous or useless prolongation of the examination, if it is to be conducted at the expense of the creditor or assignee, appears to me wholly imaginary. The whole proceeding, including an ultimate visitation of costs upon any one whose conduct is vexatious, is fully within the power of the court; and, as matter of fact, no case has ever occurred in this district in which complaint has been made on that side of the controversy, though bankrupts have sometimes thought that they were harassed with unprofitable investigations. In one of the cases cited, the late Judge Hall, whose learning was as conspicuous as his conscientious and laborious care to investigate the merits of every case brought before him for judgment, appears to have been influenced by this consideration, which experience has proved to be unfounded.

In the case last referred to, it was said to be according to the chancery practice, that costs of the cross-examination of witnesses were paid by the party conducting the cross-examination. Such is not the practice in the federal courts; and the reasons for it do not apply to the examination of a bankrupt or other person examined under section 26 of the bankrupt act.

The second question, whether the examination, as it stands, can be used against the

bankrupt, is not one properly arising in the course of his examination, and must be answered by the judge before whom the examination may hereafter be offered, if it ever should be offered in its present condition.

[No doubt instructions may be asked as to modes and forms of examination, and as to the admissibility of questions, or anything that affects the proper conduct of the examination; but as to its completeness or its effect, it would not be proper that I should express an opinion, if on such a state of facts I could form one, which is doubtful.] [2]

This opinion is to be certified to the register.

Case No. 10,371.

In re NOYES.

[6 N. B. R. 277.] [1]

District Court, E. D. Michigan. Jan. 2, 1872.

BANKRUPTCY—CLERICAL SERVICES TO ASSIGNEE—ALLOWANCE BY COURT—EXAMINATION AND PROOFS.

1. An assignee is not at liberty to charge the assets of the estate in his hands for professional and clerical services rendered him in the execution of his trust, until the same shall have been first duly allowed by the court.

2. Before incurring expenses for professional services and clerk hire, an assignee must apply to the court for proper authority; if, however, he has incurred and paid such expenses, or demands compensation beyond what he is entitled to by section twenty-eight of the bankrupt law [of 1867 (14 Stat. 530)], he must accompany his final account with a separate and distinct application for an allowance of the charges, and submit to such examination and furnish such proofs as may be required touching the necessity of such disbursements and services.

[Cited in Baldwin v. Wilder, Case No. 806; Re Cook, 17 Fed. 329.]

[In the matter of B. B. Noyes, a bankrupt.]

By HOVEY K. CLARKE, Register:

I, the undersigned register in bankruptcy, do hereby certify that in the course of proceedings in the above bankruptcy, at the fourth general meeting of creditors, the final account of the assignee of said estate was presented, under the provisions of the twenty-eighth section of the bankrupt act, to be audited and passed. On the day appointed the assignee filed satisfactory proofs that he had given the notice to the creditors as required by said section; that he had filed his account, and that he would, on the day specified in his notice, apply for a settlement of his account and for a discharge of his liability as assignee. I further certify, that on the day appointed for the settlement of said account, of the one hundred and eighteen creditors who have proved their claims against said bankrupt, not to exceed six, appeared at all, and none of them, so far as I know, examined said account nor made an inquiry concerning it, nor any objection to its allowance.

Proceeding, therefore, to the examination of the accounts, under the power and duty conferred by the fourth section of the bankrupt act, "to audit and pass the accounts of assignee," I find that the assignee has received the gross sum of fifty-seven thousand five hundred and eighty-one dollars and thirty-seven cents; that he has paid out on dividends to creditors the sum of fifty-one thousand one hundred and eighty-one dollars and twenty-seven cents, and for expenses the sum of three thousand four hundred and ninety dollars and one cent; making the gross sum paid out fifty-four thousand six hundred and seventy-one dollars and twenty-eight cents. Of the balance he claims two thousand six hundred and nineteen dollars and fifty-nine cents, for his commissions and services, leaving the sum of two hundred and ninety dollars and fifty cents for final distribution. The assignee furnishes satisfactory evidence that he has actually paid out the above mentioned sum of three thousand four hundred and ninety dollars and one cent stated as expenses. In this sum is included the sum of five hundred and twenty-six dollars and thirty cents, paid out for clerk hire, and also the sum of six hundred and ninety-seven dollars and eighty-nine cents, as follows:

To R. P. Toms, retainer and services in suits against Hill & Trollope, Dreher, Pate, Sales & Pilgrim, Danz, Whittle, Reichle, Streeter, Faughborn, Hemple, R. Gardner, Hertner, Kellogg, Ladd, Priest & Gray..	$150 00
R. P. Toms, for taxed cost in Hemple, Whittle, Dreher & Pate....	142 42
D. C. Holbrook, counsel fees, in Re C. L. Noyes et al., examining bankrupt et al......................	100 00
A. Russell, in Re Prentiss........	15 00
R. P. Toms, in suits v. Van Riper & Co., Cameron, Bathur, Trombley, St. Amoun & Waterfall..........	50 00
Taxed costs in the above, and against Danz, Faughborn & Donahue....	173 05
Taxed costs against L. Streeter...	37 42
Middaugh & Driggs, argument in district court in opposition to claim of T. J. Noyes..................	30 00
	$697 89

These items for clerk hire, counsel fees and taxed costs, amounting to one thousand two hundred and twenty-four dollars and nineteen cents, are, in my judgment, of a character that their allowance can only be claimed upon a proper showing of their necessity. If they had been considered at a creditors' meeting attended by a sufficient number to insure a fair representation of the creditors' interests, and had been affirmatively approved, or if they had, after such consideration, met with no objection, their allowance might have been justified without any further showing of their character or necessity.

The assignee presents his claim for services, under the general designation of "com-

[2] [From 11 N. B. R. 111.]

[1] [Reprinted by permission.]

missions and services," at two thousand six hundred and nineteen dollars and fifty-nine cents. The commissions are fixed by the statute (section twenty-eight), and amount as computed upon the sum "received and paid out," fifty-four thousand six hundred and seventy-one dollars and twenty-eight cents, to six hundred and ninety-six dollars and seventy-one cents. For the balance, one thousand nine hundred and twenty-one dollars and eighty-seven cents, no specification is given, nor any proof offered, that services entitled to this amount of compensation have been rendered.

The consideration of this account presents questions of very considerable importance, applicable not only to this, but to the settlement of every estate in bankruptcy, such as: First. Under what circumstances and to what extent is an assignee at liberty to charge the assets of the estate in his hands for professional services rendered him, in the execution of his trust? Second. What circumstances will justify the employment by the assignee of clerks, to be compensated out of the fund? And, third. Are the conditions implied above, on which expenses for professional services and clerk hire rest, to be determined by the assignee in the exercise of his judgment, or is it his duty, before incurring the liability, to apply to the court for the proper authority?

I am unable, from any showing before me, or from any facts within my knowledge, to determine that the accounts as presented ought to be allowed; and deeming the subject to be one of sufficient practical importance to be presented to the court for a definitive settlement of the principles by which the practice in such cases is to be guided, I intimated to the assignee my purpose to certify the question of the allowance of his account into court for determination; at the same time inviting him to supplement his account by any statement or deposition of an explanatory nature that he thought desirable. He prefers, however, to reserve them for the hearing which may be accorded to him on this certificate. All of which is respectfully submitted, together with the accounts of the assignee, which are the subjects of consideration.

LONGYEAR, District Judge. In answer to the three questions above certified, the court decides: Section 17 of the act provides that the assignee "shall be allowed and may retain, out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court." Section 28 makes a specific allowance to the assignee, of a certain per centum "on all moneys received and paid out by him" in addition to the allowances authorized by section seventeen. See In re Dean [Case No. 3,699]. It is under these provisions, and these alone, that the right of assignees to charge the estate for disbursements and services must be determined. The allowance provided by section 28 is specific, and being a mere matter of computation, may be charged up by the assignee directly against funds in his hands, so soon as the "amount received and paid out by him" is ascertained; not so, however, with the allowances authorized by section seventeen. These allowances are in the discretion of the court, and can be made only upon a specific application to the court, and a showing that the disbursements and services for which such allowances are asked, were necessary, and are reasonable in amount. This is clearly contemplated by general order 5, defining the powers of registers in bankruptcy, in which it is provided, among other things, that the registers may conduct proceedings where uncontested in relation to ordering payment of rates and taxes, "and salary or wages of persons in the employment of the assignee," and "taking evidence concerning expenses and charges against the bankrupt's estate." Under this order the register may hear and determine such application when uncontested. In re Lane [Id. 8,042]. And it is preferable that such hearing should be had before the register, because, having the proceedings all before him, he is better able to judge of the exigencies upon which the necessity of the disbursements and services and the reasonableness of the amounts charged depend.

It would be difficult, and I think impracticable, to prescribe any general rule defining the circumstances under which, and extent to which, an assignee is at liberty to charge the assets of the estate in his hands for professional and clerical services in the execution of his trust. This must be left to be decided in each individual case according to its peculiar exigencies.

The answer to the first and second questions, therefore, must be that the assignee is not at liberty to charge the assets of the estate in his hands, for professional and clerical services rendered him in the execution of his trust, until the same shall have been first duly allowed by the court.

The answer to the third question is partly anticipated in what has been already said. The assignee may, of course, apply to the court in the first instance, for authority to employ professional or clerical assistance, but in such case the court could do but little more than grant such authority in general terms, leaving the instances in and to which such assistance may be employed, largely to the discretion of the assignee, as emergencies shall arise, making such assistance necessary. Such authority, I think, the assignee already possesses under his general powers, subject however, to the control of the court; such power must be used by him cautiously and in the exercise of a sound discretion, and with the understanding that any abuse of it will be corrected by the court when applied to for authority to charge the estate for such

assistance. When the assignee desires to pay for any such assistance out of funds in his hands, belonging to the estate, before submitting his final account, he should apply to the court for the allowance of the same, or the person rendering the service may himself apply. In either case the assignee would be at liberty to charge the amount allowed to the estate at once, on payment of the same. If no such application is made, or if he has incurred liabilities or made disbursements for such assistance, or otherwise, in regard to which no allowance has been made, or if he makes a claim for services other than the per centum on moneys received and paid out by him allowed by section 28, then the assignee must accompany his final account with a separate and distinct application for an allowance of the same, and submit to such examination and furnish such proofs as may be required touching the necessity of such disbursements and services and the reasonableness of the amounts charged. The matter will then be heard and determined by the register, if uncontested, or by the court, if contested, and as the same shall be thus determined, the assignee will be at liberty to charge the estate in his final account, and not otherwise.

The application should contain a brief statement of the circumstances out of which the necessity for the disbursements, and the professional or clerical assistance, and the assignee's own services, arose, and from which the reasonableness of the amounts claimed therefor may appear, and it should be verified by the assignee. In case the application accompanies the final account, it will, of course, be laid before the creditors at the same time, and if they assent or fail to object to the same, and the items and amounts appear to be just and reasonable, all further inquiry may be dispensed with.

In this case the assignee, laboring, no doubt, under a misapprehension as to his legal rights and duties in this regard, seems to have assumed to judge for himself, not only as to the necessity of the disbursements and services, but also as to the reasonableness of the amounts, and so charged the same directly to the assets of the estate in his hands, without first having obtained an allowance of the same. The register was, therefore, correct in refusing to audit and pass the account under the circumstances stated by him in his certificate, without a proper showing by the assignee of the necessity of the professional and clerical assistance, and for his own services, charged in the account. The assignee has, however, now supplemented his account with a particular statement as to the charges for clerk hire, and as to such portion of the charges for professional services as do not explain themselves, and has also submitted to an oral examination before me in relation thereto, and also in relation to his own services, and the particulars thereof, from all of which it satisfactorily appears that the professsional and clerical services and the services of the assignee, charged in his account, were necessary in the execution of his trust, and that the charges therefor are reasonable in amount; the same must, therefore, be allowed.

It will be observed, that, in this particular case, the assignee has not been required to conform, in all respects, to the general rule above laid down; as, for instance, he has not been required to present a new account, omitting the charges for professional and clerical assistance, and for his own services, other than his per centum, under section 28, and then to present a separate application for their allowance. This must be understood as an exception merely as to this particular case, and as in nowise qualifying the general rule.

NOYES, In re. See Case No. 10,164.

Case No. 10,372.

NOYES et al. v. BRENT.

[5 Cranch, C. C. 551.] [1]

Circuit Court, District of Columbia. March Term, 1839.

GARNISHEE — COMPENSATION FOR CARE OF GOODS —GOOD FAITH.

A garnishee who received the goods of the defendant under a deed of trust, fraudulent in law as to some of the creditors, if he acted bona fide, is entitled to a reasonable compensation for his services in taking care of goods and selling them, whoever may be entitled to the net proceeds.

This was an attachment of the goods of Ezra Wilmarth, Jr., in the hands of Mr. William L. Brent, at the suit of William Noyes & Co. The garnishee held them under a deed to him by the defendant to secure a debt said to be due by the defendant to his father.

Mr. Marbury, for plaintiffs, prayed the court to instruct the jury, in effect, that if they should find the deed to the garnishee to be fraudulent in law, as to these plaintiffs, the garnishee is not entitled to retain out of the funds in his hands a compensation for services rendered by him as trustee under the deed, while acting for the supposed creditor intended to be secured thereby.

THE COURT, however (THRUSTON, Circuit Judge, absent), was of opinion that the garnishee, if he acted bona fide, was entitled to a reasonable compensation for his services in taking care of the goods and selling them, whoever might be entitled to the net proceeds.

[See Case No. 10,373.]

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

Case No. 10,373.

NOYES et al. v. BRENT.

[5 Cranch, C. C. 656.] [1]

Circuit Court, District of Columbia. March Term, 1840.

MORTGAGE OF STOCK IN TRADE—POSSESSION—ACT OF MARYLAND OF 1729.

A mortgage of all of a man's stock in trade and debts due to him, to secure payment of a debt already due and payable by him to the mortgagee on demand, is void, as to creditors, unless the possession accompanied and followed the deed, although acknowledged and recorded according to the Maryland law of 1729, c. 8, § 5.

This was an attachment [by William Noyes and others against William L. Brent] under the act of assembly of Maryland of 1795, c. 56. The garnishee pleaded nulla bona. [See Case No. 10,372.]

William L. Brent was in possession of the stock in trade of a shoe store recently kept by Ezra Wilmarth, Junior, in the city of Washington, having taken possession of the same by virtue of a power of attorney, or other authority, from Ezra Wilmarth, Senior (the father of the defendant), and one Ephraim Foster (the brother-in-law of the defendant), to whom the defendant had, by bill of sale dated February 14th, 1834, conveyed the same in trust, to secure the payment of $2,000, due by the defendant to his father by a promissory note to him, of that date, payable on demand; and of $2,700 due by the defendant to the said Ephraim Foster, by a like promissory note. The goods are described in the deed, in the following manner: "All and singular the goods and chattels, household furniture and articles as particularly described upon the schedule marked A, annexed to and made part of this instrument of writing, being all the goods and chattels, merchandises and articles now in the store of the said Ezra Wilmarth, Junior, on Pennsylvania avenue, in Washington City in the District of Columbia, and every the debts and sums of money due and owing or payable to the said Ezra Wilmarth, and all books of accounts, bonds, bills, &c.; and also all additional stock, goods, and chattels, merchandises, articles and effects as, with the proceeds of the sale, (or by other means,) of said goods and chattels, merchandises, articles, and effects now in said store, may be purchased by said Ezra Wilmarth, Junior, and sent into his store to replace such sales as may have been made by him." And there is a proviso, that if the said Ezra Wilmarth, Junior, should "pay the said several sums of money with interest from this date, or from the date of the said several debts, whenever the said Ezra Wilmarth, Junior, shall be requested so to do;" "then these presents," &c., "shall cease," &c. And "it is further stipulated and agreed, that the said Ezra Wilmarth, Senior, and Ephraim Foster, or their heirs or legal representatives, are hereby authorized and empowered, as trustees of the said Ezra Wilmarth, Junior, to take possession of all the goods," &c., "herein bargained and sold as aforesaid, at any time they may think proper, and to sell and dispose of them at public or private sale, for cash or for credit, in the manner they may think best; and to pay themselves out of the proceeds thereof; and should any balance remain, after the aforesaid debt, with interest, and costs of sales deducted, then to pay the same over to the said Ezra Wilmarth, Junior," &c. The possession did not accompany and immediately follow the deed; but it was duly acknowledged and recorded according to the Maryland act of 1729, c. 8, § 5.

Upon the trial of the issue upon the plea of nulla bona,

R. J. Brent, for garnishee, offered in evidence, the aforesaid deed of trust, with evidence that Ezra Wilmarth, Senior, the father of the defendant, was a clergyman in Rowley, in Massachusetts, whose salary was $240 a year with a parsonage worth only $60 or $80 a year. And that the said Ephraim Foster was the brother-in-law of the defendant, and lived in Boxford in Massachusetts.

Mr. Marbury, for plaintiff, contended that the possession ought to have accompanied the deed, as it was to secure a present debt, then due and payable, having no time to run, with a power to the trustees to take immediate possession and sell, and no right of possession reserved to the mortgagor. That the possession of the mortgagor was inconsistent with the deed. And he prayed the court to instruct the jury, that this deed was fraudulent and void, as to the plaintiff, unless the possession accompanied and followed the deed, although it was acknowledged and recorded according to the Maryland act of 1729, c. 8, § 5.

R. J. Brent, contra. That principle is applicable only to absolute, unconditional deeds, not to mortgages. The deed recognizes the power of the grantor, to continue to sell the goods, and replace them by the purchase of others; this implies a continued right of possession in the defendant. His possession, therefore, was consistent with the deed. The trustees were not bound to take possession immediately. The debts were not payable until demanded, and whenever demanded, the defendant had a right to redeem; and a court of equity would permit him to redeem at any time before sale. Hamilton v. Russell, 1 Cranch [5 U. S.] 309; Edwards v. Harben, 2 Term R. 594; U. S. v. Hooe, 3 Cranch [7 U. S.] 73; Conrad v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 449. It is sufficient if the possession be taken in a reasonable time after the mortgage becomes absolute. The act of Maryland, 1729, c. 8, § 5, rebuts the argument as

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

to secret fraud, and removes the objection as to the want of possession.

Mr. Marbury cited 2 Kent, Comm. 516; Gardner v. Adams, 12 Wend. 297; Look v. Comstock, 15 Wend. 244; Randall v. Cook, 17 Wend. 53.

THE COURT (nem. con.) instructed the jury as prayed by Mr. Marbury.

Verdict for the garnishee, on the plea of nulla bona.

NOYES (BROWN v.). See Case No. 2,023.

NOYES (NEW JERSEY v.). See Case No. 10,164.

NOYES (RICHARDSON v.). See Case No. 11,792.

Case No. 10,374.

NOYES v. WILLARD.

[1 Woods, 187.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1871.

PLEADING IN EQUITY — MORE THAN ONE PLEA BY DEFENDANT—WANT OF JURISDICTION — DEMURRER — CITIZENSHIP OF PARTIES — FRAUDULENT JUDGMENT.

1. Defendant in equity has no right as a matter of course to file more than one plea. But when great inconvenience might otherwise result in a particular case, the court will sometimes in its discretion allow several pleas.

2. Where a defendant in equity has filed several pleas without leave of the court, he will be put to his election as to which he will stand upon.

3. In general when a defendant insists by plea upon matter which is apparent on the face of the bill and might be taken advantage of by demurrer, the plea will not hold.

4. Where want of jurisdiction appears upon the face of the bill, the objection should be taken by demurrer.

5. Where an assignee in bankruptcy recovered a fraudulent judgment against an alleged debtor of the bankrupt, and the judgment debtor filed a bill in the circuit court to enjoin execution upon the judgment, *held*, that the fact that all parties were citizens of the same state did not oust the court of jurisdiction.

[Cited, but not followed, in Winter v. Swinburne, 8 Fed. 51.]

6. The fact that a state statute has provided a remedy at law against a fraudulent judgment does not preclude the judgment debtor from a resort to the equity courts of the United States for relief against it.

[Cited in Benjamin v. Cavaroc, Case No. 1,300.]

7. A sale of a fraudulent judgment at a public vendue of a bankrupt's effects does not confer upon an innocent purchaser the right to enforce payment of the judgment, notwithstanding its fraudulent character.

In equity. This cause was heard upon the sufficiency of defendant's pleas to the bill of complaint.

Henry B. Kelly, for complainant.

A. Micou and B. R. Forman, for defendants.

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

WOODS, Circuit Judge. The bill is filed by Noyes, who alleges himself to be a citizen of Louisiana, against Norton as assignee in bankruptcy of Victor Hebert and against James A. Willard, both of whom are also averred to be citizens of Louisiana. The case made by the bill is in substance this: Among the assets of the bankrupt Hebert which passed to Norton, his assignee in bankruptcy, was a promissory note made by complainant for the payment to the order of Hebert of $1,842, and dated May 22, 1865. Before his bankruptcy, to wit: on the 17th of February, 1866, Hebert, the payee, being then the holder and owner of the note, in consideration of the conveyance by complainant to a trustee of all his property for the benefit of said Hebert and other of his creditors, gave to complainant a full discharge and acquittance of his liability on the note. Notwithstanding this discharge and acquittance, on April 14, 1869, a suit was brought in the name of Norton as assignee, against complainant, in the United States district court for the district of Louisiana, on the note. Upon service of summons in the action complainant called upon Stone, the attorney of Norton, and advised him of the fact of said release and discharge and stated to him that his liability on the note had been extinguished. He was thereupon assured by Stone that the release was satisfactory and that no further proceedings would be taken against complainant in the suit on the note, and that complainant need give himself no further trouble about it. The complainant, trusting in these assurances of Stone, took no steps to defend the suit at law. Nevertheless the suit was fraudulently and clandestinely prosecuted, and on the 4th day of May, 1869, judgment was rendered against complainant in the district court, for the full amount of the note, with interest and costs. The bill alleges that the defense of complainant to the suit at law on the note was a good and sufficient one, and complainant would have made his defense had he not been fraudulently misled by the assurances of Stone, whereby he was prevented from making any defense to the action, either in person or by attorney. The bill further alleges that the defendant Willard claims to have purchased the judgment and to be subrogated to the rights of Norton; had caused a writ of fieri facias to issue on the judgment, by virtue of which, on the 8th day of July, 1871, the United States marshal seized certain property of complainant, and was about to advertise the same for sale to satisfy the judgment. The bill prays for an injunction against Norton and Willard, to restrain them from further proceedings on the writ of fieri facias, and for general relief. If the averments of this bill are true, it is a clear case for the interposition of a court of equity. Accordingly, after notice to the defendants, an injunction was

allowed against them as prayed for in the bill.

The defendant Willard has filed three distinct pleas to the bill of complaint, to the effect: (1) That this court has no jurisdiction of the case, because the complainant and both defendants are citizens of the state of Louisiana. (2) That complainant's remedy, if he has any, is by bill of review or a petition of nullity or other proper proceeding in the district court, or by appeal from said judgment to this court. (3) That the duties of Norton, the assignee of Hebert, have been concluded, and said bankrupt is discharged, and the judgment mentioned in the bill of complainant has been sold by order of the bankrupt commissioner, and the proceeds, with other assets, distributed. Norton also files three pleas identical with the pleas of Willard, except that he adds to the third plea, that since the sale of said judgment he has no interest therein, and has not claimed any and does not claim any, either individually or as assignee. He also appends an answer denying any fraud or deception practiced upon complainant, and any fraudulent combination with his codefendant Willard. These pleas were set down for hearing and the case has been heard upon their sufficiency. The objection to these pleas is obvious, that the defendants have the right, as a matter of course, to file only one plea and not more. The practice of courts of equity does not admit of several pleas except that, where great inconvenience might otherwise result in a particular case, the court will sometimes, in its discretion, allow several pleas. Though a defendant may file a single plea without application to the court, he cannot put in a double plea without such application, and when the court allows double pleas, it is on the condition that the defendants pay the costs. Story, Eq. Pl. § 657.

The defense proper for a plea is such as reduces the cause or some part of it to a single point, and from thence creates a bar to the suit or to the part of it to which the plea applies. 1 Daniell, Ch. Prac. 630; Mitf. Eq. Pl. 219; 1 Smith, Ch. Prac. 217; Goodrich v. Pendleton, 3 Johns. Ch. 384. Each of the pleas filed in this case is intended to be an answer to the whole bill, and as they have been filed without leave, the defendants should be put to their election as to which one they will stand upon. The first and second pleas are also open to the objection that the defenses therein relied on are proper subjects for demurrer and not plea. They do not set up any new fact nor deny any fact alleged in the bill. In general a plea relies upon matters not apparent upon the face of the bill, and in most cases it is a rule that when a defendant insists upon matter by plea which is apparent upon the face of the bill, and might be taken advantage of by demurrer, the plea will not hold. Mitf. Eq. Pl. 219. A demurrer is the proper mode of defense to a bill when any objection is apparent upon the bill itself, either from the matter contained in it or from defects in its frame or in the case made by it. Story, Eq. Pl. § 446. The first and second pleas rely upon matter stated in the bill, as showing a want of jurisdiction in the court. This should therefore have been taken advantage of by demurrer. But waiving objection to the manner in which the defenses of the first and second pleas are set up, we are of opinion that both pleas are bad in substance.

The fact that both complainant and defendants are citizens of Louisiana does not oust this court of jurisdiction of the case. In the suit in which Norton as assignee recovered judgment against the complainant, both parties were citizens of the same state, yet the court had jurisdiction, because the bankrupt law expressly gave it without regard to the citizenship of the parties. The jurisdiction of this court in this case is maintained by virtue of the same law. The last clause of the second section declares that "the circuit court shall have concurrent jurisdiction with the district courts of the district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of said bankrupt transferable to or vested in such assignee." So this court has jurisdiction over this class of cases as it has in admiralty or in controversies arising under the patent or copyright laws without regard to the citizenship of the parties.

The second plea is equally unfortunate. It declares that the remedy of complainant, if he have any, is by bill of review, or a petition of nullity or other proper proceeding in the district court, or by an appeal to this court. A bill of review, or an appeal in an action at law, where a judgment has been recovered upon a promissory note, would be something unheard of in the courts of the United States. As to the proceeding of nullity of judgment, if it is applicable at all to the courts of the United States, it by no means appears from the bill of complaint or pleas that it would avail the complainant, for no vices of form in the judgment are shown, and if the ground of nullity is that the judgment was obtained by fraud, the remedy must be sought in the equity courts of the United States, and not by a proceeding in the nature of an equity proceeding on the law side of the court. But even if this proceeding were open to complainant it would not preclude him from applying to a court of equity to enjoin the execution. Even the allowance of a writ of error would be no obstacle to the granting of an injunction. Parker v. Circuit Court Judges, 12 Wheat. [25 U. S.] 564. In a word, the complainant has not mistaken his reme-

dy. He has adopted the proper course and the only course open to him to relieve himself from the consequences of a gross fraud, if the facts he alleges in his bill be true.

The third plea of the defendants presents no valid defense to the relief sought by the bill. The fact that Norton has administered fully upon the bankrupt's estate, and the bankrupt has been discharged, and the judgment sought to be enjoined has been sold by order of the bankrupt court, and the proceeds distributed with the other assets of the bankrupt's estate, constitutes no reason why this fraudulent judgment should be enforced, and the property of complainant sold to satisfy it. The judgment was not a negotiable instrument, which the purchaser without notice could collect notwithstanding its fraudulent character. Norton is a proper party to the bill, and Willard, the transferee of the judgment, cannot shield himself under the statement that the bankrupt's estate has been fully administered. Neither the plea nor answer of Norton denies that Stone, Norton's attorney and agent, perpetrated the fraud charged in the bill. Willard does not deny the fraud, and the plea set up no facts which constitute the slightest defense to the bill of complaint. The pleas, for the reason stated, are therefore overruled.

NUCLEUS, The (LUDINGTON v.). See Case No. 8,598.

Case No. 10,375.

Ex parte NUGENT.

[1 Brunner, Col. Cas. 296;[1] 1 Am. Law J. (N. S.) 107.]

Circuit Court, District of Columbia. May, 1848.

CONTEMPT — COURT SOLE JUDGE OF ITS OWN — WARRANT OF COMMITMENT—FORM OF — POWER TO PUNISH FOR CONTEMPT—UNITED STATES SENATE—RIGHT TO HOLD SECRET SESSIONS.

1. The senate and house of representatives of the United States, as well as any court, is the sole judge of its own contempts; and in case of commitment for contempt no other body or court can have a right to inquire directly into the correctness or propriety of the commitment, or to discharge the prisoner on habeas corpus.

2. The warrant of commitment need not set forth the particular facts which constitute the alleged contempt.

3. The senate of the United States has power to punish for contempts of its authority in cases of which it has jurisdiction; and an inquiry who, if any person, had violated the rule of the senate which requires that all treaties laid before them should be kept secret until the senate should take off the injunction of secrecy, is a matter within the jurisdiction of the senate.

4. The senate of the United States has a right to hold secret sessions whenever in its judgment the proceedings shall require secrecy, and may pronounce judgment in secret session for a contempt which took place in secret session.

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

The petition for the writ of habeas corpus stated that the said John Nugent was held in custody and close confinement by Robert Beale of the city of Washington, without any authority or warrant of law; and that the said Robert Beale has refused to exhibit to the petitioner the authority, if any, under which he pretends to hold him, and to give him a copy thereof, and to discharge him from custody, etc. The writ of habeas corpus was thereupon issued by the court on the 3d of April, 1848, returnable on the 4th. The return stated that "the said Robert Beale holds the office of sergeant-at-arms of the senate of the United States; that the said senate is and has been long before the arrest of the said John Nugent holding its regular sessions; that certain proceedings were had before the said senate in executive sessions, which said proceedings are, by the rules and orders of said senate, had in secret session, and which the respondent cannot, without violation of his official oath and duty, divulge or make public. That this respondent as such sergeant-at-arms has received from the Hon. G. M. Dallas, vice-president of the United States and president of the senate, a warrant, by which he is ordered and directed, authorized and required to take into his custody the body of the said John Nugent, and him safely keep according to the terms of said precept or warrant. That in obedience to the order and command of the said senate of the United States this respondent, as in duty bound, has arrested and now holds the body of the said John Nugent in legal custody, and now produces and exhibits to the court now here the said order, precept, and warrant, as the cause of the caption and detention by him as aforesaid of the body of the said John Nugent, as part of this his return."

This return was accompanied by the warrant as follows: "United States of America. To the Sergeant-atArms of the Senate of the United States, Robert Beale. Whereas, John Nugent, having been summoned, and having appeared at the bar of the senate, and having been sworn as a witness, he answered the following interrogatories: '1. Have you any connection with or agency for the proprietors of the newspaper published in the city of New York, and called the New York Herald? If yea, state what is that connection or agency. 2. Do you know that an instrument purporting to be a copy of the treaty between the United States of America and the Mexican republic, with the amendments made by the senate thereto, and the proceedings of the senate thereon, was published in that newspaper? Declare. 3. Do you know by whom the copy of the instrument, with the amendments thereto and proceedings thereon in the last preceding interrogatory specified, was furnished to the editor or publishers, or any agent of the editor or publishers, of the said newspaper called the New York Herald? If yea, declare and specify such person or per-

sons. 4. Did you copy the parts purporting to be amendments of the treaty yourself for the purpose of sending them to the editor of the New York Herald, or for any other purpose? If you answer in the negative, then say if you know by whom they were copied. 5. Where, at what place or house, and at what time were the said amendments of the treaty copied?' And having refused to answer the following interrogatories: '6. Where, in what place or at what house, and at what time did you first receive a printed copy of the confidential document containing the treaty, the president's message, and also the other confidential documents printed in the Herald? 7. In answer to the third interrogatory you have stated that you furnished the papers (therein referred to) to the editor of the New York Herald. State from whom you received the said treaty with Mexico with the amendments and the said portion of the proceedings of the senate. 8. In your answer to the fourth interrogatory you state that the amendments there referred to were communicated to the Herald in your handwriting. Did you copy the same, and from whom did you procure the original from which you copied the same? 9. You say in answer to the last question that you decline to answer the same, because you cannot answer it with accuracy. State why you cannot answer it with accuracy. Is it because you do not recollect the facts inquired of? 10. What portion of the facts do you not recollect with accuracy, is it as to the person from whom you obtained the papers, or either of them referred to? 11. State from whom you received the treaty. 12. State from whom you received the documents. 13. State from whom you received the proceedings of the senate heretofore inquired of. 14. Was the copy of the treaty you forwarded to the Herald a printed copy?' —has, by so refusing, committed a contempt against the senate; and has by the senate been ordered into the custody of the sergeant-at-arms, there to remain until the further order of the senate. These are therefore to authorize and require you, and you are hereby authorized and required to take into your custody the body of the said John Nugent, and him safely keep until he answers the said interrogatories, or until the further order of the senate of the United States in this behalf; and for so doing this shall be your sufficient warrant. Given under my hand this thirty-first day of March, in the year of our Lord one thousand eight hundred and forty-eight. G. M. Dallas, Vice-President of the U. S. and President of the Senate. Attest: Asbury Dickens, Secretary of the Senate of the United States."

CRANCH, Chief Judge. Upon this return of the habeas corpus the principal questions are: Has the senate of the United States jurisdiction and power to punish contempts of its authority? And if so, whether this court upon this habeas corpus can inquire into the question of contempt, and discharge the prisoner?

The jurisdiction of the senate in cases of contempt of its authority depends upon the same grounds and reasons upon which the acknowledged jurisdiction of other judicial tribunals rests, to wit, the necessity of such a jurisdiction to enable the senate to exercise its high constitutional functions—a necessity at least equal to that which supports the like jurisdiction which has been exercised by all judicial tribunals and legislative assemblies in this country from its first settlement, and in England from time immemorial. That the senate of the United States may punish contempts of its authority seemed to be admitted by the prisoner's counsel, provided it be in a case within their cognizance and jurisdiction; but whether admitted or not, such is the law as laid down by the supreme court of the United States in Anderson v. Dunn, 6 Wheat. [19 U. S.] 224; and in Kearney's Case, 7 Wheat. [20 U. S.] 41.

Kearney's Case was a petition to the supreme court of the United States for a habeas corpus to the marshal, D. C., to bring up the body of J. T. Kearney, who was committed by the circuit court, D. C., for contempt in refusing to answer a question in a criminal cause. Mr. Justice Story, in delivering the opinion of the court, after citing Crosby's Case [3 Wils. 188] with approval, said (in page 44): "So that it is most manifest from the whole reasoning of the court in this case that a writ of habeas corpus was not deemed a proper remedy where a party was committed for contempt by a court of competent jurisdiction, and that if granted the court could not inquire into the sufficiency of the cause of commitment. If, therefore, we were to grant the writ in this case it would be applying it in a manner not justified by principle or usage; and we should be bound to remand the party, unless we were prepared to abandon the whole doctrine, so reasonable, just, and convenient, which has hitherto regulated this important subject."

The same law was declared by the court of common pleas in the year 1771, in Crosby's Case, 3 Wils. 188, in which (in page 201) Lord Chief Justice De Grey said: "Perhaps a contempt in the house of commons, in the chancery, in this court, and in the court of Durham may be very different, therefore we cannot judge of it; but every court must be sole judge of its own contempts. Besides, as the court cannot go out of the return of this writ, how can we inquire into the truth of the fact as to the nature of the contempt. We have no means of trying whether the lord mayor did right or wrong." And in page 202 he says: "There is a great difference between matters of privilege coming incidentally before the court and being the point itself directly before the court. The counsel at the bar have not cited one case where any court of this hall ever determined a matter of priv-

ilege which did not come incidentally before them. But the present case differs much from those which the court will determine, because it does not come incidentally before us, but is brought before us directly, and is the whole point in question; and to determine it we must supersede the judgment and determination of the house of commons, and a commitment in execution of that judgment."

Mr. Justice Gould, in the same case (page 203), said: "I entirely concur in opinion with my lord chief justice that this court hath no cognizance of contempts or breach of privilege of the house of commons. They are the only judges of their privileges." And in page 204 he says: "When matters of privilege come incidentally before the court, it is obliged to determine them to prevent a failure of justice. The resolution of the house of commons is an adjudication, and every court must judge of its own contempt."

Mr. Justice Blackstone, in the same case, said: "I concur in opinion that we cannot discharge the lord mayor. The present case is of great importance because the liberty of the subject is materially concerned. The house of commons is a supreme court, and they are judges of their own privileges and contempts, more especially with respect to their own members. Here is a member committed in execution by the judgment of his own house. All courts, by which I mean to include the two houses of parliament and the courts of Westminster Hall, are uncontrolled in matters of contempt. The sole adjudication of contempts, and the punishment thereof in any manner, belongs exclusively, and without interfering, to each respective court. Infinite confusion and disorder would follow if courts could, by writ of habeas corpus, examine and determine the contempts of others. This power to commit results from the first principles of justice, for if they have power to decide they ought to have power to punish; no other court shall scan the judgment of a superior court, or the principal seat of justice. As I said before, it would occasion the utmost confusion if every court of this hall should have power to examine the commitments of the other courts of the hall for contempts; so that the judgment and commitment of each respective court as to contempts must be final and without control."

This Case of Crosby was decided by the court of common pleas in the year 1771, and, as Mr. Justice Story said in delivering the opinion of the supreme court of the United States in Kearney's Case, 7 Wheat. [20 U. S.] 43, settled the law upon that point. It must be remembered that the Case of Crosby was upon habeas corpus, and the court could not give relief without assailing the judgment of the house of commons directly, and revising that judgment; but when the judgment of contempt comes before the court incidentally or collaterally its correctness may be questioned, as in cases where it is pleaded in justification, as was done in the case of Anderson v. Dunn, 6 Wheat. [19 U. S.] 204. The law as stated by the court in Crosby's Case was the law of the land both in this country and in England before our Revolution, and has so continued to the present time.

In the case of Stockdale v. Hansard [2 Perry & D. 1], for a libel, the defendant pleaded in justification an order of the house of commons to print and publish the report of the inspectors of prisons, which contained the supposed libel. To this plea the plaintiff demurred, and assigned for causes: "That the known and established laws of the land cannot be superseded, suspended, or altered by any resolution or order of the house of commons; and that the house of commons, in parliament assembled, cannot by any resolution or order of themselves create any new privilege to themselves inconsistent with the known laws of the land; and that if such power be assumed by them there can be no reasonable security for the life, liberty, property, or character of the subjects of the realm." The case was learnedly and elaborately argued in the year 1837, and decided in 1839 by the court of queen's bench.

One of the questions raised in the argument was whether the house of commons had the right to assume the authority to settle its own privilege, and to be the sole judge of its existence and extent. In page 20 Attorney-General Campbell said: "Another and a summary remedy might have been adopted; that the house, having confidence in the tribunals of the country, deems it expedient to refer the case to the consideration of the court in the ordinary course of justice, thereby giving to the plaintiff an opportunity either of denying that the act was done under the alleged authority, or of showing that the authority has been exceeded." In page 22 he says: "Here (i. e., upon demurrer to the plea of justification under the order of the house of commons) the question of privilege is directly raised, and cannot, therefore, be inquired into by a court of common law." And again he says, in page 23: "The most frequent cases in which the privilege of the houses of parliament has come in question directly have been cases of habeas corpus on commitments by them, and there the courts of common law have disclaimed jurisdiction. So the question would arise directly if an action of trespass or false imprisonment were brought for such a commitment, and wherever it might be sought to overrule an act done by either house and justified by its authority. The present," he says, "is a case of that description. If the complaint appears on the record to be made against an act of one of the houses, so that the court is called upon to say whether the privilege alleged in justification belongs to the house or is usurped, the point of privilege arises directly, whether raised by the declaration or by any subsequent pleading. With a question of privilege raised incidentally the court must deal as it best can. In such a case necessity may re-

quire that the existence of the privilege should be examined into; but the necessity which makes the rule points out its limit. Where an act of either house is complained of no such necessity can exist. Here an adjudication has been made on the very point, and by a court of exclusive jurisdiction, and such an adjudication is binding."

So much of the argument of the attorney-general in the case of Stockdale v. Hansard seemed necessary to be stated that the opinion of Lord Chief Justice Denman might be understood. The attorney-general contended, first, that when the question of privilege came directly before the court it could not inquire into it; and second, that in the case then before him it did come directly in question.

In support of the first proposition he cited the following cases, all of which were cases of habeas corpus:

1. Sir Robt. Pye's Case, cited in 5 How. State Tr. 948.

2. Earl of Shaftsbury's Case, 6 How. State Tr. 1269; s. c., 1 Mod. 144, 3 Keb. 792,—in which Sir Thomas Jones, J., said: "The cases where the courts of Westminster Hall have taken cognizance of privilege differ from this case; for in those it was only an incident to a case before them which was of their cognizance, the direct point of the matter now is the judgment of the lords. This court can neither bail nor discharge the earl." Wylde, Rainsford, and Twisden, JJ., concurred.

3. Streater's Case, 5 How. State Tr. 366.

4. Protector v. Streeter, Style, 415.

5. Reg. v. Paty, 2 Ld. Raym. 1105, in which eleven of the twelve judges agreed that the court of queen's bench had no jurisdiction in the case of parliamentary commitment, and could not discharge the prisoner. But in that case, Holt, C. J., who was the dissenting judge, said, in page 1114: "As to what was said that the house of commons are judges of their own privileges, that they are so when it comes before them. And as to the instances cited where the judges have been cautious in giving any answer in parliament in matters of privilege of parliament, he said the reason of that was because the members knew probably their own privileges better than the judges; but when a matter of privilege comes in question in Westminster Hall the judges must determine it, as they did in Bunion's Case."

6. Murray's Case (decided in B. R., anno 1751) 1 Wils. 299, upon habeas corpus, in which Wright, J., said: "The house of commons is undoubtedly a high court, and it is agreed on all hands that they have power to judge of their own privileges; it need not appear to us what the contempt was, for if it did appear we could not judge thereof." Dennison, J., added: "This court has no jurisdiction in the present case. We granted the habeas corpus not knowing what the commitment was; but now it appears to be for a contempt of the privileges of the house of commons. What those privileges (of either house) are we do not know, nor need they tell us what the contempt was, because we cannot judge of it."

7. Crosby's Case, 2 W. Bl. 754, upon habeas corpus, in which the counsel of the prisoner contended that the offense stated in the warrant of commitment was no contempt, and that that court had a right to judge of the privileges of the house of commons, and was often obliged to take notice of them incidentally, as in Wilkes' Case, 2 Wils. 151. But the court said: "They never discharge persons committed for a contempt by any supreme court. That the law has intrusted to these the power of judging of their own contempts."

8. In the Case of Oliver, 2 W. Bl. 758, which was the same in its circumstances with that of Lord Mayor Crosby, a habeas corpus was sued out in the court of exchequer, and a like judgment was given by the unanimous opinion of the barons.

9. In Rex v. Flower, 8 Term R. 314, Lord Kenyon said: "We were bound to grant this habeas corpus; but having seen the return we are bound to remand the defendant to prison, because the subject belongs ad aliud examen." And Gross, J., said: "That the adjudication of the house on a contempt was a conviction, and the commitment in consequence execution; that every court must be sole judge of its own contempts; and that no case appeared in which any court of Westminster Hall ever determined a matter of privilege which did not come incidentally before them."

10. In Rex v. Hobhouse, 2 Chit. 207, the commitment was by the house of commons for a contempt in publishing a libel. The court said: "The Cases of Earl of Shaftsbury and Reg. v. Paty are decisive authorities to show that the courts of Westminster Hall cannot judge of any law, custom, or usage, and consequently they cannot discharge a person committed for a contempt of parliament. The power of commitment for contempt is incident to every court of justice, and more especially it belongs to the high court of parliament; and therefore it is incompetent for this court either to question the privileges of the house of commons, or a commitment for an offense which they have adjudged to be a contempt of those privileges."

11. In Burdett v. Colman, 14 East, 163, the action was for false imprisonment, and the defendant, an officer of the house of commons, pleaded the order of the house in justification and was acquitted. The case was taken up to the house of lords, where it was held that the complaint was answered, and that the warrant of commitment would have sufficed on a return to a habeas corpus.

12. In the case of Stockdale v. Hansard, 9 Adol. & El. 1, 36 E. C. L. 74, Denman, C. J., said: "But as to these proceedings by ha-

beas corpus it may be enough to say that the present is not of that class, and that when any such may come before us we will deal with it as in our judgment the law may appear to require." Again, in the same case (page 79, 37 E. C. L. 821), Denman, C. J., says: "But even supposing this court would be bound to remand a prisoner committed by the house for a contempt, however insufficient the cause set out in the return, that could only be in consequence of the house having jurisdiction to decide upon contempts. In this case we are not trying the right of a subject to be set free from imprisonment for contempt, but whether the order of the house of commons is of power to protect a wrong-doer against making reparation to the injured man." Again, Denman, C. J. (in page 82), in the same case, said: "The other concession (of the attorney-general) to which I allude is that when matter of privilege comes before the courts, not directly but incidentally, they may, because they must decide it. Otherwise, said the attorney-general, there must be a failure of justice. And such has been the opinion even of those judges who have spoken with the most profound veneration of privilege. The rule is difficult of application.

In the same case (Stockdale v. Hansard, 36 E. C. L. 93), Littledale, J., says: "But it is said that the question of the privilege of the house of commons comes directly before the court upon the pleadings, and that, therefore, upon all authorities, it is quite clear it is not competent to this court to inquire into the question of privilege; and it is said that it is in effect the same case in principle as Burdett v. Abbot, 14 East, 1, and that it was there held that the defense being founded on the order of the house to do the thing complained of, raised the question of privilege directly, and that the court could not investigate the legality of that order. But this differs very materially from Burdett v. Abbot. That was an action against the speaker himself for an act done by him in the house. The act done by him was to commit an individual whom the house adjudged to be guilty of a contempt to the house, and who had been for that ordered to be taken into custody, and there was a specific order of the house as to the particular thing to be done; but this case is altogether different; these defendants are not members of the house, but agents employed by them. The plaintiff is a perfect stranger to the house. He has been guilty of no insult or contempt of the house, and there is no order of the house applicable to him. He stands, therefore, in the situation of a stranger to the house, complaining of persons who are not members of the house, but merely employed to distribute their papers. Lord Ellenborough, in the course of his judgment, says (14 East, 138), that independently of any precedents or recognized practice on the subject, such a body as the house of commons must, a priori, be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions may be. But yet when he comes to the summing up the points for the consideration of the court, and gives the first part of his judgment, he says, first, that 'it is made out that the power of the house of commons to commit for contempt stands upon the ground of reason and necessity, independent of any positive authority upon the subject; but it is also made out by the evidence of usage and practice, by legislative sanction and recognition, and by the judgments of the courts of law, in a long course of well-established precedents and authorities.' 14 East, 158. I admit that it is very difficult to draw the line between the question of privilege coming directly before the court and where it comes incidentally; the shades of difference run into one another. The decisions and dicta of the judges who have said that the house of commons are the only judges of their own privileges, and that the courts of common law cannot be judges of the privileges of the house of commons, are chiefly where the question has arisen on commitments for contempt, upon which no doubt could ever be entertained but that the house are the only judges of what is a contempt to their house generally, or to some individual member of it; but no case has occurred where the courts or judges have used any expressions to show that they are concluded by the resolution of the house of commons in a case like the present."

Again, in 36 E. C. L. 94, he says: "There is no doubt about the right as exercised by the two houses of parliament in regard to contempts or insults offered to the house, either within or without their walls, and as to any other thing which may appear to be necessary to carry on and conduct the great and important functions of their charge. In the case of commitments for contempts there is no doubt but that the house is the sole judge whether it is a contempt or not, and the courts of common law will not inquire into it. The greatest part of these decisions and dicta, where the judges have said that the houses of parliament are the sole judges of their own privileges, have been where the question has arisen upon commitments for contempt, and as to which, as I have before remarked, no doubt can be entertained. But not only the two houses of parliament, but every court in Westminster Hall are themselves the sole judges whether it be a contempt or not; although in cases where the court did not profess to commit for a contempt, but for some matter which by no reasonable intendment could be considered as a contempt to the court committing, but a ground of commitment palpably and evidently unjust and contrary to law and natural justice, Lord Ellenbor-

ough says that in the case of such a commitment, if it should ever occur (but which he said he could not possibly anticipate as ever likely to occur), the court must look at it, and act upon it, as justice may require, from whatever court it may profess to have proceeded."

Again, Littledale, J. (on page 102) says: "I therefore, upon the whole of this case, again point out what Lord Ellenborough very much relied upon in his judgment in Burdett v. Abbot, 14 East, 158, when he said that 'it is made out that the power of the house of commons to commit for contempt stands upon the ground of reason and necessity, independent of any positive authorities upon the subject; but it is also made out by the evidence of usage and practice, by legislative sanction and recognition, and by the judgments of the courts of law in a long course of well-established precedents and authorities.' But in the case now before the court (Stockdale v. Hansard) I think that the power of the house of commons to order the publication of papers containing defamatory matter does not stand on the ground of reason and necessity, independent of any positive authorities on the subject. And I also think that it is not made out by the evidence of usage and practice, by legislative sanction and recognition in the courts of law, in a long course of well-established precedents and authorities."

In the same case (Stockdale v. Hansard, 36 E. C. L. 107), Patterson, J., said: "It is indeed quite true that the members of each house of parliament are the sole judges whether their privileges have been violated, and whether thereby any person has been guilty of a contempt of their authority; and so they must adjudicate on the extent of their privileges. All the cases respecting commitments by the house, mostly raised upon writs of habeas corpus, and collected in the arguments and judgments in Burdett v. Abbot, 14 East, 1, establish, at the most, only these points that the house of commons has power to commit for contempt; and that when it has so committed any person, the court cannot question the propriety of such commitment, or inquire whether the person committed had been guilty of a contempt of the house; in the same manner as this court cannot entertain any such questions if the commitment be by any other court having power to commit for contempt. In such instances there is an adjudication of a court of competent authority in the particular case, and the court which is desired to interfere not being a court of error or appeal cannot entertain the question whether the authority has been properly exercised.

"In order to make cases of commitment bear upon the present, some such case should be shown in which the power of the house of commons to commit for contempt under any circumstances was denied, and in which this court had refused to enter into the question of the existence of that power. But no such case can be found, because it has always been held that the house had such power; and the point attempted to be raised in the cases of commitment has been as to the due exercise of such power. The other cases which have been cited in argument relate generally to the privileges of individual members, not to the power of the house itself acting as a body; and hence as I conceive has arisen the distinction between a question of privilege coming directly or incidentally before a court of law. It may be difficult to apply the distinction. Yet it is obvious that upon an application for a writ of habeas corpus by a person committed by the house, the question of the power of the house to commit, or of the due exercise of that power, is the original and primary matter propounded to the court, and arises directly. Now as soon as it appears that the house has committed the person for a cause within their jurisdiction, as, for instance, a contempt so adjudged by them to be, the matter has passed in rem judicatam, and the court, before which the party is brought by writ of habeas corpus, must remand him. But if an action be brought in this court for a matter over which the court has general jurisdiction, as, for instance, for a libel, or for an assault and imprisonment, and the plea first declares that the authority of the house of commons, or its powers, are in any way connected with the case, the question may be said to arise incidentally. The court must give some judgment; must somehow dispose of the question. I do not, however, lay any great stress on this distinction. It seems to me that if the question arises in the progress of a cause, the court must of necessity adjudicate upon it, whether it can be said, in strict propriety of language, to arise directly or incidentally."

In the same case (Stockdale v. Hansard, 36 E. C. L. 121, 122), Coleridge, J., said: "I know it will be said that in many of the cases alluded to the question of privilege has arisen incidentally only, and that in such ex necessitate the courts have interfered. In what sense 'incidentally' is here used has been often asked, and never, as yet, satisfactorily answered. In what sense a greater necessity exists in one case than the other has not been made out. The cases of habeas corpus are generally put as instances where the question arises directly. Let me suppose the return to state a commitment by the speaker under a resolution of the house ordering the party to capital punishment for a larceny committed, it will hardly be said that a stronger case of necessity to interfere could be supposed; and yet it must be admitted on the other hand the question of privilege or power [between which the argument for the defendants makes no difference] would arise directly. A case, therefore, may be supposed in which it would be necessary to interfere, even when the so do-

ing would be a direct adjudication upon the act of the house. It should seem, then, that some other test must be applied to ascertain in what sense it is true that the house can alone declare and adjudicate upon its own privileges. I venture with great diffidence to submit the view which I have taken of these embarrassing questions, not as claiming the suspicious merit of novelty, but as one which will at least remove all difficulties in theory, and be found, I believe, not inconsistent with the general course of authorities. I say general course, for during so long a series, carried through times so differing in political bias, and between such parties as either house of parliament on the one side and the courts of law, individual judges, or litigant suitors on the other, it would be quite idle to expect that any one uniform principle should be found to have invariably prevailed. In the first place I apprehend that the question of privilege arises directly wherever the house has adjudicated upon the very fact between the parties, and there only. Wherever this appears, and the case may be one of privilege, no court ought to inquire whether the house has adjudicated properly or not. But whether directly arising or not, a court of law, I conceive, must take notice of the distinction between privilege and power; and where the act has not been done within the house (for of no act there done can any tribunal, in my opinion, take cognizance but the house itself), and is clearly of a nature transcending the legal limits of privilege, it (the court) will proceed against the doer as a transgressor of the law. To apply these principles to the case in which, on the return to a habeas corpus, it appears that the house has committed for a contempt in the breach of its privileges, I subscribe entirely to the decisions, and I agree also with the dicta which, in some of them, this court has thrown out on supposed extreme cases. In every one of these cases the house has actually adjudicated on the very point raised in the return, and the committal is in execution of its judgment. In all of them the warrant or order has set out that which, on the face of it, either clearly is or may be a breach of privilege; or it has contented itself with stating the party to have been guilty of a contempt, without specifying the nature of it, or the acts constituting it. Crosby's Case, 3 Wils. 188, is an instance of the former; Earl of Shaftsbury's Case, 1 Mod. 144, of the latter. The difference between the two is immaterial on the present question, which is one of jurisdiction only. Although, in the case of an inferior court over which this court exercises a power of revision and control even in matters directly within their cognizance, it will require to see the cause of committal in the warrant; yet with regard to courts of so high a dignity as the houses of parliament, if an adjudication be stated generally for a contempt, as contempts are clearly within their cognizance, a respectful and a reasonable intendment will be made, that the particular facts on which the committal in question has proceeded warranted it in point of jurisdiction; for (that being assumed) the propriety of the adjudication would, of course, not be inquired into. But in both cases the principle of the decision is that there has been an adjudication by a court of competent jurisdiction. Thus in the former De Grey, C. J., says: 'When the house of commons adjudge anything to be a contempt, or a breach of privilege, their adjudication is a conviction, and their commitment in consequence is execution; and no court can discharge or bail a person that is in execution by the judgment of any other court. The house of commons, therefore, having an authority to commit, and that commitment being an execution, the question is, what can this court do? It can do nothing when a person is in execution by the judgment of a court of competent jurisdiction. In such case this court is not a court of appeal.' And in the latter, in which the main contest was on the generality of the order of the lords, Rainsford, C. J., says (1 Mod. 158): 'The commitment in this case is not for safe custody, but he is in execution on the judgment given by the lords for the contempt; and therefore if he be bailed he will be delivered out of execution, because for a contempt in facie curiae there is no other judgment or execution.' The same principle will explain and justify the observations which have been made by different judges from time to time with regard to supposed cases, even of direct adjudication; and if it should appear that the vice alleged against the proceeding is not of improper decision, or excess of punishment, but a total want of jurisdiction,—in other words, where it is contended that either house has not acted in the exercise of a privilege but in the usurpation of a power,—it cannot be doubted that the same judges who were most cautious in refraining from interfering with privilege, properly so called, would have asserted the right of the court to restrain the undue exercise of power. The fact of adjudication then has no weight, because the court adjudging had no jurisdiction. Many such instances have been referred to in the argument. I pass over the luminous and, as I think, the still unanswered judgment of Lord Holt in Reg. v. Paty, 2 Ld. Raym. 1112 (and the judgments, etc., cited page 39), which is bottomed on this principle; but I will cite by way of illustration the dicta of Lord Kenyon and Lord Ellenborough, whom I select not only for their pre-eminent individual authority, but also because I can cite from their judgments in cases in which they were, with a firm and favorable hand, upholding the just privileges of the commons. And it is satisfactory to see that the distinction was even then present to their minds. Lord Kenyon,

in Rex v. Wright, 8 Term R. 296, after saying 'this is a proceeding of one branch of the legislature, and therefore we can inquire into it,' immediately qualifies the generality of that remark by adding: 'I do not say that cases may not be put in which we would inquire whether or not the house of commons were justified in any particular measure; if, for instance, they should send their sergeant-at-arms to arrest a counsel here who was arguing a case between two individuals, or to grant an injunction to stay proceedings here in a common action, undoubtedly we should pay no attention to it.' In each case here supposed there would have been a direct adjudication upon the very matter, and in each there would have been a claim of privilege; but the facts would have raised the preliminary question, whether privilege or not. Into that inquiry Lord Kenyon would have felt himself bound to enter, and when he had satisfied himself that there was no such privilege, the fact of jurisdiction would have become immaterial. So in the most learned and able argument of Holroyd, in Burdett v. Abbot, 14 East, 128, when he had put a case of the speaker issuing his warrant, by the direction of the house, to put a man to death, Lord Ellenborough interposed thus: 'The question in all cases would be whether the house of commons were a court of competent jurisdiction for the purpose of issuing a warrant to do the act. You are putting an extravagant case. It is not pretended that the exercise of a general jurisdiction is any part of their privileges. Where that case occurs (which it never will), the question would be whether they had general jurisdiction to issue such an order; and no doubt the courts of justice would do their duty.' This case again supposes an adjudication; but can language be more clear to show the undoubting opinion of that great judge that it would have been still open to this court to inquire into the jurisdiction of the house. And can any one seriously believe that the fact of a previous declaration by the house that they had such jurisdiction would have been considered by him as shutting up that inquiry? Again the same principle relieves me from all difficulty as to cases where, at first sight, the question appears to arise directly, but where, still, the court of law would have to determine the case before it upon facts already directly adjudicated upon by the house. Such was the celebrated case of Burdett v. Abbot, 14 East, 1, in the decision of which I most heartily concur. There the action was trespass quare clausum fregit and assault and false imprisonment; but the defense was a procedure in execution of a sentence of the house of commons. If that sentence were pronounced by a competent court, it warranted all that was done. The only question that could be made upon any principle of law was the competency of the adjudicating court;, and the competency of the house to commit for a contempt being not seriously doubted, there was a direct adjudication, into the propriety of which this court would not inquire. It could not inquire into it without trying over again what has already been decided in the house; i. e., whether Sir Francis Burdett had been guilty of a contempt; but this would have been contrary to the plainest principles of law."

In the case of The Sheriff of Middlesex, 11 Adol. & El. 273; s. c. 39 E. C. L. 170,—a motion was made for a habeas corpus to the sergeant-at-arms of the house of commons to bring up the bodies of William Evans, Esq., and John Wheelton, Esq., with the day and cause of their being taken and detained, etc. The writ was issued, and the sergeant-at-arms returned that he took and still detains the said William Evans and John Wheelton, by virtue of the following warrant, under the hand of the speaker of the house of commons: "Whereas, the house of commons have this day resolved that William Evans, Esq., and John Wheelton, Esq., sheriff of Middlesex, having been guilty of a contempt and breach of the privileges of this house, be committed to the custody of the sergeant-at-arms attending this house. These are therefore to require you to take into your custody the bodies of the said William Evans and John Wheelton, and them safely keep during the pleasure of this house; for which this shall be your sufficient warrant. Given under my hand the 21st day of January, 1840. Charles Shaw Lefevre, Speaker. To the Sergeant-at-Arms Attending the House of Commons." The return being filed, the counsel for the prisoners contended that the return was bad on these grounds: First. That there was in fact no legal cause for the commitment; that the court may inquire into this by the statute of 56 Geo. III. c. 100, which enacts "that where any person shall be confined or restrained of his or her liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit), a judge shall, on proper complaint, award a habeas corpus; and that in all cases provided for by the act, although the return to the habeas corpus be sufficient in law, it shall be lawful for the judge before whom it is returnable to examine into the truth of the facts therein set forth, by affidavit or by affirmation, etc., and to do therein as to justice shall appertain." And the counsel of the prisoners contended that "if the court may inquire into the truth of the facts, it is shown here on affidavit that the sheriff is committed for having acted in the lawful execution of process, and that the proceeding of the house of commons is in opposition to the judgment delivered in Stockdale v. Hansard, 9 Adol. & El. 1; s. c., 36 E. C. L. 13,—which, until reversed on appeal, is the law of the land." Secondly (on page 84). The counsel of the prisoners contended that "the

return is bad because it does not state the facts on which the contempt arises," and they said (page 84): "There are only three precedents of parliamentary commitments which have been supported where no grounds were set forth. The first is in Streater's Case, 5 How. State Tr. 365, which from the absurdity of the reasons by which the commitment was upheld cannot be considered of any weight. The next occurs in Earl of Shaftsbury's Case, 4 How. State Tr. 1260; s. c., 1 Mod. 144,—which was decided in bad times, and is not a precedent by which any subsequent decision can be supported. The proceedings of the house of lords against the earl were by the house itself declared unparliamentary, and ordered to be vacated in the journals that they might never be drawn into precedent. 6 How. State Tr. 1310. The third instance, and the only one since the Revolution, was in Murray's Case, 1 Wils. 299. There, indeed, two of the judges, one of whom relied on the Case of Earl of Shaftsbury, said that 'if the contempt had been specified, this court could not judge of it'; but the third, Foster, J., appears to have relied upon the circumstance of the contempt being committed in the face of the house; and the particular point now in question does not seem to have been taken at the bar. In more modern cases the grounds from which the contempt was deduced have always been stated. It was so in Crosby's Case, 2 W. Bl. 754; s. c. 3 Wils. 188,—though De Grey, C. J., said there, as appears from Id. 203, that a return stating the breach of privilege generally would be sufficient; but he seems to ground that opinion entirely on the Earl of Shaftsbury's Case. In Rex v. Flower, 8 Term R. 314, the warrant was special; so were those in Sir Francis Burdett's Case, 14 East, 1. Lord Ellenborough there intimated that a commitment stated to be for a contempt of either house generally would be sufficient; but the opinion is thrown out obiter and he seems to consider Earl of Shaftsbury's Case an authority for such a form. In the case of Burdett v. Abbot, 5 Dow, 165, 199, in the house of lords, Lord Eldon put it to the judges 'whether, if the court of common pleas having adjudged an act to be a contempt of court had committed for the contempt under a warrant stating such adjudication generally, and the matter came before the king's bench on return to a habeas corpus setting forth the warrant, that court would discharge because the particular facts and circumstances of the contempt were not set forth'; and the judges answered in the negative. But in the case supposed the common pleas would be a court of record acting according to the known course of the common law; the house of commons is not such a court, or so acting; and the common pleas in the case supposed would be punishing for a contempt of court. The house of commons here professes only to commit for a contempt of the privileges of that house, without showing what are the privileges which are supposed to be infringed. If the house may declare its own privilege as the common-law courts declare that law, it should, at least, when it punishes for a breach of privilege, point out the privilege violated, so that the law on that subject may be known in future. In the judgment of Vaughan, C. J., in Bushell's Case, Vaugh. 135, 137, it is said that the writ of habeas corpus commands the day and the cause of the caption and detaining of the prisoner to be certified upon the return, which if not done the court cannot possibly judge whether the cause of the commitment and detainer be according to law or against it. Therefore the cause of the imprisonment ought, by the return, to appear as specifically and certainly to the judges of the return as it did to the court or person authorized to commit, else the return is insufficient. The house of commons, then, like other jurisdictions that exercise the power of committing, may be required on habeas corpus to show the particular grounds. And were it otherwise the houses of parliament might, at any time, punish offenses against the property, or servants of individual members, under the name of contempts, as was done formerly. That the court would not now suffer this practice to pass unquestioned, though the contempt might be alleged generally on a return to a habeas corpus, appears from several passages in the judgment of Lord Denman, C. J., in Stockdale v. Hansard, 9 Adol. & El. 116, 124, 147, 36 E. C. L., 31." No one appeared in support of the return.

Lord Denman, C. J., said: "I think it necessary to declare that the judgment delivered by this court last Trinity term in the case of Stockdale v. Hansard, 9 Adol. & El. 1, 36 E. C. L., 13, appears to me in all respects correct. The court decided there that there was no power in this country above being questioned by law." And (in page 87) he said: "The only question upon the present return is whether the commitment is sustained by a legal warrant." After stating and overruling some minor objections he says (on page 87): "The great objection remains behind, that the facts which constitute the alleged contempt are not shown by the warrant. It may be admitted that words containing this kind of statement have appeared in most of the former cases; indeed, there are few in which they have not.

"In Crosby's Case, 2 W. Bl. 754, 3 Wils. 188, Sir Francis Burdett's Case, 14 East, 1; and Hobhouse's Case, 2 Chit. 207,—words were used showing the nature of the contempt. In Earl of Shaftsbury's Case, 6 How. State Tr. 1269; s. c., 1 Mod. 144,—the form was general; and it was held unnecessary to set out the facts upon which the contempt arose. That case is open to observation upon other grounds, but I think it has not been

questioned upon this. In Reg. v. Paty, 2 Ld. Raym. 1105, three of the judges adopted the doctrine of that case to the extent of holding that the court could not inquire into the ground of the commitment, even when expressed in the warrant. Holt, C. J., differed from them on that point; but he did not question that where the warrant omitted to state facts the cause could not be inquired into. In Murray's Case, 1 Wils. 299, which has been often referred to and recognized as an authority, the warrant was in general form. There is, perhaps, no case in the books entitled to so great weight as Burdett v. Abbot, 14 East, 1, from the learning of the counsel who argued and the judges who decided it, the frequent discussions which the subject underwent, and the diligent endeavors made to obtain the fullest information upon it. The judgment of Lord Ellenborough there, as it bears on the point now before us, is remarkable. He says: 'If a commitment appeared to be for a contempt of the house of commons generally, I would neither in the case of that court, or of any other of the superior courts, inquire further; but if it did not profess to commit for contempt, but for some matter appearing upon the return which could by no reasonable intendment be considered as a contempt to the court committing, but a ground of commitment palpably and evidently arbitrary, unjust and contrary to every principle of positive law or natural justice, I say that in case of such a commitment (if it ever should occur, but which I cannot possibly anticipate as ever likely to occur) we must look at and act upon it as justice may require, from whatever court it may profess to have proceeded.' Bayley, J., as well as Lord Ellenborough, appears in that case to have been of opinion that if particular facts are stated in the warrant and do not bear out the commitment, the court should act upon the principle recognized by Lord Holt in Reg. v. Paty; but that if the warrant merely state a contempt in general terms, the court is bound by it. That rule was adopted by this court in Rex v. Hobhouse; and in the late case of Stockdale v. Hansard, 9 Adol. & El. 1, 36 E. C. L., 13, there was not one of us who did not express himself conformably to it. In the passages which have been cited from my own judgment in that case as showing that if a person were committed for a contempt in trespassing upon a member's property, the court would notice the ground of committal, I always suppose that the insufficient ground should appear by the warrant. The Earl of Shaftsbury's Case has been dwelt upon in the argument as governing the decisions of the courts on all subsequent occasions; but I think not correctly. There is something in the nature of the houses themselves which carries with it the authority that has been claimed; though in the discussion of such questions, the last important decision is always referred to. Instances have been pointed out in which the crown has exerted its prerogative in a manner now considered illegal, and the courts have acquiesced; but the cases are not analogous. The crown has no rights which it can exercise otherwise than by process of law and through amenable officers; but representative bodies must necessarily vindicate their authority by means of their own; and those means lie in the process of committal for contempt. This applies not to the houses of parliament only, but as we observed in Burdett v. Abbot, 14 East, 138, to the courts of justice which, as well as the houses, must be liable to continual obstruction and insult if they were not intrusted with such powers. It is unnecessary to discuss the question whether each house of parliament be or be not a court; it is clear they cannot exercise their proper functions without the power of protecting themselves against interference. The test of the authority of the house of commons in this respect, submitted by Lord Eldon to the judges in Burdett v. Abbot, 5 Dow, 199, was whether if the court of common pleas had adjudged an act to be a contempt of court, and committed for it, stating the adjudication generally, the court of king's bench on a habeas corpus setting forth the warrant would discharge the prisoner because the facts and circumstances of the contempt were not stated. A negative answer being given, Lord Eldon, with the concurrence of Lord Erskine (who had before been adverse to the exercise of jurisdiction), and without a dissenting voice from the house, affirmed the judgment below. And we must presume that what any court, much more what either house of parliament, acting on great legal authority, takes upon it to pronounce a contempt, is so.

"It was urged that this not being a criminal matter the court was bound by the statute 56 Geo. III., c. 100, to inquire into the case on affidavit. But I think the provision cited is not applicable. On the motion for a habeas corpus there must be an affidavit from the party applying; but the return, if it discloses a sufficient answer, puts an end to the case; and I think the production of a good warrant is a sufficient answer. Seeing that, we cannot go into the question of contempt on affidavit nor discuss the motives which may be alleged. In the present case I am obliged to say that I find no authority under which we are entitled to discharge these gentlemen from their imprisonment."

Littledale, J., concurred and said: "If the warrant returned be good on the face of it, we can inquire no further. The principal objection is that it does not sufficiently express the cause of commitment; and instances have been cited in which the nature of the contempt was specified. But the doctrine laid down in Burdett v. Abbot, 14 East, 1; 5 Dow, 165, in this court and before the house of lords, sufficiently authorizes the present form. If the warrant declares the grounds of adjud-

ication, this court in many cases will examine into their validity; but if it does not we cannot go into such an inquiry. Here we must suppose that the house adjudicated with sufficient reason, and they were the proper judges."

Williams, J., said (in page 90): "It was a startling admission in the argument which has been addressed to us that for the last century and a half there have been precedents in favor of this commitment. Recognized precedents have the force of decisions by which courts and judges individually must hold themselves bound. I do not think this court can suffer any loss of authority by so acting in the present case; but whatever may be the consequences we must overlook it when there is an ascertained rule of law before us. If the return in a case like this showed a frivolous cause of commitment, as for wearing a particular dress, I should agree in the opinion expressed by Lord Ellenborough in Burdett v. Abbot, where he distinguishes between a commitment stating a contempt generally and one appearing by the return to be made on grounds palpably unjust and absurd. Then the only point in this case is whether there be on the warrant an adjudication in form of commitment for contempt, which the court according to precedent is bound to recognize. The only real question is whether we can interfere, because the ground of commitment is not particularly stated. On this point it is sufficient to cite the judgment of De Gray, C. J., in Crosby's Case, which is referred to with approbation by Lord Ellenborough in Burdett v. Abbot, 14 East, 1, 148."

Coleridge, J. (in page 91), says: "I come to my present conclusion with great regret when I consider the circumstances, but with confidence to its justice. As to the former case of Stockdale v. Hansard, 9 Adol. & El. 1, 36 E. C. L. 13, so far as regards the general positions there laid down, I most entirely agree in them, and remain of the same opinion as when it was decided. I formed that opinion with great pains and labor, and a candid attention to the arguments. The material questions here are whether the return is not bad for not disclosing the particular grounds of the commitment, and whether it is open to an answer by affidavit; or if it be so, whether there is any case made by the affidavits. Now, first, it is too late to contend that the generality of statement in the warrant is any solid objection. It appears by precedents that the house of commons have been long in the habit of shaping their warrants in that manner. Their right to adjudicate in this general form in cases of contempt is not founded on privilege, but rests upon the same grounds on which this court, or the court of common pleas, might commit for a contempt without stating a cause in the commitment. It is contended that affidavits may be received to explain the facts returned. But the return states simply an adjudication of contempt. There is nothing in the affidavits referred to which controverts the fact of such an adjudication; and if the house had jurisdiction to make it, we can no more inquire by affidavit whether they came to a right conclusion in doing so, than we could in the case of a like adjudication by the court of common pleas. These gentlemen must therefore be remanded."

These cases and authorities, we think, show conclusively that the senate of the United States has power to punish for contempts of its authority in cases of which it has jurisdiction; that every court, including the senate and house of representatives, is the sole judge of its own contempts; and that in case of the commitment for contempt in such a case, no other court can have a right to inquire directly into the correctness or propriety of the commitment, or to discharge the prisoner on habeas corpus; and that the warrant of commitment need not set forth the particular facts which constitute the alleged contempt.

There were many cases cited in the argument to show that when the question of privilege or contempt came incidentally before the court, the court would and must decide it; but those cases have no bearing upon this, which is a case of habeas corpus, where it is admitted on all hands that the question of contempt is brought directly before the court. But if upon this point it should be thought that the majority of the judges of this court have (as it is suggested) stated the principle too broadly in respect to the conclusive effect of a judgment of contempt, and if it should be deemed necessary that it should appear in the return of the habeas corpus that at the time of the supposed contempt the senate were acting in a matter of which they had jurisdiction, we all think it does sufficiently appear in the return that the senate were, at that time, engaged in a matter within their jurisdiction; to wit, an inquiry whether any person, and who, had violated the rule of the senate which requires that all treaties laid before them should be kept secret until the senate should take off the injunction of secrecy. This appears by the interrogatories propounded to the witness (the prisoner) as stated in the return, and by the recital in part of the answers of the witness to a part of those interrogatories.

But it has been contended, also, in argument, that the power of the senate to punish for contempts is confined to their authority over their own members. It is true that by the constitution (article 1, § 5), "each house may determine the rules of its proceeding, punish its members for disorderly behavior, and with the concurrence of two thirds expel a member." But it says nothing of contempts. These were left to the operation of the common-law principle, that every court has a right to protect itself from insult and contempt, without which right of self protection they could not dis-

charge their high and important duties. It is not at all probable that the framers of the constitution, by giving an express power to the senate to punish its members for disorderly behavior, and even to expel a member, intended to deprive the senate of that protection from insult which they knew very well belonged to and was enjoyed by both houses of parliament and the legislatures of the former colonies and now states of this Union. The provision of the constitution may have been intended to remove a doubt whether a member of the senate, appointed by and responsible to a state legislature, could be guilty of a contempt to a body of which he himself was a member; or it may have been intended to apply only to such disorderly behavior as did not amount to a contempt of the house; or to remove a doubt whether the senate had power to expel a member. But whatever may have been the intention, we think the provision does not justify an inference that their power to punish for contempts can be executed only upon members of the senate. On this point Mr. Justice Johnson, in delivering the opinion of the supreme court in the case of Anderson v. Dunn, 6 Wheat. [19 U. S.] said (in page 225): "It is certainly true that there is no power given by the constitution to either house to punish for contempts, except when committed by their own members; nor does the judicial or criminal power given to the United States in any part extend to the infliction of punishment for contempt of either house, or any one co-ordinate branch of the government. Shall we therefore decide that no such power exists? It is true that such a power, if it exists, must be derived by implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted that the effort would have been made by the framers of the constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers which does not draw after it others not expressed, but vital to their exercise; not substantive and independent, but auxiliary and subordinate. The idea is Utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation." And again (in page 226) he says: "But if there is one maxim which necessarily rides over all others in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation; nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. The unreasonable murmurs of individuals against the restraints of society have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbor's rights. That the 'safety of the people is the supreme law' not only comports with but is indispensable to the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is that courts of justice are universally acknowledged to be vested by their very creation with powers to impose silence, respect, and decorum in their presence, and submission to their lawful mandates, and as a corollary to this proposition to preserve themselves and their officers from the approach and insults of pollution. It is true that the courts of justice of the United States are vested by express statute provision with power to fine and imprison for contempts; but it does not follow from this circumstance that they could not have exercised that power without the aid of the statute, or not in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment." Again the same judge (in page 228) says the alternative of denying this power "leads to the total annihilation of the power of the house of representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberative assembly, clothed with the majesty of the people and charged with a care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation, whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire, that such an assembly should not possess the power to suppress rudeness or repel insult is a supposition too wild to be suggested." And again (at page 232): "But it is argued that the inference, if any, arising under the constitution is against the exercise of the powers here asserted by the house of representatives, that the express grant of power to punish their members respectively and to expel them by the application of a familiar

maxim raises an implication against the power to punish any other than their own members. This argument proves too much; for its direct application would lead to the annihilation of almost every power of congress. To enforce its laws upon any subject without the sanction of punishment is obviously impossible. Yet there is an express grant of power to punish in one class of cases and one only, and all the punishing power exercised by congress in any cases, except those which relate to piracy and offenses against the laws of nations, is derived from implication. Nor did the idea ever occur to any one that the express grant in one class of cases repelled the assumption of the punishing power in any other. The truth is that the exercise of the powers given over their own members was of such a delicate nature that a constitutional provision became necessary to assert or communicate it. Constituted as that body is of the delegates of confederated states, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honor or interests of the state which sent him. In reply to the suggestion that on this same foundation of necessity might be raised a superstructure of implied powers in the executive and every other department, and even ministerial officer of the government, it would be sufficient to observe that neither analogy nor precedent would support the assertion of such a power in any other than a legislative or judicial body."

It was also contended in argument that although the senate might hold secret sessions, they could not in secret session punish a man for a contempt. The court, however, cannot perceive any reason why the senate should not have the same power of punishing contempts in secret as in open session. In the early years of this government the sessions of the senate were always secret. The constitution of the United States (article 1, § 5), requires that "each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy." The journal cannot be kept secret unless the proceedings themselves be kept secret. Hence, each house has a right to hold secret sessions whenever in its judgment the proceedings shall require secrecy. The necessity of the power to hold secret sessions, especially of the senate, is so obvious that no argument in its favor is required by the court. The senate besides being a branch of the legislature is the executive council of the president, and stands in intimate communion with him in regard to all our foreign diplomatic relations. Nothing, therefore, can be more proper than that all executive sessions of the senate, and all confidential communications relating to treaties, should be with closed doors and under the seal of secrecy. Hence, the standing rule of the senate (No. 38) requires that all confidential communications made by the president of the United States to the senate shall be, by the members thereof, kept secret; and all treaties which may be laid before the senate shall also be kept secret until the senate shall, by their resolution, take off the injunction of secrecy. And by the standing rule of the senate (No. 39) "all information or remarks touching or concerning the character and qualifications of any person nominated by the president to office shall be kept secret." By the fortieth rule of the senate, "when acting on confidential or executive business, the senate shall be cleared of all persons except the secretary, the principal or executive clerk, the sergeant-at-arms and door-keeper, and the assistant door-keeper." By the forty-first rule of the senate, "the legislative proceedings, the executive proceedings, and the confidential legislative proceedings of the senate shall be kept in separate and distinct books." These rules were established under the power given to the senate by the constitution of the United States (article 1, § 5) "to determine the rules of its proceedings," and are therefore until repealed as obligatory as if they had been inserted in the constitution itself; so that it is not only the privilege but the duty of the senate to hold its executive sessions in secret. No odium therefore can attach to the senate from the circumstance that the judgment for contempt was pronounced in secret session upon a transaction which took place in secret session. It could not have been done otherwise. The offense must be punished in secret session, or go unpunished, leaving the senate exposed to all sorts of insults in the discharge of their solemn constitutional duties.

After an anxious and careful consideration of the whole case, the court is unanimously of opinion that the senate of the United States has power, when acting in a case within its jurisdiction, to punish all contempts of its authority; and that the prisoner having been committed by the senate for such a contempt, and being still held and detained for that cause by their officer, this court has, upon the habeas corpus, no jurisdiction to inquire further into the cause of commitment, and must remand the prisoner. Prisoner remanded.

Case No. 10,376.

NUGENT v. BEALE.

[The case reported under above title in 1 Hayw. & H. 287, is the same as Case No. 10,375.]

NUGENT (HARRIS v.). See Case No. 6,126.

Case No. 10,377.

NUGENT v. PUTNAM COUNTY.

[3 Biss. 105.][1]

Circuit Court, N. D. Illinois. August, 1871.[2]

COUNTY RAILROAD AID BONDS INVALID IF ISSUED TO CONSOLIDATED AND NOT ORIGINAL COMPANY—NOT SAVED BY BEING MADE PAYABLE TO ORIGINAL COMPANY—NOR IF CONSOLIDATED BY CHARTER—NOR BY FALSE RECITALS.

1. County bonds issued to a consolidated railroad company upon a subscription by the county to one of the roads, previous to the consolidation, are illegal and invalid.

2. After the consolidation of the road to aid which the vote was taken, the supervisors had no authority to issue the bonds.

3. The validity of the bonds is not preserved by making them in terms payable to the original company. That corporation being dissolved, the legal effect is the same as if they were drawn payable to bearer.

4. Nor does a provision in the charter of the company allowing them to consolidate change the rule.

5. Though the bonds state on their face that they are issued in pursuance of law, that assertion being untrue, cannot clothe the authorities with power to make the issue.

This was an action of assumpsit by George Nugent on ninety coupons issued by the county of Putnam for the interest on certain bonds issued by said county. The defendant denied the validity of the bonds and coupons; to which the plaintiff replied, setting up the following facts by which he claimed that the validity of the bonds was fully established, and also that the defendant was estopped from denying the validity of the bonds. On and prior to the 4th of June, 1869, a corporation existed in this state under a special charter known by the corporate name of the "Kankakee & Illinois River Railroad Company," with authority to construct and maintain a railroad from the eastern line of this state, by way of Momence, Kankakee, Dwight, and Streator, to Bureau Junction, in Bureau county, with a capital of one hundred thousand dollars, subject to be increased to such an amount as should be necessary to complete the road of the company. On the 4th day of June, 1869, the board of supervisors of the county of Putnam, through which the proposed line was to pass, ordered an election, to be held July 10th, at the usual place for elections in said county, to determine whether said county should subscribe for seventy-five thousand dollars of the stock of said company, conditioned that said stock should be paid for in the bonds of said county, bearing interest at ten per cent. per annum, payable annually, provided said road should be located and constructed through or within one-half mile of the corporate limits of the town of Hennepin, in said county. The election was held, resulting in favor of said subscription; and on the 4th of January, 1870, another election was called by said board, to be held on the 8th of February, 1870, to determine whether said county would subscribe for twenty-five thousand dollars additional stock of said railroad company, payable in the bonds of said county, on the condition that said railroad should be located within one-half mile of the corporate limits of the town of Hennepin, these bonds to bear interest at ten per cent. per annum. This election was held, and resulted in favor of said proposition. After said election, on the 10th day of July, 1870, the said board of supervisors adopted a resolution stating that said subscription of seventy-five thousand dollars "is hereby made in pursuance of said election, subject to the following conditions: That a committee of five persons be hereafter appointed by this board, whose duty it shall be to direct the issue of said bonds and protect the interests of said county, and discharge such other duty as shall be devolved upon them by said board, and the bonds of said county shall be issued on said subscription in sums of not less than five hundred dollars, payable in annual installments of not less than ten thousand dollars, five years after the date of issue, bearing interest at the rate of ten per cent. per annum, payable annually, and that the clerk of the county court should issue to said railroad company the said bonds, but providing that the bonds should not be issued until a bona fide contract was made with responsible parties for all the iron necessary to the construction of the road, and that said bonds issued to said company upon the orders of said board shall be applied to the construction of said railroad in and through said county of Putnam, as specified in a previous order of this board." On the 15th of March, 1870, said board passed a resolution resolving that said subscription of twenty-five thousand dollars is hereby made in pursuance of said resolution of the 8th of February, subject to the following conditions, (being substantially the same as were attached to the seventy-five thousand dollar issue.) But no subscription was in fact ever made to the stock of said company by or on behalf of said county. On and prior to the 21st of October, 1870, there existed in the state of Indiana a corporation known as the "Plymouth, Kankakee & Pacific Railroad Company," with power to construct and maintain a railroad from the easterly line of this state to Plymouth, Indiana. On the 21st of October, 1870, the corporate rights, stock, powers and franchises of the Kankakee & Illinois River Railroad Company were consolidated with the stock, corporate rights and franchises of the Plymouth, Kankakee & Pacific Railroad Company, and they became a consolidated company known as the Plymouth, Kankakee & Pacific Railroad Company, with a capital stock of two millions five hundred thousand dollars, it being provided by the articles of consolidation that the stockholders of the original companies should be

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

[2] [Reversed in 19 Wall. (86 U. S.) 241.]

stockholders of the consolidated company. To this consolidation the supervisors of the county of Putnam assented, and issued to said consolidated company the bonds of the county for said stock so voted to said Kankakee & Illinois Railroad Company, bearing interest and payable as provided in said resolution, with coupons attached for annual interest accruing thereon, which are the coupons in controversy, said bonds being made payable in terms to the Kankakee & Illinois River Railroad Company, but actually dated, issued and delivered after said Kankakee & Illinois River Railroad Company had become consolidated with the Plymouth, Kankakee & Pacific Railroad Company, and after the election which sanctioned the subscription to the stock of said Kankakee & Illinois River Railroad Company. The board of supervisors appointed a committee who delivered the bonds to said railroad, and said committee, before issuing the bonds, certified to said board of supervisors that said railroad company had in all respects performed all the conditions required of it, and was entitled to receive said bonds. In the fall of 1871 said board of supervisors levied a tax on all the taxable property of said county to raise the money for paying the interest on said bonds, and also borrowed the money to pay a portion of the interest which had accrued thereon. The plaintiff was a holder of said bonds for value. The said bonds state upon their face that they were "issued for the subscription to the stock of the Kankakee & Illinois River Railroad Company, in pursuance of a resolution of the board of supervisors of said county." Demurrer by defendant to replication.

T. M. Shaw, for plaintiff.
T. Lyle Dickey, for defendant.

BLODGETT, District Judge. Upon these facts the question arises as to the liability of the county of Putnam upon the bonds and coupons in question; or, to more specifically state the issue as made by the pleadings, "Is the county, by what it has done, estopped from denying its liability upon these bonds and coupons?" I have very carefully examined the question thus raised by these pleadings, and feel compelled to say that I cannot find any line of distinction between this case and Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676, and it seems to me that case must control the decision of the court in this.

The material facts in that case are these: The state had chartered the Mississippi & Wabash Railroad Company, with power to construct a railroad across the state through Fulton county. In November, 1853, the question was submitted to the voters of the county whether the county should subscribe seventy-five thousand dollars to the stock of said company, payable in bonds of said county, such bonds not to be issued until the secretary of the company should certify to the board that seven hundred thousand dollars had been subscribed and that five per cent. had been paid thereon. A majority of the votes of the county were cast in favor of the subscription, and in April, 1854, the board ordered its clerk to subscribe for seventy-five thousand dollars of the stock, and issue bonds when it should be certified to him by the secretary of the company that seven hundred thousand dollars of the stock had been subscribed and five per cent. had been paid thereon. In February, 1857, an act was passed by the legislature of Illinois amending the charter of the Mississippi & Wabash Railroad, by which the line of the road was divided into three divisions, and each division was placed under the management and control of a board of three commissioners, to be elected by the stockholders of each division, to be invested with all the powers of the directors of the road in their division. [Private Laws 1857, p. 1053.] In April, 1857, the stockholders of the central division elected commissioners of that division, who thenceforth, until December, 1868, exercised all the powers conferred by this act.

On the books of the central division thus organized, the clerk of the county court of Fulton county—said county being in said division—acting as the clerk of the board of supervisors, made a subscription of seventy-five thousand dollars in the name of the county. In September following he issued to this division the bonds which were in suit in that cause. On these facts the court says:

"The amendatory act of 1857, dividing the road into three divisions, and subjecting each division to the control and management of a different board, clothed with all the powers of the original board, so far as the division was concerned, worked a fundamental change in the character of the original corporation, and created three distinct corporations in its place. A subscription to a company whose charter provided for a continuous line of railroad of two hundred and thirty miles, across the entire state, was voted by the electors of Fulton county; not a subscription to a company whose line of road was less than sixty miles in extent, and which, disconnected from the other portions of the original line, would be of comparatively little value.

"But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact, we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instrument might for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed; where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to

the action of the officers of the county, and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder.

"It is also contended that if the bonds in suit were issued without authority, their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the supervisors. But the answer to them all is, that the power of ratification did not lie with the supervisors. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified."

"The supervisors possessed no authority to make the subscription or issue the bonds in the first instance, without the previous sanction of the qualified voters of the county. The supervisors, in that particular, were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription, in the first instance, without such authorization. It would be absurd to say that they could, without such vote, by simple expressions of approval or in some other indirect way, give validity to acts, when they were directly in terms prohibited by statute from doing those acts, until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition."

I have quoted these copious extracts from this decision because it seems to me to contain the controlling principle of the case at bar. The votes of the 10th of July, 1869, and the 8th of February, 1870, were both upon the proposition to subscribe to the capital stock of the Kankakee & Illinois River Railroad Company, a corporation possessing the power to construct and maintain a line of road between certain termini in this state, with a capital stock limited in any event to the cost of constructing the road.

The bonds in question were issued after this Kankakee & Illinois River Railroad Company had merged itself by articles of consolidation into another corporation now known as the Plymouth, Kankakee & Pacific Railroad Company, a corporation having control of a different enterprise from that of the original company, possessing a different capital stock, and governed by a different board of directors, elected upon a different basis, with different termini to the road.

In the case of Clearwater v. Meredith, 1 Wall. [68 U. S.] 25, the supreme court of the United States has passed upon the effect of consolidating railroad corporations. In this case Meredith had guaranteed to Clearwater that certain railroad stock should be worth par on the 1st of October, 1855; suit was brought upon the guarantee, and assigned for breach that the stock was not worth par at the time stipulated. To this the defendant pleaded that the stock of the said company had been merged and consolidated with the stock of another railroad company, making one stock of the two under a new corporate name, and that the consolidation was made with the consent of the stockholders of both companies. Upon these facts the supreme court, by Mr. Justice Davis, says: "When any person takes stock in a railroad corporation he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation, to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purposes and character, at the will and pleasure of a majority of the stockholders, so that new responsibilities, and it may be, new hazards are added to the original undertaking. He may be very willing to embark in one enterprise and unwilling to engage in another; to assist in building a short line railway and adverse to risking his money in one having a longer line of transit. But it is not every unimportant change which would work a dissolution of the contract. It must be such a change that a new and different business is superadded to the original undertaking.

"The act of the legislature of Indiana, allowing corporations to merge and consolidate their stock, was an enabling act—was permissive, not mandatory. It simply gave the consent of the legislature to whatever could lawfully be done, and which, without that consent, could not be done at all. By virtue of this act, the consolidations in the plea stated were made. Clearwater, before the consolidation, was a stockholder in one corporation, created for a given purpose; after it he was a stockholder in another and different corporation, with other privileges, powers, franchises, and stockholders. The effect of the consolidation 'was a dissolution of the three corporations, and at the same instant, the creation of a new corporation, with property, liabilities, and stockholders, derived from those passing out of existence.' McMahan v. Morrison, 16 Ind. 172. And the act of consolidation was not void, because the state assented to it; but a non-consenting stockholder was discharged."

It is not necessary to quote more than this, for the principle which I alluded to is clearly announced, namely, that a different corporation results from the consolidation. The consolidated company is not either of the original corporations, although it may take the name of one of them. The original corpo-

ration for the stock of which the county of Putnam subscribed, was solely under the control of the state of Illinois; its franchises had been created by that state, and were under its control. The consolidated company is in two states; its affairs are subject to the control of the legislatures of two states.

The same principle was announced in the case of McMahan v. Morrison, in the 16th of Indiana, and has also been fully set forth in 29 Ill. 242. Now, the principle of all these authorities which I have quoted, it seems to me, is that the corporate existence of the Kankakee & Illinois River Railroad Company ceased on the 21st of October, 1871, and from that time forward whatever franchises it had were merged in the Plymouth, Kankakee & Pacific Railroad Company, the consolidated corporation, and after this event had taken place, after what we may call the legal demise of the Kankakee & Illinois River Railroad Company, the board of supervisors of Putnam county authorized the issue to the consolidated corporation of the bonds in question.

I cannot see any feature in this case which differs from Marsh v. Fulton Co. [supra], unless that this is a stronger case than that. There the corporation existed in and was controlled by this state alone, and its termini remained the same, while this consolidated corporation is a very different enterprise from the original to which the subscription was authorized.

It was insisted in the argument, and also in the pleadings, that the fact that these bonds were made payable in terms to the Kankakee & Illinois River Railroad Company should control the decision of the court. It certainly is an important fact, and has received consideration, but I cannot see that it changes the legal bearings of the question. This was a defunct corporation, and the bonds might just as well have been made payable to bearer, and the person to whom they are made payable cuts no figure in the case.

The Kankakee & Illinois River Railroad Company had gone out of existence, and its demise had become a matter of public notoriety—a matter of public record, because it was necessary that the articles of consolidation should be filed in the office of the secretary of state.

It is urged further that this company having the power originally by its charter to consolidate with another company, makes the rule in Clearwater v. Meredith inapplicable in this case; but I cannot look upon this clause as changing the application, because since February, 1854, (Act Feb. 28, 1854, Gross' St. 1872, p. 537) there has been upon the statute books of this state a general law authorizing any two railroad corporations whose lines form a continuous route, to consolidate their stock, franchises and property into one corporation, and in examining the proceedings by which this consolidation was accomplished, it is clear that this consolidation was made under this general law, and not under the charter of the company.

Now, in the case of Clearwater v. Meredith, the general law of the state of Indiana existed at the time the stock in question was issued. The law of that state and of Illinois is substantially the same, the two states having kept pace with each other in their legislation on this question; but the supreme court did not hold that the organic right of either or both corporations to consolidate changed the rights of the stockholders.

Following the doctrine laid down in Marsh v. Fulton Co. I am of opinion these bonds are illegal and void. They were issued by the board of supervisors without the power being granted to them for that purpose. The vote of the people authorized the county to issue its bonds to the Kankakee & Illinois River Railroad Company, and they were in fact issued to another company without a vote. It is true that they bear on their face the statement that they were issued in pursuance of law, and for the stock of the Kankakee & Illinois River Railroad Company, but the assertion is untrue and cannot be held to clothe the county authorities with power to make the issue. Demurrer sustained.

[In error to the supreme court the judgment of this court was reversed. 19 Wall. (86 U. S.) 241.]

NOTE. For a full discussion of various questions arising under municipal bonds, consult the following cases previously reported in this series, and numerous authorities there cited: Mygatt v. Green Bay [Case No. 9,998]; Luling v. Racine [Id. 8,603]; Schenck v. Marshall Co. [Id. 12,449]; Goedgen v. Manitowoc Co. [Id. 5,501.]

The duty of boards of supervisors to follow strictly the law, and their powers construed, Harding v. Rockford, R. I. & St. L. R. Co. [65 Ill. 90] (supreme court of Illinois, May, 1873.)

Case No. 10,378.

NUNAN v. LITCHFIELD.

[Cited in Smith v. Atlantic Mutual Fire Ins. Co., Case No. 13,005. Nowhere reported; opinion not now accessible.]

NUNAN (HO AH KOW v.). See Case No. 6,-546.

Case No. 10,379.

NUNEZ v. UNITED STATES.

[Hoff. Land Cas. 191.] [1]

District Court, D. California. Dec. Term, 1856.

LAND CLAIMS—FREMONT CASE.

This claim is valid under the ruling of the supreme court in U. S. v. Fremont [18 How. (59 U. S.) 30].

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Claim [by Sebastian Nunez] for six leagues of land in Tuolumne county, rejected by the board, and appealed by claimant.

Stanly & King, for appellant.
William Blanding, U. S. Atty.

OPINION OF THE COURT. The claim in this case was rejected by the board. The grant was issued on the twenty-second of February, 1844; but no approval of the departmental assembly was obtained, nor was juridical possession given. The authenticity of the grant seems sufficiently established. The original document is produced, and the expediente is found in the archives of the former government. The confirmation of the claim is, however, opposed by the United States on the ground that the claimant, from the date of his grant until long after the acquisition of the country, neglected to comply with any of the conditions. The grant was issued, as has been stated, in 1844. It clearly appears that from that time until about the year 1850, two years after the acquisition of the country, the claimant neither occupied, cultivated or took possession of the land conceded. No effort whatsoever on his part to perform the conditions appears to have been made, and the only explanation of the delay to be found in the evidence submitted to the board, is contained in a single sentence of the deposition of Francisco Perez Pacheco, to the effect that there was no security in putting cattle on the rancho for several years after the grant.

The testimony of Jacinto Rodriguez and Benito Diaz has been taken in this court, and is chiefly relied on as affording the necessary explanation of the omission of the claimant to fulfill the conditions. But their evidence is not very satisfactory. The first of these witnesses states that he cannot tell certainly when the first settlement was made, but the land was taken possession of as soon as it was safe to do so on account of the savage state of the wild Indians. In reply to an inquiry as to his means of knowing these facts, he states that he used to go there to catch wild horses, and also as a soldier to pursue the Indians. Benito Diaz testifies in nearly the same terms, that he does not know exactly when the first settlement was made, but that he knows possession was taken as soon as the wild state of the savage Indians permitted, and that the hostility of the Indians prevented possession from being taken. He adds that he knows these facts, because he was mining in the neighborhood, and frequently passed there; that he is forty-one years of age, and has lived in that neighborhood many years. If by mining the witness means gold mining, then his knowledge of the country derived from that occupation could not have been extended further back than 1848 or 1849. But if he means some other kind of mining carried on before the conquest of the country, it is not explained why the claimant could not have cultivated his rancho with as much security as the witness carried on his own business of mining. If he has, as he states, resided many years in the vicinity, that fact would seem to show that the claimant might have done the like.

But another witness was produced before the board whose testimony, however, is not alluded to in their opinion; probably for the reason that it was considered unworthy of credit. Francisco Perez Pacheco testifies that the land has been occupied by the present claimant "for about two years." The deposition bears date May 4th, 1852. He also says that a house and corral have been on the land between two and three years. This witness is a colindante, and one to whom the governor referred for information, and on whose report the grant was made. His means of knowledge must therefore have been as good as those of any other person. José Abrego, however, ignorant apparently of the previous testimony of Pacheco, and with a zeal somewhat outstripping his discretion, does not hesitate to swear (March 3d, 1853) that "during the last eight years the land has been in the possession and occupation of the claimant; that he has used it principally for grazing purposes; constructed and occupied several small houses by himself and those in his employment; has constructed several large corrals for the herding of cattle, and has cultivated portions of the land during all that time." This witness does not seem to have been aware that the theory of the case on the part of the claimant was, not that he had shortly after his grant occupied, cultivated and stocked his rancho, and fully performed all the conditions, but that he had been prevented from doing so by Indian hostilities. Nor does he appear to have considered that the court would be slow to believe that such extensive improvements could have been made, and the rancho stocked with cattle, rendering necessary the construction of "several large corrals," and the fact remain entirely unknown to the nearest neighbor of so enterprising a ranchero. The testimony of this witness suggests a painful doubt as to the reliability of much of the evidence taken in this class of cases, and perhaps justifies a regret that we are not authorized to exact in every instance evidence of occupation and cultivation under the former government as the best, if not the only check upon forgeries and frauds, in cases where the archives contain no evidence of the grant. Rejecting then the testimony of this witness as wholly unworthy of credit, the question recurs—has the claim been forfeited by neglect to perform the conditions?

Under the view formerly taken by this court, the grant of the governor, issued before the approbation of the assembly was obtained, was regarded as inchoate or imperfect, and as conveying of itself no title

to the land. It was considered, however, that while the grantee had, on the faith of this imperfect title, fulfilled the conditions, and thus rendered to the government the only consideration for the grant exacted by their laws or policies, he had, on showing that fact or a performance cy-près, or perhaps even an effort to perform, which had been frustrated by unforeseen obstacles, an equitable right to a confirmation. It was not supposed by this court that if by the grant an estate vested in the grantee, that that estate could be divested unless by a proceeding by way of denouncement under the former government. It was considered, as observed by the supreme court in U. S. v. Fremont [18 How. (59 U. S.) 30], "that the grant subjects the lands to be denounced by another, but that the conditions do not declare the land forfeited to the state on the failure of the grantee to perform them." When, therefore, no denouncement had taken place, it was not deemed competent for this court to inquire into and declare forfeitures which might have accrued under the Mexican government.

It was also considered by this court that, inasmuch as the assembly and supreme government had the right, at their discretion, to annul the grant, our government had succeeded to that right; and was at liberty to exercise it unless under circumstances which would have made it inequitable in the former government to have done so. If then, so radical a change as that which has since occurred had taken place in the value of the land, the condition of the country, and the policy and even duty of the government, the Mexican authorities would clearly have been justified in withholding their approval, unless by the settlement and occupation of the land, on the faith of the grant, they had already received the consideration for it. The equitable obligations which were binding on them, are binding on us, but none others, and the substantial equity of the claimant was supposed to consist in the fact that he had received an imperfect or inchoate title, and had performed the conditions during the existence of the former government. Where, however, the grant was rendered complete by the approval of the assembly, and the title of the Mexican nation had been finally divested, it was not considered that we could inquire into previous forfeitures, unless such as had been taken advantage of and declared by the former government. It is decided, however, by the supreme court, that by an unapproved grant a right or interest vested in the grantee, which remained in him unless forfeited or divested under the former government. Such forfeiture did not, however, accrue on those cases alone where a denouncement of the land was made. It also took place and must be declared by this court, wherever there has been unreasonable delay in performing the conditions, and such as to authorize the presumption of abandonment.

What delay is to be considered unreasonable, and as giving rise to this presumption, the court does not explicitly state; nor does it perhaps admit of precise definition. It would seem more in accordance with the generous and benignant spirit with which the supreme court has viewed these cases, to hold that no delay shall be considered so unreasonable at to forfeit the land, unless such as would not have been excused by the former government if the land had been denounced. The time assigned for the performance of the conditions was usually one year. But this rested wholly in the discretion of the governor. By the usage of the country the excuses of the grantee for nonperformance were indulgently received, and even when the land was denounced as vacant a further time to fulfill the conditions was usually allowed, if the government was satisfied that the grantee intended to occupy his land and had been unexpectedly prevented. The delay which the supreme court regarded as working a forfeiture of the vested interest of the grantee, is evidently something more than such as would constitute a technical breach of the conditions. It must be such "unreasonable" delay as justifies the belief that in point of fact the grantee voluntarily abandoned his land. But such an inference could hardly be drawn, unless his negligence was protracted and susceptible of no other explanation, or unless he had left the country, or obtained and settled upon some other grant, or had by some other unequivocal act or omission clearly indicated his intention to renounce and surrender his property. When. therefore, the court is called upon to declare that a grantee of land has voluntarily abandoned the rights he is admitted to have acquired, the question is not unattended with difficulty; and perhaps the test already suggested may be found as safe as any other, viz: that he shall be deemed to have forfeited his lands only under such circumstances as would under the laws and usages, have deprived him of it had it been denounced by another.

In the case at bar the grant was made in 1844. The grantee had, therefore, only two years and some months during the existence of the former government, within which to perform the conditions. The political and other disturbances, which were reviewed by the supreme court in Fremont's Case, as excusing or accounting for Alvarado's neglect to perform, must have presented equal obstacles to the grantee in this case; and the hostility of the Indians in this case as in that, probably, though the fact is not very satisfactorily shown, increased the difficulty of effecting a settlement. It is true that others appear to have settled upon neighboring ranchos. For the grant is bounded by the ranchos of two colindantes, and Francisco Perez Pacheco, by the informe and his own

deposition, is shown to have had a rancho in the vicinity. But a settlement might have been practicable to a wealthy man with numerous dependents, while a poor man might have found it impossible to occupy alone an extensive tract, separated from his nearest neighbor by a distance of several leagues.

I am inclined to think that if, under the circumstances of this case, the land had been denounced, the Mexican authorities would, under their laws and customs, have accepted the excuses of the grantee, and allowed him a "proroga" or extension of time; and the fact that no denouncement was made is of some weight, as showing that no one else offered or found it practicable to fulfil the conditions. I have felt much hesitation and difficulty in arriving at a conclusion in this case. But assuming as I am bound to do that the grantee acquired a vested interest by his grant, I have not felt authorized to say that the circumstances show that he voluntarily abandoned or surrendered his rights during the existence of the former government. What circumstances the supreme court may hereafter regard as authorizing the presumption of abandonment, we cannot now say. But it has seemed to me that they should be strong and unequivocal before we can declare that a right of property once vested in a grantee of the former government has been forfeited or lost by an abandonment of it.

NUNNEMACHER (UNITED STATES v.). See Cases Nos. 15,902 and 15,903.

NURNBERG, The (BEYER v.). See Case No. 1,380.

Case No. 10,380.

NUSBAUM v. EMERY.

[3 Biss. 469;[1] 5 Chi. Leg. News, 549; 18 Int. Rev. Rec. 85.]

Circuit Court, N. D. Illinois. Feb. 25, 1873.

DISTILLER CANNOT RECOVER MONEY DEPOSITED FOR PATENT METERS — DUTY OF COLLECTOR — PRESUMPTION THAT REGULATIONS WERE FOLLOWED — PATENTED METERS — MAY BE PRESCRIBED—DISTILLER—WHEN ESTOPPED.

1. A distiller cannot recover from the collector money which he had deposited with him to pay for the patented meters for his distillery prescribed in the internal revenue department.

2. Upon receipt of meters he should transmit the deposits to the patentee; and he is not liable to the distiller. He is a mere stakeholder.

3. Where a plea does not distinctly either allege or deny that the regulations were followed, the court, on general demurrer, will presume that they were.

4. Congress has the right to compel distillers to affix certain meters to their stills as a condition precedent to carrying on their business, whether such meters are patented or not.

5. The government having prescribed the terms upon which a person can engage in the business of distilling, a person having accepted those terms and entered upon the business cannot afterwards question their binding force.

This was an action of assumpsit as for money had and received, brought by Adolphus and Simon Nusbaum, distillers at Peoria, against Enoch Emery, the United States collector for that district, to recover the sum of $1,500 deposited with him to pay for certain Tice meters to be used in their distillery. Defendant pleaded, in substance, that the said sum was not had and received by him as the money of plaintiffs, but as the money of one Isaac P. Tice; that on the first day of June, 1869, plaintiffs were distillers at Peoria, in said district, and holding a license as such distillers according to the rules and regulations prescribed by the commissioner of internal revenue of the United States; that theretofore said commissioner had, by certain rules, adopted and prescribed for use by all distillers of the United States, certain spirit meters manufactured at the city of New York by the said Isaac P. Tice, he being the only manufacturer thereof; which rules and regulations in substance required that all distillers should make application in writing to the collector of internal revenue of the collection district within which their distilleries were situate, for said Tice meters, and should deposit with such collector the price of such meter by a certificate of deposit, to be forwarded to said Tice, when Tice should ship the meter at the city of New York, by a good and responsible company of common carriers, to the distiller applying therefor, and should forward bills of lading to the said collector; that the plaintiffs being such distillers, on the day and year aforesaid made their application in writing for certain spirit meters to said defendant, who was then collector of internal revenue for the district in which said distillery was situate, and deposited with the defendant the said money in said declaration mentioned, to pay the purchase price of said meters according to said rules and regulations; that said application for said meters was duly forwarded to said Tice, who shipped said meters by responsible carriers to plaintiffs at Peoria as required by said application, and forwarded the bills of lading, and that said meters were afterward duly received by said plaintiffs at Peoria. Wherefore defendant saith that said money so had and received by him became and was the money of said Isaac P. Tice, and not the money of said plaintiffs. To this plea plaintiffs filed a general demurrer.

Ingersoll & McCune, for plaintiffs.
J. R. Doolittle, for defendant.

BLODGETT, District Judge. By the third section of the act of July 20, 1868 (15 Stat. 125), it is provided that whenever the commissioner of internal revenue shall adopt and

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

prescribe for use in distilleries any meter, every owner, agent, or superintendent of a distillery, must furnish and attach at his own expense such meter for use in his distillery.

On the 16th of September, 1868, the commissioner of internal revenue adopted and prescribed for use in distilleries the spirit meter, invented by Isaac P. Tice, which it appears had also been adopted and prescribed by the secretary of the treasury on the 19th day of April, 1867, under section 15 of the act of March 2, 1867 (14 Stat. 481), and was subsequently recommended by the commissioners appointed by joint resolution of congress, approved February 3, 1868 (15 Stat. 246).

By certain rules and regulations adopted by the commissioner of internal revenue at the time of adopting said meter, the commissioner notified all distillers of the fact that the meter so adopted had been patented to Mr. Tice, and that he alone had the right to make and sell the same, but that by an agreement between the commissioner of internal revenue and Mr. Tice the price at which said meters should be sold had been fixed by a committee of three skillful and practical mechanics, two of whom had been selected by the commissioner and one by Mr. Tice. The regulations then provided that in order to obtain such meters, distillers should make application to Mr. Tice through the collector of the district where the distillery was situate, and at the time of making application should furnish to the collector a certificate of deposit in a United States depository, payable to the order of Mr. Tice, for the amount of the price of the meter or meters so applied for. The collector was to certify upon the application that he had received such certificate, and forward the application to the office of the commissioner of internal revenue for transmission to Mr. Tice.

In his application the distiller was also required to state the means of access to his distillery, whether by railroad, steamboat, or canal, and with what points the distillery was connected by either of these modes of conveyance, and upon the delivery of the meter to the distiller the collector should at once transmit the certificate of deposit to Mr. Tice.

It will be seen that the plea sets up a substantial and almost literal compliance with the statute and regulations under it, and the demurrer admits the facts alleged in the plea. The act of congress authorized the commissioner of internal revenue to adopt a meter for use in all distilleries. By the order of September 16, 1868, the Tice meter was so adopted. The plaintiffs were distillers; their distillery was situate in Peoria, in this state. Defendant was collector of internal revenue for said district. Plaintiffs applied for certain meters, pursuant to the rules and regulations in that regard, and deposited the purchase price (the plea says by money or certificate of deposit, but the court must presume upon a general demurrer that the price was deposited with the collector by certificate of deposit, made payable to Tice, because such was the requirement of the rules.) The meters were ordered, were shipped by Tice, and received by plaintiffs.

It then became the defendant's duty to transmit the certificate of deposit to Tice. I do not see how it can be claimed that defendant has ever received any money to plaintiffs' use. The certificate of deposit was not money, and defendant could not convert it into money except by forging the indorsement of Tice to the certificate, and that would not make the money he might thus obtain upon it the money of plaintiffs.

And even if it should be held that defendant disregarded the letter of the rules, and received from plaintiffs the money required to pay Tice for the meters ordered, instead of the certificate of deposit, still the moment Tice complied with the requisition and forwarded the meters to plaintiffs the money became the money of Tice, and defendant was liable to him for it.

This court has no doubt of the right of congress to compel distillers to affix certain meters to their stills as a condition precedent to the right to carry on the business of distillers. And if the meter adopted is the subject of a patent, the distiller may be compelled to purchase of the patentee, or what is equivalent to that, because it rests with the patentee only to say whether he will monopolize the manufacture of his patented article or allow others to manufacture on terms.

We can see no principle of law which would prevent the commissioner of internal revenue from adopting for use a certain meter because it was patented. In this case the government took the precaution to protect the distillers by limiting the price to a rate fixed by an impartial committee, and this, it seems to me, was all it was bound to do.

The power of the government to prescribe the use of certain meters or locks or other devices whereby it can exercise a proper surveillance over the business of distillers is incident to the power to raise a revenue by a tax on manufactured products. And when the government by its proper officers has prescribed the terms upon which a person can be allowed to engage in the business of distilling, and any person has accepted those terms and entered upon the business, it seems to me he ought not to be allowed to question their binding force upon him afterward. He elected to carry on the business on the terms imposed, and should not be heard afterward to deny that those terms are binding on him.

The defendant in this case is only a mere stakeholder, even admitting that he ever had the money. And when the event has transpired which transferred the title to the money to Tice, the defendant no longer holds it for plaintiffs. His duty as a public officer requires him to transmit the certificate, or money if money is deposited with him, to Tice, and it is not right that he should be sued for

money which plaintiffs have no right to demand of him.

Demurrer overruled.

[For hearing on a motion by plaintiff to set aside an order reinstating these cases on the dockets after they had been dismissed, see Case No. 10,381.]

Case No. 10,381.

NUSBAUM v. EMERY.

[5 Biss. 393;[1] 5 Chi. Leg. News, 542; 18 Int. Rev. Rec. 77.]

Circuit Court, N. D. Illinois. Aug. 11, 1873.

COURT WILL RETAIN JURISDICTION TO PROTECT REAL PARTY IN INTEREST—MONEY HELD BY NOMINAL PARTY—WHEN ORDERED INTO COURT.

1. Where by collusion between the nominal parties to the record, a suit had been prosecuted to final judgment in the state court, pending proceedings in this court, this court will not allow the proceedings here to be dismissed against the wish of the real party in interest.

2. The fact that the defendant in the state court did not plead the pendency of the suit in this court is evidence of collusion between the parties.

3. Where money in controversy in a suit is held by a nominal party, solely as trustee for another person not a party to the record, the court, at the instance of the party in interest, may order it to be paid into court.

4. Where the holder of money, being an officer of the government, had ceased to be such during the pendency of the suit, the court should order the money to be paid into court.

This was a motion by the plaintiff [Adolph Nusbaum] in similar cases, to set aside an order reinstating the cases on the docket, and also a motion by Isaac P. Tice for a rule upon defendant [Enoch Emery] to show cause why he should not pay into court the money in controversy in the several cases. The suits were brought in the Peoria circuit court by distillers in the Peoria district, against the defendant, the United States collector for that district, to recover money deposited by them severally, under the revenue law, to pay for meters for their distilleries, to be furnished by Tice, under the regulations of the commissioner of internal revenue. The plaintiffs being dissatisfied with the meters, and their use having been soon abandoned, brought these suits, claiming the laws and regulations requiring the use of these patented meters were unconstitutional and void. The cases were removed to this court on the application of the defendant, and on the 25th of February, 1873, the demurrer to defendant's pleas was overruled [Case No. 10,380]; but no formal judgment entered, and twenty days given plaintiffs to elect whether they would stand by their demurrer or withdraw their demurrer and plead to the merits. The record stood in this manner until about July 1st, when the attorney for the defendants appeared and asked that judgment be entered upon the demurrer. Notice was forwarded to the attorneys of the plaintiff, and on the 8th of July plaintiff's attorney came into court and dismissed the suits.

C. A. Roberts, for plaintiff.

Harding, McCoy & Pratt, for defendant.

J. R. Doolittle & Son, for Isaac P. Tice.

BLODGETT, District Judge. At the time of the dismissal of these suits about July 1st, there was no appearance on the part of the defendant, and it did not occur to the court that there was any impropriety in the plaintiff's dismissing his own suit, as probably would have been the result if judgment had been entered upon the demurrer unless my attention had been called to the special stipulations hereafter referred to.

[2] [This case, and several others now on the docket involving the same questions, are brought before the court on a motion by the plaintiffs to set aside an order entered a few days since reinstating the cases upon the docket, and also upon a motion by Isaac P. Tice for a rule on defendant to show cause why he should not be ordered to pay into court the money in controversy in the cases. The history of these cases is substantially this: By the internal revenue law of July, 1868 [15 Stat. 125], it is provided that the commissioner of internal revenue may prescribe a meter to be used in all distilleries for the purpose of measuring the spirits made therein. And by a regulation subsequently adopted by the internal revenue bureau, the meters made and patented by Isaac P. Tice were adopted by the government and required to be used in all distilleries. The defendant Emery was, in the fall of 1868, and for some years thereafter, the collector of internal revenue in the Peoria district in this state, and the plaintiffs in these several suits were distillers at Peoria. Being thus required to use the Tice meters in their distilleries, they made the requisitions provided by the "regulations" on the collector of their district for "meters," and paid into the collector's hands the purchase price of the meters so ordered. The collector thereupon ordered the meters from Tice, and the same were duly shipped to the distillers so ordering them. On the arrival of the meters the plaintiffs were dissatisfied with their operation, and their practical use was soon abandoned. The several distillers who had so paid over their money to the defendant and ordered meters subsequently brought suits in assumpsit for money had and received against Emery in the Peoria circuit court, to recover back the purchase money they had respectively paid for their meters. They also respectively filed bills in chancery against Emery and Tice in the Peoria circuit court, alleging in substance that the meters were worthless, that the regulations of the bureau of internal revenue requiring the use of the meters in distilleries were unconstitutional and void, and alleging

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

[2] [From 5 Chi. Leg. News, 542.]

also that Tice, to whom the money was owing, was insolvent, and prayed that Emery be enjoined from paying the money over to Tice, and that he be decreed to pay it back to them. All these cases were removed to this court, on the application of Mr. Emery, where they were pending at the time of the Chicago fire. After the fire, the record was restored in the common law cases, but the files have not been restored in the chancery cases.

[To the declarations restored in the several cases at common law, the defendants pleaded, first, the general issue, and, secondly, a special plea setting up in substance that Emery, the defendant, was the collector of internal revenue for the Peoria district; that the money referred to in the plaintiff's declaration was paid to Emery, as such collector, as the purchase money for Tice meters ordered by the plaintiff, and that the money was the money of Tice, and not the plaintiff's, and that Emery did not hold the money for the plaintiff, but held it for Tice, and stating the regulations and proceedings under the internal revenue law by which the money had been paid over. To this plea the plaintiffs filed demurrers in all the cases, joinder was had upon this demurrer, and all the cases were thereupon submitted to the court. The matter was held under advisement for some time by the court, during which time it was pretty carefully and thoroughly examined, and on the 25th of February last the demurrers taken by plaintiffs were overruled by the court; but inasmuch as the attorneys for the plaintiffs in the cases were not in court at the time, and as the court did not, under the circumstances, deem it expedient to enter judgment upon the demurrer, as might have been done, until plaintiffs' counsel could have time to decide upon the course they would pursue, an entry was made that the plaintiffs should be allowed twenty days to elect whether they would stand by their demurrer, or withdraw their demurrer and plead. The record stood in this manner until some time in the month of July, when the attorney for the defendants appeared and asked that judgment be entered upon the demurrer. Notice was forwarded to the attorneys of the plaintiffs, and on the 8th of July, I think, Mr. Ingersoll, of the firm of Ingersoll & McCune, plaintiff's attorney, came into court and dismissed the common law suits. There was no appearance at that time on the part of the defendant, and it did not occur to the court that there was any impropriety in the plaintiff's dismissing his own suit, as probably that would have been the result, if judgment had been entered upon the demurrer, unless my attention had been called to the special stipulations hereafter referred to.] [2]

A few days after this dismissal it was brought to the notice of the court that after the decision upon this demurrer a suit had been brought by one of the plaintiffs in these common law cases, D. C. Farrell, upon the equity side of the circuit court of Peoria county, against Emery and Tice, setting up that he, the complainant, was the owner, in his own right, of the money which he had paid for the meter which he had ordered, and was the owner, by assignment, from the various other distillers, of what they had respectively paid; that the money was wrongfully withheld by Emery, the collector of the district; and praying relief in the premises. The suit thus commenced proceeded to hearing, upon the default of Emery, Tice being brought into court by publication, and his default being also entered, a final decree was entered on the 25th of June last, and on the 7th day of July, the day before these cases were dismissed, as the record now produced in court shows, Mr. Emery paid over to Farrell, the complainant in that suit, the amount of money in his hands growing out of the Tice meter transaction.

From the time these cases were first brought to the notice of the court it has been apparent upon the record that this was really a suit between these various distillers and Tice, and not between these men and Emery; that Emery had no interest in the matter, was merely a stakeholder of the money, and was in no wise concerned in the result of the suit. His plea stated that substantially, and the various stipulations which have been placed upon the record in the case, and the statements of counsel, have shown that counsel who appeared for Emery appeared, in point of fact, at the instance of Tice, were employed by Tice, and acted in the interest of Tice, and that Emery's name was merely used as the nominal defendant, the money in his hands being the money of either the plaintiff or of Tice, and not in any event the money of Emery.

Counsel who had appeared in the case for the defendant, under these circumstances called the attention of the court, by an affidavit, to the fact that this suit had been brought in Peoria, that Emery had paid these sums over to the complainant Farrell, and asked upon this affidavit that these cases should be reinstated, claiming that he was entitled to a judgment upon the demurrer, and to an order that the money should be paid to Tice, producing a stipulation, entered into between the counsel about the 30th of March, 1870, a copy of which was preserved from the fire of October 9, 1871, by having been transmitted to counsel engaged in certain cases of the same nature in New York. This stipulation is as follows:

"Enoch Emery ads Nusbaum et al. In all the Tice meter cases, including the above, pending in the United States court, Northern and Southern district of Illinois, and in state courts, we agree that the trial of the one shall be conclusive of all other cases where the facts are substantially alike. And that, upon the trial of that case, the certifi-

2 [From 5 Chi. Leg. News, 542.]

cates of United States collectors as to the time when meter was ordered, and when bill of lading was received, and of all other facts of record in the collector's office, shall be taken without objection.

"And we further agree that for the distillers we will make and rely upon the following points: First—That the law compelling the distillers to use the meters is unconstitutional, and that the commissioner of internal revenue had no legal right to compel distillers to purchase or use the same at their expense. And that the meter was of no value. Of all which Tice had notice.

"The legal questions shall be argued before the court, before any proof is taken, and the court may give time to take such evidence as the ruling of the court may render appropriate. We will argue the case in the United States circuit court, Northern district, Illinois.

"The defendant insists that the value or want of value is immaterial in the absence of fraud or bad faith on the part of Tice.

"All the orders of the revenue department may be read by either party, on hearing, argument or trial, and should plaintiffs finally be beaten, then the court may order the money in the collector's hands, in all cases, to be paid to Tice.

"(Signed) Ingersoll & McCune,
"For plaintiffs in said several cases.
"(Signed) Doolittle & Norton,
"Defendant's attorneys in said several cases."

All the cases in this court, on the common law side, were submitted on demurrer, and, as I understood, it was expected that they would be substantially disposed of by the demurrer. It was only because the plaintiffs were not in court by their counsel at the time the demurrer was disposed of, that the matter was allowed to rest. The decision was given in the winter time, in precarious weather, and I thought it very possible they might not have received the notice, or that it might have been impossible for the plaintiffs' attorneys to be here on the appointed morning. Therefore time was given them, simply as a matter of courtesy, as I supposed, in order that they might decide whether they would abide by the demurrer or whether they would still insist upon some proof being taken; but, as I said before, I understood that all the important questions in the cases were disposed of, and that any further action would be merely pro forma.

On the entering of the motion to reinstate the cases I sustained it, on the ground that they had been improvidently dismissed.

Defendants' attorneys then asked for a rule against Mr. Emery, to show cause why he should not pay this money into court. The rule was granted. On the return of the rule, Mr. Emery appeared, by his counsel, and moved to set aside the order reinstating the cases, and to dismiss or re-dismiss the cases. The motions for a rule against Emery to pay the money into court and to dismiss the cases were argued a few days since, and, after mature consideration, I can see no reason for changing the order formerly made on the reinstatement of the cases on the record. I think in the present status of the record, and in view of what has transpired elsewhere, it is the duty of this court to retain these cases within its own control, and within its jurisdiction, for the purpose of protecting the rights of the real parties in interest in the litigation.

I can not look upon the proceedings at Peoria, whereby an attempt, at least, was made to obtain the adjudication of the Peoria circuit court upon the matters in controversy between the parties, as anything less than a fraud upon the jurisdiction of this court, and the real parties interested in the suits here. It seems to me that this is as mild a term as the court should, in justice to itself and to the parties, apply to the transaction, although it is not intended to impute any intentional fraud to the Peoria circuit court.

Here was a court of competent jurisdiction, and having jurisdiction of the subject matter and parties, where the case had already been heard, where the delay in entering the final judgment was purely out of courtesy to the plaintiffs, and where the court had the undoubted right, under the stipulation, to order the subject matter of the litigation to be paid into court for the purpose of protecting the rights of the party in interest. In the face of these stipulations, and the rights of Tice, the plaintiffs, with the connivance of the defendant, and, as it appears, by collusion with him, enter into an agreement by which a suit is to be instituted before another tribunal, decree rendered, and the money paid over to the plaintiffs on that decree.

I say there must have been collusion between these parties, because I can hardly conceive that these plaintiffs could, without an understanding with the defendant, have deemed it possible for them to carry through, to a successful termination, this late Peoria suit. It was Emery's right to have plead at once to that suit the pendency of these suits, and the plaintiffs must have known he would have done so if he was not acting in their interest and in collusion with them. This court cannot but conclude from the admitted facts that there was an understanding between Emery and these plaintiffs in regard to the bringing of the suit in Peoria, and that the suit was brought by collusive arrangements between them. The plaintiffs would not have dared to have brought such a suit; they would have known they would have been met on the threshold by a plea in abatement which would have inevitably thrown them out of court, if the defendant was acting in good faith for the interest of Tice. But, so far from that being the case, no such plea was interposed; the rights of the party in interest are not at all protected by Emery, but

he suffers the court to take default against himself and Tice, the party in interest, and allows decree to be entered simply protecting himself, as he states in his own affidavit, by taking a bond of indemnity from Farrell. By doing that, he shows that he has no confidence, after all, in the validity of the proceedings, because he must be held to know that the decree of a court of competent jurisdiction, honestly rendered, is protection enough, and that he needed no bond or other indemnity. But the whole transaction, taken together, satisfies me that this was a somewhat ingenious attempt to evade the jurisdiction of this court, and to evade the stipulations which these plaintiffs had themselves entered into, and which were binding on them in this forum.

Without charging that Mr. Emery intended to be himself a party to this fraud, I think his position must probably be construed to be about this: He is a neighbor of these parties; he has heard their assertions made so repeatedly, and reiterated so frequently, in regard to this meter being worthless, that he perhaps sympathizes with them in their attempts to recover this money back. He perhaps feels that they should not have been compelled to purchase these meters, and that, therefore, he, as a good neighbor, ought to facilitate their effort to get back their money. But he certainly ought not to do it at the expense of violating his own stipulations, made in the interests of the party whom he really represented. His relation to Mr. Tice was that of a trustee for him, and he ought not to have been guilty of a collusive arrangement by which the funds belonging to Mr. Tice should be placed in any other custody than that in which they were at the time of the commencement of the original suit.

Therefore, I think the court did right in restoring the cases in the first instance to the docket, setting aside the order of dismissal as having been improvidently entered, and requiring the rule to be entered that the defendant should show cause why this money should not be paid into court.

I have no doubt but at common law, where the record shows that money is held by a nominal party, either plaintiff or defendant, solely as trustee for the benefit of some other person, not a party to the record, it is the right of the court, at the instance of the party in interest, to order the money in controversy to be brought into court.

I say I have no doubt that that is one of the common law powers of a court of law as well as of a court of equity, but if I had any doubt on this question, it would be entirely set at rest by the stipulation in the case. The pleas of Emery, the defendant, state emphatically and solemnly that he has no interest in this money. The stipulation provides that whenever the court has disposed of these cases, it shall order the money to be paid to Tice, if the decision be in his favor, and the court can only do that by ordering the money to be first paid into court, and then order it paid to Tice,—at least that would seem the most regular way.

At the time these suits were brought, Mr. Emery was an officer in the United States government, and the proper custodian of the money. Since the bringing of these suits, he has ceased to be such officer, and is no longer the proper custodian of this money, either for Tice or the government,—the controversy being in one sense between the distillers and the government.

I can, therefore, see no reason why the court should not make an order that the defendant pay this money into court. I think it a duty the court owes to itself and to the parties, that it should not allow its jurisdiction to be evaded by a cunning shift of this character, and that the administration of justice between the parties litigant in this tribunal should not be thwarted by a case of this kind.

An order will therefore be entered that Mr. Emery pay the money in all these cases into court within twenty days from this time.

Payment to a nominal plaintiff in a suit is not a satisfaction of the debt. Triplett v. Scott, 12 Ill. 137.

NUTE (HOWES v.). See Case No. 6,790.

NUTT (BROOKS v.). See Case No. 1,958.

Case No. 10,382.

NUTT v. MECHANICS' BANK et al.

[4 Cranch, C. C. 102.] [1]

Circuit Court, District of Columbia. Nov. Term, 1830.

ASSIGNMENT OF DOWER—EQUITY.

Dower will be assigned in equity, where there has been a parol partition by tenants in common, and damages will be awarded from the time of the demand, if the husband died seized.

Bill in equity [by Jemima Nutt against Mechanics' Bank and Joseph Smith] for dower in certain lots in Alexandria, conveyed in fee to Nutt & Anderson, as tenants in common, subject to a ground rent, and conveyed by Nutt & Anderson to R. J. Taylor, in trust, to secure debts due by them to the Mechanics' Bank, and to Joseph Smith, and sold by R. J. Taylor, the trustee, to the bank. The bill seeks for damages, from the time of the sale to the bank. Anderson and Nutt were partners in merchandise, and this property was purchased with their joint funds. They divided their joint property, but no legal conveyance or deed of partition was made of the real estate.

Mr. Hewitt and Mr. Swann. A parol partition by tenants in common, is valid.

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

Mr. Neale. The husband died seized. The rent charged granted by the husband did not deprive him of his seizin.

Decree. Dower to be assigned, and referred to the master commissioner to take an account of the damages from the commencement of this suit to the time of taking the account.

NUTT (UNITED STATES v.). See Cases Nos. 15,904 and 15,905.

Case No. 10,383.

NUTTER et al. v. RODGERS et al.[1]

Circuit Court, D. Connecticut. March 15, 1875.

EQUITY—REHEARING—WHEN ALLOWED.

[The assignee of a bankrupt, on being notified that a suit was pending for the infringement of a patent owned by a bankrupt and was on the trial list, informed a lawyer that the estate had no money to expend in the preparation of a case, and instructed the lawyer to prepare a prima facie case and make the best defense he could. At the trial the prima facie case was substantially admitted, but the validity of the patent was attacked by an array of witnesses from the West whose testimony was unbroken on cross-examination, and uncontradicted by plaintiff in rebuttal; and the court found the patent invalid. *Held*, that a rehearing would not be granted on the grounds that the lawyer ventured to trial without preparation to defend the validity of the patent and that the assignee deemed an expenditure of money in such a preparation unwise, since the assignee could test the validity of the patent in another circuit, in which a similar suit was pending, without the defendant's being compelled to undergo the expense of a rehearing.]

In equity. Petition by Thomas F. Nutter & Company, as assignee of A. S. Gear, for a rehearing of the suit by A. S. Gear and John Gear against C. B. Rodgers & Company for infringement of patent.

OPINION OF THE COURT. Upon the trial of the above entitled cause, the following facts were found to be proved and true: In February, 1874, Alonzo S. Gear, of Boston, Massachusetts, was adjudged a bankrupt by decree of the district court of that state, and Joshua S. Wheeler of Worcester and Benjamin F. Sturtevant of said Boston, were duly appointed the assignees of the estate of said bankrupt. Said Sturtevant declined, and said Wheeler accepted said trust. Previously to said adjudication, said Gear was the owner of letters patent originally granted to Nathaniel Gear, November 8th, 1853, for a machine for cutting irregular forms, and had been engaged in extensive and protracted litigation before the circuit court of the United States for the district of Massachusetts to sustain the validity of said patent, and to obtain injunctions against alleged infringers thereof. A decree in favor of said patent and of said Gear was once granted, by said circuit court, which decree was subsequently set aside, upon the ground that the title to said letters patent for said state of Massachusetts was outstanding in another person. Said Gear thereupon purchased said outstanding title and brought new petitions before the same court against alleged infringers of said patent. At the time of said adjudication in bankruptcy, said suits were pending before said court. D. Hall Rice, Esq., of Boston, was managing counsel for the defendants therein and also for C. B. Rodgers & Co. in the Case of Gear against that corporation then pending before this court. Said Wheeler, assignee, employed Charles E. Pratt, Esq., of Boston, as his counsel. Said Pratt and Rice were nominally partners in business.

Their partnership was rather in name than in reality and was instituted for the purpose of enabling Mr. Rice, who was desirous of devoting himself to patent business, to retain control of his common law business by intrusting the same to the immediate management of said Pratt. Said Rice did not share in the profits or care of the business which was entrusted to Pratt without the intervention of said Rice, and said Pratt had nothing to do with Rice's patent business. Immediately after the adjudication, said Gear secretly went to Europe. Thomas F. Livermore, Esq., had been counsel for him in his patent and other business, and after the adjudication in bankruptcy was counsel for both said Gear and Sewell K. Lovewell, to whom said Gear had assigned said patent prior to his bankruptcy. The assignee of Gear's estate brought a petition against said Lovewell before the district court for the district of Massachusetts to set aside said assignment upon the ground that it was fraudulent, which petition was pending at the April term, 1874, of this court. Shortly before said term, said Pratt heard that the case of Gear v. C. B. Rodgers & Co. was on the trial list, and informed the assignee of that fact. The assignee replied that the estate had no money to expend in the preparation of the case, and instructed said Pratt to prepare a prima facie case, and make the best defense of the patent he could, in case a trial should take place. Said Pratt thereupon prepared his prima facie case, but did not prepare to meet any attack which might be made upon the validity of the patent. Such a preparation would have involved an expenditure of time and money which the assignee did not authorize. Said Pratt informed said Livermore that the case was upon the trial list, which fact the latter already knew. Said Livermore communicated nothing to Pratt, except that John S. Beach, Esq., of New Haven was counsel in the case. In truth, Pratt & Livermore, as a result of the Lovewell litigation, and of other lawsuits which had been instituted at the instance of the assignee to recover the property of said Gear, were not upon very cordial terms with each other, and

[1] [Not previously reported.]

neither dared to be frank in regard to the condition of the Connecticut suit. Said Pratt, at the opening of the April term, 1874, moved the court that the assignee be permitted to prosecute the suit, which motion was granted. Upon the trial, the assignee presented his prima facie case, which was substantially admitted. The validity of said patent was then vigorously attacked by an array of witnesses from the West, whose testimony was unbroken upon the cross-examination and was uncontradicted. The patent was found by the court to be invalid, and the bill was dismissed. Said Gear, soon after the trial, returned from Europe, brought a petition for the removal of said Wheeler from the assigneeship before the district court of Massachusetts, upon the ground of collusion with the infringers of said patents in the trial of said case. His honor, Judge Lowell, found that there was no collusion, dismissed the petition, and appointed Thos. F. Nutter, Esq., co-assignee in place of Sturtevant resigned. A second petition was thereafter brought to remove said Wheeler, who thereupon resigned at the suggestion of the court, and Mr. Nutter is now sole assignee. There was no collusion between said Wheeler and the parties who are opposed to the Gear patent, nor was there any collusion between Mr. Pratt and the counsel for C. B. Rodgers & Co. in regard to the trial of that case before this court, nor was there any understanding or arrangement between said counsel that the case should not be prosecuted with vigor. It is true that there were circumstances connected with the relations between Messrs. Pratt & Rice, which, until explained, naturally gave color to the idea of collusion between these gentlemen, or of unfaithfulness on the part of Mr. Wheeler in the management of the case, but, in my opinion, these circumstances have been satisfactorily explained. Mr. Wheeler was averse to spending the funds of the estate in litigation. Mr. Gear had left for Europe, having, as the assignee thought, conveyed the assets of the estate in fraud of creditors, while Mr. Livermore was, in the judgment of the assignee, one of the custodians of this property. The assignee employed Mr. Pratt, in whom he had confidence and who was his counsel in the other business of the estate. Mr. Pratt's error of judgment consisted in undertaking the trial of a cause which he had no adequate opportunity to prepare, and in underestimating the strength of the testimony of his adversaries. The defendants in good faith prepared for the trial of their cause and obtained the personal attendance of ten witnesses, all of whom, except one, lived in the states of Ohio or Indiana, who were in attendance for two or three days. The expenses of the trial must have been quite large. In the event of a new trial, a similar expense must be undertaken, and a heavy burden must be thrown upon the defendants. The validity of the patent may still be tested in some one of the suits now pending in Massachusetts, for the opinion of this court in a case where no testimony was offered to rebut the testimony of the defendants will not control the judgment of the judges of other circuits. The question simply is, whether the decree shall stand as to the defendants, or whether they shall be compelled to undergo the serious expense to which they would be subjected, in the event of another trial, because the plaintiffs' lawyer improvidently ventured upon a trial with no adequate preparation, and because the assignee to whom the creditors had entrusted the estate, considered the expenditure of money in the preparation of the case unwise.

I deem the rule to be that a court will not order the retrial of a cause, when the injury to the petitioner, if any injury exists, arose from the error of judgment, or the mistakes, or the lack of due diligence of the agents to whom he had entrusted his case. Courts have not ordinarily permitted the mistakes or errors of counsel or parties to be remedied by a new hearing of the cause, and have required that it should be shown as a prerequisite to a new trial, that there has been no want of diligence or attention on the part of the petitioner. In this case, the title of Mr. Gear to this patent had become vested in the person whom the creditors selected as the assignee. It is not yet manifest whether his opposition to the expenditure of money in the prosecution of a suit in Connecticut was wise or unwise. But the present assignee has still an abundant opportunity to test the validity of the patent without any serious obstruction from the decree which was granted by this court, while a new trial would compel a large expenditure on the part of the defendants, to which they ought not, under the circumstances, to be subjected.

Let a decree be entered dismissing the present petition.

[For other cases involving this patent, see Cases Nos. 5,290, 5,291, 5,293, and 10,384.]

Case No. 10,384.

NUTTER v. WHEELER et al.

[2 Lowell, 346.] [1]

District Court, D. Massachusetts. 1874.

BANKRUPTCY OF FACTOR—RECOVERY OF GOODS BY PRINCIPAL—PROCEEDS—CHANGE OF RELATION OF AGENT TO THAT OF PURCHASER.

1. The principal of a bankrupt factor may recover from the assignee any goods remaining unsold, or any proceeds of sale of such goods which the assignee has sold, or which can be specifically distinguished from the property of the bankrupt.

[Cited in Re Linforth, Case No. 8,369.]

[Cited in National Bank of Augusta v. Goodyear (Ga.) 16 S. E. 964.]

2. A consignee, by the terms of his agency, may be the agent of the consignor until the

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

consigned goods are sold; and, when they are sold, become, as between him and the consignor, the purchaser of and principal debtor for the goods sold.

Action of contract by the assignee in bankruptcy of A. S. Gear, to recover $627, alleged to have been received by the defendants [J. S. Wheeler and others] to the use of the plaintiff [Thomas F. Nutter]. The case was, by consent, tried by the court without a jury. The facts, as found by the judge, were these: The defendants were manufacturers of machinists' tools at Worcester, and Gear had a shop in Boston, where he sold such tools, among other things. The defendants were in the habit of sending their manufactured goods to Gear, and he sold them at such prices and to such persons and on such terms as he pleased, not less than the trade prices fixed by the defendants; whenever he had sold any tools, and not before, he was to pay the defendants, in thirty days, the prices shown in the list, less an agreed discount. The defendants had the right to sell any goods which at any time remained in his shop unsold, and he was permitted to sell any of their goods at the factory, and the defendants would then deliver them according to his order, and charge him with the trade price less the discount. Instead of paying in thirty days, Gear would sometimes give his note for the balance due; and the defendants held one such note at the time of his bankruptcy. In December, 1873, Gear ordered three drills to be sent by the defendants, from their factory at Worcester, to the New York Central Railroad Company, at three different machine-shops of that company, in the state of New York. They were sent, and a bill was made out to Gear, as the purchaser, for the trade price of $600, less fifteen per cent., and sent him in a letter, in which the defendants say they had taken off fifteen per cent. and hope to get the cash in thirty days. In January, 1874, Gear failed; and the defendants took back the tools of their manufacture, then in his shop in Boston, unsold. In February, 1874, Gear went into bankruptcy, and at the first meeting of creditors the defendants proved against his estate for the amount of his note, above mentioned, and for the price of the three drills. J. S. Wheeler, one of the defendants, was chosen assignee. Finding that the railroad company had not paid Gear for the drills, the defendants collected the price, giving to the company the receipt of J. S. Wheeler, the assignee. Wheeler afterwards resigned his trust as assignee. This suit was brought by the successor of Wheeler, as assignee, against the firm of J. S. Wheeler & Co., for money had and received. The defendants filed a petition to amend their proof, as having been made by mistake of fact and law.

E. Avery and T. F. Nutter, for plaintiff.

N. Morse and A. Jones, for defendant, cited Barry v. Page, 10 Gray, 398; Audenried v. Betteley, 8 Allen, 302; Lerned v. Johns, 9 Allen, 419; Swan v. Nesmith, 7 Pick. 220.

LOWELL, District Judge. It has been settled for a very long time that, upon the bankruptcy of a factor, his principal may recover from the assignees any of the goods remaining unsold, or any proceeds of the sale of such goods which the assignees themselves have received, or which remain specifically distinguishable from the mass of the bankrupt's property. The action may be brought at law as well as in equity, subject, of course, to the factor's lien for advances or commissions (Scott v. Surman, Willes, 400; Ex parte Chion, 3 P. Wms. 187 note; Kelley v. Munson, 7 Mass. 319; Tooke v. Hollingworth, 5 Term R. 215); and it makes no difference that the factor acted under a del credere commission, or sold the goods in his own name (Thompson v. Perkins [Case No. 13,972]; Barry v. Page, 10 Gray, 398; Audenried v. Betteley, 8 Allen, 302).

A like doctrine is applied to bankers, who, if they have received notes or bills from their customers and have not discounted them, will not usually be held to have acquired the property in them; and if the banker becomes bankrupt, his assignees are liable to the customer for the bills, or their distinguishable proceeds, subject to the lien for advances. Thompson v. Giles, 2 Barn. & C. 422; Ex parte Barkworth, 2 De Gex & J. 194; Stetson v. Exchange Bank, 7 Gray, 425.

The important question, therefore, in this case is, whether the defendants and Gear stood in the positions, respectively, of principal and agent in this transaction of the sale of three drills. Upon the first view of the correspondence and the acts of the parties, it appears a simple case of sale to Gear of goods delivered to a third person at his request. And the defendants found some difficulty in stating their case in such a way as to take it out of this category. In their application to withdraw this part of their proof in bankruptcy, they say it ought to have been put, not as a sale, but as a consignment or delivery of the drills to Gear, or his order, for sale by him on their account, on commission. It was not a consignment, certainly, and Gear never for an instant had the possession or property, general or special, of the goods.

The defendants, however, appeal to the course of business between the parties to prove that it was a sale on commission. The bankrupt and the defendants, being examined as witnesses, disagreed about the conversation which took place at the beginning of the business connection between them; but the very voluminous correspondence shows clearly enough what the actual mode of dealing was. And it is plain that the goods sent to Boston by the defendants, from time

to time, remained their property until they were sold, and that when a sale occurred Gear became immediately the debtor at a fixed price, and was bound to pay at a definite time, and that he never consulted with them about terms or purchasers, or any thing else, except the variations of the trade price; never accounted to them or was expected to account as agent, or was subject to their directions, excepting as to the tools remaining in his hands undisposed of. As to those goods sent to Boston, he may be described as a bailee, having power to sell as principal. Until a sale was made, the property in the goods remained in the defendants, and they were well justified in reclaiming those which remained on hand at the time of the failure of Gear.

But after the goods were sold, the agreement appears to have been that Gear's credit only was looked to. Perhaps there were conveniences in this mode of conducting the business. Whatever profit or loss Gear might make, or whatever credit he might give, the defendants had a fixed price and a fixed time of payment. He never consulted them about his sales, or rendered any account of sales. The prohibition against selling below the trade price is a very common one between a manufacturer and those who buy of him to sell again, and is intended to prevent a ruinous competition between sellers of the same article. I have often known this arrangement to be made by a patentee and his various licensees. It has but little tendency to prove agency.

The question of agency is mooted usually either between the principal and the third person, or between that person and the supposed agent; but the real inquiry in all the cases is, whether the credit was given to the person sought to be charged by the person seeking to charge him. Thus, when the defendants were suing the railroad company, the liability depended on the fact of credit having been given them by the defendants, either directly or through their agent, Gear. The terms of the sale by Gear to the company were not proved, but it was taken for granted by both parties that he sold as a principal; and that this was so, is shown by the fact that the company insisted upon the receipt of his assignee.

I will now examine some adjudged cases. Where a trader, having a contract with government to supply a large amount of candles, asked a friend, who had candles of the required quality, to accommodate him with some, which the friend assented to, provided the bills should be made out in his name; and the trader delivered the candles (as the court inferred) in his own name, and his assignees in bankruptcy received the price; it was held they must pay it in full to the owner of the candles. Ex parte Carlon, 4 Deac. & C. 120. But it was taken for granted by the judges, that, if the owner had intended to trust the trader's credit, he could not have intervened after the bankruptcy, but must have proved against the assets as for goods sold.

So, in the cases about bankers, it has been said that if the agreement were that the bills should be the property of the banker, then, whatever might be the hardship of the particular case, his assignee in bankruptcy could hold them. See remarks of Eldon, L. C., in Ex parte Sargeant, 1 Rose, 153, explained in Ex parte Barkworth, 2 De Gex & J. 194.

The late English case, Ex parte White, 6 Ch. App. 397, is on all fours with this. With a change of names, the course of dealing described in that case would do for this, in respect to the goods sent to Gear and sold by him in Boston; and the precise question came up, whether, after the goods had been sold, the bankrupt was to account as agent. The court decided that the agency continued only up to the time of selling the goods; and, when they were sold, the bankrupt himself became the purchaser, as between him or his assignees in bankruptcy and the consignor of the goods. The learned justices say that this mode of conducting business is a usual one, of great convenience to the parties, and they carefully and ably distinguish the contract from one of a sale by an agent, even with a del credere commission. That case was to be taken to the house of lords, but I cannot find that it has been decided there. Whatever may be its fate in that court, I consider the decision of the lords justices a sound one.

The case of Audenried v. Betteley, 8 Allen, 302, has been cited by the defendants. There the plaintiffs agreed to "stock" the wharf of the bankrupt with coal and wood, and the bankrupt was to make sales at prices fixed by the plaintiffs. He agreed to carry on no other business; to keep books which should always be open to the inspection of the plaintiffs; to guarantee the sales; to account monthly, &c. The contract was evidently drawn with a view to keep the whole business under the plaintiffs' control, without making them liable for the debts of the bankrupt; and in providing for these objects it ran some risk of making the bankrupt a mere purchaser. But the court held that he was an agent. That case differs from the case at bar as much as the English case resembles it. Here, none of the circumstances are found from which an agency was there inferred. Gear did not render an account of sales; did not agree to guarantee sales, nor to keep books, nor to sell at prices to be fixed by the defendants, excepting as to the minimum, which has been already explained.

If the relation of the parties was such as I have considered it, then, even as to the goods which had once been consigned to Gear, he should be considered as the purchaser, subject only to the understanding that he was neither the owner of them, nor liable to pay for them until he had succeeded in finding a purchaser;

but when he did sell, he immediately became the principal, and the defendants ceased to have the rights of a consignor, and could not follow the goods or their proceeds as undisclosed principals.

If this is so, then the transaction now under review, which, standing alone, appears to be a sale to Gear himself, and not a sale through him as agent, is not shown to be any thing else by the course of trade between the parties. But even if the goods which had once been consigned to Gear should be held to be sold by him as agent or factor, I doubt if such sales as this could be so considered.

The defendants, then, have collected money which belonged to the estate of Gear. They collected it by action; but as they had no right to collect it, they cannot deduct the expenses, unless they would have been necessary and proper costs of a recovery by the assignee if he had brought the action. In the settlement with the railroad company they were obliged to give the receipt of one of the firm as assignee, and there is no evidence that he could not have had the money in the first instance upon such a receipt. The expenses, therefore, were incurred in their own wrong. They must pay to the present assignee the price the railroad gave for the drills, which I understand to be $610.

Judgment for the plaintiff.

[See Case No. 10,383.]

Case No. 10,385.

In re NUTTING.

[1 McA. Pat. Cas. 455.]

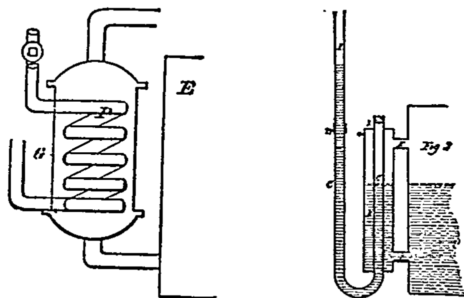
Circuit Court, District of Columbia. June, 1856.

PATENTABLE INVENTION — OBVIOUS CHANGES— STEAM BOILERS.

[The placing of a coiled or otherwise lengthened indicator pipe, instead of a straight one, in the chamber communicating with the boiler of a steam engine, for the purpose of accomplishing the same result, namely, regulating and controlling the supply of water in the boiler, involves no patentable invention.]

[This was an appeal by Mighill Nutting from the refusal of the commissioner of patents to grant him a patent for an alleged invention relating to the indicator pipe connected with steam boilers.]

[The apparatus for which the applicant seeks a patent is shown in Fig. 1. His application was rejected by the commissioner upon a reference to patent No. 11,030, granted May 19, 1854, to Patrick Clark. Clark's apparatus is shown in Fig. 2.]



Everett & Pollok, for appellant.

MORSELL, Circuit Judge. Appeal from the decision of the commissioner of patents refusing to grant him letters-patent for a certain new and useful improvement in apparatus for regulating water in steam-boilers. In his specification he says: "The nature of my invention consists in the construction of an apparatus indicating and regulating in a constant manner the height of the water-level in the boiler to which it is attached, obviating thus the dangers arising from an irregular supply of water. * * * I do not claim an apparatus for indicating the level of water in steam-boilers consisting of an inverted syphon, one leg of which passes longitudinally through a chamber connected with the boiler, and in relation to an independent horizontal tube and chamber; but what I claim, and desire to secure by letters-patent, is the use of one curvilinear or several straight and connected pipes, arranged in the manner described and for the purposes set forth." The commissioner states, in substance, as the reasons and grounds of the rejection, that "the appellant was referred to the patent granted to Patrick Clark on the 19th of May, 1854 (No. 11,030). On examining Mr. Clark's specification, it will be found that he sets forth an apparatus which, so far as relates to the point claimed, differs from Nutting's only in having a straight pipe within what Mr. Nutting calls the chamber G, instead of a curvilinear pipe or several pipes united and continuous. The purposes of Mr. Clark's apparatus and Mr. Nutting's are the same, and they operate in the same way, so far as is known to this office. The only question that has been raised by the appellant against the identity of the two inventions bears upon the single point of one tube or of several tubes. The construction placed upon that part of Patrick Clark's specification in which this statement occurs, 'by means of tubes of sufficient length,' is that it applies to the tubes containing the liquid in communication with the diaphragm, while it is understood that the appellant construes it to apply to the tubes connecting the exterior chamber which contains the tubes of the actuating liquid with the steam and water space of the boiler. It does not in reality make any difference in the force and pertinency of the reference under either construction; and although the first construction above named is regarded as the correct one, yet if the second be adopted the main and important ground is unbroken. If Mr. Clark in using his apparatus should find that a straight or syphon tube was insufficient, and should lengthen the tube by

coiling it within the chamber, as is shown by Fig. 1 of Mr. Nutting's drawings, does it seem reasonable to deny that his patent would give him protection? What more common and ready plan would occur to any individual when he wished to extend tubular surface within a given space than to make a coil? It is well known that tubes and pipes within a given chamber can have a more extended surface by coils or by a series of curved or straight tubes than by one tube of the length of that chamber; and in all cases where tubes or pipes are used, the aggregating or coiling plan is adopted wherever it may be useful and convenient. As instances, look to the use of pipes for heating buildings, for steam condensers, for distilling purposes, for heating feed-water for locomotive engines, and for heating air for metallurgic purposes. Again, the series of tubes arranged vertically or horizontally, and connected with other tubes at right angles to the first, is only another plan of extending tubular surfaces equally well known, and of as common use as the former plan. In all departments of mechanics and the useful arts, where tubular surface can be employed, the extension of that surface by a continuous pipe or tube coiled, or by a series of pipes or tubes arranged in any desirable positions or conditions, and connected in various ways, is as well understood at this day as is the extension of plain surfaces by stretching out sheet after sheet of metal or of any other of the fabrics of common use in the ordinary affairs of life."

The reasons of appeal are, in substance: First. That appellant is the first and original inventor and discoverer, and that the invention has not been patented or described in any printed publication, &c. The second is because the commissioner rejected the application without giving satisfactory references, and because he uses arguments based upon said references of which they are not justly susceptible. Upon which application, due notice was caused to be given of the time and place of trial; at which time and place the commissioner laid before me the original papers, with the reference, models, and drawings in the case, together with the grounds and reasons of his decision and the aforegoing reasons of appeal, and the case has been submitted thereupon and upon the written argument of the appellant's counsel.

The question is as to the identity between the two inventions—the appellant's and that of Clark's, to which the reference has been made. There is certainly a difference in the construction of the apparatus claimed as the improved invention between this case and that of Clark's. Clark says: "The nature of my invention consists in indicating the level of water in steam-boilers, and also of regulating the supply of water fed to the boiler, and of giving an alarm in case the water should get below the proper level by means of the action, i. e., the expansion and contraction caused by the change of temperature which occurs in a vessel or chamber connected with the boiler by means of tubes of sufficient length, and of such material as will prevent said chamber from being heated or cooled except by the presence or absence of the steam caused by the rise or fall of the water in the boiler."

The specification of claim on the part of the appellant has been hereinbefore recited, and is the use of one curvilinear or several straight and connected pipes, arranged in the manner described and for the purposes set forth, in connection with the diaphragm and the boiler. Clark, for the purposes of his invention, uses the inverted syphon, and his tubular contrivance is different. It is true that he does not, in the part of his specification just recited, expressly state the connection of the tubes containing the liquid with the diaphragm. To give a true and proper construction on this point, the whole of the specification should be taken together; in another part of which I think it sufficiently appears that it will admit of that construction. Thus it will appear that with both Clark and appellant the idea or principle was the same, although differently clothed. The general purpose and object appear to have been the same; the changes appear to me to be only in things mechanically equivalent. If found necessary, Clark would have a right, under a proper construction of his specification, to extend the length of his tube to effect more perfectly the desired object, being means within the scope of the principle of his invention, as ordinarily included in such cases.

I take the law applicable to be clear, which is, that "it is necessary to ascertain, with as much accuracy as the nature of such inquiries admits, the boundaries between what was known and used before and what is new in the mode of operation. Whittemore v. Cutter [Case No. 17,601]. The inquiry, therefore, must be, not whether the same elements of motion or the same component parts are used, but whether the given effect is produced substantially by the same mode of operation and the same combination of powers in both machines." Curt. p. 84. One machine is the same in substance as another if the principle be the same in effect, though the form of the machine be different. Bovill v. Moore, Dav. Pat. Cas. 361, 405. One man was the first inventor of the principle, and the other has adopted it; and though he may have carried it into effect by substituting one mechanical equivalent for another, still we must look to the substance, and not to the mere form. Equivalents are to be known by an inference to be drawn from all the circumstances of the case, by attending to the consideration whether the contrivance used by the appellant is used for the same general purpose, performs the same kind of duties, or is applicable to the same object as the contrivance used by the patentee.

The aforegoing views bring me to the con-

clusion that there is substantially no difference between the inventions of the appellant and that of Clark in a patentable sense, and that the commissioner has correctly rejected the application for a patent of the appellant, and that his decision is, and ought to be, affirmed.

Case No. 10,386.

The N. W. THOMAS.

[1 Biss. 210.] [1]

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

SALE UNDER STATE LAW—PRIOR ADMIRALTY LIEN.

1. The sale of a vessel under a state statute does not divest a prior admiralty lien.

[Cited in McAllister v. The Sam Kirkman, Case No. 8,658.]

[Cited in The E. A. Barnard, 2 Fed. 722.]

2. As between the purchaser at the marshal's sale, and the purchaser under the state court proceedings, the former has a good title, even though the proceedings in the state court may have been first instituted. The case is similar to that of a purchaser of land on execution, which is afterwards sold under a prior mortgage.

3. If a state should institute proceedings in rem, unknown to the common law, which interfere with a rightful exercise of the admiralty law, it would be a violation of the constitution and laws of the Union.

4. The statutes of Ohio and Missouri as to attachment of boats and vessels construed.

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

The libel was filed in 1854 on a claim for services performed on the above boat. The respondents in their answer say, that after the date of the alleged claim of the libellants, the steamboat N. W. Thomas was seized on a warrant issued from the court of common pleas of Hamilton county, under a statute of the state, at the instance of material men, and on the 16th of February, 1854, sold by the sheriff to the claimants who claim to hold it free from all prior liens. The district court overruled this defense, and decreed that the claim of the libellants was a lien upon the boat, and that it should be sold, &c. [Case unreported.] The lien of the libellants was prior in date to that of the respondents.

T. D. Lincoln, for libellants.

The libellants have a lien upon the boat preferable to any other lien even in admiralty, and prior to a bottomry bond. The Globe [Case No. 5,484]; Abb. Shipp. 662; The Favourite, 2 C. Rob. Adm. 232; Pitman v. Hooper [Cases Nos. 11,185 and 11,186]; Taylor v. The Royal Saxon [Id. 13,803]; The Sydney Cove, 2 Dod. 11; Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328. The lien in admiralty is not lost by a sale or by a forfeiture or condemnation of the vessel to the government, and it is preferable even to bottomry bonds. The Globe [supra]; Abb. Shipp. 662; U. S. v. Wilder [Case No. 16,694]; St. Jago de Cuba, 9 Wheat. [22 U. S.] 409; The Sydney Cove, 2 Dod. 12; Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328; Harmer v. Bell, 22 Eng. Law & Eq. 64. It being an admiralty lien, the state courts can take no jurisdiction of it, because the ninth section of the judiciary act gives the United States courts exclusive jurisdiction in all admiralty and maritime causes. 1 Stat. 76, 77; Ashbrook v. The Golden Gate [Case No. 574]; The Globe [supra]; The John Richards [Case No. 7,361]; The Chusan [Id. 2,717]. The Ohio law does not profess to enforce the admiralty lien, but proceeds to create new liens and liabilities, and to enforce them, entirely regardless of the admiralty preferences and priorities. See first and second sections Swan's Statutes (p. 185, new Ed.; p. 209, old Ed.). The lien when acquired by the Ohio law is inferior to the admiralty lien. Dudley v. The Superior [Case No. 4,115]. Under this law it has been held that the court cannot enforce other maritime liens. Goodsill v. The St. Louis, 16 Ohio, 178. In none of the states do they enforce the lien laws of other states, as is done in admiralty courts. Noble v. The St. Anthony, 12 Mo. 263; Wight v. Maxwell, 4 Mich. 45. The party who first seizes the boat in the state courts is the first satisfied. Jones v. The Commerce, 14 Ohio, 412. It was originally held to apply only to such cases as originated in the state. The Champion v. Jantzen, 16 Ohio, 91; Goodsill v. The St. Louis, Id. 178. These services having been earned out of this state, the law would not apply to them. The amendatory act of 1848 extends it to causes arising out of the state, but it saves all bona fide purchasers. Swan's St. p. 187. This is not the case as to admiralty liens. They hold even against bona fide purchasers, who have no notice of the claim, but as to all causes arising out of the state, as this cause did, the amendatory act prohibits the libellants from proceeding as against a bona fide purchaser without notice. This very act shows that it does not take, and does not profess to take, cognizance of admiralty liens, for it prohibits a recovery in such cases. Since the amendatory law the lien has been held to be one remedial simply. Thompson v. The J. D. Morton, 2 Ohio St. 27; Hillyard v. The Spray, 10 West. Law J. 80; Barker v. The Flag, 1 Handy, 385. See, also, Canal Boat Huron v. Simmons, 11 Ohio, 458; Lewis v. The Cleveland, 12 Ohio, 341. It cannot, therefore, do more than to affect the rights of the owners, who bring her to the state, where only she can be seized under the act. Indeed, none but the owners and their agents have any authority to appear in the cause. They are authorized to appear, and release the boat, receive the money, appeal, &c., and the judgment professes to bind

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

them. Swan's St. p. 209. It does not profess to bind any one else. As a remedy, and as a lien, affecting merely the owners, when they appear it may be valid. Yet as a remedy it cannot take away the rights of any persons not made parties. Green v. Biddle, 8 Wheat. [21 U. S.] 75; Bronson v. Kinzie, 1 How. [42 U. S.] 311; Arrowsmith v. Burlingim [Case No. 563]; Norris v. The City of Boston, 4 Metc. [Mass.] 293; Pierce v. State, 13 N. H. 536.

As the act provides for no monition nor for bringing other parties before the court, none but those actually before the court are bound by the proceedings under it, nor can their rights be affected; certainly none who claim under another and higher law. The Globe [Case No. 5,484]; The Mary, 9 Cranch [13 U. S.] 126; Bradstreet v. Neptune Ins. Co. [Id. 1,793]. Proceedings in rem bind all the world only because monition issues, and all the world are made parties. The Mary, 9 Cranch [13 U. S.] 126; Bradstreet v. Neptune Ins. Co. [supra]. None are made parties here, and none have a right to appear except the owners and their agents. In this respect see the case of Germain v. The Indiana, 11 Ill. 535, which is a decision under a law identical with the Ohio law. This principle has been carried still further in Ohio. The old attachment law of Ohio provided that the judgments should be personal judgments, and that the balance not satisfied by the property attached should be collected on execution, as in other cases. Section 11, Swan's St. (§ 92, old Ed.). But the supreme court has held that no execution could be issued upon such for such balance, though the statute did authorize it. Arndt v. Arndt, 15 Ohio, 33; Pelton v. Platner, 13 Ohio, 209. Under this statute no monition or notice is given, and each person proceeds separately, and for himself; a separate record and judgment are had in each case. There are many cases where it has been held that such a sale does not deprive the libellants of their right thus to proceed. See Taylor v. The Royal Saxon [Case No. 13,803]; Gallatin v. The Pilot [Id. 5,199]; Wall v. The Royal Saxon [Id. 17,093]; Dudley v. The Superior [Id. 4,115]; Certain Logs of Mahogany [Id. 2,559]. It is the practice in the English admiralty to seize vessels under common law process. The Flora, 1 Hagg. Adm. 298. Even the state courts of the different states have held that a public sale under this law does not cut off liens under these laws. Wight v. Maxwell, 4 Mich. 45; Germain v. The Indiana, 11 Ill. 535; The Sea Bird v. Frances Beehler, 12 Mo. 571; Devinney v. The Memphis, 2 Am. Law Reg. 666; Reed v. Fawkes, 9 Port. (Ala.) 623. That state laws cannot apply to this class of vessels or interfere with admiralty liens, see, also, Smith v. The Eastern Railroad [Case No. 13,039]; The Chusan [Id. 2,717]; Dudley v. The Superior [supra]; Sexton v. The Troy, Id.

Mr. Coffin, for respondents.

McLEAN, Circuit Justice. The constitution of the United States declares that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction," and the judiciary act of 1789 provides that the district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." 1 Stat. 76.

The supreme court of the United States has decided that the admiralty jurisdiction extends over all navigable waters of the United States, where the commerce is carried on between two or more states. Over a commerce which is limited to any state, the jurisdiction of such state is exclusive. And so, over a commerce between two or more states, the admiralty jurisdiction of the United States, under the constitution, is exclusive.

In the case of The General Smith, 4 Wheat. [17 U. S.] 438, it was held by the supreme court, that the maritime lien did not extend to the home port of the vessel. In this decision the common law of England was followed, as appears from the argument of Mr. Pinckney, and the decision of the court. In that case the proceeding was in rem, and not in personam. At the home port there is a maritime lien throughout continental Europe under the civil law, the same as at a foreign port. But so strenuously was this principle opposed by the common law lawyers of England, with Coke at their head, that the admiralty law was not permitted to operate within the body of any county in England; and in the above case of The General Smith, the supreme court adopted the same rule, at least so far as the maritime lien is concerned.

The maritime lien for seamen's wages is as old as the sea laws, whether founded on the Rhodian laws, the laws of Oleron, the ordinances of France, or the famous laws of Wisbuy. This law, being a part of the maritime system, was adopted by our constitution, and by the act of 1789 is declared to be exclusively of federal cognizance.

In an early period of our government the supreme court held, "The decree of a court of admiralty in rem is conclusive everywhere; and the grounds of such decree cannot be inquired into in any other admiralty court." Penhallow v. Doane's Adm'rs, 3 Dall. [3 U. S.] 54. This decision was placed upon the fact that the whole world are parties in an admiralty court. Every person interested may make himself a party, and in all cases notice is given with this view.

By the steamboat law of Ohio, passed in 1840 (Rev. St. Swan & C. c. 26, pp. 252, 257), an action may be brought against a steamboat or other water craft, for any cause or ground of action; and the vessel may be seized, her apparel and furniture, and finally

sold in satisfaction of the judgment. This law was amended in 1848, so as to authorize the procedure against the vessel though the cause of action may have arisen beyond the jurisdiction of the state, and though the boat may not have been navigating the waters of the state or those bordering upon it.

Another amendment of this law was made in 1843; the first section of which seems to have been intended for some other purpose than that which is expressed. And in 1851 an act was passed requiring ten days' notice to be given of the sale of a vessel, in a newspaper, in addition to the notice required in the preceding acts. In the preceding acts no notice of such sale is required, unless it be found in providing that execution shall issue according to the usual rules of such proceedings.

Under this law the steamboat in question was sold, and the purchasers claim to hold it exempt from the lien of seamen's wages of prior date.

The seamen's lien for wages is favored in the admiralty, and takes precedence over all other liens. The sailor is considered as a part of the ship, as indispensable to its movement as any part of its equipment.

Suppose the legislature of Ohio had provided that no maritime lien should be recognized within the state, could any one doubt that such an act would have been unconstitutional and void? This, perhaps, may be admitted, and the argument might still be urged, that a prior maritime lien may be barred by the subsequent sale of the vessel on a junior lien under the Ohio statute.

A case is cited of high authority lately decided in Louisiana, on the point before the court. It was held by Mr. Justice Campbell, in the case of Auther v. The Atlantic [Case No. 668], that the prior maritime lien of the libellants, who lived in New Orleans, was extinguished by a sale of the vessel at St. Louis, in Missouri, under a law of that state, it being the port where the vessel was registered, and consequently its home port.

That case may not be accurately reported, or was not, perhaps, fully presented by the counsel. I am quite sure that if the learned judge had had before him the Missouri statute, and the decisions on that statute by the supreme court of Missouri, he would have come to a different conclusion. The act of Missouri expressly provides, "the effect of a sale under the statute, shall be to discharge all other liens and incumbrances, under this act." This clearly imports that the act could only be applied in discharge of liens arising in the state of Missouri, and under the same act. It could, therefore, have no application to a prior maritime lien, arising in a foreign port; and this was the character of the lien claimed at New Orleans.

I am confirmed in this construction of the Missouri act, from the fact that it has so been construed by the supreme court of the state. The court held: "The Missouri statute concerning boats and vessels, is limited in its provisions to contracts made within the state, with boats used in navigating the waters of the state." No claim arising out of the state could, therefore, come under the act.

In addition to the above, the able district judge of the United States for Missouri, in the case of Harris v. The Henrietta [Case No. 6,121], held, that a sale of the vessel under the Missouri statute, did not displace a prior maritime lien for supplies. By an act of congress of the 19th of May, 1822, it is provided, "That proceedings in the courts of admiralty and maritime jurisdiction shall be according to the principles, rules and usages, which belong to courts of admiralty," &c. (4 Stat. 278); and this being within the constitution, is the supreme law of the land.

I have stated the saving clause in the act of 1789, which makes the admiralty jurisdiction of the district court exclusive "saving to suitors in all cases, the right of a common law remedy, where the common law is competent to give it." Is the procedure under the Ohio statute, a common law remedy? In Wight v. Maxwell, 4 Mich. 45, the supreme court of Michigan held that the procedure under the Ohio statute, was not a proceeding in rem.

I have read the Ohio statute with some care, and I find no provision for other creditors to appear, and make themselves parties to the suit. The ordinary notice of a sale of property on execution, under other laws, and a notice of ten days, required to be given in a newspaper by the last amendatory law, are the only provisions in the act as to notice.

In Bradstreet v. Neptune Ins. Co. [Case No. 1,793], Judge Story says: "It is a rule founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned. If a person have not such opportunity, and yet is deprived of his rights, the proceedings are not judicial, but arbitrary, and ought to have no intrinsic credit given to them, either for their justice or truth."

Chief Justice Marshall says, in Rankin v. Scott, 12 Wheat. [25 U. S.] 177: "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity, to a subsequent claimant."

In the Eastern district of Pennsylvania,—Wall v. The Royal Saxon [Case No. 17,093],—a steamboat had been attached out of the supreme court of the state, eight days before she was libelled in admiralty by material men. The marshal made a special return, that he found the sheriff on board. The district judge took jurisdiction of the case and condemned the vessel, and ordered her to be sold, though this proceeding was opposed by

the attaching creditors. The purchaser's title, under the marshal's sale, was held to be good by the district judge; and on an appeal to the circuit court, his judgment was affirmed. Judge Grier, on the appeal said: "That Taylor's title, who purchased under the marshal, is good against all the world, will hardly admit of a doubt; and as between him and the sheriff's vendee, the latter's title is as completely divested as if he had bought land on execution which was afterwards sold on a mortgage, which was the oldest lien on the property."

That case was before the supreme court at the last term. The only difficulty in the mind of any judge was, whether, as the process from the state court was first served, the process in admiralty could be interposed, before the final action in that court. The maritime lien was prior in date, and no judge doubted that it was of paramount obligation to the local lien.

In a case before the circuit court of this circuit, at Detroit, a libel was filed and process served on a vessel, not known to have been previously attached under the local law of Michigan, but the sheriff and marshal agreed they would hold a common possession for all concerned. The vessel was condemned and sold under the local law; and on the same day, but after the sale under the Michigan act, she was sold by the marshal under a decree in the admiralty. The admiralty lien was prior in date, and, on appeal, I held the right of the purchaser paramount to the purchaser under the sheriff's sale. The only doubt I felt in that case was, as to the legal right of the marshal to attach the property, it having been attached by the sheriff. Some effect was given to the arrangement between the attaching officers. In The Chusan [Id. 2,717], Judge Story held, that a state could pass no law affecting the maritime lien.

The admiralty law prevails in all commercial countries. It has been formed by the experience of many centuries, from the necessity and convenience of commerce, under the lead of the most eminent jurisconsults of the civil law for ages, and it is most admirably adapted to maintain and advance the growing interests of our commerce. Already it is practically extended to all our internal navigable waters, on which floats a commerce annually exceeding in value ten hundred millions of dollars, and this immense property, in its transit, is protected and regulated by the long established rules of the admiralty; and the question is, shall this system be impaired, and its uniformity and efficiency broken down by the legislation of the different states, influenced by local interests?

If a state shall institute a proceeding in rem, unknown to the common law, which shall interfere with a rightful exercise of the admiralty law, it would be a violation of the constitution and laws of the Union. Each state has the exclusive regulation of its own commerce, and in regard to liens, the home ports of its vessels; and beyond these, the common law remedies remain unrestricted. Every one who deals with a ship, or purchases it, should be careful to be informed as to prior liens. From their nature they constitute a mortgage on the vessel, which is a wanderer, whether it plies in our own country or in foreign countries, and the credit given to it, in the form of bottomry bonds or otherwise, is often essential to its prosperous voyages. On the certainty of these liens much depends. A sale or transfer of the vessel by the owner, or a subsequent creditor, under the forms of law, will not displace them. Even a condemnation of the vessel by the government does not defeat the lien for seamen's wages. I affirm the decree of the district court, with costs.

NOTE. See Ashbrook v. The Golden Gate [Case No. 574]; Foster v. The Pilot [Id. 4,980]; Hill v. The Golden Gate [Id. 6,491]; The Gazelle [Id. 5,289]; The John Richards [Id. 7,361]; The Circassian [Id. 2,721]; also, The Skylark [Id. 12,928], decided by Drummond, J., Northern district of Illinois, February term, 1870. The lien of a seaman who is also part owner is, however, discharged. Gallatin v. The Pilot [Id. 5,199]. It is held in the Sailor Prince [Id. 12,-218], that an attachment from a state court levied upon a vessel and her freight money would not prevent the district court from taking jurisdiction to enforce seamen's wages. The questions decided in this case are also thoroughly considered in Taylor v. Carryl, 20 How. [61 U. S.] 583.

NYE (UNITED STATES v.). See Case No. 15,906.

Case No. 10,387.

The NYMPH.

[Blatchf. Pr. Cas. 564.] [1]

District Court, S. D. New York. Oct., 1863.

PRIZE — DEVIATION—CONTRABAND OF WAR—CONDEMNATION.

The vessel having been captured within five miles of the enemy's coast, and about 150 miles off her true course, as designated on her papers, and no excuse being given for the deviation, and her cargo consisting partly of articles contraband of war, and wholly of supplies of urgent importance to the enemy, and no claim being interposed to the vessel and cargo, although the master was brought in and examined as a witness, the court ordered condemnation of vessel and cargo, unless their owner should, on application, obtain leave, prior to the third regular term after such order, to interpose a claim to the merits of the libel. The libellants were allowed meantime to take an order for the sale of the prize property.

In admiralty.

BETTS, District Judge. The above vessel had a certificate of British registry, at Belize, Honduras, dated March 26, 1863, to James McNab, of that place. She is represented to be of foreign build, but the place of her build is not stated in the registry. A shipping agreement was entered into between Alexander McCapping, master, and a ship's crew on

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

the 2d of April, 1863, for a voyage from that place to a port or ports in the Gulf of Mexico, and thence back to Belize, or other port in the West India Islands. A manifest of the cargo to be carried, destined to Matamoras, was found on board the vessel when arrested, and the vessel was cleared from Belize for Matamoras. The manifest included, amongst general merchandise, 90 coils of rope, 6 packages of brandy, 554 gallons of rum, 35 gallons of alcohol, 35 gallons of whiskey, 1 barrel of castor oil, 5 packages of medicines, 1 barrel of alum, &c. Her cargo at the time of her capture consisted of medicines, shoes, coffee, rice, sugar, dry goods, &c. The testimony given by the master of the vessel and a passenger, on their examination in preparatorio, shows that the vessel sailed from Belize about the 2d of April, and was captured on the 22d of April in the morning, 4 miles off Pass Caballos, near Galveston, and about 5 miles from the light-house, because, as the master says, "they thought she had run the blockade." She had no log-book on board when seized. She was about 150 miles off her true course to Matamoras. No proof is furnished in excuse of so wide a deviation, such as that violent weather had been encountered, or some impediment to a direct navigation to Matamoras. McNab, the owner of the vessel, is an English subject, now resident at Matamoras. No bill of sale of the vessel to him accompanies the register, nor any evidence of the payment of any consideration for the purchase. The master resides at Matamoras. The vessel was captured by a United States gunboat. The master knew that Pass Caballos and the coast of Texas were under blockade. The owner of the vessel was an Englishman, who resided with his family at Matamoras.

It is very obvious that the position, equipment, and circumstances of the vessel and her relation to the voyage, are all clothed with violent suspicions and presumptions against the fairness and honesty of the adventure. They abundantly justify her arrest in the attitude in which she was discovered. The suspicions are of such force as to demand at the hands of her owner the clearest explanation, to relieve her from the conclusion that she was purposely hovering on the enemy's coast with the intention of placing her cargo in the possession of the rebels. It consisted in part of articles contraband of war, and wholly of supplies of urgent importance and necessity to all the region held under blockade. Every inference would seem to be of controlling force that the vessel could not, on the facts in evidence, be 150 miles out of her true course on that short transit, and that she had purposely run directly from Belize to Galveston, with the design to deliver her cargo to the rebels. The master was in court, convenient, at the wish of the owner, to claim the vessel and cargo, and vindicate the honesty of the voyage, had any defence been desired from him. A decree by default has been suffered, and the strong suspicions which justified the capture and that first decree call, also, for the final condemnation and forfeiture of the vessel and cargo, unless an application is made to the court, on proper grounds, on behalf of the real owner, for leave to intervene and give proof in vindication of the lawfulness and integrity of the voyage in question. That opportunity will be accorded him if sought for, when he may be allowed to prove, if such be the fact, the bona fide ownership of the vessel and the honesty of her voyage, and to justify her being found almost in the act of entering a blockaded port, with a cargo most especially fitted for its necessities, at a point almost 200 miles aside from her alleged destination. The final judgment to be entered in the suit will be the one above indicated, unless a claim is permitted as above to be interposed to the merits of the libel previous to the term to be held in January next. In the meantime an order may be taken, at the discretion of the libellants, directing a sale of any portion of the prize not already disposed of.

Decree accordingly.

Case No. 10,388.

The NYMPH.

[1 Sumn. 516.] [1]

Circuit Court, D. Maine. May Term, 1834.[2]

COD-FISHERY LICENSE—ACT OF 1828.

1. Since the act of 1828, c. 119 [4 Stat. 312], the mackerel fishery cannot be lawfully carried on under a license for the cod fishery, in pursuance of the act of 1793, c. 8, § 32 [1 Stat. 316].

2. Semble, that before the act of 1828 it could not be carried on under such a license, unless so far as it was an incident to the cod fishery; as, for instance, for bait, or provisions for the crew.

[Cited in The Harriet, Case No. 6,099.]

3. The cod fishery is a trade within the true intent and meaning of the 32d section of the act of 1793, c. 8. So is the mackerel fishery. "Trade" in the act is used as equivalent to occupation, employment, or business, for gain or profit.

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

This was the case of a libel of seizure against the Nymph, a vessel licensed for the cod fisheries [Bibbord, claimant]. And the charges were: (1st.) That during the continuance of the license the schooner was employed in a trade other than that for which she was licensed, contrary to the 32d section of the coasting act of 1793 [1 Story's Laws, 285] c. 52 [8]; (2d.) that during the same period she proceeded on a foreign voyage, without first giving up her enrolment and license, contrary to the 8th section of the same act. The district court pro-

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

[2] [Affirming Case No. 10,389.]

nounced a decree of acquittal upon the facts [Case No. 10,389], and from that decree the United States appealed to this court.

Dist. Atty. Anderson, for the United States.
C. S. Daveis, for claimant.

STORY, Circuit Justice. There are in this case two points; one of law, upon which, having been fully argued, the court will now pronounce its opinion; and the other of fact, which will be open for argument at a future term, if in the mean time the cause is not otherwise disposed of. The schooner was duly licensed in October, 1832, to be employed in the cod fishery, pursuant to the coasting and fishery act of 1793, c. 52 [1 Story's Laws, 285; 1 Stat. 316, ch. 8]. And the allegation made at the bar is, that she was during the existence of that license employed in the mackerel fishery, which, it is contended, is a trade other than that for which she was licensed; and consequently, that she is subjected to forfeiture under the 32d section of the act. Assuming, that she was so employed in the mackerel fishery, it is contended; first, that the mackerel fishery is not a trade within the meaning of the 32d section of the act; and, secondly, that if it be, still the license for the cod fishery includes the right to be employed in the mackerel fishery. The 32d section declares, that if any licensed ship or vessel "shall be employed in any other trade than that, for which she is licensed," she, with her tackle, &c. shall be forfeited. And the first question is, in what sense the word "trade" is used in this section. The argument for the claimant insists, that "trade" is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion, that such is not the true sense of the word, as used in the 32d section. In the first place, the word "trade" is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade. Thus, we constantly speak of the art, mystery, or trade of a housewright, a shipwright, a tailor, a blacksmith, and a shoe-maker, though some of these may be, and sometimes are, carried on without buying or selling goods. It is in this extended sense, that the word was understood in construing this very section by the circuit court in the case of The Eliza [Case No. 4,346], and by the supreme court in the case of The Active, 7 Cranch [11 U. S.] R. 100, 106. In neither of these cases was the vessel employed in traffic in the strictest sense; but merely in the transportation of merchandise on freight, or for hire. See Com. Dig. "Trade," A. D. 5; 2 Co. Inst. 621, 668. See, also, The Two Friends [Case No. 14,289]; The Three Brothers [Id. 14,009]. But the act itself furnishes abundant proof, that "trade" in the 32d section is used in the more enlarged sense already alluded to; and indeed this is the only sense which will satisfy the requisitions of the act. We are not to enlarge penal statutes by implication, so as to cover cases within the same mischiefs, though not within the words. But, on the other hand, we are to ascertain the true legislative sense of the words used; and that sense being once ascertained, courts of justice are bound to give effect to that intent, and are not at liberty to fritter it upon metaphysical niceties. The very words of the 32d section show, that "trade" must there mean something more than mere traffic in goods or commercial buying and selling. The words are, "if any such ship or vessel shall be employed in any other trade, than that for which she is licensed." It is then supposed, that she is to be licensed for some trade, and that she may be employed in another trade. The only cases, in which a license is authorized and required, are for vessels to be employed in the coasting trade, or the whale fishery, or the cod fishery. The 32d section equally applies to each of these employments; and each of them is, therefore, necessarily contemplated to be a trade in the sense of the act. Indeed the coasting trade is ordinarily not a traffic of buying and selling, but a transportation of goods for hire. And there is no more difficulty, in propriety of language, in denominating the whale fishery the whale trade, and the cod fishery the cod trade, than in denominating the coasting business the coasting trade. See Reeve, Shipp. p. 216, c. 5, &c.; Bac. Abr. "Merchant and Merchandise," N, 5; 2 Dane, Abr. c. 68, art. 9, § 9. Each embraces the same general notion, employment, occupation, or business for gain or hire, in contradistinction to employments for mere pleasure. It also deserves notice, and, in confirmation of the views already suggested, it may be added, that the charter of Massachusetts of 1628 expressly provided, that all subjects should have the right and liberty "to use and exercise the trade of fishing upon the coast of New England" (1 Haz. Collect. p. 254; Hutch. Collect. pp. 1–23; Ancient Charters and Laws, and Prov. Laws, p. 26; Adams, Fisheries [1822], p. 185); and the provincial charter of 1691 recognised the same right and liberty in the same terms; thus conclusively establishing, that the very fisheries in question were significantly deemed a trade.

The very form of the license, and the other regulations prescribed by the 4th and 5th sections of the act, prove, that trade, employment, and business are used in the act as equivalent terms. Before a license is granted, a bond is to be given, that the vessel "shall not be employed in any trade, whereby the revenue of the United States shall be defrauded." The master of the vessel is to

swear or affirm, "that such license shall not be used for any vessel or any other employment than that for which it is specially granted, or in any trade or business whereby the revenue of the United States may be defrauded." And "no license granted to any ship or vessel shall be considered in force any longer than such ship or vessel is owned, and of the description set forth in the license, or for carrying on any other business or employment, than that for which she is specially licensed." Taking these provisions in connexion with the language of the 32d section, it seems beyond any reasonable doubt, that the whole policy of the act would be defeated, and its manifest intention be evaded, by any narrow definition of the word "trade." It appears to me, therefore, that, unless the court were at liberty wholly to disregard its ordinary duty in the construction of this statute, an employment in the mackerel fishery is a "trade" within its purview.

The next question is, whether the license in the present case, for employment in the cod fishery, includes within its scope a license for a distinct employment in the mackerel fishery. Notwithstanding the ingenious and able argument of the counsel of the claimant, I am decidedly of opinion, that it does not; and I will now proceed to give the reasons for that opinion. A license to be employed in the cod fishery, ex vi terminorum, cannot include any right or privilege except those, which are incident and belong to that particular branch of trade. The license confers on the party whatever is necessary and appropriate to that trade; for a right to carry on any business naturally includes all the usual and customary means, by which the end is to be accomplished. The right to dig, purchase, and use clams, or other bait, to purchase and transport salt, and procure other reasonable equipments for the voyage, are therefore clearly within the scope of the license. And so far as mackerel are or may be used, as a customary bait in the course of the voyage, there can be as little doubt, that the right to fish for and use them for that purpose is also included. And I go further, and freely admit, that any other fish caught in the ordinary course of the voyage, not as a substitute for employment in the cod fishery, but as a mere incident to the principal business, are equally protected by the license. We all know, that halibut, pollock, cusks, and some other fish are commonly caught in the course of such voyages, and sometimes used as provisions, and sometimes preserved for sale. The true ground, upon which all these apparent exceptions rest, is, that they are mere incidents to the principal employment, and not a distinct and separate employment. No man can justly suppose, that a license to carry on the cod fishery authorizes a party to carry on all sorts of fisheries; as, for instance, the whale fishery, the herring fishery, the shad fishery, the salmon fishery, as a principal employment. That would be to confound all distinctions of trade. It would be to declare, that although the act of 1793 requires a license for the cod fishery, and a distinct license for the whale fishery, any person, who possessed either, could carry on both trades at the same time. Under a license to catch cod, he would be at liberty to institute and carry on a whaling voyage; or, conversely, under a whaling license, he might employ himself wholly in the cod fishery.

It is undoubtedly true (as has been suggested at the bar), that mackerel have for a long time been used as bait in the cod fishery, and caught in the course of the fishing voyage for this purpose. But it is also historically true, that until a recent period the mackerel fishery was carried on solely for this purpose, or by small boats on the coast for the mere supply of the daily market. Within a few years it has become an important branch of trade; and it is carried on as a distinct employment; so that at present, as I learn from the argument at the bar, upwards of 40,000 barrels are annually taken on our coast and put up for use and exportation. In the year 1828, the attention of congress was attracted to this subject; and by the act of the 24th of May, 1828 (chapter 119), it was enacted, that from and after the passage of that act, it shall be the duty of the collector, &c., "to issue a license for carrying on the mackerel fishery" to any vessel, in the form prescribed by the coasting and fishery act of 1793 (c. 8); and that all the provisions of that act, respecting licensed vessels, shall be deemed and taken to be applicable to licenses, and to vessels licensed, for carrying on the mackerel fishery. This act must at all events (it seems to me), be deemed to erect the mackerel fishery into a distinct and independent employment; and to make it distinguishable and disconnected from the cod fishery. Unless this construction be given to the act, I cannot well perceive what bearing or operation the act can have. If a license for the cod fishery will, notwithstanding this act, cover the mackerel fishery, whether carried on in connexion with the cod fishery, or exclusive of it, what possible use can there be for any provision allowing a license for the mackerel fishery? It would be already sufficiently provided for. And, on the other hand, if the mackerel and cod fishery are to be deemed identical, then, under a license for the mackerel fishery, the cod fishery might be pursued. So that whichever way we look at the act of 1828, it would in this view be, in a judicial sense, a mere nullity. A construction leading to such a conclusion, must be wholly unjustifiable, if any other reasonable interpretation can be given to the act. It is certain, that cod and mackerel are not the same fish; and that employment in the one fishery does not naturally or necessarily include the other. And if it did,

still it was quite competent for the legislature to distinguish the one from the other; to separate their character and advantages; and to allow to one, what it might well deny to the other. It cannot well be denied, that the legislature has in fact made such a distinction. By the act of 1813, c. 34 [2 Story's Laws, 1350; 3 Stat. 49, c. 35], congress have allowed a bounty of twenty cents per barrel upon all pickled fish of the fisheries of the United States, exported from the United States. And they have allowed a very different bounty, according to certain rates of tonnage, to all vessels licensed and employed for certain periods in the bank and other cod fisheries. The bounty upon pickled fish belongs to the exporter; that upon the cod fishery is distributable in a given proportion between the owner and crew of the fishing vessel. It seems to me impossible to contend, that the bounty on tonnage given in the cod fishery can be applied to vessels employed in the mackerel fishery. The terms of the act apply it to the cod fisheries, in which the fish are dried and cured for exportation. In the mackerel fishery the fish are barrelled and pickled, and not cured and dried. The irresistible conclusion is, that the mackerel and cod fishery are not identical trades; and that the acts of congress look to them as known and distinct trades.

It has been said, that before the act of 1828 the mackerel fishery might be exclusively carried on under a cod-fishery license; and if so, it is still lawful, as there are no prohibitory words in that act, which take away the privilege. The answer is, that the conclusion would not follow, if the premises were admitted; for when congress create a distinction between things before united, that distinction must ever afterwards be respected. The severance creates a legal separation between them, so that the one cannot ever afterwards be judicially said to be included in the other. But the premises are not in themselves admissible. A license for the cod fishery could never properly include a right to the mackerel fishery, except so far as the latter might justly be carried on as an incident to the former. It never could in a legal sense justify an employment exclusively in the mackerel fishery; nor could a vessel, exclusively employed in the mackerel fishery, ever be justly deemed employed in the cod fishery for the purpose of the bounty, or for any other purpose. If, under color of a cod-fishery license, the mackerel fishery was in fact carried on, as an exclusive employment, the practice was an abuse of the license, and not a just and appropriate use of it. The practice could not establish its legal correctness. And, indeed, unless my memory misleads me, the very question came, several years ago, before the district court in Massachusetts in some cases, where the bounty was either claimed, or had been received, and the court pronounced against the title.

In every view, therefore, which I am able to take of the law, the defence of the claimant is unsupportable. As to the matter of fact, I propose, with the assent of the claimant's counsel, to let the cause lie over until the next term, in order that in the mean time an application may be made to the secretary of the treasury for a remission, as the case is admitted not to be one for vindictive prosecution; and the principal object has been to procure a decision upon the question of law. I am not aware, that my view of the law differs in the slightest degree from the opinion of the learned judge of the district court. Libel continued.

Case No. 10,389.

The NYMPH.

[1 Ware (257) 259.] [1]

District Court, D. Maine. June Term, 1833.[2]

COD-FISHERY LICENSE—ACT OF 1828—UNAUTHORIZED ACT OF TRADE—FORFEITURE.

1. In a libel against a vessel for a forfeiture, the master under whom the alleged illegal act was done, is inadmissible as a witness for the claimant.

[Cited in Patten v. Darling, Case No. 10,812.]

2. Since the act of May 24, 1828 [4 Stat. 312], a vessel licensed for the cod-fishery is not authorized by her license to engage in the mackerel fishery, that act having provided a special license for that business.

[Cited in The Harriet, Case No. 6,099. Doubted in U. S. v. The Reindeer, Id. 16,145. Cited in U. S. v. The Paryntha Davis, Cases Nos. 16,004 and 16,003; The Ocean Bride, Case No. 10,404.]

3. Any act of trade by a licensed vessel, not authorized by her license, under the 32d section of Act Feb. 18, 1793, c. 8 [1 Stat. 316], subjects her to forfeiture.

[Doubted as to its application here in U. S. v. The Reindeer, Case No. 16,145.]

4. The word "trade," in that section of the act, is equivalent to employment or business. The cod-fishery is a trade, and since the act of May 24, 1828, the mackerel fishery is a trade distinct from the cod-fishery, within the meaning of the word in that section of the act of 1793.

[This was a libel against the Nymph (Bibbord and others, claimants).]

The libel in this case was founded on the 32d section of the act of February 18, 1793, for enrolling and licensing vessels for the coasting trade and fisheries. The material facts proved were as follows: In May, 1832, a license was taken out by the owners of the Nymph, for the cod-fishery. This was held till July, when it was exchanged for a license for the mackerel fishery. Under this license the vessel was employed until the beginning of October, when this was exchanged for a new license for the cod-fishery. The facts relied upon as working a forfeiture, took place under the last license. After it was granted, she made two trips

1 [Reported by Hon. Ashur Ware, District Judge.]

2 [Affirmed in Case No. 10,388.]

before the close of the fishing season. There was some discrepancy in the testimony, but taking the facts most favorably for the claimants, and as they came from their witnesses, it appeared that while she was sailing under this license, about one half of the time was employed in taking mackerel, and the other half in taking cod.

Mr. Shepley, Dist. Atty., for United States.
C. S. Daveis, for claimants.

WARE, District Judge. A preliminary question has been raised in this case as to the admissibility of the master as a witness. As the acts complained of were done while he had the command of the vessel, and under his direction, if they are adjudged to be illegal and draw after them the penalty of a forfeiture of the vessel, he would undoubtedly be responsible to the owners, and a decree of condemnation in this court would be good evidence in an action against him. He is offered as a witness to exempt the vessel from a forfeiture resulting from his own act. He has therefore a direct interest in the result of the suit, and he is offered as a witness to support his own interest. He is therefore clearly inadmissible. The case of The Hope [Case No. 6,678], is directly in point.

The first question which arises upon the merits of the case is whether a vessel, being licensed for the cod-fisheries, is authorized by the license to engage in the mackerel fishery; and if this be decided in the negative, a second one arises, namely, to what penalty she is subject when she engages in this unauthorized employment. The act of February 18, 1793, provides for three forms of licenses only: for the coasting trade, for the cod-fisheries, and for the whale-fishery. Although in a license for the cod-fishery, cod is the only fish mentioned, a liberal construction has been practically given to the license, although I am not aware that it has been sanctioned by any judicial decision. All the bank and coast fisheries have been carried on under the authority of this license. Pollock, hake, and other fish which are cured and dried in the same manner as cod, have always been taken by the fishermen, and no doubt has been raised as to the legality of the employment. The mackerel fishery was also formerly carried on under the same license. But when engaged in this employment, vessels were not considered as entitled to the bounty allowed to those which were employed in the cod-fishery, the duty upon the salt consumed by them in this business being refunded by a drawback, on the exportation of the fish. The legislature seems tacitly to have sustained this liberal construction of the license, for they have allowed a drawback of the duty on salt, on the exportation of pickled fish, although no license was granted to vessels for any other than the cod-fishery, and cod are never cured in this way. When the act of 1793 was passed, the mackerel fishery could hardly be said to have had an existence as a distinct employment; at least, it was carried on only to a very limited extent. It is only within a few years that it has increased and expanded into a very important branch of business. It was, without doubt, in consequence of this increase, and because that vessels in this employment were not entitled to the cod-fishing bounty, the duty on the salt which they consumed being refunded to them in another manner, that the act of May 24, 1828, was passed, requiring vessels engaged in this branch of the fisheries to take out a special license for that purpose. This act provides that the collectors, on the application of the master or owner of any vessel for that purpose, shall give a license to the vessel for carrying on the mackerel fishery, in the form prescribed by the act of 1793, and it is declared that "all the provisions of that act respecting the licensing ships and vessels for the coasting trade and fisheries, shall be deemed and taken to be applicable to vessels licensed for carrying on the mackerel fishery."

Is a vessel, since the passing of this act, authorized to carry on the mackerel fishery under a cod-fishing license? Is the same latitude to be given to the authority allowed by that license, as was given before the act was passed? I think clearly not. Although the act is silent as to the liberty which had been before allowed under the license, yet from this fact alone, that the act provides a license for this particular branch of business, and by applying to the license the act of 1793, confines vessels under this license to the particular business mentioned in it, it must be taken as the sense of the legislature, that the cod-fishing license should not be construed to include the liberty of engaging in the mackerel fishery, whatever might have been the former practice. On any other construction of the act, it is rendered perfectly nugatory. If the business can still be carried on under the old license for the cod-fishery, then the new license is entirely useless. Such cannot have been the sense of the legislature. The evidence proves beyond a doubt that, under the last license, taken out in October, this was a case of mixed employment. She was part of the time engaged in taking cod, and part of the time in taking mackerel. The case was argued on this admitted state of facts, and it was not considered by the counsel on either side as very material to ascertain the exact proportions in which her time was divided between the two. If, under a cod-fishing license, a vessel may be employed a quarter of her time in the mackerel fishery, I see no reason why she may not one half or three quarters.

The next question is, to what penalty is the vessel subject? The district attorney claims a forfeiture under the 32d section of the act of 1793. By this section of the act, any vessel is made liable to forfeiture which

is employed in any other trade than that for which sho is licensed. This vessel being licensed for the cod-fisheries, it is contended by engaging in the mackerel fishery she engaged in another trade than that for which she was licensed. The counsel for the claimants, on the contrary, contends that even on the admission that the mackerel fishery is not included in the license, the employment of the vessel in this business is not engaging in a trade, within the meaning of this section of the act. The word "trade," it is contended, is not here used in its largest sense, as synonymous with employment, but in the restricted sense of an employment in the transportation of merchandise, either for hire or in carrying on the owner's mercantile business; that is, in what is considered in the most usual and popular sense of the word, the trade of the country. The primary signification of the word "trade" is traffic, or buying and selling. But this is not its only sense. It is the appropriate word to designate a mechanical art or mystery, and it is also familiarly used to express a customary or usual occupation, in a mechanical art, in mercantile or in other business, as distinguished from employment in the liberal arts or learned professions. The meaning, therefore, which the word has in any given case, must be learnt from its connection, from the subject-matter of the discourse in which it is used, and, from the apparent intention of the person who uses it. The title of the act in which the word occurs is, "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The whole act relates to the manner of procuring vessels' documents, and regulating their employment. After a great variety of particular directions relating to their employment, follows the 32d section, which is the one under consideration. This provides that, "if any such ship or vessel (licensed ship or vessel), shall be employed in any other trade than that for which she is licensed," &c. The form of the expression seems plainly and necessarily to imply that every vessel is licensed for some trade. It applies to every licensed vessel, whether licensed for the coasting trade or fisheries, and the penalty is for her engaging in another trade than that specified in the license. If a vessel under a fishing license is not licensed for a trade, it can with no propriety be said that she engages in another trade than that for which she is licensed. Every distinct business for which a license is provided, must be a trade within the meaning of this act, and every vessel that takes out a license is licensed for a trade. Nor is there any more impropriety of language in applying the word trade to the fishing business than applying it to the coasting business.

But the learned counsel have not, on either side, rested the case solely or principally on the grammatical and philological criticism of the words of the law. It has been, on both sides, largely and ably argued, as a case involving the general policy of our domestic navigation laws. On the part of the claimant it is contended that the object of the legislature in confining vessels by their license to a particular employment, is to protect the revenue against frauds. And although, when a licensed vessel is engaged in business not within the scope of her license, she may forfeit her national privileges as an American bottom, and subject herself to be treated as an unprivileged, or a foreign, vessel, that it was not the intention of the legislature to visit this offence with a forfeiture, except when she engaged in a business by which the revenue might be defrauded. Several sections of the act have been referred to and urged with great power in support of this position. The same argument was urged before the supreme court in the case of The Active, 7 Cranch [11 U. S.] 100; but the court said, that although "a number of the preceding sections of the act furnish much reason for believing that a forfeiture, in a case where the revenue could not be defrauded, might not be contemplated by the legislature, yet they were not so expressed as to control the thirty-second section." The language of this section is so explicit and precise as to admit of but one construction; and it has been repeatedly decided that any act or trade, or the carrying on any business beyond the scope of the license, was followed by forfeiture. U. S. v. The Mars [Case No. 15,723]; The Eliza [Id. 4,346]; The Julia [Id. 7,574]. The proof is that the Nymph, while under a cod-fishing license, was employed part of her time in taking mackerel, not for bait, to be used in pursuing the cod-fishery, but as a distinct and separate business, taking her fish, and curing them for the market. Whatever may have been the practice previous to the act of 1828, as that act provides for a special license for that business, it is clear to my mind that, since the passage of that act, a license for the cod-fisheries does not include the liberty of engaging in the mackerel fishery. The license given pursuant to the act is required to be in the form prescribed by the act of 1793, all the provisions of which are declared to be applicable to it. The mackerel fishery is now as distinct and independent a business or trade, as the cod-fishery, the whale-fishery, or the coasting trade. My opinion, therefore, is, that by engaging in the mackerel fishery, while under a license for the cod-fishery, the Nymph rendered herself liable to forfeiture, as engaging in another trade than that for which she was licensed. Decree of condemnation.

[On appeal to the circuit court the decree of this court was affirmed. Case No. 10,388.]

NYSTROM (HAWORTH v.). See Case No. 6,251.

O.

Case No. 10,390.

OAKES v. RICHARDSON.

[2 Lowell, 173.][1]

District Court, D. Massachusetts. 1872.

ADMIRALTY — JURISDICTION — PERSONAL ACTION AGAINST OWNER—FAILURE TO PROCEED TO PORT OF LOADING—ACTION IN REM—DAMAGES—LOSS OF PROFIT—INTEREST.

1. The admiralty has jurisdiction of a personal action by a charterer against the owner of a vessel for damages, in not proceeding to the port of loading.

[Cited in Scott v. The Ira Chaffee, 2 Fed. 407; The Monte A., 12 Fed. 336; Paterson v. Dakin, 31 Fed. 684.]

2. The jurisdiction does not depend upon the fact of the cargo, or some part of it, having been put on board the vessel.

[Cited in Scott v. The Ira Chaffec, 2 Fed. 405, 407; The J. F Warner, 22 Fed. 345.]

3. It seems an action in rem would lie in such a case.

[Disapproved in Scott v. The Ira Chaffee, 2 Fed. 405; The Monte A., 12 Fed. 336. Cited in Paterson v. Dakin, 31 Fed. 684.]

4. The measure of damages in such an action is, usually, the increased freight and charges, if any, which the charterer has been obliged to pay in order to have his goods carried.

[Cited in The J. C. Stevenson, 17 Fed. 545.]

5. The cases in which loss of profit on the goods have been allowed in damages are exceptional.

[Cited in The Caledonia, 43 Fed. 686; Wheelwright v. Walsh, 44 Fed. 382.]

6. Interest allowed from the date of demand, upon evidence that the delay in proceeding was granted at the defendant's request.

Affreightment. The libel propounded that [James] Oakes and [Thaddeus] Richardson entered into a charter-party at Boston 19th September, 1868, by which the latter, as part owner and agent of the brig Goodwin, then on a voyage to Lisbon, chartered her to the libellant for a voyage from Cadiz, in Spain, to Gloucester or Boston, Massachusetts, to carry a full cargo of salt, in bulk, at a freight of seventeen cents for each bushel, measured out at the port of delivery; that he covenanted to receive the cargo on board, and safely deliver it, &c.; and that the parties bound themselves to each other in the penal sum of $3,000; that the defendant had broken his covenants, the vessel never having begun the voyage; and the libellant demanded the penalty. A copy of the charter-party was annexed to the libel. It contained this stipulation: "It is also agreed that the funds of the brig shall be used to pay for the cargo at Cadiz, and that, on the receipt of the invoice, Mr. Oakes shall pay the same in United States currency, with an additional amount sufficient to convert the same into American gold coin." He was also to pay interest, insurance, and wharfage. The answer admitted the execution of the charter-party. It denied the jurisdiction of the court, and alleged that, after the contract was made, the parties agreed that if the master of the brig should not assent to the charter-party, it was to be void, and that the master did not assent; that the libellant did not provide a cargo at Cadiz, and did not furnish the master with funds, except by directing him to draw on the libellant, which he was not bound to do; and that the brig had no funds. It denied all damage. There was evidence tending to show that the libellant had been in the salt trade with Cadiz for above forty years, and had a correspondent there who had agreed to furnish a cargo for this voyage at a certain price; that the libellant wrote to the master at Lisbon, communicating the terms of the charter, and directing him, in case the funds of the brig were insufficient, to draw on the libellant for the balance. One of the parties sent the charter-party to the master at Lisbon. In his deposition, in answer to a question, what he did about the charter-party, he said: "Well, I weighed the contents in my mind, in the first place. I abandoned it. I would not accept of it. I notified Mr. Thaddeus Richardson to that effect soon after I received the charter-party, perhaps a week after." The respondent received such a letter from the master, and notified the libellant, in writing, that the master declined to accept the charter. The parties afterwards met, and the respondent testified that he told the libellant, that, if it was a great disappointment, he would try to obtain him another vessel. An agent of the respondent testified to a similar conversation; and they both said that the answer of the libellant was, that he cared nothing about it. The libellant denied having had any such conversation with either witness. The libellant's evidence on the subject of damages tended to show that the season for selling salt of this kind was through the winter and early spring, before the fishermen began their voyages; that, if he had had this cargo at any time during the season of 1868–69, he should have made a profit of about $1.25 on each hogshead; that vessels were difficult to obtain for this business; and that he tried to charter them, not only to bring this cargo, but for his trade generally, and succeeded in obtaining only one ship, for which he paid a freight of twenty-five cents a bushel. It was agreed that the carrying capacity of the brig Goodwin was one-thousand eight hundred and forty-seven hogsheads, or fourteen thousand seven hundred and seventy-six bushels of salt.

S. Wells, for respondent. (1) The admiralty has no jurisdiction of a contract of affreightment, unless the goods have been ac-

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

tually shipped. Rich v. Parrott [Case No. 11,-760]; Clarke v. Crabtree [Id. 2,847]; Cutler v. Rae, 7 How. [48 U. S.] 729; The Tribune [Case No. 14,171]. (2) The agreement to furnish funds was conditioned on the brig's having them; and the libellant should have been prepared to furnish them in the contingency which happened. He could not require the master to become responsible as drawer of a bill. (3) The measure of damages is the difference in freight which the libellant would be obliged to pay to bring his salt to Gloucester or Boston, as to which there is no sufficient evidence.

J. C. Dodge, for libellant. (1) At the present day, there can be no doubt of the jurisdiction of the district court in admiralty over damages for breach of a charter-party. The doubts that were expressed at one time have all been done away by the late decisions. (2) The stipulation that the brig should furnish funds was not conditional, but an absolute engagement that there should be funds forthcoming; and the libellant was not bound to do even as much as he did in authorizing a draft. (3) The damages would often be the difference in freight; but, when other vessels cannot be obtained. it is the profit that might have been made on the goods. Sedg. Dam. (2d Ed.) 355–357; Brackett v. McNair, 14 Johns. 170; Amory v. McGreggor, 15 Johns. 24; O'Conner v. Forster, 10 Watts, 418; Bell v. Cunningham, 3 Pet. [28 U. S.] 69; Arthur v. The Cassius [Case No. 564].

LOWELL, District Judge. Since the decision in New Jersey S. N. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, it has not been doubted that the courts of admiralty of the United States have jurisdiction of a contract of affreightment; and this is now true of all voyages on the Great Lakes and other navigable waters of the country, as well as on the high seas. The Belfast, 7 Wall. [74 U. S.] 624; The Eddy, 5 Wall. [72 U. S.] 481; The Harriman, 9 Wall. [76 U. S.] 161. The respondent contends that the jurisdiction does not attach until the goods have been shipped. The opinion in Rich v. Parrott, which he cites, contains no more than the intimation of a doubt created by some then recent remarks in The Freeman v. Buckingham, 18 How. [59 U. S.] 182, and Vandewater v. Mills, 19 How. [60 U. S.] 82. In the former of these cases, there is a dictum (page 188) that the law creates no lien on a vessel as security for the performance of a contract to deliver cargo, until some lawful contract of affreightment is made, and a cargo is shipped under it. And, in the latter case, that remark is quoted and called a decision of the court; and a like rule concerning the privilege against vessels is cited from Boulay-Paty, 19 How. [60 U. S.] 91. But I do not understand the point to be decided in either of those cases; because, in the one, the controlling consideration was that no valid contract of affreightment had been made, the master having signed a bill of lading for goods that had never been put on board his vessel, a fact which went quite beyond any question of lien; and in the other case, the contract was held to be one of partnership, and not of affreightment, and for that reason to be out of the sphere of the admiralty.

In a case which was ably argued and carefully considered, Mr. Justice Nelson, enforced a lien against a steamer for breach of a contract with a passenger, though the voyage had not been begun, and the libellant had not actually gone on board before suit brought. The Pacific [Case No. 10,643]. So did Judge Betts in respect to precisely such a contract and such a breach as are now in judgment, excepting that the proposed voyage was only from New York to Brooklyn. The Flash [Id. 4,857]. After stating the general rule, that the ship is bound by such an undertaking, the learned judge proceeds: "This principle does not require, as was contended by the counsel upon the argument, that the goods should be actually on board the vessel to raise the lien." And he gives some sound reasons for this opinion.

No doubt, liens or privileges in the admiralty may often exist when the law of agency would not hold the principal to be bound. The master can impress liens on the vessel by acts and neglects which do not bind the owners; as where he is appointed by a special owner, or even where he is not lawfully master at all. There may be cases in which a vessel will be bound for salvage, collision, bottomry, and, I think, for many other things, in which no person excepting the master can be sued in any court; and it follows from this, that, until some service has been begun, there will be no privilege against the vessel under such circumstances. But this case, being a personal one, does not raise any question of lien. The notion that the admiralty has no jurisdiction independently of lien, no power to give damages in a personal action for breach of a maritime contract, has been long since exploded in this country. The case, The Tribune [supra], contains only a reference to Andrews v. Essex F. & M. Ins. Co. [Case No. 374], in which it was held that a mere preliminary contract, looking to a maritime contract, is not itself maritime and cognizable in the admiralty; as, for instance, an agreement to give a policy of insurance in a certain form. In other words, a court of admiralty, though it acts on equitable principles, has not the power of a court of equity to enforce specific performance. When the agreements are executory in that sense, as being incomplete, this court cannot deal with them; but when the contract has been fully made, and is a maritime contract, it has not been held in this country, within the last twenty-five years, that the only remedy for a breach of it is in a court of common law. That the admiralty has jurisdiction of charter-parties, and that it may give a remedy for a breach

of such contracts, are identical propositions.

I do not find that this contract was to be void if the master refused to accept it. Some admissions of the libellant were testified to; but they are opposed to the charter-party itself, and cannot be received to control it. Nor do I consider it proved that the respondent offered to find another vessel as a substitute for the brig; and that the libellant, understanding the offer, refused it. The libellant denies it; and the conduct of the parties confirms the denial. If such an offer was made and refused, it is very doubtful whether it would estop the libellant from recovering damages. Higginson v. Weld, 14 Gray, 165. It is plain that the respondent had no other vessel to offer; and whatever was said can hardly have amounted to more than some suggestion or proposition of an equivocal character, that made no impression on the libellant's mind.

Upon the true measure of damages, the difference between the parties is rather of fact than law. This is not an action for misfeasance or delay in transporting a cargo, or damages for its loss. In such cases, where a carrier has once taken possession of the goods, he may often be liable for the net market price, at the port of delivery, at the time when the goods would have arrived but for the fault of the carrier; or for a diminution in market value. Cutting v. Grand Trunk Ry., 13 Allen, 381; The Boston [Case No. 1,671]. But the damages for refusing to receive a cargo are the necessary expenses to which the refusal has subjected the shipper, which are usually the increased rate of freight, if any, and often some incidental charges. The Tribune [Id. 14,171]; The Zenobia [Id. 18,209]; Crouch v. Great Northern Ry. Co., 11 Exch. 742; Ogden v. Marshall, 4 Seld. (8 N. Y.) 340; Porter v. The New England No. 2, 17 Mo. 290. The cases cited by the libellant hold that, if it is impossible to obtain other carriage for the goods, the loss of a probable profit may be recovered; but they are exceptional, and are so explained by Grier, J., in charging the jury in the suit in 10 Watts. Therefore, I say the parties differ only on the question of fact whether other vessels could have been obtained to bring this cargo. It appears that the libellant did charter one vessel during the season, and that he made some effort to charter others. This is all that is proved with any degree of definiteness. It seems probable that ship-brokers might have given further information as to the state of the market for freights. It appeared incidentally from one of the defendant's witnesses that ships were difficult to obtain at that time; and there was evidence that some vessels had been chartered during the season, but before the breach of this contract, for sixteen cents, and so on up to seventeen cents, a bushel. After the breach, it was the duty of the charterer, if he wished to claim damages of the respondent, to obtain a freight as low as he reasonably might; and, whether he made any such exertions or not, the damages would be measured by what he might have done in that respect. I do not doubt that Mr. Oakes chartered the ship in December as low as he could; but whether, in November, he could have done any better, or whether there may have been other vessels at any time during the season ready to serve at more reasonable rates, I do not know. Taking the evidence as given, I must award the difference between seventeen and twenty-five cents a bushel. When the damages are unliquidated, whether the form of the action be tort or contract, the allowance of interest is within the discretion of the court or jury. Here the libellant in June, 1869, made a demand on the respondent for damages at one dollar per hogshead, though he considered the loss to be more than that. The preponderance of testimony seems to me to be, that the delay in prosecuting the case, after this bill was rendered, was occasioned by a request of the respondent that the libellant would wait until the brig should come to Massachusetts; so that the damages, if any, should fall equally on all interests, without raising any question of contribution, or requiring another action between the owners themselves. Under these circumstances, it seems to be just that interest should be charged from a reasonable time after the demand. I accordingly award to the libellant damages for the breach of the charter-party, as follows: Cost of freight beyond that agreed on, 14,776 bushels at 8 cents, $1,182.08; interest three years and four months, $236.41,—$1,418.49, and costs of suit.

Case No. 10,391.

The OAK HILL.

[Cited in Pacific Coast Wrecking Co. v. The Eastport, Case No. 10,646. Nowhere reported; opinion not now accessible.]

OAKLAND, The (THOMPSON v.). See Case No. 13,971.

OAKLAND MANUF'G CO. (BUFFUM v.). See Case No. 2,113.

Case No. 10,392.

In re OAKLEY.

[5 Law Rep. 327.]

District Court, S. D. New York. Aug., 1842.

PRACTICE—DECREE OF BANKRUPTCY VACATED.

Objections were interposed to the decree of bankruptcy, resting in part on matters of fact, touching the integrity of the bankrupt in his statements, and in part on points of law, as to the sufficiency of the schedules on their face. The legal objections were first set down on the calendar, and argued, as taking precedence of any inquiry into the merits. The court, on the hearing, decided

that the papers were insufficient, and that the bankrupt could proceed no further, unless the schedules were properly amended. The petitioner thereupon proceeded ex parte to file amendments, and without submitting his amendments to the court for its allocatur, or obtaining the assent of the opposing creditor, moved for, and took a decree of bankruptcy. The court decided that this decree be vacated as irregular; that the petitioner if his proceedings in relation to the amendments, could be upheld, could not in that way override the objections to the merits of his application. Those were referred to a commissioner and must be investigated and properly disposed of, before any steps could be taken towards a decree. That investigation was properly suspended until questions of form were settled, and the creditors now had a right to pursue the reference before a commissioner, on the merits. Decree of bankruptcy vacated with costs.

Mr. Morris, for petitioner.
P. J. Joachemssen, for creditors.

Case No. 10,393.

OAKLEY v. BALLARD et al.
BALLARD v. OAKLEY et al.

[Hempst. 475.] [1]

Circuit Court, D. Arkansas. Oct., 1846.

VENDOR AND PURCHASER—ENFORCEMENT OF UNCERTAIN CONTRACTS—RESCISSION.

1. A vendee cannot occupy the attitude of an innocent purchaser without notice, where the vendor was not vested with the legal title.

2. Courts of chancery will not make contracts for parties, nor enforce contracts when uncertain.

3. Where in a contract it was stipulated that a previous agreement relative to the same subject-matter should be rescinded, and this second contract was afterwards rescinded; *held*, that this did not revive the first agreement, and that the rescission of one contract cannot revive another without express words, or a necessary implication to that effect.

[These were cross bills by James Oakley against Thomas B. Ballard and James W. Finley, administrator of Allen M. Oakley, deceased, and Thomas B. Ballard against James Oakley and James W. Finley.]

F. W. Trapnall, John W. Cocke, and Daniel Ringo, for complainant.
Absalom Fowler, for defendants.

OPINION OF THE COURT. From a review of the allegations and proofs in this case, the following appear to be the material facts: Thomas B. Ballard, the defendant in the original and complainant in the cross bill, being entitled to a donation from the United States of three hundred and twenty acres of land, sold the same on the 10th day of July, 1828, to Allen M. Oakley, for $100, the receipt of which was acknowledged on the writing between them. On the 21st May, 1830, an agreement, under hand and seal, was entered into between Thomas B. Ballard, Allen M. Oakley, James Lemmons, and John H. Fowler, reciting that the said Ballard, by virtue of the act of congress of the 24th May, 1828, had been allowed a donation claim of two quarter sections of land, and had selected them adjoining the town of Little Rock, and had made and erected certain improvements thereon, and then occupied the house and premises so situated; and that for divers good and lawful considerations, the said Lemmons, Oakley, and Fowler had furnished the said Ballard with certain work and labor, care and diligence, and certain sums of money, to enable the said Ballard to carry on his clearing and improvements, and to enable him to go to Batesville to establish his claim to the said two quarter sections of land. Lemmons, Oakley, and Fowler further agreed to aid and assist Ballard, and to furnish such other and further necessaries towards his said settlement as should make his house fit for occupation; and he, on his part, agreed with them that he would do and perform all such acts and things as might be necessary to establish his claim to the above-named lands; and he also thereby granted, bargained, and sold to them four fifths of the land to be acquired by virtue of his settlement right. It was further stipulated that as soon as the title should be acquired, the land should be divided into five equal parts, and Lemmons was to have two parts, and Ballard, Oakley, and Fowler one part each. Shortly after this contract was made, the parties, finding that the land officers at Batesville refused to allow Ballard's claim to be located on the two quarter sections of land on which he had settled and made an improvement, abandoned the contract and surrendered the writings into the hands of Ballard.

It is proven by the testimony of two witnesses, that at the time the second contract was entered into, Allen M. Oakley expressly agreed that his first contract with Ballard for the purchase of his claim was rescinded, and he promised to destroy the papers, which were not then present. Ballard's claim has been located on two quarter sections of the public lands on the Mississippi river, and patents therefor have issued to him; but whether the entry was made by Ballard or Oakley, does not appear. It seems that Allen M. Oakley did not destroy the writings containing the original contract between himself and Ballard relative to the purchase of Ballard's donation claim; but after the claim had been located, namely, on the 21st January, 1837, sold and conveyed the land thus located to the complainant by a deed of that date. It may be material to remark, that James Oakley stands in the shoes of Allen M. Oakley, of whom he purchased. The legal title to the land never was vested in Allen

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

M. Oakley, and of course his vendee cannot occupy the attitude of an innocent purchaser without notice. Boone v. Childs, 10 Pet. [35 U. S.] 177; Wood v. Mann [Case No. 17,951]; Flagg v. Mann [Id. 4,847].

The question then arises, whether the claim of Ballard, or rather the land on which it was located, belongs to Oakley or to Ballard. By the first contract, Ballard sold his claim to Allen M. Oakley; by the second contract between Ballard, Oakley, Lemmons, and Fowler, the first contract was rescinded and annulled. They are inconsistent with each other and cannot stand together, and in fact Oakley agreed to burn or destroy the writings, then absent, containing the only evidence of that contract. The second contract, by the mutual consent of the parties, was also rescinded and annulled. To whom does the claim now belong? The claim originally belonged to Ballard. Oakley purchased it from Ballard, and afterwards rescinded the contract of purchase; and from that time it had no vitality. By a second contract, Oakley takes an interest of one fifth in the claim, and this second contract is also rescinded, and the writings surrendered into the hands of Ballard. If Oakley can now have any interest in Ballard's claim, it must be by virtue of the revival and resuscitation of the first contract; and this indeed is insisted on by the counsel of the complainant. I cannot perceive the principle upon which the rescission of one contract can revive another without express words, or a necessary implication to that effect. In this case it is not pretended that there was any express agreement to revive the first contract, nor do I perceive any thing in the circumstances from which such an intention can be implied. If, then, under both of these contracts, Oakley surrendered his rights, he cannot call on this court to restore them, in the absence of fraud or mistake, which are not alleged in the case, nor pretended to exist. It is the province of a court of chancery to enforce contracts fairly entered into, but not to make contracts for parties where they have made none, nor enforce them when uncertain. Colson v. Thompson, 2 Wheat. [15 U. S.] 336, 4 Pet. Cond. R. 144.

I am therefore of opinion, that the bill of James Oakley, the complainant, should be dismissed, and that the writings evidencing the first contract between Thomas B. Ballard and Allen M. Oakley ought to be cancelled; and that each party pay his own costs. Decreed accordingly.

NOTE. At the same term, on the 31st October, 1846, it was proved orally before the court that the lands in controversy exceeded the value of two thousand dollars (Course v. Stead's Ex'rs, 4 Dall. [4 U. S.] 22, 1 Pet. Cond. R. 217; U. S. v. The Union, 4 Cranch [8 U. S.] 216, 2 Pet. Cond. R. 91); and after tendering an appeal bond, with security, to prosecute the appeal according to law, James Oakley, and James W. Finley, as administrator of Allen M. Oakley, deceased, prayed an appeal to the supreme court of the United States from the final decree rendered in the case, which was granted; but the case was not taken up, and the appeal was abandoned.

OAKLEY (HERWIG v.). See Case No. 6,-435.

OAKMAN (SAWYER v.). See Cases Nos. 12,-402–12,404.

OAKVILLE CO. (AMERICAN PIN CO. v.). See Case No. 313.

Case No. 10,394.

In re O'BANNON.

[2 N. B. R. 15 (Quarto, 6).] [1]

District Court, E. D. Missouri. 1868.

BANKRUPTCY—PROPERTY HELD BY GRANTEE IN FRAUD OF GRANTOR'S CREDITORS — RETURN IN SCHEDULES — DEFINITION OF MERCHANT OR TRADER.

1. Property conveyed in fraud of the creditors of grantor, as between grantor and grantee, vests the title in the grantee, and must be returned in his schedules of property when he has been adjudged a bankrupt, and if not so returned he is guilty of concealment.

2. A party buying and selling goods for the purposes of gain, though but occasionally, is to be considered a merchant and trader, and must keep proper books of account, so that the creditors may learn the actual condition of his affairs. Discharge refused.

The discharge of a bankrupt was opposed on several specifications.

Specification 2. Concealing and failing to return five hundred and ninety acres of land in Vernon county, the title to which had been vested in the bankrupt by deed of William Shields, made January 13th, 1866, and falsely swearing that he had no real estate at the date of his petition, and had had none since 1861. Upon the hearing it appeared that William Shields, against whom judgments had been recovered, for the purpose of protecting his property from forced sales, made and put on record a deed for five hundred and ninety acres of land in Vernon county to his son-in-law, the bankrupt. This deed was never actually delivered to the grantee, but prior and subsequent to the filing of his petition the bankrupt had executed deeds to purchasers from Shields, Shields receiving the money himself and paying all the expenses. The bankrupt testified that he never considered the property as belonging to him, but to Shields, and that he was but a trustee, and as such made deed when requested by Shields. Shields, the grantor, stated very frankly what was his object in making the deed, and that it was to protect it from forced sales, judgments having been recovered against him, and many of his lands sold at ten cents per acre.

TREAT, District Judge, held, that although the creditors of Shields might have attacked the deed as fraudulent, and although as to

[1] [Reprinted by permission.]

them it was void and passed no title, yet as between Shields and the bankrupt the deed was valid to vest the title in the bankrupt, and give him an estate which passed to his assignee, and therefore that the bankrupt had concealed his property.

Specification 4. Being a merchant and not keeping proper books of account.

It appeared that the bankrupt since March 2d, 1867, had been engaged in the general business of soliciting freight for a transportation company, but had also purchased and shipped flour and grain, making his payments by drawing bills against his shipments, and that he had done so repeatedly. It also appeared that he had kept no regular books of account, day-book, blotter or ledger, and that his only means of determining the condition of his business was from the bills for purchases, accounts of sales returned, and the entries made on the margin of his check books on bank.

THE COURT held, that the bankrupt was a merchant and trader, and as such it was his duty to keep proper and correct books of account, so as to show the condition of his affairs. That it would appear that this duty had been purposely omitted, the bankrupt having previously failed in business, and yet buying, shipping and selling produce, without keeping any accounts whatever, keeping the profits and throwing the losses on his creditors. Specification number 4 sustained. Discharge refused.

Case No. 10,395.

In re OBEAR.

In re THOMAS.

[3 Dill. 37;[1] 10 N. B. R. 151; 1 Cent. Law J. 362.]

Circuit Court, E. D. Missouri. July 8, 1874.

BANKRUPT ACT — RETROACTIVE OPERATION OF AMENDMENT OF JUNE 22, 1874.

While the late amendment to the bankrupt act is retrospective in its operation so as to bring within it all cases commenced since December 1, 1873, and in which at the time of the passage of said amendment, June 22, 1874 [18 Stat. 178], the petitions for the adjudications remained to be acted on, yet it does not annul or disturb judgments rendered or adjudications made and in force at the time of the taking effect of said amendment.

[Cited in Re Comstock, Case No. 3,077; Re Leland, Id. 8,231.]

These are petitions for review under section 2 of the bankrupt act.

Facts in the case of E. G. Obear: On the 4th day of May, 1874, a creditor's petition was filed against Obear in the district court for the Eastern district of Missouri, stating that, being a broker and a trader, he did, on the 28th day of May, 1873, suspend, and did not within fourteen days, nor at any time thereafter, resume payment of his commercial paper. To an order to show cause, Obear appeared on the 13th day of May and admitted the petition, and he was thereupon, on that day, by the court, adjudicated and declared a bankrupt, and subsequently, June 22d, an assignee was elected, to whom a deed of assignment was made, and was regularly proceeding in the discharge of his duties until June 30th, when the district court, on its own motion, made the following order: "It is ordered that the petitioning creditor amend his petition within thirty days so as to conform to the twelfth section of the act of congress, approved June 22d, 1874, in the following respects, to-wit: "1st. By alleging that the number of unsecured creditors who have joined therein constitute at least one-fourth in number, and that the aggregate of their debts, provable under this act, amounts to at least one-third of all the debts so provable. 2d. Said amended petition shall be signed and verified by the first five signers thereof, if so many there be, in the manner and form required by said act. 3d. The allegation in the original petition of the suspension of the debtor's commercial paper for fourteen days, shall be so amended as to aver the suspension and non-resumption thereof within a period of forty days before the filing of the original petition of his commercial paper made or passed in the course of his business as such broker or trader. And it is further ordered that all other proceedings in the case be stayed until said amended petition is filed." To this order the petitioning creditor, the bankrupt, and certain secured and unsecured creditors excepted; and it is to have the same reviewed that the petitioning creditor has brought the present petition.

Facts in the case of James S. Thomas: In this case a creditor's petition was filed against Thomas on the 25th day of April, 1874, duly charging as an act of bankruptcy the suspension of his commercial paper on the 15th day of November, 1873. Such proceedings were had that Thomas was regularly adjudicated a bankrupt on the 25th day of April, and his case referred to a register. Creditors met on May 30th, and resolved to proceed under section 43 of the bankrupt act [of 1867 (14 Stat. 538)], and appointed a committee of one, John G. Priest, as trustee, to whom all the property of Thomas was conveyed, and who has since then been engaged in winding up and settling the trust. On the 30th day of June the district court, on its own motion, entered an order similar to the one in Obear's case, above given, and which was excepted to in like manner, and is now here for review at the instance of the petitioning creditor, the bankrupt and other creditors.

J. B. Woodward, for Obear's creditors.

Hill & Bowman, for Thomas's creditors.

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

DILLON, Circuit Judge. In both the cases before me the proceedings in the district court were commenced after December 1st, 1873, and the adjudication of the debtors as bankrupts was made before the late act amending the bankrupt act took effect, and in neither of the cases had the estates then been fully settled.

The recent amendment to the bankrupt law makes several important changes in respect to involuntary bankruptcy, and among other changes it requires that at least one-fourth in number of the creditors, representing one-third in amount of the provable debts, shall petition for the adjudication; and the time of the suspension of the payment of commercial paper, constituting an act of bankruptcy, is extended from fourteen days to forty days, and it prescribes and limits what shall be considered such paper.

The amendatory act approved June 22d, 1874, is made retroactive in the following language: "The provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the 1st day of December, 1873, as well as to those commenced hereafter. And in all cases commenced since the 1st day of December, 1873, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court, if satisfied that the admission was made in good faith, shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and in cases hereafter commenced, with costs," etc.

Undoubtedly the new act is retrospective in its operation so as to bring within it all cases commenced since December 1st, and in which, at the time of its passage, the petitions for the adjudication remained to be acted on.

Without entering upon the inquiry as to the competency of congress to annul by mere legislative declaration prior adjudications of bankruptcy, regularly made, in pursuance of laws in force at the time, and the conveyance and acts thereunder, I am of the opinion that congress did not intend by the amendatory act to overturn or disturb adjudications then already made and in force. The arguments in support of this view are derived from the language of the amendment; from the accepted principle of construction that statutes are to have no further or greater retrospective operation than plainly appears to have been the legislative intention; and from the failure of congress to make any provision for the necessary consequences of setting aside all adjudications in bankruptcy, and all acts done under them throughout the United States for the seven preceding months.

While the language making the law retroactive as to cases commenced since December 1st is very broad and applies to "all cases" commenced since that day and prior to the passage of the amendatory act, yet it is obvious that the purpose of congress was to put such cases upon the footing of new cases so as to enable them to participate equally in the benefits of the new provisions. But it is implied from the nature of the proceedings and the steps that are prescribed to be taken in respect to both old and new cases, that by the language quoted, congress contemplated pending cases in which no adjudication had yet been made. The law requires the adjudication to be made upon the petition of creditors, and as amended, requires a given proportion of the creditors to concur, and limits the time within which, both as to old and new cases, the requisite number and amount must join in the petition. The court determines whether the requisite number and amount have or have not petitioned—if they have, the matter proceeds, and the adjudication will or will not be made, depending upon whether the alleged acts of bankruptcy are or are not established. On the other hand, if the statutory requirement as to the number and amount of creditors is not met, the provision is that the proceedings shall be dismissed. All this clearly shows that congress had in contemplation cases in which no adjudication had been made, for these steps are all preparatory to an adjudication, and this view is further confirmed by the provision of section 13, amending section 40 of the original act.

Besides, it is impossible to suppose that congress overlooked the fact that throughout the United States, between December and June, there were many hundred cases in bankruptcy in which adjudications had

been made and which were in various stages of progress, some in which little had been done, others in which property had been sold, suits decided, and dividends made, but which were not yet entirely closed. If it had been intended by congress to annul all that had been done under the bankrupt act since the 1st day of December, overturning adjudications, and disturbing settlements, payments, dividends, conveyances, etc., it is quite incredible that provisions would not have been made for this extraordinary and confused state of affairs. The amendatory act is silent as to the rights and remedies of the various parties who would be affected by legislation having this grave and extensive retrospective operation. The argument, then, is a strong one that no such consequences were intended; and the more so since the retroactive provisions may have full effect given them by holding them as intended to apply to all cases commenced since the 1st day of December which had not progressed to an adjudication at the passage of the amendatory act.

I am of the opinion, therefore, that the orders of the district court in each of the cases under review were erroneous, and they are accordingly reversed. These orders were purposely made as they were, not as necessarily embodying the opinion of the district court, but that they might present for review cases which would measure the scope of the retroactive operation of the amendatory act. And what I hold is that it does not affect decrees or adjudications then made, while conceding that its remedial provisions do in many respects apply to cases brought since December 1st, and which were pending when it went into operation. Orders reversed.

[For a petition of the Broadway Savings Bank to vacate adjudication of bankruptcy in the matter of James S. Thomas, see Case No. 13,891.]

NOTE. The retroactive clauses of the late amendment to the bankrupt act have already, in several instances, come before the federal courts for construction and application.

In Re Angell [Case No. 386], Longyear, J., July 9th, 1874, held that the provisions of section 12 of the amendatory bankrupt act of 1874, which relate to the number and value of petitioning creditors, apply only to cases where the petition for adjudication was still pending, and not to cases in which adjudications had passed upon the petition, before the approval of the act. So it was likewise held by Blodgett, J., in Re Scammon [Case No. 12,430].

Judge Hopkins, of the United States district court for the Western district of Wisconsin, in the Case of Raffauf [Case No. 11,525], bankrupt, decided that the amendment did not disturb adjudications already made. The facts upon which the question arose were these: The bankrupt has filed affidavit showing that the requisite number of his creditors did not petition for his adjudication according to the twelfth section of the recent act amendatory of the bankrupt law, and moves that the proceedings be dismissed unless a sufficient number join in the petition within the time prescribed in said act. The petition was filed against the bankrupt in this case on the 5th day of February, 1874, and an order was made requiring him to show cause, on the 16th day of February, why he should not be adjudged a bankrupt, which was duly served upon him. On the 16th of February he was adjudged bankrupt by default, and a warrant issued to a messenger in due form, upon which his property was seized, and his creditors notified of the first meeting before the register to elect an assignee. On the day fixed an assignee was duly chosen by the creditors, who then and there accepted, qualified, and proceeded in the execution of his trust, under the assignment. He was pursuing his duties as such assignee when the amendatory act above mentioned was passed. The question raised in this case is whether the amendatory act applies to cases in the advanced condition this was when the act took effect.

The conclusion of the learned judge was expressed by him in the following language: "My conclusions upon the case here presented are, that it is not necessary to amend the petition, where there had been an adjudication before the amendment took effect; that the provisions of the amendment in regard to the number and amount of the petitioning creditors do not apply to such cases; but on the contrary, I hold that the judgment of adjudication based upon a petition conforming to the provision of the law in force when made, is valid, and as binding upon the debtor and his creditors as if the amended act had not been passed; that the adjudication removes the case beyond the domain of legislative control. The motion of the bankrupt is denied."

In re Rosenthal [Case No. 12,062], bankrupt, before the judge of the United States district court for the Western district of Missouri, presented the following questions as stated in the opinion of Judge Krekel: "Can a bankrupt by a mere protest made to the assignee, alleging want of jurisdiction in the court, in a case commenced since the 1st of December, 1874, and prior to the late amendments of the bankrupt law, stop the declaring of a dividend which could legally be declared under the law prior to the amendments?" The court very properly held in the negative, and in the course of its opinion remarked:

"All parties, debtor as well as creditors, may be willing that the proceedings pending shall go on to final settlement. It would require a very plain provision of law to show that congress intended to arrest and oust the court of the jurisdiction of a case which had been commenced and prosecuted under existing laws and progressed to the satisfaction of all parties."

Reduction of Fees—Fees of Clerk of District Court. Section 18 of the amendment to the bankrupt act, approved June 22, 1874, provides that after its passage "the fees, commissions, charges and allowances, excepting actual and necessary charges and allowances, of, and to be made by the officers, agents, marshals, messengers, assignees and registers in bankruptcy, shall be reduced to one-half of the fees, commissions, charges and allowances heretofore provided for or made in like cases." In Re Hunt [Case No. 6,882], bankrupt, it was held by the circuit judge of the Eighth circuit that this reduction applied to the fees of the clerk of the district court as well as to the fees, etc., of the other officers therein mentioned for services since June 22d, 1874.

OBER (CITIZENS' BANK v.). See Case No. 2,731.

Case No. 10,396.

In re OBERHOFFER.

[9 Ben. 485;[1] 17 N. B. R. 546.]

District Court, S. D. New York. May, 1878.

PRIVILEGED DEBTS IN BANKRUPTCY — JUDGMENT AGAINST ASSIGNEE —ASSIGNEE'S COSTS AND COMMISSIONS.

At the commencement of bankruptcy proceedings, the bankrupt, who was a manufacturer of woollen cloths, had in his mill wool which he had received from A. under a contract, by which he was to work it up into cloth for compensation. The assignee in bankruptcy took possession of the mill and of the wool in it, in the form of wool yarns and partly finished cloth, and under the direction of the court was allowed to purchase other materials and complete the unfinished stock. A. demanded of the assignee the unfinished cloth, yarn, and wool on hand, offering to pay for the labor and material expended on it. The assignee refused to deliver it, and A. brought suit in trover against him and recovered a judgment for the amount realized by the assignee from the sale of goods manufactured from A.'s wool, deducting the cost of labor and other materials put into them. A.'s claim was a doubtful one, and such as the assignee was justified in contesting. The amount of money in the hands of the assignee was not enough to pay this judgment after deducting the costs, fees, and expenses of the assignee in the bankruptcy proceedings and his administration of the estate. A. thereupon moved the court that the judgment be paid by the assignee as far as the funds in his hands would go: *Held*, that the petitioner having recovered damages had no claim to the money in the hands of the assignee, as being his own property, and was entitled to no priority as against the claim of the assignee for his costs and expenses of administration paid or incurred, or for his commissions.

[In the matter of Louis M. Oberhoffer, a bankrupt.]

A. P. Whitehead, for the motion.

J. E. Parsons, opposed.

CHOATE, District Judge. The bankrupt was a manufacturer of woollen cloths. At the time of the commencement of the proceedings in bankruptcy, he had in his mill certain wool which he had received from R. W. Aborn and others, under a contract, by which he was to work up the same into cloth for them, and to receive compensation for the labor and materials used in the manufacture. The assignee took possession of the mill and its contents, including the wool in question, then in course of manufacture, in the form of wool yarns and partly completed cloth. Under the direction of the court the assignee was allowed to purchase other materials and to complete the manufacture of cloth from the materials and unfinished stock in the mill, and the new material so purchased. The petitioners demanded of the assignee the unfinished cloth and yarn, and the wool on hand, belonging to them, offering to pay the charges for labor and materials expended thereon. The assignee having refused to recognize their claim, they brought suit against him as assignee in the circuit court in trover, and after a trial and verdict in their favor, have recovered judgment for the principal sum of $1,737.69 with $629.79 interest, as their damages, and $208.11 costs. Under the instructions of the court the recovery was limited to the amount realized by the assignee from the sale of the goods manufactured from the petitioner's wool, deducting therefrom the cost of labor and other materials put into the goods by the bankrupt and the assignee. The jury found the amount they were so entitled to, to be said sum of $1,737.69, and interest was allowed from the time of the demand made upon the assignee by the petitioners.

The amount in the hands of the assignee is insufficient to pay this judgment in full after the payment of the fees, costs, and expenses of the assignee incurred in the course of the bankruptcy proceeding and in his administration of the estate, and the petitioners now move that their judgment be paid in full or so far as the funds in the hands of the assignee will go toward its payment, the effect of granting which will be to give it a priority over the costs and expenses of administration and the commissions of the assignee.

The motion must be denied. The position taken by the petitioners that the money in the hands of the assignee is their money cannot be sustained. If instead of bringing an action of trover for damages the petitioners, being able to trace into the hands of the assignee and to identify in any fund or as part of any separate fund in his hands the proceeds of their goods, had claimed it as their own money on application to the court and proof of its identity, they might have had an order that it be paid to them, with proper deductions for labor and materials expended on their goods. Such a claim however, would not have extended beyond the money of the petitioners so traced and identified in the hands of the assignee with such increase thereof or interest thereon as the assignee might actually have realized on it in his hands. It would not extend to interest on the amount of their money, unless actually realized by the assignee, for beyond that any interest would not be their money, but damages for the detenuon of their money or goods, nor would such claim extend to any costs. But instead of pursuing this remedy, perhaps because it was impossible for them to trace and identify the actual proceeds of their goods they have elected to sue the assignee in trover, to sue for and recover not their own money, but damages, for the tortious detention of their goods. They have had their damages assessed and determined by verdict and judgment. They have thereby clearly lost and waived any claim they may once have had to the money in the hands of the assignee as their own money. All their rights against him are merged in the judgment. They cannot hold their judgment for damages and their title to the proceeds of the goods as their own too.

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

The petitioners then having no claim to the money in the hands of the assignee as their own money, have they any lien on it, or any claim of priority as against the claim of the assignee for the allowance of his fees and costs and expenses of administration paid or incurred, or for his commissions? I think not. Section 5101, Rev. St., provides that in the order for a dividend "the fees, costs, and expenses of suits, and of the several proceedings in bankruptcy, and for the custody of property" are first to be paid in full. There is no express provision as to judgments that may be recovered against the assignee, and I see no reason for preferring such a judgment over these expenses which are expressly preferred by the statute. On the contrary the preference given to the fees, costs, and expenses of the assignee is clearly just and right. Assuming that the estate of the bankrupt is liable for such claims as that of the petitioners in preference to the claims of creditors of the bankrupt, yet in no proper sense is there any estate to pay their claim, except what remains after paying the necessary expense of administering it, and realizing upon it, and thus creating the fund available to pay such claims. Therefore by virtue of the express provisions of the statute as well as upon general equitable grounds, the fees, costs, and expenses of administration must be first paid. I have had some doubt as to the assignee's commission, the doubt being whether as against the petitioners, toward whom his act was tortious, he can equitably deplete the fund by taking out anything for his services, but I have concluded that he is entitled to his commission. Though guilty of a technically tortious act as against the petitioners, the case clearly shows that even as regards their claim he has only done his duty toward the creditors. The petitioners' claim was not so clear that it was his duty to yield to it, and it was so doubtful in fact and in law that a judicial investigation was necessary, and it was settled only after a long trial, by the verdict of a jury. He has done nothing for which he should be deprived of his commissions. Motion denied.

OBERMEYER (UNITED STATES v.). See Case No. 15,907.

O'BRIAN (UNITED STATES v.). See Case No. 15,908.

Case No. 10,397.

In re O'BRIEN.

[1 N. B. R. (1873) 176; [1] Bankr. Reg. Supp. 38; 6 Int. Rev. Rec. 182.]

Circuit Court, N. D. New York.

BANKRUPTCY—APPEAL FROM ADJUDICATION TO CIRCUIT COURT.

1. Where an appeal from an adjudication of bankruptcy was made from the district courts to the circuit court: *Held*, such appeal would not lie, and should be dismissed for want of jurisdiction.

[Cited in Farnsworth v. Boardman, 131 Mass. 118.]

[2. Cited in Re Goodman, Case No. 5,540, and in Lawyer v. Gladden, 110 Pa. St. 581, 1 Atl. 660, to the point that, in a state where a feme covert may be sued upon her contracts, she may be declared a bankrupt.]

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

[In the matter of Mary A. O'Brien, a bankrupt.]

NELSON, Circuit Justice. The decision in the court below, and which is sought to be revised on this appeal is, that a feme covert, a trader, is within the bankrupt act of the 2d March, 1867 [14 Stat. 517]; and may be declared a bankrupt. A preliminary question is raised, and must first be disposed of, and that is, whether the adjudication is one that may be revised on an appeal to this court? The second section of the act is chiefly relied on, which declares "that the several circuit courts of the United States, &c., shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may upon bill, petition, or other process, of any party aggrieved, hear and determine the case in a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof in term time, or vacation." Concurrent jurisdiction is also given to the circuit courts with the district courts in suits by the assignee in bankruptcy against any person claiming an interest in the property of the bankrupt, or by such person against the assignee. Although the language of the fore part of this section is very broad and comprehensive, and the scope of it difficult to understand, yet we are inclined to think that, in connection with other provisions of the act, it must be construed as relating to cases of original, and not of appellate jurisdiction. If construed to relate to the latter, it is apparent that every question decided by the district courts in the course of the proceedings in bankruptcy, would be subject to an appeal, which could hardly have been the intention of congress. But what, in our judgment, is decisive of this construction is, that the subject of appeals to this court from the district courts is specially provided for and limited. The 8th section declares that appeals may be taken from the decision of the district courts in two cases: First, by the creditors whose claim against the bankrupt has been wholly or in part rejected; and, second, by the assignee who is dissatisfied by the allowance of any claim. These two appeals arise out of the decisions of the district court in the course of the bankrupt proceedings proper, and are the only instances of the kind provided for.

[1] [Reprinted from 1 N. B. R. 176, by permission.]

They are distinct from appeals in cases in equity arising under the act, when the debt or damages amount to more than $500. The 24th section provides for the mode of appealing by the aggrieved creditors, and one of the rules in bankruptcy carries it out more in detail. Having arrived at the conclusion that the decision is not the subject of an appeal, and hence, that this court has no jurisdiction of it, the question on the merits is not before us, and will not be examined. Appeal dismissed.

O'BRIEN (BOSSEAU v.). See Case No. 1,667.
O'BRIEN (COOKE v.). See Case No. 3,177.
O'BRIEN (MILLER v.). See Case No. 9,586.
O'BRIEN (UNITED STATES v.). See Case No. 15,909.

Case No. 10,398.

O'BRIEN v. WOODY.

[4 McLean, 75.][1]

Circuit Court, D. Indiana. May Term, 1846.

FOREIGN WILL — TITLE TO LANDS — ALIENS AND CITIZENSHIP—JUDGMENT AGAINST EXECUTORS —SALE ON EXECUTION.

1. Under the statute of Indiana, a will made and recorded in any other state, according to the laws of such state, is valid to pass lands or other property in Indiana; and a copy duly certified from such record is made evidence.

2. An alien in the United States before 1802, may be admitted to the rights of citizenship, without proof of having resided, etc., five years.

3. A judgment against executors in Indiana, does not authorize an execution against the lands of the deceased.

4. A sale of land on such an execution can confer no title.

[This was an action in ejectment by O'Brien against Woody.]

Mr. Judah, for plaintiff.
Mr. Bright, for defendant.

OPINION OF THE COURT. The lessor of the plaintiff claims the tract of land in controversy, as devisee of Thomas Jones. The patent is dated the 12th of July, 1812, and was issued to Jones. An exemplification of his will being offered in evidence, was objected to, as not being duly authenticated. Jones died in the state of Pennsylvania, and a copy of the will is offered under Act 1824, § 8, which provides that "wills devising lands in this state, executed abroad, and proved according to the law of the country in which executed, and so duly certified under the seal of the court, or officers taking such proof, and the signature of the clerk of such court, and the same authenticated by the certificate of the presiding judge of such court, or the first judge of the county, or district, that the certificate is in due form of law, shall be sufficiently proved to admit the same to record, and be of like force as if taken within the state," etc. "And copies of the wills and testaments and codicils, proved as aforesaid, etc., and authenticated as aforesaid, shall be good and sufficient evidence of the devises or title therein contained."

It is objected that the statute requires the original will to be produced, having the authentication above specified. If the original were produced with the proofs, it might be evidence; but the statute declares a copy certified as required, shall be evidence. A copy, as in this case, from the Pennsylvania record of wills. As the will with its authentication may be recorded in this state, a copy from such record, it is presumed, would be evidence.

We think that the authentication is a substantial compliance with the act above cited. And if that law, as to the mode of proof, differs somewhat from the Indiana act on the same subject, still the above statute makes the proof valid. In regard to the proof of the will, the Pennsylvania mode is substituted for that of Indiana. If the original will were produced, it might be necessary, as laid down in Roberts, Wills, 145, to prove to the jury that it was attested by the witnesses. But the statute makes the copy duly authenticated evidence, without this proof.

It is objected that Thomas Jones was an alien, and that he consequently, could not transmit land by devise. That being an alien, on office found, his land would have reverted to the state And although this proceeding was not had, yet on his death the land passed to the state, as an alien could not transmit it by will. It is proved that the devisor was an alien. But under the act of congress of the 22d March, 1816 [3 Stat. 258], it is provided that "any alien residing in the United States before 1802, may be admitted to the rights of citizenship without proof of having resided, etc., five years," etc. Under this act, it is alleged that Jones became a citizen; and we think there is reasonable proof of the fact.

The defendant shows a sheriff's deed in 1828, and a record of a judgment and execution in Knox county, against Thomas Jones, under which the land in controversy was sold to Welburn; also, a deed from Welburn and wife to Block, and from Block and wife to the defendant. The judicial proceedings in Knox county were irregular. The judgment was obtained against one executor, there being two. And it was against the lands and tenements of the defendant, when there was no statute authorizing such a procedure. At common law, a judgment against an administrator or executor, does not authorize a sale of the real estate of the deceased.

Under the charge of the court, the jury found the defendant guilty, as charged in the declaration, to the extent of the interests represented by the lessors of the plaintiff. And there was a judgment entered on the verdict.

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

Case No. 10,399.

O'BRIEN COUNTY v. BROWN.

[1 Dill. 588.]

Circuit Court, D. Iowa. 1871.

LIMITATION OF ACTION—FRAUD—NOTICE — JURISDICTION—FRAUDULENT JUDGMENT.

1. The circuit court has jurisdiction of a bill in equity filed by defendant in a judgment rendered therein, against an assignee of a judgment plaintiff, to set aside the judgment for fraud, though both assignee and plaintiff be citizens of the same state, as such proceeding is merely a continuation of the original suit.

[Cited in Re Sabin, Case No. 12,195.]

2. Discovery of fraud, in the meaning of the statute of limitations, is not to be imputed to a county simply because it was known to its officer who committed it.

In equity.

H. B. Wilson and T. M. Dye, for county.

Joy & Wright and Withrow & Wright, for defendant.

DILLON, Circuit Judge. We decide the following points:

1. The court has jurisdiction of a bill in equity, filed by the defendant in a judgment rendered therein, against an assignee of the judgment plaintiff, to set aside the judgment for fraud, though such assignee and the complainant be citizens of the same state. Such a proceeding is, in substance, a continuation of the original suit. Jones v. Andrews, 10 Wall. [77 U. S.] 327; Dunn v. Clarke, 8 Pet. [33 U. S.] 1; St. Luke's Hospital v. Barclay [Case No. 12,241]; Dunlap v. Stetson [Id. 4,164].

2. The bill brought by a county to set aside a judgment, charged to have been fraudulently procured on county warrants fraudulently issued (the assignee of the judgment being charged with complicity and notice of the frauds alleged), held sufficient on demurrer. Clark v. Des Moines, 19 Iowa, 199; Clark v. Polk Co., Id. 248; Burtis v. Cook, 16 Iowa, 194.

3. Discovery of the fraud, within the meaning of the statute of limitations, is not to be imputed to the county from the moment the fraud was perpetrated, simply because it was known to the officer who committed it. Martin v. Smith [Case No. 9,164].

O'BRIEN COUNTY (PHELPS v.). See Case No. 11,078.

O'BRYAN, THE RICHARD. See Case No. 11,767.

Case No. 10,400.

O'CALLAGHON v. RIGGS.

[The case reported under above title in 5 Am. Law Reg. 139, is the same as Case No. 7,361.]

O'CALLAHAN (UNITED STATES v.). See Case No. 15,910.

Case No. 10,401.

The OCEAN.

[1 Spr. 535;[1] 18 Hunt, Mer. Mag. 295.]

District Court, D. Massachusetts. Feb., 1848.

SHIPPING—BILL OF SALE—DEFEASIBLE UPON CERTAIN CONDITIONS—RIGHTS OF THIRD PERSONS—JOINT OWNERS—THEIR RESPECTIVE RIGHTS.

1. Where there is a bill of sale of a vessel, absolute on its face, but by a collateral agreement between the parties, defeasible upon certain conditions, third persons cannot avail themselves of such conditions to defeat the title of the grantee.

2. Where two persons were joint and equal owners of a vessel, and one of them, while in possession as ship's husband, improperly left her in an unsafe condition, with no person on board, and the other half owner took possession, the court refused to interfere with such possession.

This was a libel in a cause of possession. The libellant [J. N. Harding] was owner of one-half of the schooner Ocean, the other half belonging to one Eaton, of New York, who gave a bill of sale of his half to the claimant, as collateral security for a debt. The libellant, as managing owner, and ship's husband, sent the vessel upon a voyage, and after her return, had made some preparations for sending her upon another, but had, for several days, left her in an unsafe condition, not properly fastened, nor locked up and with no one on board. While in this condition, the claimant [C. A. Replier] took possession of her, and refused to give her up to the libellant, claiming at the time (under a mistake of title), the entire ownership. After this suit was brought, he abandoned the claim for the whole vessel, and relied on his title under Eaton, to one-half, and claimed the right to possession. The libellant contended that the claimant's title under Eaton, was void, he not having fulfilled the terms of his collateral agreement; and that if the claimant's title was good, the right to possession was in the libellant, who had never abandoned the general possession and oversight of the vessel, and had equitable claims upon her for advances, and by reason of contracts for a new voyage.

R. H. Dana, Jr., for libellant.

C. L. Hancock, for claimant.

SPRAGUE, District Judge. The bill of sale from Eaton to the claimant, is absolute on its face, conveying all right of property which Eaton had. This is valid as against third persons. Eaton alone could take advantage of a forfeiture growing out of any collateral agreement, and it is not competent for the libellant to dispute the claimant's title. Considering, therefore, the claimant as rightfully holding the part that originally belonged to Eaton, it becomes a simple ques-

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

tion of possession between half owners. From the evidence, the court is satisfied that the libellant so negligently kept the vessel, that the claimant was warranted in taking possession of her. The next question is, was he bound to restore her to the libellant upon request? It has not been shown that the libellant has claims on the vessel for advances, or by reason of any contract for a new voyage, which establish an equity in his favor. I must leave the possession where I found it, that is, with the claimant.

As the libellant has suggested that this suit would not have been brought, but for the claimant's assertion of title to the whole vessel, there should be no costs prior to the amendment of the claim.

Decree that the libel be dismissed, with costs to the claimant after the filing of his answer.

Case No. 10,402.

The OCEAN BELLE.

[6 Ben. 253.] [1]

District Court, S. D. New York. Nov., 1872.

JURISDICTION—RIGHTS OF MAJORITY AND MINORITY SHIPOWNERS—POWER TO SELL—BOND FOR SAFE RETURN.

1. A court of admiralty has no power to decree a sale of a vessel, at the instance of the owners of a minority interest, except, perhaps, as the result of the failure of the owners of the majority interest to give security for the safe return of the vessel.

2. A court of admiralty has power to decree a sale, in case of a dispute between owners of equal moieties, as to the employment of the vessel.

[Cited in Coyne v. Caples, 8 Fed. 640.]

[See The Annie H. Smith, Case No. 420.]

3. A court of admiralty has no jurisdiction in matters of accounting between part owners of a vessel.

[Cited in The John E. Mulford, 18 Fed. 457; The H. E. Willard, 53 Fed. 601; The Eclipse, 135 U. S. 608, 10 Sup. Ct. 876.]

4. A court of admiralty cannot require the owners of a majority interest in a vessel to give a bond to the minority interest to cover indebtedness of the vessel to the minority owners, or to indemnify them against loss in her future employment.

In admiralty.

E. D. McCarthy, for libellants.

C. Donohue, for claimants.

BLATCHFORD, District Judge. The libel in this case, filed in December, 1869, styles itself a libel "in a cause of possession and sale." It prays for no process against the vessel or against any person. On the filing of the libel, a monition commanding an attachment of the vessel was issued. Under it, the vessel was attached. A claim to the vessel was filed on behalf of the owners of eleven-sixteenths of her. She was discharged from arrest, on a bond in the sum of $4,500, conditioned to abide the decree of the court.

The libel states, that it is brought against the vessel, and against all persons lawfully intervening for their interest in her, and especially against Richards, Adams & Co., owners of two-sixteenths of her; that the libellants are the owners of five-sixteenths of her, having owned four-sixteenths since the 30th of December, 1864, and one-sixteenth since the 3d of November, 1865; that they bought the four-sixteenths when she was new, and paid for it a proportional part of $14,000, and that they paid for the one-sixteenth a proportional part of $12,000; that, by mismanagement, she has depreciated in value; that, although, since December, 1864, nearly $4,000 of repairs have been put upon her, she is not now worth more than $6,500; that her depreciation is also due to the fact that she has been controlled by parties who now have but a nominal interest in her, and who have never owned more than two-sixteenths of her, and to the fact that her owners have always been at variance as to what voyages she should make, who should command her, and what repairs, if any, should be put upon her; that, for the past three years, from year to year, she has lost money to her owners; that, in no one year during the past three years, has she earned enough, over and above expenses, to pay interest, to say nothing of necessary insurance; that, during the year 1866, the libellants advanced considerable money to pay her expenses; that, in September, 1866, they paid for her repairs, when she put into Newport in distress, and have never been repaid therefor; that she is now unfit for sea, requiring to be refitted as to her sails, and rigging, and to have other repairs, at a cost of not less than $2,000; that their interest in the vessel, bought for $4,250, is not worth more than $2,000, and they have offered to sell it to Richards, Adams & Co. for that sum, which offer has been refused; that the value of the vessel is every day depreciating; that, for five years, she has made but one or two successful voyages; that, under her present ownership and management, she never will make successful voyages; that, unless this court shall intervene to protect the libellants, their whole interest will quickly be lost to them; that they have frequently offered their co-owners either to buy or sell, on the same terms, whether as buyers or sellers, but no result has been reached, or can be; that the ownership of the vessel is, the libellants five-sixteenths, which is the largest belonging to any single individual or firm, one Emery, formerly master of the vessel, three-sixteenths, one Farwell, one-sixteenth, one Locke, one-sixteenth, one Barnes, one-sixteenth, one Caldwell, one-sixteenth, one Nickerson, two-sixteenths, and Richards, Adams & Co., ship's husbands and agents of the vessel, two-sixteenths, but only nominally, they having transferred it to another; that the vessel is about to sail on a voyage, but whither

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

the libellants do not know; and that they have protested against her further use and employment.

The prayer of the libel is for a decree, that the vessel be sold, for the benefit of her creditors and owners, the proceeds to be applied, first, to the payment of all her just debts, and the balance to be then distributed among her owners; that, until such decree and sale, the libellants be given possession of the vessel, to be used by them prudently and with discretion, they offering to give a bond, in double the amount of the value of all adverse interests in the vessel, to use her with care and prudence, and to render just accounts of all her earnings and expenses, and to do such other things as the court shall impose, in the condition of the bond; and that, in case the vessel shall be given over to the use and possession of owners other than the libellants, a bond be required of them, in double the value of the interest of the libellants in the vessel, and also in double the further amount of the indebtedness of the vessel to the libellants for moneys advanced, and that such bond shall indemnify the libellants against further loss, and guarantee to them the payment of moneys expended on account of the vessel such expenses to be assessed by a commissioner of the court.

The claimants of eleven-sixteenths of the vesssel except to the libel on these grounds: (1.) It does not state a cause of action cognizable in this court; (2.) This court has no power under the statements in the libel, to take the possession of the vessel from the claimants, or to deliver it to the libellants; (3.) This court has no jurisdiction to order the sale of the vessel to pay her debts; (4.) The libellants do not set up any facts that entitle them to the interference of the court. They also answer the libel, taking issue on its material allegations, and praying for its dismissal.

The main prayer of the libel is for a sale of the vessel. There is an incidental prayer, that, until the sale, possession of the vessel be given to the libellants; and that, if possession be given to the other owners, a bond of a certain character be required from them.

The court has no power to order a sale of this vessel, on the facts set out in the libel, to pay the debts and distribute the residue of the proceeds, on the demand of the owners of five-sixteenths of her, and against the will of the owners of the rest, except, perhaps, as the result of a failure of the owners of the eleven-sixteenths to give security for the safe return of the vessel. Such power of sale has never been established in this country. A power of sale has been exercised where the dispute was between the owners of equal moieties, as to undertaking a particular voyage or adventure, as in Davis v. The Seneca, 18 Am. Jur. 486, and in The Vincennes [Case No. 16,945], cited in 2 Pars. Shipp. & Adm. 343. The power is thus expressly limited by Judge Story, in his treatise on Partnership (section 439), and in his opinion in The Orleans v. Phœbus, 11 Pet. [36 U. S.] 175, 183. In that opinion he says, speaking for the court: "The jurisdiction of courts of admiralty, in cases of part owners, having unequal interests and shares, is not, and never has been, applied to direct a sale, upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages, properly so called. The majority of the owners have a right to employ the ship in such voyages as they may please, giving a stipulation to the dissenting owners for the safe return of the ship, if the latter, upon a proper libel filed in the admiralty, require it. And the minority of the owners may employ the ship in the like manner, if the majority decline to employ her at all."

Nor has this court any power to take the vessel out of the possession of the majority owners, and put her into the possession of the minority owners. As the majority intend to employ her on a voyage, they have a right to select the voyage, and to keep possession of the vessel, while she is employed, subject only to the requirement of giving bond for her safe return, if such bond is required.

The bond asked for by the libel, in case the vessel is left in the possession of the other owners, is one which this court has no power to require, except so far as the libel may be regarded as asking for a bond for the safe return of the vessel. The court has no jurisdiction in matters of account between part owners of a vessel. The Orleans v. Phœbus, 11 Pet. [36 U. S.] 175, 182; Grant v. Poillon, 20 How. [61 U. S.] 162; Ward v. Thompson, 22 How. [63 U. S.] 330. It follows, therefore, that it cannot require the other owners to give a bond to the libellants to cover the past indebtedness of the vessel to the libellants, or to indemnify the libellants against future loss in the employment of the vessel. Besides, such a proceeding would be substantially to permit the libellants to libel the vessel in rem for a claim alleged to be due by her to them as owners, and that for a claim the amount of which cannot be ascertained, except as the result of an accounting among all the owners.

The libel does not ask for security for the safe return of the vessel, nor has it any prayer for general relief. The exceptions are allowed, so far as the second and third grounds of exception are concerned. The first and fourth will be allowed, and the libel will be dismissed, unless the libellants shall apply for leave to amend their libel, so as to make it one praying for security for the safe return of the vessel.

OCEAN BELLE, The. See Case No. 10,961.

OCEAN BELLE, The (PENT v.). See Case No. 10,961.

Case No. 10,403.

The OCEAN BIRD.

[2 Spr. 261.] [1]

District Court, D. Massachusetts. Feb., 1864.

PRIZE—ATTEMPT TO VIOLATE BLOCKADE.

Vessel ostensibly bound to Port Royal, then in the possession of the United States forces, condemned for an attempt to break the blockade of other ports.

In admiralty.

R. H. Dana, Jr., U. S. Atty., for the United States and captors.

SPRAGUE, District Judge. This vessel, a small schooner, of about 18 tons burden, was captured by the United States steam gunboat Norfolk, on the 23d of October last, off the west coast of Florida. The vessel and her cargo were owned in Nassau, and she had sailed from that port a few days before. Her papers declared the voyage to be from Nassau to Port Royal, S. C.; but, when sighted she was beating to the southward with a fair wind for Port Royal. The master, also, in his deposition, admits that he was destined to any blockaded port he could safely enter, and Port Royal was only a possible ultimate destination in case he should abandon his intention of entering a blockaded port. He makes no claim for his vessel or cargo, although he was a part-owner of the cargo. The vessel and cargo must be condemned for attempt to break blockade, coupled with the holding out of a false destination.

The vessel was left at Port Royal, as unfit to be sent in for adjudication, and the cargo, chiefly salt, was sent here in the United States steamer Circassian, with the witnesses. The decree of distribution will be withheld until the value of the vessel can be ascertained, and her proceeds deposited here.

Case No. 10,404.

The OCEAN BRIDE.

[1 Hask. 331.] [2]

District Court, D. Maine. 1871.

SHIPPING — FISHERY LICENSE — IMPORTATION OF FOREIGN MERCHANDISE—HOW SHOWN—FORFEITURE—SINGLE ACT OF TRADING.

1. A vessel licensed for the fisheries, that brings merchandise from a foreign port with the knowledge or consent of her officers, is engaged in other trade, and is liable to forfeiture under section 32 of the act of February 18, 1793.

2. When the importation is admitted or proved, the burden rests with the claimants to establish their innocence.

3. The illegal employment may be shown from circumstances, even against the direct testimony of the master and crew.

4. Goods of less value than $500 found on board will work a forfeiture of the vessel, notwithstanding section 21.

5. A single act of trading, not authorized by the license, will work the forfeiture, even though the business of the license is still continued.

In admiralty. Libel in rem by the United States, claiming a forfeiture of the schooner Ocean Bride for a violation of the revenue laws, by being engaged in a trade other than that for which she was licensed. The owners, one of whom was the master, made claim and answer, denying all knowledge of the illegal traffic charged.

Nathan Webb, Dist. Atty., for the United States.

William L. Putnam, for claimants.

FOX, District Judge. This schooner belongs to Gloucester, Mass., and was licensed in January, 1870, for the fisheries for one year, three-fourths of her being owned by John McLoud and the residue by his sons, Jesse and Alex., Jesse acting as the skipper and Alex. as one of the crew. She was seized in September by the collector of Portland for being employed in a trade other than that for which she was licensed.

She sailed from Gloucester in August with a crew of ten men. She cruised along the coast of Maine without great success in fishing, and about the 1st of September put into Yarmouth in the province of Nova Scotia, about 3 p. m., and sailed early the next morning. She then proceeded westwardly, on the evening of the 3d of September off Isle Haut, was run into by another vessel, carrying away her bowsprit, &c., and she was obliged to make this port for repairs. She arrived the 4th, was overhauled by the revenue officers on the 7th, and after a pretty diligent search there was found carefully stowed away in her run twenty cases of brandy and one case of gin. The skipper, on being informed by the officers that they suspected his vessel, stated that there were no dutiable articles on board, as they had not been into any port on the voyage where they could be obtained. He was present when the forecastle and house were examined; offered to open the barrels of salt to satisfy the officers that they did not contain any smuggled goods. He accompanied the officers into the after-cabin, was present with them a part of the time, but left before the discovery of the liquors, having, as is stated, been called to go to the blacksmith's for some bolts which were needed for the repairs.

The run is in the stern of the vessel directly aft of the cabin, without access, excepting through an opening in the bulkhead back of the movable stairs from the deck to the cabin, the floor of the cabin being about four feet below the deck, the stairs projecting into the cabin. The opening in the partition separating the cabin from the run was

1 [Reported by Hon. Richard H. Dana, Jr., and here reprinted by permission.]

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

closed by a piece of sail-cloth, the edges of which were under the run, and it was in part kept in its place by the boxes under the floor of the run being nearly even with that of the cabin. The master, his brothers and three of the crew slept in the cabin. The whole run was filled with the cases of liquor which were stowed so as to resist the force of the waves. The case which was next to the opening was gin. Its cover was split, one bottle was missing from it, and a similar bottle, empty, was found at the time in one of the lockers in the cabin. The report of the revenue officers also showed that one or more of the cases of brandy were short of their complement of bottles, which were of a very peculiar size and form, and marked "imperial." One similar to them was also found in the locker.

After the skipper was informed of the finding of the liquors on board the schooner, he denied all knowledge of their being there, could give no information in relation to them, excepting that he supposed that they must have been put on board at Yarmouth by some one unknown to him, and without his knowledge or authority.

The liquors were advertised by the collector and no one appearing to claim them have been sold at public auction.

The answer is sworn to by the claimants and in it they severally deny all knowledge of the liquors having been placed on board of the schooner, and they have been examined as witnesses at the hearing, and each of them in the most direct and positive language re-affirms his denial and asserts that the cases were there without his consent, authority or knowledge, and that he had no suspicion that any were on board until they were so informed by the revenue officers.

If these statements of the claimants are credited by the court, the defence is sustained, as I do not hold that a vessel would be subject to confiscation when goods have been put on board of her secretly without the knowledge of her officers. Those in authority should consent to or connive at the employment in order to subject the vessel to forfeiture.

"The story now told is indeed a very extraordinary one, and yet is supported by positive, direct testimony. It is certainly the duty of the court not lightly to suspect the truth of the statements clothed with the solemn sanctions of an oath and supported by numerous concurring witnesses. But testimony however positive must in its nature be liable to control by strong presumptive circumstances, and must be weighed with care when it comes loaded with the temptations of private interests and the impressions of personal penalties. It is a melancholy consideration for the court, that in the discharge of public duty it finds itself often obliged to resist the influence of human declarations and to rely upon the concurrence of probable circumstances." These remarks of Judge Story in The Short Staple [Case No. 12,813], may with much propriety, be adopted by the court in the present cause, although on the appeal to the supreme court, a majority of that court were of opinion that the circumstances in the case of The Short Staple were satisfactorily explained and the decree of condemnation was reversed.

Is it to be credited by the court that this vessel could have gone into Yarmouth, received on board twenty cases of liquor stowed away in the run abaft of the cabin in which the skipper and Alex. McLoud lodged with a small piece of canvas covering up the opening, and that they could have remained there from Thursday until the next Wednesday without either of these persons knowing or suspecting their being there?

The testimony is that the crew went ashore about 5 and remained until about 10, leaving only Simeon McLoud, aged 16, in charge. There is some discrepancy about the manner in which the crew went ashore, Jesse and Alex. McLoud testifying that they took both dories, five men in one and six in the other, whilst Simeon, who was not present at their examination, being examined at a subsequent day, says that all went in the first dory excepting the cook, who had something to do and did not go until half an hour afterwards. Simeon swears that he slept in the cabin, turned in about dusk, that before that no one had come off. That he soon fell asleep and did not wake until morning. Did not know when any of the crew came on board, heard no noise and knew nothing of any one having come on board or of any boxes being put on board that night. First he knew about them was when they were found by the revenue officers. This statement I cannot credit. The cases must have been taken into the little cabin where he slept, as he says, from there passed into the run, which was a dark place, and required a light of some kind, as is evident from the manner in which the boxes were stowed. It must have taken more than one man to accomplish it, and after it was done would have immediately been discovered by a boy of that age, always on the lookout and peering into every out of the way place in such a craft, especially when his attention would be attracted by the canvas used as a covering for the opening into the run.

Under the circumstances of guilt which surround this vessel, if these cases had been procured and put on board of her at Yarmouth by some of her crew, I hold it was incumbent on the claimants to establish this by the independent testimony of the crew, especially of those who were not concerned in the affair, and also by the evidence of the parties at Yarmouth, from whom these liquors were procured. This latter testimony could have been obtained by a commission, but the claimants have not endeavored to procure it, or that of any others of the crew excepting three brothers as before stated.

The excuse now given for going into Yarmouth is that the weather was foggy, and they thought it prudent to make a harbor on that account. It does not appear from the testimony that any other vessel thought such a precaution expedient, as there were none that night in at Yarmouth excepting the cutter. From all the circumstances the court is the rather impressed with the belief that they made this port to procure these articles, rather than on account of the bad weather, especially when it is recollected that the next morning they turned their course homeward, not doing much certainly in fishing, as the next night they were off Isle Haut, more than one hundred miles from Yarmouth.

It is stated that one or more of the crew belonged in the vicinity of Yarmouth, and it is urged in argument that whilst the officers were on shore, these cases of liquor were surreptitiously put on board by some of the crew without the authority or connivance of the officers; but of all the attempts at smuggling which the court has been called upon to investigate, this is the most improbable, and is certainly as bold an operation on the part of a crew, without a shadow of a possibility of escaping discovery, as can well be imagined.

There are other facts and circumstances which directly establish the complicity of the officers in this transaction. They occupied the cabin, and in the lockers there were found bottles corresponding with those which were missing from the packages, peculiar in their appearance, and one of which was of a kind before unknown to the officers. These bottles were empty, and no doubt can be entertained that the contents were consumed in the cabin on the trip, and yet these claimants deny all knowledge on their part of these being on board.

Again, when the skipper was informed by the officers that they suspected he had smuggled goods on board, he denied it, asserting that they had not been to any place where they could have procured them if they wanted to do so. This statement is proved against the skipper by two witnesses and is not really denied by him. That the statement is false is now admitted. Why resort to falsehood to conceal their voyage, if all that had taken place was honest and legal? Parties do not state that which they know is absolutely false without motive and object, and in the present instance the purpose is quite apparent. If true, of course there could not be on board of the vessel any goods thus illegally imported from a foreign place, and therefore there could be no further occasion for examination; if the vessel had merely touched at Yarmouth for a harbor one night, sailing the next morning without any merchandise being brought on board, why did not the master so state frankly and according to the truth, and let the officers then act for themselves in searching her or not as they should think best? If, on the contrary, the skipper was conscious of his guilt, was well aware that a search would disclose their illegal conduct by discovering its fruits, what more natural than for him to attempt to avert all suspicion by his repudiating and denying his having had the opportunity thus to acquire the merchandise. If he had not been conscious of guilt, if he did not know that a search would disclose his misconduct, would he have attempted by a falsehood to blind the eyes of the inquirers? If he knew he was innocent, would he not have instantly disclosed all he knew, asserted that the fullest investigation would disclose nothing to implicate him or his vessel?

There are other circumstances which tend to confirm the conclusion that the skipper was aware the liquor was concealed on board the schooner, especially his leaving the cabin just before the liquors were discovered, and when it was apparent from their thorough search that it would soon be found. An explanation is attempted, viz.: that he was called upon by Alex. to go to the blacksmith's for some bolts; in this he is not corroborated by Simeon, and I have great doubt of the truth of this excuse; but even if it were so and he had been thus called away, if he had been conscious of his innocence and that nothing could be discovered, I apprehend he would certainly have remained until the search was ended, and not have allowed the officers to pursue their search in the cabin with none of the officers to observe their proceedings. Statements made by him to the officers were not such as an innocent party would be likely to make, and notwithstanding the positive denials of the skipper and his brothers, I am forced to the conclusion and have no doubt, that the schooner was designedly taken to Yarmouth for the purpose of obtaining these liquors, and that at the time of the collision she was making her way homeward as direct as possible, with the intent on the part of those in charge to smuggle the liquors into the country, if practicable.

The thirty-second section of the act of February 18, 1793 [1 Stat. 316], declares that "if any licensed ship or vessel shall be employed in any other trade than that for which she is licensed, every such ship or vessel with her tackle, &c., and the cargo found on board of her shall be forfeited."

In the various cases which have been before the district and circuit courts for a violation of this provision, it has been uniformly held that a single act of trading not authorized by a license would subject the vessel to forfeiture. It is claimed in defence, that the trade or employment for which the vessel is licensed must be abandoned, and that for the time being she must be exclusively employed in the unauthorized trade, in order to subject her to forfeiture. Such a construction does not meet with the approval of the court. If adopted it would eventually annul and defeat this provision of the act. If it is sanctioned, a vessel licensed for the fisheries

might pursue in part that employment, and as occasion offered in the course of her fishing voyages engage in smuggling operations, and thus the mischief would prosper which the law intended to punish. A vessel in the course of her voyage may pursue two employments, one legal, the other unauthorized, and be subject to the penalties of the law for the consequences of her illegal employment. This was in fact decided in the cases of The Nymph [Case No. 10,388]; The Harriet [Id. 6,099], and other fishing vessels, condemned heretofore in this district for pursuing the mackerel fisheries when licensed for cod-fishing, and no doubt exists as to the correctness of the construction given to this section by the rulings in these cases.

It is further contended, that as the goods found on board the schooner were not of the value of $500, that the vessel should not be condemned, because by the twenty-first section of the same act, which authorizes permits for fishing vessels to touch and trade at a foreign port, it is enacted "that if any such licensed vessel is found within three leagues of the coast, with merchandise of foreign growth on board exceeding the value of $500 without having such permission on board, such ship or vessel shall be subject to forfeiture;" and from this it is argued that it was not the intention of congress to subject a licensed fishing vessel to forfeiture for trading without a permit, unless she is found within three leagues of the coast with foreign goods exceeding the value of $500. The twenty-first section was intended to secure the revenue, and to subject to forfeiture vessels licensed for the fisheries found near the coast with the prohibited quantity of foreign merchandise. Such a vessel is presumed to be engaged in a smuggling enterprise, without regard to the manner in which she has obtained such merchandise, being licensed only for the fisheries, without authority to visit foreign ports. She would not be so likely to fall under the suspicion of the officers of the revenue, and would enjoy greater freedom and license in smuggling.

The thirty-second section of the act, as decided in the case of The Active, 7 Cranch [11 U. S.] 100, was intended as a regulation of commerce and navigation, to restrict each vessel to her legitimate employment, and was not entirely designed to protect the revenue. In that case it was stated, "Although other sections of the act furnish much reason for believing that a forfeiture in a case where the revenue could not be defrauded might not be contemplated by the legislature, yet they are not expressed so as to control the thirty-second section." In the case of The Three Brothers [Case No. 14,009], it appeared that the vessel was licensed for the fisheries and in the course of the voyage she caught over 500 quintals of fish; she also procured by purchase, at a port in Labrador, fifty quintals of fish, eight barrels of mackerel and eight of salmon, all being of less value than $400. Mr. Justice Story said: "Upon principle as well as upon authority of the case of The Active, I am satisfied that the purchase and taking on board of the fish was a trading within the thirty-second section, but, as there is no count founded on that section, the forfeiture cannot in this suit be adjudged." The learned judge in the same opinion says, "Perhaps it is not easy to reconcile all the provisions of the act together; but it seems to me that the eighth section points to a foreign voyage where there is no intent to pursue the fisheries; the twenty-first section to voyages where the vessel is engaged in the fisheries, and afterwards proceeds and trades with her cargo at a foreign port; and the thirty-second section with a sweeping effect to all manner of trading beyond the authority of the license. In some cases these sections may be cumulative and perhaps cannot otherwise be completely reconciled." The words of the thirty-second section are clear, explicit, absolute, and no limitation is to be found in any part of the entire act by which a vessel is saved from forfeiture, if found employed beyond the authority of her license.

In The Short Staple [Case No. 12,813], Judge Story says, when the onus probandi rests on the claimants, a forfeiture must be pronounced unless he brings the defence clear of any reasonable doubt; and this rule received the sanction of the supreme court of the United States in the case of The Octavia, 1 Wheat. [14 U. S.] 20. In Cliquot's Champagne, 3 Wall. [70 U. S.] 114, it was decided that when probable cause of forfeiture is made out, the onus of proving innocence is thrown upon the claimant in all cases, and has always been regarded as a permanent feature of the revenue system of the country.

It being admitted that the vessel had visited a foreign port and there received on board this amount of foreign merchandise and brought the same to this place, the burden was clearly upon the claimants to establish their innocence. Instead of verifying it, the examination has satisfied me that they were knowingly and purposely engaged in an attempt to defraud the revenue by illegally importing in this vessel foreign merchandise.

I pronounce therefore the condemnation of this vessel, her tackle, apparel and furniture, with the cargo on board at the time of seizure, as forfeited, together with costs to the United States against the claimants and their sureties.

OCEANIC STEAM NAV. CO. (JONES v.). See Case No. 7,485.

OCEANIC STEAM NAV. CO. (LEVINSON v.). See Case No. 8,292.

Case No. 10,405.

OCEANIC STEAMSHIP CO. v. TAPPAN.

[16 Blatchf. 296; 25 Int. Rev. Rec. 177; 7 Reporter, 645.][1]

Circuit Court, S. D. New York. May 6, 1879.

CONSTITUTIONAL LAW — PASSENGER TAX UNDER STATE LAW—PAYMENT UNDER PROTEST—RECOVERY BACK—ACT OF CONGRESS VALIDATING THE PAYMENTS.

1. T., as chamberlain of the city of New York, collected from a corporation moneys which it paid under protest, as a passenger tax, under acts of the legislature of the state of New York, which the supreme court of the United States held to be unconstitutional and void. Afterwards, congress passed an act (Act June 19, 1878, 20 Stat. 177), validating the collection of the moneys, and declaring that no action should lie to recover them back. The moneys paid were paid to relieve the corporation from an accumulation of penalties, the collection of which could be enforced only by judicial proceedings. In a suit by the corporation against the chamberlain, to recover back the moneys: *Held*, that the payments were voluntarily made and could not be recovered back, although paid under protest.

[Cited in Houston v. Feizer, 76 Tex. 365, 13 S. W. 268: Maxwell v. San Luis Obispo County, 71 Cal. 468, 12 Pac. 485.]

2. Whether such validating act of congress is valid, quere.

[3. Cited in Joannin v. Ogilvie, 49 Minn. 567, 52 N. W. 217, to the point that where the demandant is in a position to seize or detain the property of him against whom the claim is made, without a resort to judicial proceedings in which the validity of the claim may be contested, payment under protest, to recover or retain the property, will be considered as made under compulsion, and the money can be recovered back.]

[This was a proceeding by the Oceanic Steam Navigation Company against J. Nelson Tappan to recover taxes alleged to have been illegally exacted.]

Henry Nicoll, Ashbel Green, and James Emott, for plaintiff.

George P. Andrews, William C. Whitney, and Lewis Sanders, for defendant.

WALLACE, District Judge. This action is brought to recover moneys alleged to have been illegally exacted by the defendant, the chamberlain of the city of New York, and to whom the plaintiff paid the sum involved, under protest. The moneys were collected by the defendant under color of the provisions of acts of the legislature of the state of New York, by which, in effect, a tax was imposed upon alien passengers arriving in vessels at the port of New York, to be collected of the master or owner of the ship by which they were landed. These acts, since the payment of the moneys in suit, have been declared unconstitutional by the supreme court of the United States, as in conflict with the clause of the constitution of the United States which delegates to congress the right to regulate commerce with foreign nations. Henderson v. Mayor of City of New York, 92 U. S. 259. Since the payment of the moneys, however, congress has passed an act (Act June 19, 1878, 20 Stat. 177), which declares that the acts of every state and municipal officer or corporation of the several states, in the collection of these moneys, shall be valid, and that no action shall be maintained against such officer or corporation, for the recovery of such moneys. The defence of the action is placed upon two grounds—first, that the moneys were paid voluntarily; and, second, that the validating act of congress precludes a recovery by the plaintiff.

An action does not lie to recover back moneys claimed without right, if the payment was made voluntarily, and with a full knowledge of the facts upon which the claim was predicated. It is not enough that payment was made under protest by the party paying. The payment must have been compulsory; that is, it must have been made under coercion, actual or legal, in order to authorize the party paying to recover it back. In the absence of such coercion, the person of whom the payment is demanded must refuse the demand; and he will not be permitted, with knowledge that the claim is illegal and unwarranted, to make payment without resistance, where resistance is lawful and possible, and afterwards to select his own time to bring an action for restoration, when, possibly, his adversary has lost the evidence to sustain the claim. Where, however, the demandant is in a position to seize or detain the property of him against whom the claim is made, without a resort to judicial proceedings, in which the validity of the claim may be contested, and payment is made under protest, to release the property from such seizure or detention, the party paying can recover back his payment.

The commutation moneys paid by the plaintiff were paid to relieve the plaintiff from an accumulation of penalties, the collection of which could only be enforced by judicial proceedings. The statute required the plaintiff, within twenty-four hours after the arrival of its vessel at the port of New York, to report in writing to the mayor of the city, the number, names, places of birth and last legal residence, of each alien passenger, and, in case of failure, imposed a penalty of seventy-five dollars for each passenger not reported. The statute also directed the mayor, by an endorsement to be made on such report, to re-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 25 Int. Rev. Rec. 177, and 7 Reporter, 645, contain only partial reports.]

quire the owner of the vessel to execute a several bond, with sureties, in a penalty of $300, for each passenger included in the report, to indemnify and save harmless the commissioners of emigration, and each and every city, town or county in the state, against all expenses which might necessarily be incurred for the care and support of such passenger. The statute also enacted, that such owner might commute for the bonds so required, within three days after the landing of such passengers, by paying to the chamberlain of the city of New York the sum of one dollar and fifty cents for each and every passenger reported according to law, and that the receipt of such sum should be deemed a full and sufficient discharge from the requirements of giving bond. In case of neglect or refusal to give the bonds required, within twenty-four hours after landing passengers, the statute imposed a penalty upon the owner or consignee of the vessel, of five hundred dollars for each passenger landed.

The penalties given by the act were to be sued for and recovered by the commissioners of emigration, in any court having jurisdiction of such actions, and, under a general statute of the state respecting claims against vessels, such an action could be commenced by the seizure of the vessel by attachment, upon giving security to indemnify the owner. Briefly stated, the plaintiff's position was this—if it failed to report, it was liable to a penalty of seventy-five dollars for each alien passenger; if it did report, it was required to pay one dollar and fifty cents for each passenger, by way of commutation, or was liable, if required by the mayor, to give onerous bonds, and, in default, to pay a penalty of five hundred dollars for each bond withheld; and the penalties, in either case, were a lien upon the vessel, collectible by an action at law, wherein, upon giving security for the indemnity of the vessel owner, an attachment against the vessel might be obtained and the vessel seized.

Palpably, the statute was framed to coerce the payment of the commutation moneys. If they were not paid, the owner of the vessel was made liable to an accumulation of penalties, which would aggregate an enormous sum, and which, if collected, would ordinarily bankrupt the ship-owner. Naturally, rather than incur the hazard of such disastrous consequences, the ship-owner would pay, in preference to abiding the contingencies of litigation. The hardship of the particular case, however, cannot change the rule of law. The penalties imposed in lieu of the commutation money could only be collected by suit in a court of law, where the corporation against which they were claimed could have its day and all the protection which the courts afford to suitors; and a payment made under such a state of facts is not made under legal coercion. The party paying is bound to know the law and to assume that it will be correctly administered by the tribunal which is to decide the controversy. The rule is well stated in Benson v. Monroe, 7 Cush. 125, which was a case to recover head money, under a statute similar to the one here, and was precisely like the present case, except that attachments had been obtained, and the vessel seized under them, to recover the penalties. The plaintiffs thereupon paid the commutation money under protest, and brought suit to recover it back; and the court said: "They should have contested the demand made on them, in the suit that was instituted against them, and, having voluntarily adjusted that demand, and relieved their vessel from seizure, with a full knowledge, or means of knowledge, of all the facts of their case, they cannot now be permitted to disturb that adjustment."

It is stated, in general terms, in some of the decisions, that, where money is paid to a public officer, upon an unlawful demand, to save the person paying from the infliction, under color of authority, of great or irreparable injury, from which he can only be saved by making the payment, such payment is made under an urgent and immediate necessity and may be recovered back. But, it will be found that none of these decisions were in cases where the injury apprehended by the party paying could only be inflicted by the decision of a court in favor of the validity of the claim made against him. There cannot be an immediate and urgent necessity for the payment of a demand which can only be enforced by the decision of a court of justice. The case of Benson v. Monroe, and that of Cunningham v. Boston, 16 Gray, 468, are directly in point, as deciding, that the apprehension of the recovery of heavy penalties by suit, in case the demand for a small sum is not complied with, does not take the case out of the general rule.

The case of Cunningham v. Monroe, 15 Gray, 471, cited for the plaintiff, was one where the payment was made under circumstances amounting to duress de facto, which were emphasized, in the opinion of the court, as distinguishing it from Cunningham v. Boston. There are cases in the books, where payments have been extorted by threats of criminal or civil proceedings, and the party paying the demand has been permitted to recover back, but these were cases where the facts were held to constitute actual duress, of which the threats were an incident.

In reaching this conclusion I have not adverted to the fact, that the mayor never required the bonds to be executed by the plaintiff, by the endorsement upon the reports, which the statute directs. The moneys were paid by the plaintiff to escape the penalties imposed for neglect to execute the bonds, and not the penalties for failing to make the report required by the act. Until the mayor's endorsement these penalties could not accrue. The plaintiff, without waiting to ascertain

whether or not the mayor would take the action required to subject the plaintiff to the penalties, paid the commutation moneys, upon the assumption that the mayor would take such action at some future time. Within the recent decision of the supreme court of the United States in Railroad Co. v. Commissioners, 98 U. S. 541, this circumstance should defeat the plaintiff. That case holds, that, where a warrant was in the hands of an officer, for the collection of a tax, which authorized him to seize the property of the plaintiff, and no actual attempt to execute the warrant had been made, but the plaintiff, assuming that a seizure would be made, went to the treasurer and paid the tax under protest, setting forth in the protest the illegality of the tax, and stating that a suit would be brought to recover back the payment, the payment was not compulsory, in a legal sense, and could not, therefore, be recovered back.

I have preferred, however, to rest the decision, upon this branch of the case, upon the broad ground, that money paid upon a demand, to prevent the seizure of property which can only take place by judicial proceedings, where the party paying may have his day in court and defeat the proceeding, is not paid under legal compulsion, and cannot be recovered back, although paid under protest. Mayor & City Council of Baltimore v. Lefferman, 4 Gill, 425; Town Council of Cahaba v. Burnett, 34 Ala. 400; Cook v. City of Boston, 9 Allen, 393; Taylor v. Board of Health, 31 Pa. St. 73; Mays v. City of Cincinnati, 1 Ohio St. 268.

Having thus reached a conclusion which must dispose of this case adversely to the plaintiff, it is not necessary to pass upon the question presented by the defence, which rests on the effect of the act of congress declaring that the acts of the defendant in collecting the moneys in suit shall be valid, and declaring that no action shall be maintained to recover back the money. It would be indecorous to adjudge an act of congress unconstitutional, when it is not necessary to do so in the disposition of the controversy before the court. It is proper, however, to say, that, to sustain the validity of this act, it will be necessary to decide that it is within the authority of congress to legalize the action of officers of a state in collecting moneys under a law of the state, which, because it was unconstitutional, conferred no authority whatever to act under it; and I am not aware of any legislative validating act containing such a vigorous and radical measure of relief, which has been the subject of judicial exposition. Unless the act can be sustained as a validating act, it would seem that the clause which declares that no action shall be maintained to recover back the moneys collected, must be ineffectual, because it would deprive the plaintiff of a right of action, which is a vested right of property, without due process of law.

Judgment is ordered for the defendant.

Case No. 10,406.

OCEAN INS. CO. v. FIELDS.

[2 Story, 59.] [1]

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

EQUITY—BILL CHARGING FELONY—PROOF—PUNISHMENT UNDER CRIMINAL LAW—DEMURRER—RELIEF AFTER TRIAL—CUMULATIVE EVIDENCE—INSURANCE—OVER-VALUATION.

1. A bill in equity, although it charge a felony, may be sustained by proof; but the defendant is not bound to make a discovery thereof.

2. At common law, the civil rights of a party, injured by a felonious act, are only suspended until the rights of the government to punish it criminally have been satisfied. But a verdict and judgment thereupon are conclusive, as to the fact, in a suit upon any collateral matter connected therewith.

3. If the felony be not cognizable under the criminal law of the country, where civil redress is sought, the civil rights of the party seeking redress are not thereby suspended.

4. A bill in equity will be sustained to set aside a judgment upon a policy of insurance, upon the ground of such newly-discovered evidence of fraud and felony on the part of the original plaintiff, as would, if pleaded, have been a perfect defence to the previous action; especially, if the felony were committed by a British subject in a British vessel, on British waters; for the offence is not, in such case, punishable by the criminal law of this country.

[Cited in Trefz v. Knickerbocker Life Ins. Co., 8 Fed. 180.]

[Cited in State v. Matley, 17 Neb. 567, 24 N. W. 201; Plymouth v. Russell Mills, 7 Allen, 441; Barker v. Walsh, 14 Allen, 175.]

5. Over-valuation and misrepresentation of the value of the subject-matter of insurance, although they afford no conclusive proof of fraud, afford a very strong presumption thereof.

6. The office of a demurrer to a bill in equity, is to bring before the court the right to maintain a bill, admitting all its allegations to be true, and the court will not, therefore, examine aliunde, what facts might or might not defeat it; for this is the office of an answer, or plea.

7. Although a court of equity will not ordinarily grant relief, in cases after trial, where mere cumulative evidence of fraud or of any other fact is discovered, yet it will, wherever the defence was originally imperfectly made out from the want of distinct proof, which is afterward discovered; although there were circumstances of suspicion.

Bill in equity to set aside a judgment in this court obtained upon a policy of insurance upon the ground of newly-discovered evidence. The bill in substance stated, that the defendant [Robert Fields] was, or pretended to be, the owner of a schooner called the Frances, which he had agreed to sell at Antigua for $6,000, and had agreed to carry there from St. Johns with a cargo of lumber; and that the said defendant intending to defraud the plaintiffs, and to induce them to insure her for more than she was worth, and then to cast away and destroy her, and then to demand the sum insured, did, on the 1st of May, 1837, fraudulently represent to the plaintiffs, that the

[1] [Reported by William W. Story, Esq.]

said vessel was worth $8,000, and procured insurance for one year on the said vessel valued at that sum; and that the plaintiffs being deceived by the said pretences, executed two policies to that effect, which is set forth. That the said policies being obtained by fraud, were void. That the said defendant, on the 29th of June, 1837, intending to destroy the said schooner, and fraudulently to recover the said insurance, sailed from St. Johns with a cargo of lumber, and a crew selected by him, ostensibly for Antigua, and proceeded down the Bay of Fundy, in pleasant weather, from side to side, with the apparent intent to effect his said intention, and navigated her among breakers, where she was saved by the interference of the crew; that he went out of his course without necessity; and that, on the 2d of July, 1837, he intentionally cast her ashore in a dangerous situation, fastened her there, and went on shore with his crew, and suffered her to remain there eleven days, though she might easily have been got off; and that while so lying, a rock under her bilge caused her to leak. That about July 16th, 1837, one Hutchins took possession of her and got her off, and removed her, full of water, to Mud island. That about July 17th, 1837, Elisha D'Wolf took her from the said Hutchins, and carried her to Pimlico, a convenient place for repairs. That about July 31st, 1837, John Everett, agent for the plaintiffs, took charge of her, and with the assistance of the defendant and one Rankin, unloaded the residue of cargo, repaired her bottom, and made her tight enough to be carried to St. Johns. That about the 9th of August, 1837, the said vessel proceeded towards St. Johns, the said Rankin being on board as seaman, and Fields (the defendant) as passenger, under command of Everett. That, on her passage she went into Yarmouth harbor, and waited there two days for a favorable wind, and leaked but little. That the defendant bought an auger at Yarmouth, and bored, or caused to be bored, holes through the inner plank of the said vessel, and through the out-board plank five holes, which he then filled up with slight plugs, easily removed. That, the said vessel proceeded on her passage and came to anchor in Cranberry Cove, the weather being pleasant, and the water smooth; that the said Everett, having caused the vessel to be pumped dry, went below for two hours, and then returning to deck, found her half full of water and sinking; which was owing to the withdrawal of the said plugs; and that the said vessel was then drawn on shore and filled with water. That, on August 14th, the defendant insisted upon having a survey, which was held, and the said vessel was condemned and sold for $782.20, which was paid to the said defendant. That, on February 23rd, 1838, the said defendant Fields sued out a writ from the United States circuit court for the First circuit against the plaintiffs, returnable, &c.; and that, at the Oct. term, 1838, issue was joined, and that a trial was had before a jury, and that "your orators" being ignorant of such fraudulent intent and practices, and unable to prove them, a verdict was rendered in favor of Fields, which the plaintiffs were compelled to pay. That since payment, the plaintiffs discovered and were informed of the said boring, and hoped, that they would not have been called on to pay the sums so insured, and that the sums paid would be refunded. That the defendant pretends, that the policies were not fraudulently obtained; that the plaintiffs were not deceived; that no attempt was made to destroy the said vessel or to defraud the plaintiffs; and that the plaintiffs were justly held to pay the sums insured. The bill charges that the contrary is true, and that the orators were deceived by the said Fields; who intended to defraud and actually did defraud them. Whereupon the bill prayed that the defendant might answer, and especially might state whether he represented himself to be sole owner at the time of effecting the insurance? Whether he was owner, and if not, how much he did own, and who were the other owners? Whether he had not agreed to sell her for $6,000, and to whom? Whether he did not take passage in her for St. Johns? Whether he and Rankin were not on board while she was unloading? Whether, while at Yarmouth, the said Rankin, at the defendant's request, did not purchase an auger? And for what purpose, and what use was made of it? Whether at Cranberry Cove the defendant took charge of the said vessel? Whether a survey was there called? Whether the vessel was sold, and the proceeds received by the defendant? The bill also prayed, that the court would decree the defendant to repay the amount of the said judgment; and that the said judgment should be declared void; and also prayed for farther relief. A demurrer was put in to the bill.

F. C. Loring, for defendant.

The first objection is, that this bill charges the defendant with a crime, punishable by our laws, and by the English laws, with death; and that the whole equity of the bill is founded on this charge. We maintain that, upon the face of the bill, there is no remedy either at law, or in equity. If the defendant has committed this crime, he may be indicted and punished; but the crime cannot be made the ground and substance of a civil action till after the criminal trial. An action of assumpsit will not lie against a man who has stolen money; the civil right is merged or suspended in the felony, and no stronger authority is necessary to sustain this position, than the fact that no single case can be found where a bill for relief and discovery has been brought on the ground, that the defendant has committed a felony,

and thereby become possessed of money to which he was not entitled. Cox v. Paxton, 17 Ves. 329; Crosby v. Leng, 12 East, 415.

The next objection to the bill is, that it is brought to set aside a judgment, and shows no sufficient cause. The law on this subject is, I suppose, the same as is applicable to bills of review in equity; and the plaintiffs must make out the same cause to set aside a judgment at law as to review a decree of a court of equity. Story, Eq. Pl. 322, 328, 602; 2 Story, Eq. Jur. 180. These authorities sustain these positions: That the plaintiffs must show either new matter arisen since the judgment, or new proof come to light since that time, which could not possibly have been used at the trial; and that the complainants could not, with due diligence, have ascertained and proved the new fact at the hearing. The bill affords no ground for equitable relief, and is bad on demurrer.

The bill contains two charges: 1st, a fraudulent over-valuation. But it does not allege, that this was a fact unknown to them at the hearing, nor that it could not have been proved then; nor does it even allege, that the fact set forth as evidence of the over-valuation, the contract of sale, was unknown to them at the trial. But if these things were properly alleged, they do not make out any ground for equitable relief on this point. Supposing the defendant had contracted to sell his vessel at some future time for $6,000, there would be no fraud in insuring her while she was his property for $8,000, if the insurers were willing to do so. The valuation is not a warranty; the insurer gets his premium; and if there is a substantial interest at risk, which is not denied by the bill, and the owner chooses to pay a high premium, there is no fraud in valuing the subject insured at a higher sum than it would bring in the market, if the valuation is not so excessive as necessarily to lead to a presumption of fraud. Alsop v. Commercial Ins. Co. [Case No. 262]; Marine Ins. Co. v. Hodgson, 7 Cranch [11 U. S. 332].

The second charge is, that the vessel was intentionally cast ashore, and her destruction afterward consummated by boring. There is a general allegation, that the complainants were ignorant, at the hearing, of the defendant's fraudulent acts and intentions, and unable to prove the same; and a special allegation that, since the trial, they have discovered the fact that she was bored, and this special allegation impliedly admits, that they knew, at the trial, that the vessel was fraudulently destroyed, and have since discovered the manner in which it was done. The charge of fraud was in their knowledge at the trial, and the defence was made on that ground; if that does not appear by the bill, it is admitted to be the fact; and it is not in fact pretended that any thing has since been discovered, except that two or three years after the trial, a piece of wood was brought to Boston, which, it is alleged, was taken from this vessel. This fact, if it be a fact, is not any new matter; but is parcel of the fraud formerly charged by the complainants. If the vessel was bored by the defendant, it was done before the trial. The complainants then are bound to show, in this bill, that this new proof has come to light since the trial; and not only that, but that they could not, by the use of reasonable diligence, have ascertained and proved it at the trial. Verdicts will not be set aside, if the facts on which the bill is founded, though discovered since the hearing, might have been before. Taylor v. Sheppard, 1 Younge & C. Exch. 271. Nor unless some special ground of equitable relief is shown. Harrison v. Nettleship, 2 Mylne & K. 423. Nor to enable a party to get fresh witnesses. Hankey v. Vernon, 2 Cox, 12; Williams v. Lee, 3 Atk. 223; Whitmore v. Thornton, 3 Price, 231. Injunction granted after verdict dissolved though bill charged fraud and defendant had not answered. Le Guen v. Gouverneur, 1 Johns. Cas. 495; Bateman v. Willeo, 1 Schoales & L. 201.

What are the allegations in the bill touching this matter? There is not a single circumstance alleged, or reason given, why this proof was not obtained and used at the trial. Even if we admit the general allegation of ignorance not to be contradicted by the special allegation of the discovery since the trial of the boring, the complainants show no cause, and no reason why they did not discover the fraud then. But if we take the case as the plaintiffs state it, that since the trial only, they have discovered that the vessel was bored; then it appears, that they knew or suspected the fraud at the trial; and that, since the trial, they have discovered a single fact going to prove it; and for all that is shown by the bill, this fact might have been ascertained and proved at the trial. Their ignorance of the fact is no ground for equitable relief. The language of the court in Le Guen v. Gouverneur, 1 Johns. Cas. 495, is applicable: "The charge of fraud was in their knowledge, and if it did exist, the presumption is, that they had the proof in their power; for the presumption is, that a party is not ignorant of, or incapable of evincing, the truth of his cause. If the fact be so, it is incumbent on him to show it, in order to excuse the apparent neglect, and support his claim to an exception in his favor. In the present case, there is no circumstance alleged, from which it can be reasonably inferred, that the respondents could not with proper diligence have possessed themselves of evidence of the fact, if such was the fact, in the trial at law, and no such pretence is alleged in their bill." The bill then is bad, because it does not allege affirmatively, that this evidence could not have been obtained in time for the trial; and because it does not allege that any diligence was used to obtain it; and that the

complainants have not been guilty of laches, or negligence, in respect to it; nor does it even allege how this fact came to their knowledge. Dexter v. Arnold [Case No. 3,856]; Respass v. McClanahan, Hardin, 352; Young v. Keighly, 16 Ves. 354; Livingston v. Hubbs, 3 Johns. Ch. 124; Bingham v. Dawson, 1 Jac. 243.

If we examine the statements in the bill, in relation to the loss of this vessel, it will appear that this fact, if it be one, might easily have been ascertained, and proved at the trial, and that they had the power then to prove. The fact alleged is, that the vessel was bored in her bottom. The existence of such a fact might easily have been ascertained by inspection. The suit at law was commenced in February and tried in October, a period of eight months intervening; this afforded time. The vessel, it is alleged, was sold, and so without the control of the defendant; and it is not alleged, that they were prevented from examining her. The complainants had an agent, Everett, it is alleged, on the spot, who was on board at the time the vessel is said to have been bored. While he was on board, she began, it is said, to leak in a most extraordinary and mysterious manner, which can only be accounted for by her being bored. Each one of these facts is alleged, and, moreover, the complainants knew or suspected that this vessel was fraudulently destroyed. They were then put on the inquiry for fraud. They had time, opportunity, an agent on the spot, and they knew that the vessel leaked in a manner, which, they say, can only be accounted for by her having been bored; and yet they never had that vessel's bottom examined, and never took any pains to ascertain whether any injury had been done to her. If the rule were contrary, and plaintiff was held to show, to get this relief, that he had all the means in his power to obtain this evidence, and neglected to use them, the bill would make out a good case.

Another ground of demurrer is, that the bill seeks a discovery, which may subject the defendant to a criminal prosecution. As to the discovery sought, this is undoubtedly good cause of demurrer: and if the bill is so framed that the defendant is not bound to answer it, or any part of it, then it is bad on general demurrer. Story, Eq. Pl. 438, 452. The offence charged is punishable by our laws with death. It appears from the allegations of the bill, if they are true, that the defendant, being the owner of this vessel, did, on the high seas, wilfully and corruptly destroy this vessel with intent to prejudice the insurers, by intentionally casting her ashore, and then consummated his purpose by boring; thus bringing the defendant within the scope of Stat. March 26, 1804, § 1. The idea of seeking a discovery by a bill in equity, which may subject the defendant to the loss of his life, is abhorrent to all the principles of law and equity, which are recognized in the courts of England and this country.

Mr. Peabody, for plaintiffs.

The objections made by the counsel for the defendant, are to the substance of the bill, and it is argued, that, upon the complainant's allegations, he has no case. For the purpose of deciding the present question, all the allegations in the bill are to be taken as true and well stated. The allegations in the bill are in substance, that the defendant with a fraudulent design misrepresented the value of his vessel when he applied for insurance. That after he sailed from St. Johns, he carelessly navigated, and voluntarily run his vessel on to Mud island. That he afterwards bored the vessel, or caused her to be bored, and thereby caused her to fill with water; and thereupon caused her to be surveyed, condemned, and sold; and thus occasioned the loss of her. That he sued the defendants, and they, being ignorant of all the matter aforesaid, were obliged to submit to a judgment against them, &c. That all these fraudulent doings came to the knowledge of the defendants, since the said judgment was rendered. And the bill prays, that Fields should repay the amount of the judgment, that the judgment may be decreed void, and for other and farther relief.

The defendant's objections are: 1st. That the bill charges a crime for which the defendant should be indicted; and it shows no case for remedy in law or equity. That a crime cannot be the ground and substance of a suit. 2d. That the bill is brought to set aside a judgment, and shows no sufficient cause. That it is like a bill of review.

By the English law, it is in some cases said, if a man commits a felony, and thereby injures another man, or obtains his property, the injured man may not sustain his suit for damages against the felon, until he is prosecuted and convicted or acquitted. But this court will not be governed by English statutes. The object of this rule of law is to induce prosecutions for offences. But the supreme judicial court of Massachusetts says, it is doubtful if such be the law in England, and it certainly is not law in this country. Boardman v. Gore, 15 Mass. 336. The doctrine that no civil action lies where the injury sustained is occasioned by crime, by common law, is not universally true (as our court believe) in England. It is only true in cases of robberies and larcenies, which, by the common law, are felonies. Another reason for the rule may be, that, by common law, the act of felony forfeits all the felon's property to the crown, and it is fruitless to give an action, where there can be no property to satisfy a judgment. Such reasons do not exist with us. Actions are everywhere sustained, in a variety of cases, where crimes occasioned the damages sued for. Such, among others, are actions for slander, and assault and battery.

The English cases referred to, are cases, where a remedy is sought for damages resulting immediately from the felony, as for a felonious assault and battery, &c. Ours is not a similar case. We seek relief, by having money paid back, which was wrongfully recovered; and to vacate a judgment obtained wrongfully, by suppressing facts. We do not allege, that the judgment was a crime. In this country, if A. make his note and forge the name of B. thereon as endorser, and sell it to C., at law, C. may maintain an action against A. on the note, or for money paid, though the forgery of B.'s name was the only inducement to C. to part with his money.

Again; it is the most common office of a bill in equity to seek for indemnity for frauds. Thus, money obtained by misrepresentations, or fraudulent papers, is recovered by proceedings in equity. So, also, fraudulent deeds are canceled, and lands obtained by them are recovered by decrees in equity. So, equity grants relief not only against deeds, writings, and solemn assurances, but against judgments and decrees obtained by fraud and imposition. Reigal v. Wood, 1 Johns. Ch. 402. Thus, where a deed was obtained of the plaintiffs by fraud by B., who confessed judgment to H., and Robbins innocently, and for a good consideration, bought the judgment with a lien on the land obtained by the fraudulent deed; it was decreed, that Robbins, though ignorant of the fraud, must reconvey the land to the plaintiff. The land was thereupon discharged of the judgment, and a perpetual injunction laid against the execution of the judgment on that land. The fruits of the judgment were restored to the plaintiff; but, as the judgment being by H. v. B. might be good, it was not revoked, but left to be satisfied on B.'s property, if it could be found. Livingston v. Hubbs, 2 Johns. Ch. 512. So, where a judgment, which had been paid, was fraudulently kept alive, and satisfied by taking the plaintiff's land; the defendants, who were assignees of the judgment, were decreed to release the land to the owners, to deliver up possession, and to pay rents and profits, and for waste. Troup v. Wood, 4 Johns. Ch. 228. Fraud and damages, coupled together, entitle the party to relief in equity. Bacon v. Bronson, 7 Johns. Ch. 194. And, indeed, a court of equity has an undoubted jurisdiction to relieve against every species of fraud. But fraud is so various, that it is difficult to enumerate and classify all the cases where the court will relieve. 1 Story, Eq. Jur. 188, 189.

The defendant says that the plaintiff must show that new matter has arisen since the trial; or that new proof has come to light which could not possibly have been used at the trial, and that the complainants could not, with due diligence, have ascertained and proved the new fact at the hearing; or otherwise the bill is bad. The bill alleges the frauds before named: avers that at the trial, they were unknown to the plaintiff; and that they have discovered them since the trial; and all this is admitted by the demurrer; or, for the purpose of the present hearing, are to be considered true.

The defendants professed to object that the bill is, in substance, bad; it was not supposed they would take exceptions to forms, which, if well taken, might require amendment. But we insist that the allegations in the bill are sufficient. It is not necessary in the bill to state the history of the discovery of new facts proving a fraud, which were not suspected at the time of the trial, nor the various efforts then made to discover the true history of the case. It will be enough to show, on the trial of this case, that due diligence was used at the former trial, and that such facts, showing a gross fraud, which was not then supposed to exist, have since been discovered.

What was proved at the former trial seems to us to have no bearing on the question now submitted to the court. If the plaintiffs show, that the defendant bored twenty holes through the sound and solid plank of the bottom of the vessel, and thus sunk the vessel, and that such proceedings were unsuspected, until the repairs of the vessel were undertaken, some time after the former trial, we think it will be for the court to decide when the evidence shall be presented, (but not now), whether those injuries could with due diligence have been discovered, before the former trial. The plaintiff was bound, on the former trial, to use all reasonable diligence: not all possible diligence. For by all possible diligence, such as cutting up a vessel, every latent defect or injury in her could at any time be discovered. But to present now, as far as practicable, every question, tending to show, whether the plaintiffs can maintain any bill, we admit, that on the trial of this case, it will appear, that on the former trial, the defendants alleged in defence the misrepresentation of the value of the vessel; and the attempt and design to cast her away on Mud island, and failed to prove them. But we aver, that the distinct fraud of boring the vessel was then alleged or suspected by us; and we admit, that if an unsuccessful attempt to prove a fraud at the former trial, takes from the plaintiffs the right, now to show the same or other distinct and more gross frauds, we have no case.

We think this bill is not analogous to a bill of review, and that the authorities cited on that subject are inapplicable. We think this is a case, merely of seeking relief from the consequences of a fraud; that the power of the court to give relief in such cases is so well established, that it is needless to cite cases to show it. The objection, that the bill seeks to make the defendant criminate himself, is not valid. Bills very generally charge fraud, and frauds are generally crimes either at common law, or by statute.

The defendant is always called on to answer the charges. If the latter objection is well founded, all bills in equity, charging fraud, are illegal, for they all seek to make the defendant criminate himself.

STORY, Circuit Justice. This case comes before the court upon a demurrer to the bill; and, of course, the demurrer admits the truth of the statements made in the bill, at least for the purposes of the present argument. The bill asserts, in substance, that the judgment recovered in this court upon the policy of insurance in the case, was procured by the fraud of the defendant Fields, which has been satisfied; and that the loss of the vessel, upon which the recovery was had, was occasioned by the fraud of the defendant, in fraudulently casting away the vessel, and also in fraudulently boring holes in her bottom. There is, also, another distinct allegation of a fraudulent misrepresentation of the value of the vessel insured, at the time when the policy was underwritten. The bill then goes on to allege, although not in a very precise and accurate form, that at the trial of the cause in this court, the plaintiffs were "uninformed of the fraudulent intentions and practices of the said Fields," stated in the bill, and "were unable to prove the same, which were by the said Fields fraudulently suppressed and concealed," and, thereupon, the verdict was rendered against the plaintiffs. The bill farther alleges, that since the payment of the judgment, "they, for the first time, discovered and were informed of the boring of the holes in the said vessel, herein described, the same concerning;" and, therefore, prays the interposition and relief of the court in the premises. Now, upon this posture of the case, all these allegations of misrepresentation and fraud must be taken to be true; and if they are, they certainly do present a strong appeal to the justice and equity of the court, unless solid grounds can be established to repel the conclusion.

What then are these grounds? No just objection exists as to the jurisdiction of the court, because it is a suit between an alien on one part, and a corporation, all of whose members are citizens of some one state in this Union, on the other part; and, besides, this is a case to overhaul and set aside a judgment of this court, which, perhaps, no other court is competent to do to the same extent, and with all the same beneficial consequences, as may be here attainable.

The first objection urged against the bill, is, that it charges the defendant, Fields, with a crime, punishable, both by our law and the English law, with death; and that, under such circumstances, the bill is not maintainable. Now, in the first place, although, if the charge in the bill be of a public crime committed by the party, that may constitute a good ground against compelling him, personally, to a discovery thereof; yet it is by no means a sufficient reason in all cases, why, if the fact is made out by other proofs, the plaintiffs may not well be entitled to relief. It is by no means true, as a general proposition in the common law, that, because the act is a public crime, therefore the civil rights of other parties affected thereby are merged or suspended by the rights of the government to punish the same, even when the crime is a felony. The most that can be said, is, that the common law requires, that before the party, injured by any felonious act, can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied, in respect to the public offence. But after a verdict of acquittal or conviction, and a judgment thereon, that judgment is so far conclusive in any collateral proceeding, quoad the subject-matter, that the objection is thereby removed to bringing that, sub judicio, in a civil action, which was the proper subject-matter of a criminal prosecution. So the doctrine was laid down by Lord Ellenborough, in the case of Crosby v. Leng, 12 East, 409, in which he was supported by the whole court. In Boardman v. Gore, 15 Mass. 331, the supreme court of Massachusetts held, that this doctrine had not been adopted in our country. Upon that point, it is not now necessary to pronounce any definitive opinion, although certainly the reasoning of the late learned chief justice, upon that occasion, has great force and strength in it. In Cox v. Paxton, 17 Ves. 329, Lord Eldon recognized the doctrine of the courts of common law as strictly applicable in equity. But then the case there, was, that the plaintiffs made this title to relief against a third person, through a felony committed against them by their own clerk, by an embezzlement of their moneys intrusted to him, and vested by him in certain life policies of insurance, which had been transferred by the clerk to the defendant, alleged in the bill to be with notice. Lord Eldon, upon a demurrer, thought the bill not maintainable, upon the ground that the relief was to be reached through the felony of the clerk, and that an action at law would not lie to recover the moneys embezzled, if they had been in the hands of the defendant. That might be true, if the party had not been convicted or acquitted upon a criminal prosecution therefor; and there was no such allegation in the bill. But if he had been, I profess not to see very distinctly what real objection lay to the bill. But upon this case, also, I give no opinion; because the present stands upon considerations wholly independent. In the first place, the plaintiffs here do not claim title through any felony committed by the defendant to maintain an original suit. Their case is the converse of that of Cox v. Paxton, 17 Ves. 329; for theirs is purely matter of a defence to a suit brought originally by the defend-

ant, in which he deduced his own title to recover, through an asserted fraudulent and felonious act on his part. There can be no possible doubt, that, if the plaintiffs had, in the suit at law, known the real facts, and had sufficient proofs thereof, they might have set up that very felony as a bar to the plaintiffs' recovery in that suit. It is a case completely out of the mischiefs of the rule at the common law; and it would be a monstrous doctrine to assert, that any person claiming a right to an action founded upon his own fraud and felony, could avail himself of it, and thus, by his own turpitude, exclude the other party from a perfect defence to the action. To such a case, the maxim of retributive justice is most properly addressed: "Allegans suam turpitudinem non est audiendus." Now, the very reason, upon which the present bill is founded, is, that this, a perfect and valid defence at law, was, by the fraudulent concealment of the defendant, and the total ignorance of the plaintiffs in the facts, incapable of being set up to the original action; and the recovery was, therefore, inequitable and iniquitous. It would be against all the principles of a court of equity, to allow one party to practice a fraud upon another innocent party, and by another act of fraudulent concealment recover a judgment against him founded upon the prior act; and then to be permitted to assert this double iniquity as a bar to all equitable relief against the judgment. Upon this ground alone, the objection would be unavailable.

But there is another and still more urgent and decisive answer to the objection. The bill states a case, where the felony, if any, was committed on board a British vessel by a British subject, within British waters. It is, of course, therefore, solely punishable by the British laws. Now, although this court may judicially take notice of the common law and the crimes recognized therein; yet, as to the statute law of Great Britain, now in force, or created since the Revolution, it is difficult to perceive how it can be judicially taken notice of, or established before the court, except in the same manner and by the same proofs as the criminal laws of any other foreign country. Even supposing the present statute law of Great Britain could be judicially taken notice of by the court, and the offence supposed be a felony by that law, it would not change the posture of the present case; because the criminal laws of a foreign country cannot be of any force, or be in any manner enforced in any other country, unless recognized by some treaty stipulation. Now, the common law of England does not apply the rule that a civil action cannot be maintained for any injury or trespass which involves a felony, unless it be a felony committed in, and cognizable and punishable by the courts within the realm. If it be an offence committed in a foreign country, there can be no merger or suspension of the civil rights of the injured party, until there has been a conviction or acquittal of the offender, for the plain reason that there can be no trial thereof had in the tribunals of England; and, consequently, in such a case, the whole policy of the rule is completely swept away. Upon either ground, therefore, the objection fails of support.

Another objection is, that, although the bill charges that the policy was procured by a fraudulent over-valuation, yet, it does not allege that the facts relied on to establish it were unknown to the plaintiffs at the time of the trial; and that even if these things were properly alleged in the bill, yet they constitute no ground for equitable relief. Now the bill is certainly not pointed and stringent as to the want of knowledge on the part of the plaintiffs, as it should and ought to have been. It is not improbable that the concluding allegation in the bill, that since the payment of the judgment, the plaintiffs were for the first time informed of the boring of the holes, &c., "and of all things herein alleged the same concerning," was thought to be sufficient to cover this particular matter, although it certainly does not. This charge, therefore, of the bill, if it constituted the whole equity, would, by reason of this defect, be insufficient to sustain it. But, if the charge were rightly framed, with the proper allegations, it would, in my judgment, constitute a complete title to relief. A fraudulent over-valuation and misrepresentation of the value of the subject-matter of insurance will avoid a policy of insurance; and if unknown at the time of the trial and judgment, is a proper case for equitable interference. Over-valuation, I agree, is no necessary proof of fraud; and far less, a positive statement of a sale bargained for at a high price in the port of destination. But there may be very cogent circumstances, from which fraud may be inferred, where the cause otherwise labors under strong suspicions. Besides; the demurrer with reference to this matter is merely argumentative, and addressed to the sufficiency of the proofs, and, therefore, seems in this respect to be of the character of a speaking demurrer. However, if the other charges in the bill can stand, and sustain it, the demurrer must be over-ruled.

Then, as to the main objection, on the ground of the fraudulent casting away of the vessel, and especially of boring holes in her, it is suggested, that in point of fact, the defence of fraud was made at the trial, and did not prevail. Assuming that it was so, still, as the bill admits nothing of this sort, but charges that the facts were unknown until after the judgment, this court cannot upon demurrer travel out of the allegations of the bill. The office of a demurrer is to bring before the court the right to maintain the bill upon the admission pro hac vice of the entire truth of all its allegations; and the court cannot look aliunde to search out or conjecture, what other facts might or did exist

to defeat the bill. That is the proper office of a plea or answer. But the parties admit, for the sake of the argument, that the point of fraud was made at the trial; but that it was in effect founded upon circumstances of suspicion, not sustained by any clear and satisfactory proofs; and that the boring of the holes was not known or suspected at the trial; and that it was not and could not therefore then be a matter of controversy. Now, I agree that mere cumulative evidence to the fact of fraud or any other leading fact not discovered since the trial, will not ordinarily constitute any just ground for the interference of a court of equity to grant relief, for the solid reason that it is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal. But I do not know that it has ever been decided, that, in an assignable case, where the defence has been imperfectly made out at the trial, from the defect of real and substantial proofs, although there were some circumstances of a doubtful character, or some presumptions of a loose and indeterminable bearing before the jury, and afterwards newly-discovered evidence has come out, full, and direct, and positive, to the very gist of the controversy, a court of equity will not interfere to grant relief and to sustain a bill to bring forth and try the force and validity of the new evidence. My recollection does not furnish me with any case, where a doctrine so strict and so binding has been positively upheld and pronounced. The disposition of courts of equity, upon this head, seems, as far as I can gather it, not to encourage new litigation in cases of this sort; but, at the same time, not to assert their own incompetency to grant relief, if a very strong case can be made out. A fortiori all reasoning upon such a point must be powerfully increased in strength, when it is applied to a case which, upon the face of the bill, is composed and concocted of the darkest ingredients of fraud, if not of crime. At all events, it would be an extraordinary course for a court of equity to pronounce such a judgment in such a case, upon a demurrer, rather than to retain it for a final adjudication upon a hearing of the merits, where the full pressure of the whole facts, and the weight of all the attendant circumstances known at the trial and discovered since, may be fully brought before it. While the court would not be disposed lightly to interfere with the verdict of the jury, upon the point of fraud, it might well deem itself at liberty to look deeper into the case upon new evidence which might justly, if known at the time, have changed the verdict of the jury. I agree, that there is a strong analogy between bills of this sort and bills of review, as to newly-discovered evidence; although there may possibly be some ground for a distinction, in favor of the former bills, founded upon the consideration, that they approach somewhat nearer to the analogy of motions for a new trial. The subject was a good deal considered by this court in Dexter v. Arnold [Case No. 3,856] and Wood v. Mann [Id. 17,953], where it will be found, that the principal cases are reviewed. It does not appear to me, that it can be laid down as a positive rule, that in no case whatsoever ought relief to be granted, however stringent the evidence may be, which goes to establish the fraud asserted, but imperfectly brought out at the trial, from the mere defect of evidence without laches of the party seeking relief in equity. But in the present case, I am not prepared to say, that the very fraud now preferred in the bill was identical with that propounded at the trial. Fraud in casting away a ship may be very distinguishable from fraud in destroying her by boring holes in her bottom. Both may concur and be concomitant circumstances of the same general transaction: but they may also constitute distinct and independent transactions and matters of defence. How can a court of equity, upon a dry demurrer, assert, that they are the one, rather than the other? If I were compellable to decide upon the face of this bill, what in this case was the real proximate cause of the loss and destruction of the vessel, I should say that it was not the casting away of the vessel, but the boring of the holes in her bottom. But it is unnecessary to decide that, because upon a demurrer, in odium spoliatoris, the court will not decide a matter of such importance in his favor, but reserve it for a final hearing upon the merits.

Objections have been urged to the frame of the bill, in other respects; that it does not contain any allegations of due diligence to ascertain these facts before the trial, and that the plaintiffs have lain by and been guilty of gross negligence and laches. That may be or may not be made out upon a final hearing of the merits. But the bill asserts that the boring of the holes was unknown until after the judgment; and the court cannot presume that it could by any prior, seasonable diligence, have been established. If it might have been discovered by such vigilance, it is more properly a matter of defence, than of allegation in the bill. Upon the whole, my opinion is that the demurrer ought to be overruled.

OCEAN INS. CO. (POTTER v.). See Case No. 11,335.

Case No. 10,407.

OCEAN INS. CO v. SUN MUT. INS. CO.

[8 Ben. 272.] [1]

District Court, S. D. New York. Dec., 1875. [2]

RE-INSURANCE—INSURANCE ON CHARTER—PAROL EVIDENCE TO EXPLAIN WRITING—INFORMATION MATERIAL TO THE RISK.

1. By an agreement made between the O. Ins. Co., of Portland, Me., and the S. Mut. Ins. Co., of New York, the latter agreed to re-insure such risks, taken by the former, as the latter should endorse on an open policy to be issued by the latter to the former. The open policy was accordingly issued. On the 30th of January, 1864, the ship C. S. P., of which one M. was one-eighth owner, was in New York, and was on that day chartered for a voyage from New York to San Francisco, thence to Callao and the Chincha Islands for a cargo of guano, and thence to Hamburg or Rotterdam with such cargo. By this charter the ship was not required to carry cargo from New York to San Francisco. She was at that time under a previous charter, by which she was to carry a cargo of coal from New York to San Francisco. On the 23d of March, 1864, the president of the O. Ins. Co. wrote to the vice president of the S. Mut. Ins. Co., saying: "I enclose returns for registry as follows: $5,000 on ship C. S. P., to San Francisco and Chinchas—war; $5,000 on pc. of do—marine"; and in a postscript he added: "I also enclose an additional return for insurance on charter, primage and property per ship C. S. P. to San Francisco only." The returns enclosed were all dated that same day and read as follows: (1) "Enter on open policy of this Co., war risk only, $5,000 on ship C. S. P. at and from New York to, at and from San Francisco and Callao to Chinchas, rate 3 per cent;" (2) "Enter on open policy of this Co., $5,000 on charter of ship C. S. P. at and from New York to, at and from San Francisco and Callao to Chinchas—rate 3 per cent;" (3) "Enter on open policy of this Co., $6,550 on charter, $2,650 on primage and $1,500 on property, on board ship C. S. P., at and from New York to San Francisco, including war risk—rate 6 per cent." Entries were made on the open policy according to these returns. Separate policies had been issued by the O. Ins. Co. to M. covering these several risks. The ship sailed from New York, and, before reaching San Francisco, was lost near Buenos Ayres. The O. Ins. Co. paid to M. and the S. M. Ins. Co. repaid under the re-insurance the $5,000 insurance on the charter of the ship, mentioned in the second of the returns. Such repayment was made before May, 1866. In September, 1866, M. commenced a suit in the supreme court of Maine, on the policy issued to him by the O. Ins. Co., to recover the $6,550 on charter, $2,650 on primage and $1,500 on property, which he claimed to have been an insurance on the guano charter. The O. Ins. Co. defended the suit, denying that they had insured the guano charter, and they sent notice of the suit to the S. M. Ins. Co., which co-operated in the defence. On the trial of that suit the plaintiff offered parol evidence to show that the word "charter," in the application for the policy, and in the policy, was understood, at the time the insurance was effected, to mean the guano charter. When the decision of the court in Maine that such evidence was admissible was communicated by the O. Ins. Co. to the S. M. Ins. Co., the latter refused to co-operate further in the defence of that suit. The parol evidence being admitted in that suit, the plaintiff recovered judgment against the O. Ins. Co., and that company then brought this suit against the S. M. Ins. Co., on the policy of re-insurance: *Held*, that, as the parol evidence which was admitted in the suit against the libellants, to establish that the charter intended to be insured by them was the guano charter, was not communicated by the libellants to the respondents before the effecting of the re-insurance, the recovery against the libellants was not binding on the respondents.

2. The language of the several returns sent by the libellants to the respondents, did not amount to notice of the existence of the guano charter.

3. There being two charters, one of them having the same termini as the voyage described in the policy, and the other of them covering that route and a farther continuing route, and there being no explanation between the parties as to which charter was meant to be covered by an insurance on "charter," the policy must be regarded as saying that the charter intended was the charter covering only the route of the voyage described in the policy.

4. The payment by the respondents of the $5,000 on the policy issued under the second of the returns did not constitute a recognition of their having effected insurance on the guano charter.

5. The information which it was shown that the libellants had when they applied for the re-insurance, as to the existence of the two charters of the vessel and their terms, was material to the risk to be assumed by the respondents and was not communicated to them.

6. The re-insurance made by the respondents was not upon the guano charter, and the libellants were not entitled to recover.

In admiralty.

Benedict, Taft & Benedict, for libellants.

Evarts, Southmayd & Choate, for respondents.

BLATCHFORD, District Judge. This is a libel filed by the Ocean Insurance Company, a marine insurance corporation, of Portland, Maine, against the Sun Mutual Insurance Company, a marine insurance corporation, of the city of New York, to recover upon a policy of insurance issued by the respondents to the libellants. The libel alleges, that, before the 20th of March, 1864, the libellants and the respondents entered into an agreement, that the respondents should, on request, reinsure the libellants, on risk taken by the libellants, on all such risks as the respondents should, from time to time, approve and endorse on an open policy to be made by the respondents; that the respondents made their open policy, whereby they insured the libellants upon the risks specified in the libel, which were approved by the respondents and endorsed on the policy; that the ship Charles S. Pennell, being in the port of New York, and George M. Melcher being the owner of one-eighth of said vessel, and being her master, and said vessel having been chartered on the 30th of January, 1864, to A. J. Schon & Co., and J. D. Mutzenbecher, Sons, merchants and agents of Messrs. Henry, Witt & Shutte, Lima, agents of the supreme government of Peru and their consignees of guano in Germany, for a voyage

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

[2] [Reversed in Case No. 10,408. Decree of circuit court reversed by supreme court in 107 U. S. 485, 1 Sup. Ct. 582.]

on the high seas from New York to San Francisco, thence to Callao and the Chincha Islands, for a cargo of guano, and thence to Hamburg or Rotterdam with said cargo, said charter party being of the value of $52,400, and the primage thereon being of the value of $2,650, and said Melcher being interested in said charter and said primage, and being the owner of certain property on board of said ship, the libellants insured said Melcher, on the high seas, at and from New York to San Francisco, $6,550 on charter, meaning the said charter, $2,650 on primage, meaning the said primage, and also $1,500 on property on board, meaning said property, against the perils of the seas and other perils enumerated in said policy; that, thereupon, the libellants, on the 23rd of March, 1864, being interested in said charter, and said primage, and said property on board, and said insurance thereon, for the reimbursement of the libellants thereon, made an application to the respondents to enter upon said open policy, $6,550 on charter, $2,650 on primage, and $1,500 on property on board said ship, at and from New York to San Francisco aforesaid, including war risk, being the same risk insured by the libellants; and that the respondents, on the receipt of said application, approved the same, and endorsed the same on said open policy, at a premium which was paid. The libel then avers the loss of the vessel, while on said voyage, by the perils of the seas, and before sne reached San Francisco; that thereby said Melcher wholly lost said charter, and his said interest therein, and said primage, and said property, whereby the libellants, as such insurers, became liable to pay the said several sums, amounting to $10,700, to said Melcher; that, on notice of said loss to the libellants, they gave notice thereof to the respondents; that the respondents then declared that payment of the loss should be refused, and it was accordingly refused, and an action was thereafter brought by said Melcher in the supreme judicial court of Maine, against the libellants, to recover the same, and such proceedings were thereupon had, that said Melcher, on the 7th of December, 1872, recovered against the libellants, on the policy given by them, the sum of $9,200 and interest from April 28th, 1865, of which recovery the libellants paid, before judgment was entered, $4,234.29, and, on June 28th, 1873, judgment was duly entered for the balance of said recovery, $9,473.71, and costs taxed at $574.17; that, by reason of the premises, the libellants became liable to pay to said Melcher said loss and costs so recovered, and the respondents became liable, under said open policy, and said loss and said judgment, to pay said loss and costs to the libellants, with interest, and also the further sum of $1,164.70 counsel fees, costs and expenses of said suit, paid by the libellants, other than the costs above mentioned, with interest thereon from the time of such payment, July 23rd, 1873; and that due proof of loss, costs, expenses and counsel fees, and of interest, was furnished to the respondents more than 30 days before the commencement of this action, and payment was demanded of the respondents, and refused.

The answer sets up various defences, but, as one of them seems to be conclusively established, and that the main one, and one which goes to the foundation of the action, it will be necessary to refer to only that one. The answer avers, that, at the time of the application by the libellants to the respondents for the reinsurance mentioned in the answer, the respondents had not, nor had any of its officers or agents, heard of any charter of the said ship for a voyage on the high seas from New York to San Francisco, thence to Callao and the Chincha Islands for a cargo of guano, and thence to Hamburg or Rotterdam with said cargo, nor did either of them have any intimation of any such charter until after the loss of said ship; that, at the time of such application for reinsurance, the said ship was lying in the port of New York, bound on a voyage to San Francisco, and under a charter to carry a cargo of coal and other merchandise from New York to San Francisco; that she was then nearly or entirely loaded and ready to sail upon that voyage, and upon no other, as was well known to the respondents and to other persons having dealings with said ship; that, on the 23rd of March, 1864, the libellants sent to the respondents an application in the following words: "To the Sun Mutual Insurance Company: Enter on open policy of this Co. 51,564, $6,550 on charter, $2,650 on primage, $1,500 on property on board ship Chas. S. Pennell, at and from New York to San Francisco, including war risk, rate 6 per cent;" that the respondents, understanding said application to refer to the charter of said ship on her voyage from New York to San Francisco, on which she was then bound, and under which charter she had been then nearly or completely loaded with merchandise to be carried to San Francisco, and not being aware or having heard of any other charter of said vessel, thereupon endorsed the same on said open policy; that, after the happening of the disaster to said ship, said Melcher claimed that the policy issued to him by the libellants related to the guano charter and the primage on the charter money mentioned therein, and that he was entitled to recover the said sums of $6,550 and $2,650 from the libellants, for his interest in said last mentioned charter and primage; that such claim was disputed and refused by the libellants, on the express ground that said policy issued by the libellants had no application to the guano charter, but referred and was intended to apply only to the charter under which the vessel was employed to carry said cargo of coal and other merchandise from New York to San Francisco; that, the libellants having, in

April, 1865, given to the respondents notice of the making of such claim, the respondents acquiesced in such dispute and refusal of the same, and did, so far as the respondents were concerned, refuse to recognize said claim as falling within the terms of said re-insurance policy; that thereupon said action was brought by said Melcher against the libellants, and said judgment was recovered; that said judgment was given against the libellants mainly upon the ground that one Sawyer, who was the said Melcher's agent for effecting said insurance and other insurance upon his interest in said ship, applied to the libellants for such insurance of $6,550 and $2,650, and, at the time of such application, produced and exhibited to the president of the libellants, to whom personally such application was made, a letter from said Melcher to said Sawyer, requesting the latter to procure insurance of said sums of $6,550 and $2,650 upon said guano charter and the primage of the same; and that, upon the strength of evidence of those facts, and of such evidence alone, the insurance made by the libellants was held to be applicable to the guano charter; that said letter was never exhibited or communicated to the respondents, or to any of its officers or agents, by the libellants, nor did the respondents ever know or hear of its existence, or of any purpose or intention on the part of the said Melcher or his agent, or on the part of the libellants, to make the policy issued by the libellants applicable to the guano charter, until about the month of January, 1872, when it was brought to the attention of the respondents by their counsel, after an examination by him of the proceedings on the trial of the action of Melcher against the libellants; that the respondents immediately notified the libellants, through their counsel, of the refusal of the respondents to be bound by any judgment rendered in said action, which should be based on the fact of the exhibition of said letter by said Sawyer to the president of the libellants, or upon any thing which took place between the president and said Sawyer when the original insurance was applied for by the latter, inasmuch as none of said matters were communicated to the respondents at the time of the application for said re-insurance; that the respondents, at the time they made such re-insurance, had not, nor had any of their officers, any knowledge or information of any matter or thing in regard to said original insurance, or of its application to any particular subject-matter, other than the notice from the libellants to the respondents, above set forth, requesting the latter to enter the said sums of $6,550, $2,650 and $1,500 upon the said re-insurance policy, and had no knowledge or information of any fact, matter or thing which could operate to make the said insurance, so far as concerned the said $6,550 and $2,650, applicable to any other subject-matter than the said charter under which the said ship was employed to carry a cargo of coal and other merchandise from New York to San Francisco; and that, if the respondents had had knowledge of any such fact, matter or thing, and, especially, if they had been aware of any purpose to make the said insurance applicable to the guano charter, they would have declined to become the libellants' re-insurer therefor, for the reasons, among others, that it would have involved a large over-insurance upon or in respect of the said Melcher's interest in the said ship, and that the accumulation of so large an amount of insurance thereon (making nearly three times its value) would have been contrary to the rules and principles which govern prudent underwriters in making insurances, and would have offered strong inducements to said Melcher, supposing him to be subject to pecuniary temptation, to cast the said ship away.

I regard it as clearly established that the respondents did not insure the guano charter. The transactions between the parties were effected wholly by correspondence. On the 23rd of March, 1864, the president of the libellants wrote a letter to the vice-president of the respondents, saying: "I also enclose returns, per registry, as follows: $5,000 on ship C. S. Pennell to San Francisco and Chinchas, war; $5,000 on pc. of do. marine." Then, in a postscript to the letter, he says: "P. S.—I also enclose an additional return for insurance on charter, primage and property, per ship C. S. Pennell to San Francisco only." The returns enclosed were these (all of them dated March 23rd, 1864): (1) "Enter on open policy of this company 51,564, war risk only, $5,000 on ship Chas. S. Pennell, at and from New York to, at and from San Francisco and Callao to Chinchas —rate 3 per cent." (2) "Enter on open policy of this company 51,564, $5,000 on charter of ship Chas. S. Pennell, at and from New York to, at and from San Francisco and Callao to Chinchas—rate 3 per cent." (3) "Enter on open policy of this company 51,564, $6,550 on charter, $2,650 on primage, and $1,500 on property on board ship Charles S. Pennell, at and from New York to San Francisco, including war risk—rate 6 per cent." It is the insurance made on the last-mentioned return that is the subject of the present suit. The respondents received no information from the libellants as to what the charter intended was, except such as is contained in the three returns above set forth and in the letter enclosing them.

From the policy issued by the libellants to Melcher, on the 23rd of March, 1864, it appears that the insurance made by them was described in that policy as "$6,550 on charter, $2,650 on primage, and also $1,500 on property on board ship Chas. S. Pennell, at and from New York to San Francisco." From the record of the proceedings in the suit brought against the libellants by Melcher, it appears that he alleged that the li-

bellants, by their policy, insured the guano charter. To prove this, he introduced as a witness one Sawyer, who, as the agent of Melcher, personally effected the insurance for Melcher at the office of the libellants. He did so in pursuance of a letter which he had then just received from Melcher, dated New York, March 20th, 1864. In that letter Melcher said: "I want you to insure on my part of the ship as follows: Say war risk out to San Francisco, ship, $5,000; charter to San Francisco, $26,500, 1-8, $3,300: primage on same, $1,325; homeward charter from Chinchas, insure out, say 1,750 tons, at $4, $7,000; at current rate of exchange, $52,-400; my 1-8, $6,550; primage on same, $2,-650; chronometers, $500; and on our own effects, clothing, &c., $1,000; making, total, $19,425." The written application which Sawyer signed on the libellants' book was in these words: "I wish for Geo. M. Melcher $6,550 on charter and $2,650 on primage, and $1,500 on property on board ship Charles S. Pennell, at and from New York to San Francisco, including war risk." But Sawyer testified as follows on that trial: "Q. State whether or not you exhibited that letter to the president of the company at the time you applied for insurance. A. I did. Q. At whose request did you exhibit it to him? A. At his own. He asked me to hand him the letter. Q. Did he take it and examine it? A. He took it, and, I suppose, examined it. He made some comments on it. Q. What time in the day did you receive the letter? A. I think it came in the noon train. I got it about 2 o'clock in the afternoon and went to the Ocean Insurance Company the next morning at 10 o'clock. Q. State all that was said and done between yourself and the officers of this company at the time, in relation to this policy of insurance and the subject matter insured. (Defendant objects to both form and substance. Admitted, subject to objection.) A. After effecting an insurance on the ship, Mr. Woodbury" (the president) "asked me if I could give him any other insurance. I told him I had received a letter from Capt. Melcher, requesting me to insure a guano charter. He said, 'Let me see the letter.' I passed it over the desk to him. He took it in his hands and says: '1,750 tons; ain't that a large amount to insure on that ship?' I told him I had insured the ship in his office when she carried 1,800 tons in her. He said, 'Homeward charter, insure out—why didn't the captain ask you to insure all the way round, as he had the ship?' My answer was, before the ship got through, if the war closed, he could effect the insurance cheaper. I was to be advised by Capt. Melcher on his arrival at San Francisco, and agreed with him to insure in his office if he took it. He made some other comments. Among others he said, 'what did Foye take the New York insurance for?' I told him 6 per cent. with the scrip earnings back. After some little talk he told me he would take this at 5 1-2, and I was going to leave the office, he said: 'It will be necessary to make application,' or sign one. Wright copied an application on to his book, and I signed it without reading it. I don't know what I signed. It was mere form, I suppose. Q. Did he make any other comment in relation to the statement in the letter you showed him, or figures? A. He asked me what the captain rated the pound at. I told him I thought about $8. He took a pen and figured over on the desk and said he thought it was about that himself. Q. Did he read any part of the letter about pounds when he made those figures? (Objected to by defendant. Admitted, subject to objection.) A. He did. Q. Do you hold in your hand the letter you carried to Mr. Woodbury? A. I do. Q. State what part he read when he asked you how the captain figured the pound. (Objected to. Admitted, subject to objection.) A. I cannot tell you what part he read. He said, 'say 1750 tons, at $7,000.' Then he asked me what the captain cast this insurance for at the pound. I cannot state all that was said—six years have passed. I am giving the subject matter as well as I can. Q. Had he just been examining the letter when he made that statement? A. He had. I think he held the letter in his hands or on the desk when he made the figures. Q. What charter did you tell Woodbury you wanted insured at this time? A. A guano charter. Q. What description did you give him of the charter? A. I told him the captain was chartered for guano. He says, 'I know it. Pennell has been talking with me about it this afternoon.' Q. Did you state what voyage the guano charter was for? A. I don't know that I did, for we had stated the voyage a few minutes before, in effecting the insurance on the ship. I had effected an insurance on the same route a few minutes before; the same voyage for which this guano charter was for. Q. Did you apply for any insurance to the Ocean Ins. Co. upon any other charter or freight, except the guano charter? A. I did not at that time. Q. Upon what voyage had you obtained insurance upon the ship at the Ocean Ins. Co.'s office at this same time? A. New York to San Francisco, with liberties of Callao, to the Chinchas, and from thence to a port in Europe. Q. Where did the conversation you have related take place? A. In the Ocean Ins. Co.'s office, on Exchange street. Three or four days after that I went for the policies. Q. Whom did you see there? A. Mr. Wright. I think no one else. He is secretary of the Ocean Ins. Co. Q. What was said in relation to this charter? A. I opened the policy and read '$6,550 on charter.' I says to Wright, 'You have left out the word guano.' Said he, 'That don't make any difference. The insurance you effected with Foye was freight; this is charter.' I said to him, 'Hadn't you rather have charter than

freight?' 'No,' said he, 'if I get freight and the vessel is wrecked, the freight helps forward itself, whereas charter is a total loss.' Q. Have you stated all the first conversation in relation to what Woodbury said to you about effecting this insurance? A. He said a good deal in relation to not insuring the round voyage. I think I told him I should not insure her guano charter with a war risk. He wanted to know why. I told him the Southern Confederacy privateers did not burn guano ships. He referred me to one instance where it had been done. Q. State what else you recollect was said in relation to that subject matter of insurance at Woodbury's office, at the first conversation, if anything. (Defendant objects to both form and substance.) A. I told him I would put implicit confidence in his insuring me; told him I had made a mistake in insuring the last one, and I wanted this guano charter insured out, and I wanted no mistake about it. He gave me to understand there should be none." All the foregoing testimony of Sawyer was seasonably objected to by the counsel for the defendants in that suit, and was admitted by the court subject to objection. After this, and the other evidence on the trial had been introduced, the judge before whom the cause was tried, being of opinion that it was desirable, before proceeding further in the cause, to take the opinion of the full court upon the question of the admissibility of the evidence which had been put in by the plaintiff subject to the defendants' objection, the case was withdrawn from the jury, and reported to the court for their opinion, as to whether any of said evidence was admissible, and, if any, what portion thereof, and, after the determination of those questions, the cause to stand for trial, if either party should so desire. The questions raised were argued before the full court. The decision is reported in 59 Me. 217. The court held that insurance of the charter meant insurance of the freight to be carried under the charter. As the vessel, at the time she was lost, was sailing under two charters, one requiring her to carry coal and other merchandise from New York to San Francisco, and the other requiring her to carry a cargo of guano from the Chincha Islands to Hamburg or Rotterdam, and, as she was lost on the outward voyage, the court considered the question to be whether extrinsic evidence was admissible to show which of the two charters was the one insured by the defendants in that suit. The plaintiff having offered to prove that it was the guano charter, the defendants resisted, on the ground that the words in the policy, "at and from New York to San Francisco," were descriptive of the charter insured, and that extrinsic evidence that any other charter was intended was not admissible, as its effect would be to vary and not explain the policy. The court held that the words "at and from New York to San Francisco" did not describe any portion of the property insured, but described, simply, the voyage during which the risk was to continue, and did not describe both the voyage and the charter; that, as a charter was insured by the policy, and two charters were shown to exist, either of which would answer the call in the policy, the case was one of a latent ambiguity, to remove which extrinsic evidence might be resorted to; and that, therefore, the evidence offered by the plaintiff was admissible for that purpose, and the action must stand for trial. The second trial took place, and the same evidence of Sawyer, that is above detailed, was given; and it was proved that the vessel sailed from New York for San Francisco, loaded with a general cargo for San Francisco, with a charter from New York to San Francisco, and that Melcher's interest under that charter was covered by other previous insurance. The case was then withdrawn from the jury and submitted to the court, to enter such judgment as the law and the evidence should direct. The court held (60 Me. 77) that the evidence satisfactorily showed that the policy sued on was intended to cover the guano charter; that the voyage covered by that charter was a continuous one from New York to San Francisco, thence to Callao, thence to the Chincha Islands, there to load with guano, and thence to Hamburg or Rotterdam; that the insurance effected by the policy sued on was on so much of said voyage as was to begin at New York and terminate at San Francisco; that as, under the charter, no freight was carried between New York and San Francisco, and none between San Francisco and the Chincha Islands, the policy, to give any effect to it, must be regarded as one upon the freight which would be carried during the whole voyage, if the loss should occur between New York and San Francisco; that, as the vessel had started on her chartered voyage, Melcher's interest in the chartered freight had commenced, and was an insurable interest, as freight; that the fact that there was a charter between Melcher and others for a voyage from New York to San Francisco, and an insurance thereon by another company, constituted no defence, unless the liability of the defendants was thereby increased or injuriously affected; that the defendants knew that there was to be freight from New York to San Francisco, and that the same was insured, and, with such knowledge, insured the risk for a portion of the voyage covered by the guano charter; and that they were liable for the $9,200 insurance on charter and primage. Judgment was given accordingly.

On the trial of the present action, the policy which the libellants issued on the 23rd of March, 1864, on Melcher's interest in the vessel, and which Sawyer, in his testimony in the suit in Maine, described as an insurance for the voyage covered by the guano char-

ter, has been put in evidence. That policy insures Melcher "$3,000 on ship Chas. S. Pennell, at and from New York to, at and from San Francisco and Chinchas, with usual liberties of Callao, to her port of advice and discharge in Europe."

The evidence in the present suit shows that the respondents co-operated with the libellants in resisting the claim made against the libellants by Melcher in the suit in Maine, until it appeared, by the decision to admit the parol evidence offered by Melcher, that the libellants were to be held liable, by means of such evidence, for an insurance of the guano charter, but that, from and after that time, the respondents asserted to the libellants that the respondents were not bound by anything which was not communicated to them when they insured the libellants, and that the respondents would not admit that they could be held to have insured the guano charter. On the 16th of January, 1872, as soon as the court had decided that the parol evidence was admissible, the attorneys for the libellants sent to the respondents a copy of the opinion of the court. The respondents submitted that opinion to their counsel and received his written views thereon, a copy of which they sent to the libellants' attorneys on the 29th of January, 1872, in a letter of that date, which said: "If the effect of the admission of the evidence of the plaintiff in the suit against the Ocean Insurance Co. will be to hold them liable on a risk different from that described in and re-insured under our policy to them, we, not being re-insurers of such risk, of course have no interest." The attitude then assumed by the respondents was always subsequently maintained.

The respondents insured a charter and primage for a voyage from New York to San Francisco. What charter? It is not shown that any of the information which Sawyer communicated to the libellants was made known to the respondents, nor that the latter knew of the guano charter, or of the insurance made by the libellants on Melcher's interest in the vessel for the voyage covered by the guano charter. But it is shown that the ship sailed from New York under a charter from New York to San Francisco. That charter is in evidence. It was made a month before the guano charter was made. It charters the vessel for a voyage from New York to San Francisco for a full cargo of merchandise, no cargo to be received on board during the voyage without the consent in writing of the charterers, the charter money to be $26,500 (the sum named in Melcher's letter to Sawyer as "charter to San Francisco"), payable on discharge of the cargo at San Francisco. It is also shown that the respondents, a few days before they insured the libellants on the risk in question, entered on an open policy issued by them to a customer, two risks of merchandise by the ship Charles S. Pennell from New York to San Francisco, and that the vessel was advertised by such charterers as a general ship for a voyage from New York to San Francisco, in a newspaper which was taken by the respondents, and otherwise, and that she was loading with cargo for some time at New York for such voyage. It is also shown by abundant evidence, in the testimony of experienced marine underwriters, that, in an application for insurance "on charter, at and from New York to San Francisco," where there are two charters, and one of them is over a part of the route of the other, it is material to the risk that the applicant should disclose the existence and termini of the two charters, and the fact that the insurance applied for is intended to cover the risk of the charter for the longer route over the shorter route. The reasons which the witnesses give for this conclusion are plain and satisfactory. It is worth a higher rate of premium to take the risk of a given amount on the guano charter over the route from New York to San Francisco than it is to take the risk of the same amount on the charter from New York to San Francisco over the same route, because, in the former insurance, in case of a disaster, there would be no possibility of any salvage by forwarding cargo to its destination by another vessel, whereas, in the latter insurance, there might be such salvage, which, if the disaster occurred near the port of destination, would be large. Moreover, such disclosure in respect to the two charters is material to enable the insurer to determine whether he will insure at all or not. One of the expert witnesses expresses his view as follows: "If the insurance were applied for without such disclosure, I should regard it as an application to insure simply the freight money dependent upon the delivery of cargo at San Francisco, whilst, with the disclosure, I should understand it to be a proposition to make an insurance which I should understand to be a wager policy, as there would be no interest to be transferred to the underwriter, or from which he could, by any possibility, derive salvage. As an underwriter, I believe such an insurance as that last mentioned to have an immoral tendency, as offering to a master a temptation to lose his vessel on such voyage, and I invariably, as an underwriter, refuse such an insurance. In case of a total loss, the insured would receive pay from the insurer not only for the whole freight depending on the passage from New York to San Francisco, but for the expected freight, and that without the very considerable outlay which would have to be made in undertaking and performing the further voyage." It is also shown, that, under the charter for the voyage from New York to San Francisco, no consent was given to carry other cargo than that put on board by the charterers, and that the vessel sailed with a full cargo under that charter.

An insurance upon "charter" is an insurance of the risk of losing the freight to be

carried under a charter. Where there are two charters, one of them having the same termini as the voyage described in the policy, and the other covering that route and a further continuing route, and the policy merely insures "charter" (which is the present case), and there is no explanation between the parties at the time of effecting the insurance, as to which of the two charters is intended, the policy must be regarded as saying that the charter intended is a charter covering only the route of the voyage described in the policy. This would have been so in the suit brought against the libellants in Maine but for the parol evidence that was admitted. But for that, Melcher could not have made out the policy issued by the libellants to him to be a policy on the guano charter, and it would, on its face, have been a policy on the charter that was co-terminous with the voyage described in the policy.

What parol evidence is there, in the present case, as against the respondents, to show that they insured the guano charter? The libel alleges, that, the vessel having been chartered under the guano charter, and Melcher being interested in said charter and in the primage thereon, the libellants insured him on said charter, and on said primage, at and from New York to San Francisco, and that the respondents reinsured the same risk so insured by the libellants. It also alleges, that the libellants, in insuring "charter," meant the guano charter, and in insuring "primage" meant the primage on the guano charter. These allegations mean, and the evidence shows, that the libellants knew, when they insured Melcher, that there was a guano charter and what its terms were. The evidence also shows that the libellants knew, when they insured Melcher, and when they applied to the respondents for insurance, that there was also a charter from New York to San Francisco, under which the vessel was to carry cargo and earn freight, and that the guano charter covered the passage from New York to San Francisco, as well as the route thence to the Chinchas and beyond the Chinchas. All this appears on the face of the letter from Melcher to Sawyer, which was exhibited to the libellants before they insured Melcher on charter and primage. It also appears, from the evidence given in the suit in Maine, that the libellants, in insuring Melcher on charter and primage, expressly agreed, having the knowledge above mentioned, to insure the guano charter, and meant, by the insurance they made, an insurance on the guano charter. But, knowledge of the existence of the guano charter, and of the letter from Melcher to Sawyer, and of the other facts above mentioned as known to the libellants, is not shown to have been possessed by the respondents, or to have been communicated to them by the libellants. It was the duty of the libellants to make known to the respondents, in applying for the reinsurance, all the information possessed by the libellants that was material to the risk. The information so possessed by the libellants, and not communicated to the respondents, is shown, by the evidence, to have been material to the risk. But the libellants communicated nothing, except that they desired an insurance on "charter" and "primage," "at and from New York to San Francisco," leaving it to be inferred that the charter to be insured was co-terminous with the voyage stated.

The libellants, at the same time that they applied to the respondents for insurance on charter and primage, at and from New York to San Francisco, applied to them, as before mentioned, to take a war risk only on the same vessel of $5,000, and a separate marine risk on charter of the same vessel of $5,000, "at and from New York, to at and from San Francisco and Callao to Chinchas;" and the respondents insured those risks. It is urged, on the part of the libellants, that the written applications made to the respondents for these two risks informed them of the guano charter, and informed them sufficiently, that the insurance desired in the third application was an insurance on the guano charter. But, the information conveyed by the first and second applications was only to the effect that the vessel was going further than to San Francisco, and was, after leaving San Francisco, going to Callao and the Chinchas, and was to be under charter from New York, on such voyage, as far as the Chinchas. Those applications conveyed no information that the charter for any route beyond San Francisco was a charter commencing at New York, or that, while it was a different charter from the one under which the vessel was carrying cargo to San Francisco, the two charters covered, both of them, the passage between New York and San Francisco, with cargo to be carried and freight to be earned under the one for that passage, and no cargo to be carried and no freight to be earned under the other for that part of the passage, and that there was a charter covering the carriage of a cargo from the Chinchas to Europe, and that the voyage for the earning of the freight for such carriage was a voyage commencing at New York. No such information was communicated to the respondents, either by those applications, or by any of the letters written by the libellants to the respondents, or otherwise; nor was there anything in those applications, or in the letters, to put the respondents on inquiry. The information not disclosed is shown to have been material to the risk.

It is shown that the respondents paid to the libellants, in discharge of the insurance which they made in favor of the libellants, of $5,000 marine risk on "charter" of the ship, "at and from New York to, at and from San Francisco and Callao to Chinchas," the sum of $2,500 in October, 1865, and the further sum of $2,500 in May, 1866. It is strongly urged by the libellants that the fact of this payment is evidence that the respondents knew that, in insuring "charter," in the two insurances

made on "charter," March 23rd, 1864, they were insuring the guano charter. But, the suit in Maine against the libellants, brought by Melcher on their insurance of "charter" and primage, "at and from New York to San Francisco," was not commenced until September, 1866; and it does not appear that the respondents before that time had any information that Melcher claimed that such insurance covered the guano charter, or that the respondents had before that time heard of the guano charter. As there was not in the insurance by the respondents of $5,000 on charter "at and from New York to, at and from San Francisco and Callao to Chinchas," any conscious insurance of a charter such as the guano charter was, in view of the other charter from New York to San Francisco, so there was not in the payment of such $5,000, at the time and under the circumstances stated, any conscious recognition of an insurance on such a charter. From the time the suit in Maine was brought by Melcher, setting up that the charter insured by the libellants was the guano charter, the respondents have always contended to the contrary, and have always contended, also, that the guano charter was never insured by the respondents.

The insurance sought to be established in this case is one, on the evidence, of such a character as to require the fullest proof that the underwriters made it with a clear understanding of all the facts and circumstances attending the vessel, and her employment and her voyage, and of the liability they were assuming. The face of the policy imports no such insurance and no insurance of a charter extending beyond San Francisco. Where, as in the case of the insurance on charter by the libellants for Melcher, the insurers assume the risk with a clear knowledge of all the facts that are material to the risk, and thus with freedom of choice to accept or reject the risk, and with the ability to fix and exact an adequate premium, the insurance may properly be held to be binding, if the interest insured be an insurable interest. But such clear knowledge and freedom of choice are indispensable, for the system of insurance sought to be upheld in this case is one which would admit of several charters, each of which might include the passage from New York to San Francisco and each of which might be separately insured, while the vessel would really be earning freight, in carrying cargo from New York to San Francisco, under only one charter. Insurance on "charter" "at and from New York to San Francisco" would cover each one of the charters, and the real interest at risk between New York and San Francisco would be largely over-insured, under the guise of insuring the transit between those two places, as a part of a transit from New York, by the way of San Francisco, to places beyond. The evidence in this case shows that such a system of insurance is one that would not be adopted by underwriters generally, and that no such insurance would be made or acknowledged, unless entered upon with full knowledge that it was such an insurance.

It results, from these considerations, that the libel must be dismissed, with costs.

[NOTE. On appeal to the circuit court the decree of this court was reversed, and a decree entered in favor of libelant. Case No. 10,408. Subsequently an appeal was taken to the supreme court, where the decree of the circuit court was reversed, and the cause remanded, with directions to enter a decree dismissing the libel. 107 U. S. 485, 1 Sup. Ct. 582.]

Case No. 10,408.

OCEAN INS. CO. v. SUN MUT. INS. CO.

[15 Blatchf. 249.] [1]

Circuit Court, S. D. New York. Sept. 13, 1878. [2]

MARINE INSURANCE — POLICY APPLICABLE TO EITHER OF TWO CHARTERS—REINSURANCE—PROOF OF LOSS—JUDGMENT AGAINST INSURED COMPANY —DELAY—COSTS AND EXPENSES.

1. A policy of reinsurance on a marine risk, issued by one insurance company to another, insured "$6,550 on charter, $2,650 on primage, and $1,500 on property, on board ship C. S. Pennell, at and from New York to San Francisco." There were two charters at risk during the voyage. The language of the policy was equally applicable to both, and it was *held* that the insured had proved that the insurance related to a particular one of the two charters.

2. In this suit on the reinsurance policy, proof of a judgment against the insured company on the policy issued by it, was, under the circumstances, *held* to be sufficient proof of loss, and of the insurable interest of the insured company.

3. The defence of delay on the part of the insured company in bringing suit, overruled.

4. The insured company was allowed to recover the amount it had paid on the judgment against it, and the costs and expenses it had paid in the suit which resulted in the judgment.

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

This was an appeal by the libellant, in a suit in personam in admiralty, from a decree of the district court [Case No. 10,407], dismissing the libel. The following facts were found by this court: At the several times hereinafter mentioned, the libellant and the defendant were insurance companies, engaged in the business of insuring against losses by perils of the sea. The libellant, to be referred to herein as the Ocean Company, was incorporated under the laws of the state of Maine, and had its principal place of business at Portland in that state. The defendant, to be referred to as the Sun Company, was incorporated under the laws of the state of New York and had its principal

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

[2] [Reversing Case No. 10,407. Decree of circuit court reversed by supreme court in 107 U. S. 485, 1 Sup. Ct. 582.]

place of business in the city of New York. On or about January 19th, 1864, the Sun Company issued its open policy, No. 51,564, to the Ocean Company, in the usual form, for the insurance of cargoes at and from Cuba to Boston or Portland, it being, however, expressly understood and agreed that no risk would be taken under it, unless the Ocean Company take or have an amount on same risk equal to one-half the amount covered by the Sun Company. On the 9th of February, 1864, it was agreed in writing, noted upon the policy, that the policy should cover such other risks as this (the Sun) company may approve and endorse thereon. Under this new arrangement, the clause limiting the risks to such as the Ocean Company retained an interest in to the extent named, to wit, an amount equal to one-half that of the Sun, was kept in force, but, February 24th, 1864, the president of the Sun Company wrote the Ocean Company as follows: "We are willing that you be not obliged to retain a half of risk, when you do not wish to do so, but we reserve the right to object to amounts returned, which it is not probable will be too great very often." A copy of the policy issued, with the endorsement thereon, is printed in the apostles in this case, as exhibit No. 1. This policy was issued with the expectation that it would be used by the Ocean Company for the purposes of reinsurance, an arrangement for such a business on the part of the Sun Company having been made. December 24th, 1863, Charles S. Pennell, as an owner and agent of the ship C. S. Pennell, of 975 tons burthen, and then lying in the harbor of Portland, Maine, chartered the whole of the vessel, "including the state rooms in cabin, not used by the officers, and deck rooms, not used for the crew or for sails and stores," to Sutton & Co., for a voyage from New York to San Francisco. No cargo was to be received on board, except with the written consent of the charterers; and they were to pay "for the charter or freight," on the good and proper discharge of the cargo in San Francisco, $26,500, less two and one-half per cent. commission. George M. Melcher was, at the time, master of the ship, and his primage on the freight money, if earned, would have been $1,325. This charter will be referred to as the San Francisco charter. After the making of this charter, the vessel sailed from Portland to New York, and was there put up and advertised, by Sutton & Co., as a general ship for San Francisco. That firm, at that time, represented what was known as the "Dispatch line of San Francisco packets." January 30th, while the ship was in New York, loading under her San Francisco charter, and advertised for that voyage, her master chartered her again to the Peruvian government. By the terms of this charter she was to sail from New York, "on or before June 1st, 1864, to San Francisco, and thence proceed, with all convenient dispatch, to Callao, Peru," and from thence, if, on inspection, she should be found to be well conditioned for the voyage, to the Chincha Islands, for a cargo of guano, to be taken to Hamburg or Rotterdam. The freight to be paid was at the rate of £4 per ton of 20 cwt., British net weight, of guano, subject, however, to a deduction of five shillings per ton, if the vessel was not ready in Callao to proceed to the Chinchas by December 15th. This charter will be referred to as the "Rotterdam charter." On the 25th of February, 1864, while the ship was in New York loading, Charles S. Pennell, a part owner, took from the Ocean Company a policy, insuring his interest in the ship for $8,000, against war risks, and his interest in the Rotterdam charter for $8,000, against marine risks, on the voyage between New York and the Chinchas. In this policy, the duration and locality of the risk was described as "at and from New York, to, at and from San Francisco, Callao and the Chinchas." George M. Melcher was, at the time, owner of one-eighth of the ship, and master. On the 20th of March, he wrote one Sawyer, his agent at Portland, advising that the ship was about ready to sail, and directing that insurance be effected on his interest, as follows: "War risk to San Francisco, ship, $5,000; charter to San Francisco, $26,500, 1/8, $3,300; primage on same, $1,325; homeward charter from Chinchas, insure out, say, 1,750 tons, at £4, £7,000, at currency rate of exchange, $52,400, my 1/8, $6,550; primage on same, $2,650; chronometers, Dent, 1883, Negos, 1261, $500; and on our effects, clothing, &c., $1,000; making, total, $19,425." In the same letter it was said: "I think you had better put 5 or $6,000 more marine risk, in case I should lose the ship." Upon receipt of this letter, Sawyer applied to the Ocean Company for a policy upon the Rotterdam charter, primage and personal effects, to San Francisco. In doing so he exhibited his letter of instructions and explained fully all the circumstances. The risk was accepted, and a policy issued, March 23d, in which the risk was described, as follows: "$6,550 on charter, $2,650 on primage, and also $1,500 on property on board ship Chas. S. Pennell, at and from New York to San Francisco." On the same day, the Ocean Company insured the master for $3,000, on his interest in the ship, during the whole of her voyage, describing the duration and locality of the risk as, "at and from New York, to, at and from San Francisco and Chinchas, with usual liberties at Callao, to her port of advice and discharge in Europe." On the same 23d of March the president of the Ocean Company wrote the vice-president of the Sun, as follows: "* * * I also enclose returns for registry, as follows: * * * $5,000 on ship C. S. Pennell, to San Francisco and Chinchas, war; $5,000 on fr. of do., marine. * * * P. S. I also enclose an additional return for

insurance on charter, primage and property, per ship C. S. Pennell, to San Francisco only." The returns enclosed in this letter were as follows: "To the Sun Mutual Insurance Company: Enter on open policy of this company, No. 51,564, $5,000 on charter of ship Chas. S. Pennell, at and from New York, to, at and from San Francisco and Callao to Chinchas. Rate, three per cent. on board. New York, March 23d, 1864. J. W., V.-P. Ocean Ins. Co., Per G. A. W., Sec'y." "To the Sun Mutual Insurance Company: Enter on open policy of this company, No. 51,564, war risk only, $5,000 on ship Chas. S. Pennell, at and from New York, to, at and from San Francisco and Callao to Chinchas. Rate, three per cent. on board. New York, March 23d, 1864. J. W., V.-P. Ocean Ins. Co., Per G. A. W., Sec'y." "To the Sun Mutual Insurance Company: Enter on open policy of this company, No. 51,564, $6,550 on charter, $2,650 on primage, and $1,500 on property on board ship Chas. S. Pennell, at and from New York to San Francisco, including war risk. Rate, six per cent. on board. New York, March 23d, 1864. J. W., V.-P. Ocean Ins. Co., Per G. A. W., Sec'y." The first and second of these returns were for reinsurance on the risks taken for Charles S. Pennell, and the last on account of the risk taken in favor of the master on the Rotterdam charter and personal property on board, from New York to San Francisco. The risk on the vessel taken in favor of the master at the same time, was not reported to the Ocean Company. Upon the receipt of this letter, with its inclosures, the vice-president of the Sun Company wrote the Ocean Company, under date of May 24th, as follows: "Your favor of the 23d inst. is received, * * * and returns as stated. Those * * * on charter, &c., per Chas. S. Pennell, $10,700 in conformity thereto. For the marine risk per Chas. S. Pennell to San Francisco, thence to Callao and Chinchas, our regular tariff rate is four and one-half per cent.; the war risk on same is worth the same, but we propose to enter for both marine and war, on $5,000, for four per cent." To this the president of the Ocean Company replied, under date of March 26th, as follows: "Your favor of the 24th inst. is received. I think, really, considering that you have the risk on charter, primage and property to San Francisco at full rates, you should take the war and marine to San Francisco and Chinchas on C. S. Pennell, at 6 per cent., as there is or will be but little risk in the Pacific, after leaving San Francisco. I can have both risks taken at less than these rates * * *." In response to this, the vice-president of the Sun wrote, under date of March 27th, as follows: "Your favor of the 26th inst. is received with a return * * * which is entered in conformity thereto, as have also been the returns of the 23d inst. per ship C. S. Pennell." The endorsement of these returns upon the open policy, was as follows:

1864.	Vessel.	From.	To.	Am'ts.	Rates.	Prems.
March 23,	Ship "Charles S. Pennell,"	New York.	S. Francisco, Callao and Chinchas, on charter,	$5,000	3	$150 marine.
" "	" "	"	" " vessel,	5,000	3	150 war only.
" "	" "	"	San Francisco, " charter,	6,550	6	393 war and marine.
" "	" "	"	" " primage,	2,650	6	159 " "
" "	" "	"	" " property,	1,500	6	90 " "

At the time these returns were made and accepted, the Sun Company had actual knowledge of the San Francisco charter, and had taken risks on cargo shipped on board the vessel to San Francisco under it. When the returns were made by the Ocean Company to the Sun, for acceptance and endorsement, no special mention was made of the Rotterdam charter, and no information was given the Sun Company of what had transpired between the Ocean Company and the agent of the master, when the insurance was effected. No allusion was made to the letter of the master to his agent, which was shown the president of the Ocean in connection with the application to that company, and the Sun Company had no other knowledge of the existence of the Rotterdam charter, than such as is to be inferred from the correspondence which preceded the acceptance of the risk. Both the president of the Ocean Company and the vice-president of the Sun Company are dead. The first named, died in July, 1869, and the last, some time before January 1st, 1867. The ship sailed from New York to San Francisco about the 1st of April, 1864, having on board a full cargo under her San Francisco charter. Having met with a disaster on the voyage, she put into Rio Janeiro, where she was condemned and sold and the voyage broken up. The loss under the risk taken in favor of Charles S. Pennell, both on the ship and the Rotterdam charter, were paid by the Sun Company without objection, October 23d, 1865, and May 5th, 1866. In due time after the loss occurred, the master filed with the Ocean Company his proofs under his policy on account of the Rotterdam

charter and his primage thereon. These proofs were promptly forwarded by the Ocean Company to the Sun, and no objections to their form were ever made. Payment was refused by the Sun Company, on the ground that the master was over-insured, and also upon the ground that the ship had been fraudulently cast away, and the Ocean Company was advised not to pay the claim, on that account. Pursuant to this advice, payment was refused by the Ocean Company, and, in October, 1866, Melcher, the master, commenced suit upon his policy in the courts of Maine. Of the commencement of this suit notice was immediately given the Sun Company by the Ocean Company, and the Sun Company interested itself in the preparation for defence. An agent of those interested, including another company having a risk upon the voyage, was sent to Rio Janeiro to ascertain the facts in relation to the loss, and report. In the meantime, the suit upon the policy was suffered to remain in court without being pressed. At the October term, 1869, the counsel for the plaintiff insisting that something should be done, it was agreed, on behalf of the Ocean Company, that the case should, if possible, be tried at the January term, 1870. In November, or late in October, 1869, the counsel on the part of the Ocean Company visited New York for the purpose of having a personal interview, in respect to the case, with the officers of the Sun Company. He there met the then vice-president of the company. At the interview which then took place, the points of defence that had been previously suggested by the companies having been discussed, the counsel stated, that, in his opinion, they could not be sustained by the evidence, but that he intended to make the point that the Rotterdam charter was not included in the risk as described in the policy. He said, however, that he had been informed by the attorneys who conducted the case for the plaintiff, that they had extrinsic evidence which would establish the liability, and which they expected to introduce. This extrinsic evidence he considered inadmissible, but he, at the same time, said, that, if admitted, the defence to the action would undoubtedly fail. He then informed the Sun Company, that, upon the presentation of the evidence on the trial, he should object to its admission and he had no doubt the presiding judge, under the practice in that state, would take advice of the supreme court upon that question, before proceeding further. If the evidence was ruled out, he expected to succeed in his defence, but, if admitted, he had little hopes. He did not at that time know precisely what the testimony would be, and he did not communicate to the company the particular facts relied upon. At the conclusion of the interview, he was instructed by the vice-president of the Sun Company to go forward with the defence and make every point possible. He was paid, at the time, one hundred dollars, for which he gave a receipt as follows: "New York, Nov. 2d, 1869. Received from the Sun Mutual Insurance Company one hundred dollars, on account of legal expenses and services for defending the Ocean Insurance Company, of Portland, from claim for loss on charter and primage in case of the ship C. S. Pennell, reinsured by the Sun Mutual Insurance Company for the Ocean Insurance Company. John Rand." At the April term, 1870, the cause came on for trial and the questions were raised upon the admissibility of the extrinsic evidence, and reported to the supreme court for its opinion. The testimony objected to included the deposition of Sawyer, the agent of the insured, as to what transpired between him and the Ocean Company at the time the insurance was effected; the letter from the insured to Sawyer specifying the risk to be taken, and which was submitted to the company by the agent, as showing the authority under which he acted; and, also, the Rotterdam charter. On the 6th of October, 1870, the attorneys of the Ocean Company sent the Sun Company a copy of the case thus made, which contained a statement of the evidence offered and objected to. In the letter transmitting this document, the attorneys said: "The question now presented to our court is simply, whether he (the insured) shall be allowed to put in the testimony. If not allowed, there is an end of the case. If allowed, then we go to trial upon other points of defence." In reply to this, the president of the Sun Company wrote as follows: "New York, Oct. 15, 1870. Messrs. J. & E. M. Rand, Portland, Me. Gents: Yours of 6th inst. was duly received, also the printed documents which you sent, and which we have perused carefully. It is shown by the testimony that the policy was made in accordance with the application of the plaintiff, and that there was no misunderstanding in relation thereto, calling for the admission of evidence outside of the policy, to explain it. Certainly, none would be admissible to contradict it, for that would be setting up a new contract other than the policy itself which is sued upon. It is important, therefore, to have excluded all evidence tending to contradict the policy. By the policy as made, the plaintiff insured on charter, New York to San Francisco, $6,550; on primage, $——; on personal effects, $——. There is no such charter shown, but the plaintiff sets up a charter to San Francisco and ports beyond, as described in the charter party. The insurance of the charter to San Francisco was an insurance of only a part of said charter—not amounting even to a part insurance of the charter—because, as the charter party is to the effect that no money is to be paid by the charterers unless the whole round voyage is performed, and the contract being indivisible, if no money was to be paid for the passage to San Francisco, the plain-

tiff had no insurable interest in that part of the charter. Besides, the ship was loaded to her full capacity and was carrying full freight on said passage outside of the charters, which was covered under special policies. The plaintiff has, therefore, by the perils insured against in the policy, suffered no loss beyond what he has already been indemnified for under his policy on freight. The interest of the plaintiff in the passage to San Francisco was, therefore, an impossible interest. I do not mean to say that he had no interest in the charter party, but the risk under our policy, being only to San Francisco, ended before the charter party could by any possibility be performed. I think, therefore, that the main question is the question of interest, and think that the above reasons will be found sound in law. Please let me hear from you as to your opinion of them, and also as to your line of defence—what your points are—in order that I may be able to form some opinion as to the ultimate issue of the suit. Yours, respectfully, J. P. Paulison, President." In or about January, 1872, the supreme court decided that the testimony was admissible, and, on the 16th of that month, the attorneys advised the Sun Company of the result, and sent a copy of the opinion delivered. They also said that the case would probably come up again for hearing in a week or two, and asked that papers of any kind, relating to the defence, in the possession of the Sun Company, might be forwarded to them at once. Upon the receipt of this last letter, the case was submitted by the Sun Company to its counsel in New York, who gave his opinion, in writing, to the effect, "that the Sun Mutual Insurance Company's liability under the reinsurance policy cannot be extended beyond the obvious import of the terms in which it is expressed. The letter of Melcher, ordering the insurance not having been exhibited to them, nor the explanations of Sawyer made to them, they cannot be affected by them; and, hence, if the admission of extrinsic evidence, as to what took place between Sawyer and the Ocean Company, when the original insurance was made, varies the case, as between that company and Melcher, from what it appears to be on the face of the original policy, I cannot see that it is a matter which concerns the Sun Company." January 29th, a copy of this opinion was forwarded by the Sun Company to the attorneys in Portland, and attention called to its contents. At the January term, 1872, the cause was again tried, and, the testimony being all in, the case was withdrawn from the jury and submitted to the court, to enter such judgment as law and the evidence required. The point was directly made, by the Ocean Company, that the policy never attached, because the ship never actually or legally sailed under the Rotterdam charter. On the 12th of July, 1872, the case having been printed, a copy was sent by the attorneys in Portland to the Sun Company, with a statement that the cause would come on for argument before the full bench in a few days. Permission was also asked to draw on the company, at sight, for five hundred dollars, on account of fees and disbursements. On the 15th of July, the Sun Company replied, denying its liability to pay fees, and saying that, "as the suit is against the Ocean Company and not against us, you must look to them for your fees." It is also said, in the letter, that, when the payment of $100 was made, in November, 1869, the case, as subsequently developed, was not fully understood. A judgment was afterwards rendered in the suit against the Ocean Company, for $9,200 and interest from April 27th, 1865. This judgment was satisfied by payments of the Ocean Company, as follows: July 19th, 1873, $4,234 39; July 21st, 1873, $10,086 55. The costs in the action, which were included in this payment, were $574. The account of the counsel in the cause for their professional services and disbursements, over and above the $100 paid by the Sun Company, was $1,164 70. This was also paid by the Ocean Company, July 23d, 1873, and was reasonable. Payment of the amount of the judgment and the account for counsel fees was duly demanded of the Sun Company by the Ocean Company before the commencement of this suit and refused.

Enos N. Taft and Robert D. Benedict, for libellants.

Joseph H. Choate and Charles H. Tweed, for respondents.

WAITE, Circuit Justice. The important question, which presents itself at the outset of this case, is, whether the Sun Company's policy covers the Rotterdam charter. The language is, "$6,550 on charter, $2,650 on primage, and $1,500 on property on board ship C. S. Pennell, at and from New York to San Francisco." This is to be construed in the light of the circumstances which surrounded the parties when the contract was made. These were: 1. That the Ocean Company did insure that charter and did not insure any other; 2. That the only interest which that company had in that charter was as insurer; 3. That it had no insurable interest whatever in the San Francisco charter; 4. That the Sun Company, when it took the risk, had full knowledge of the San Francisco charter, and of its general provisions; 5. That the arrangement between the two companies contemplated principally, if not altogether, the reinsurance, by the Sun Company, of risks taken by the Ocean; 6. When the risk was taken by the Sun Company, both parties supposed it covered that taken by the Ocean; 7. There was no actual fraud on the part of the Ocean Company, and there was no intentional concealment or misrepresentation.

The Maine court decided, that the words, "at and from New York to San Francisco," were not used to describe the charter insured, but the locality and duration of the risk. In that I fully concur. The opinion of Judge Walton is entirely satisfactory to my mind, and I shall not attempt to add to what he has said. In fact, I do not understand it to be contended now, that if, in reality, the minds of the two companies met upon a contract for the insurance of the Rotterdam charter, it may not be proved. The real controversy is, as to whether or not that was the contract, and not as to the admissibility of extrinsic evidence to prove it.

It is quite true, that the burden of showing that the risk was taken upon the Rotterdam charter is upon the Ocean Company. There were two charters at risk during the voyage. The language of the policy is equally applicable to both, and it is, therefore, incumbent on the insured to prove to which it actually does relate. It is not contended that, when the risk was taken, the letter of Melcher to Sawyer, or the explanations of Sawyer to the Ocean Company, were communicated to the Sun. If there is not enough to charge the Sun Company without this, there can be no recovery.

Every contract is, if possible, under the settled rules of construction, to be so interpreted as to give it some effect. If this policy is confined to the San Francisco charter, it can have no effect, as the Ocean Company had no insurable interest in that charter. There was nothing illegal in the arrangement by which the ship became bound to fill the two charters, after leaving New York and before her return. Neither did one of the charters interfere with the other. That to San Francisco did not prevent the ship from going to Callao and the Chinchas, after discharging her cargo at San Francisco; and that to Rotterdam did not forbid the taking on cargo in New York to be delivered in San Francisco, while on the way to the Chinchas for the guano to be carried to Rotterdam. The Rotterdam charter was satisfied in this particular, if the ship left New York by June 1st, and was ready to sail from Callao for the Chinchas within a reasonable time after December 15th.

It is clear, from the evidence, that, when the risk was taken by the Sun, it knew of the two charters. Knowledge of that to San Francisco is conceded. In fact, this knowledge is made one of the elements of the defence in this action. To my mind, also, knowledge of that to Rotterdam, or, what is equivalent, of some charter to be in existence after the ship left San Francisco, and before she returned from the voyage on which she was about to sail, is equally well established. The same letter from the Ocean Company, which tendered this risk, tendered another upon a charter expected to be in jeopardy after the ship left San Francisco. Otherwise, a premium for insurance "at and from New York, to, at and from San Francisco and Callao to Chinchas," would not have been paid. This could not have been the San Francisco charter, for all freight under that would have been earned upon the delivery of the cargo at San Francisco. The risk thus tendered was accepted, and the loss, when it occurred, paid. When the proofs of loss were presented, and the payments made, both the president of the Ocean Company, who tendered the risk, and the vice-president of the Sun, who accepted it, were living, and no doubt seems to have been entertained by them that the policy under which the claim was made covered the Rotterdam charter. When the Ocean Company tendered the Sun the risk which is now under consideration, it must have had in mind the Rotterdam charter only, because it had no interest whatever in that to San Francisco. It was seeking indemnity against the liability it had incurred, and that was on account of the Rotterdam charter alone. There cannot be reinsurance, if there is not insurance to be insured against.

It remains only to consider, whether the Sun Company did, in fact, accept the risk, supposing, and having the right to suppose, it related to the San Francisco charter, and not to the Rotterdam. The application was for reinsurance upon a charter—that is to say, freight to be earned under a charter—to be fulfilled during the voyage upon which the ship was to enter when she sailed from New York. As there were two charters, both known to the Sun, that company ought to have understood that the application related to the charter which had already been issued by the Ocean. A policy issued under such circumstances will be presumed to refer to that charter, unless a contrary intention is clearly manifested. Certainly, no intention to exclude the Rotterdam charter was manifested in this case. The correspondence, which contains all the evidence there is upon the subject previous to the acceptance of the risks, makes no mention, directly or indirectly, of any other charter. Each of the other applications which accompanied this, indicates, in the most unmistakable terms, that the voyage upon which the ship was to sail would not end at San Francisco, and that she contemplated other service than that required by her San Francisco charter. Under one of these applications, a risk upon the Rotterdam charter was confessedly taken, and, in the letter which preceded the acceptance of that risk, and upon which it was largely predicated, allusion is made to the present application in terms which indicate very strongly that both referred to the same charter, but to different interests. The language is: "I think really, considering you have the risk on the charter, primage and property to San Francisco, at full rates, you should take the war and marine to San

Francisco and Chinchas * * * at six per cent., as there is, or will be, but little risk in the Pacific, after leaving San Francisco." Equally significant was the form of the present application itself. It was added, by way of postscript, to the letter which transmitted the other, and which, as has just been said, embraced the Rotterdam charter. The words are: "I also enclose an additional return for insurance on charter, primage and property to San Francisco only." There cannot be a doubt, if another charter was intended, it would have been so said.

Another important consideration is, that the charter to be insured was one upon which the primage was to be $2,650. No San Francisco charter alone could have been expected to furnish such an amount of primage, and, taken in connection with the Chinchas, as it must be, as a point in the voyage, a guano contract of some kind is clearly indicated.

This much for the evidence of what occurred before the risk was taken. That which happened afterwards is no less significant. When the loss occurred, and the first proofs were made, the officers of the two companies, active in taking the risks, were alive. No intimation was then given by either that the risk did not cover the loss that was claimed. The only ground of defence put forth by the Sun Company was, that there had been over-insurance and fraud. To establish this, an agent was sent to Rio Janeiro for testimony. Certainly, if it had not then been supposed, by these officers, that the policy covered the loss, no such trouble would have been taken, and no such expense incurred. It is to be borne in mind, also, that this suggestion of defence came from the Sun Company, and no other seems to have been thought of until after both the president of the Ocean and the vice-president of the Sun were dead, and it was apparent that the evidence was not sufficient to relieve the companies from their responsibility on that ground. Then, for the first time, the counsel suggested that the policies did not cover the Rotterdam charter, and that point was put forward "to defeat the swindling claim." It was not until long after this, when, by the extrinsic evidence, the parties were driven to their original defences, that the Sun Company claimed to occupy a different position, in respect to the case, from the Ocean. The risk was taken March 23d, 1864. The loss occurred in June following. The parties commenced their correspondence within a proper time thereafter. The loss to Pennell, the owner, was paid in 1865 and 1866. The suit was commenced against the Ocean in September or October, 1866. No other defence than over-insurance and fraudulent loss was suggested by any one until November, 1869, and then by the counsel in the cause, and not the parties. In October, 1870, the Sun Company was fully advised in respect to the extrinsic evidence upon which it was expected the Ocean would be held, and it was not until this evidence was admitted, more than a year afterwards, that it was even hinted by the Sun Company that this altered its own position. Under all these circumstances, I cannot come to any other conclusion than that the policy of the Sun Company covers the Rotterdam charter.

It is, however, further contended, that, even if the policy does cover the risk, it is void, because the Ocean Company, when it applied for the insurance, concealed from the Sun the fact that no freight was to be carried under the charter, until after the arrival of the ship at San Francisco. Such I do not understand to be the fact. As has already been seen, it was disclosed in the application, that insurance was wanted upon a charter to be operative and in force after the ship left San Francisco. The Sun Company knew that no freight, under such a charter, could be carried between New York and San Francisco, because the San Francisco charter, as to which it was fully advised, contemplated a full cargo between New York and San Francisco, and ended upon the discharge at the last named port. The particulars of the Rotterdam charter beyond San Francisco were unimportant, as the risk was to end there. It is not pretended now that the charter was not made, or that it was valued, for the purposes of the insurance, at more than it was worth. No such defence has been put upon the record here, or upon that of the suit in Maine. This objection, therefore, cannot be maintained.

It is next insisted, that sufficient proof of the loss has not been made. As has already been seen, the Sun Company was a reinsurer of the Ocean. In effect, the Sun Company guaranteed the Ocean against loss by reason of the risk it had taken upon the charter. When the claim for the loss was made upon the Ocean, it was at once referred to the Sun, and that company advised its disallowance. When, in consequence of the refusal of the Ocean Company to pay, suit was commenced, the Sun was promptly notified. The Sun at once took part in the defence, consulted with the counsel, and advised as to points to be taken. A judgment, under such circumstances, finding the loss, concludes the Sun Company. Proof of the judgment, therefore, is equivalent to proof of loss.

Again, it is said, that there was an utter want of an insurable interest in the freight to be carried under the Rotterdam charter, before the arrival of the vessel at San Francisco, she being on the route from New York to that point, carrying full freight under the San Francisco charter, and the Rotterdam charterers having no interest or concern whatever in the performance of the voyage to San Francisco. This precise point was made in the Maine court. It was specially relied upon by the Sun Company, and, even

after the counsel had made the objection to the admissibility of the extrinsic evidence, and the president of the Sun Company had seen and "perused carefully" the case as made upon that point, he (the president) wrote the counsel, pressing this defence, and saying that he thought it the "main question." At the final hearing it was urged upon the attention of the court, and its discussion occupies the principal portion of the opinion of Chief Justice Appleton, in disposing of the case. The Sun Company is bound by that judgment, and the question is not now an open one.

The clause in the original policy, which required the Ocean Company to insure on the same risk an amount equal to one half of that covered by the Sun, was waived, before this insurance was effected, by the letter of the Sun Company, under date of February 24th, 1864, which has been put in evidence since this appeal was taken. The acceptance of the full risk after that date binds the Sun Company.

There is no statute of limitations applicable to courts of admiralty, in this class of cases. Stale claims will not be entertained in that court, any more than in equity; and, to determine what is stale, resort is sometimes had to the limitation in common law actions, established by statute; but the statutes themselves are not binding. The court is emphatically a commercial court, and requires reasonable promptness on the part of its suitors. Here, there has been no unnecessary delay. The Ocean Company has been active all the time, and has always proceeded under the supervision, and in accordance with the suggestions, of the Sun. This suit was commenced in a little more than sixty days after the liability of the Ocean Company was fixed in the very action which the Sun Company had promoted for that purpose, and which, until a short time before its termination, it had treated as substantially against itself. Under such circumstances, a court of admiralty cannot hold that the Ocean Company has lost its rights by delay.

The costs and expenses paid in the suit in Maine are not unreasonable, and they were all incurred under the advice of the Sun. They are, therefore, recoverable, in this action against the Sun, as the reinsurer.

Let a decree be prepared in favor of the Ocean Company, for the payments of July 19th, 1873, $4,234 39; July 21st, 1873, $10,-086 55; July 23d, 1873, $1,164 70; in all, $15,485 64, with interest from July 21st, 1873, at seven per cent. per annum.

[On appeal to the supreme court, the decree of this court was reversed, and the case remanded, with orders to enter a decree dismissing the libel. 107 U. S. 485, 1 Sup. Ct. 582.]

OCEAN MILLS (PEARL v.). See Case No. 10,876.

OCEAN NAT. BANK (SECOND NAT. BANK v.). See Case No. 12,602.

Case No. 10,408a.

The OCEAN QUEEN.[1]

District Court, S. D. New York. May 16, 1864.[2]

COLLISION—STEAMER AND SCHOONER—NEGLIGENCE.

[The schooner John L. Darling, bound from Baltimore to Providence, sailing wing and wing, headed N. E. by N., and going at the rate of four miles per hour, when about eight miles south of Barnegat light, discovered the lights of the steamer Ocean Queen, headed S. by W., and going at the rate of nine miles per hour. The steamer discovered the schooner on her starboard bow at the distance of a mile or more, and ported her helm to pass, but did not slow her engines. The schooner held her course until a collision became inevitable, when, in the confusion, her bow fell off to the eastward, and came lightly into contact with that of the steamer. Her stern swung round under the latter's quarter, and was cut down to the water's edge by the paddle wheels, which had been reversed. *Held*, that the steamer was at fault in porting and in not slowing her engines on first discovering the schooner, and was liable for the damage to the latter.]

[This was a libel in rem by Seth Adams, Jr., against the steamer Ocean Queen, Cornelius Vanderbilt, claimant, for damages suffered by the schooner John L. Darling in a collision.]

Choate & Donahue, for libelant.

Clark & Rapallo, for claimant.

SHIPMAN, District Judge. This was a libel filed by the owners of the schooner John L. Darling to recover the damages occasioned to her and her cargo by a collision with the Ocean Queen, which occurred on the night of January 12, 1863, some seven or eight miles southeast of Barnegat light. The schooner was bound from Baltimore to Providence, with a cargo of corn, flour, and feed. The steamer was bound from New York down the coast, with freight and passengers. The night was fair, the wind was light, and about southwest. For some time before the collision the schooner had been sailing wing and wing, heading, until she discovered the light of the Ocean Queen, N. E. by N., and going about four miles an hour. She had a light set under her bowsprit. The steamer, until she discovered the schooner's light, was heading S. by W., going about nine miles an hour. She had all her lights burning and was seen by the schooner some twenty or thirty minutes before the collision, and some time before she discovered the schooner. The master and mate of the schooner, and the man at the wheel, all testified that their vessel did not change her course before the vessels came together. But all the witnesses on both vessels agreed that when they came together, their heads both pointed in an easterly direction, and that there was no severe blow, their hulls hardly coming in contact. The steamer had very little headway on, her engine having been reversed. They came

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[1] [Not previously reported.]

[2] [Affirmed in Case No. 10,410.]

lightly together forward, catching by the rigging so that no damage was done to the schooner's hull till her stern swung round under the steamer's guards, and was cut down nearly to the water, probably by the paddle wheel.

HELD BY THE COURT: That these vessels were approaching each other on tracks which, if continued, would bring them into proximity, and the well-established rule required that the schooner should keep her course, and leave the steamer to clear her as she thought best. That as at the moment of the collision the vessels were pointing in the same direction, it is incredible that the schooner's bow should not have fallen off to the eastward. Otherwise the steamer must have gone down to west of the schooner, and come up alongside of her bearing N. E. by N., which would be equivalent to supposing those on the steamer to be lunatics. That the more rational theory is that the schooner's bow fell off to the eastward during the alarm which seized her crew when they saw that a collision was inevitable, and that as the steamer was also swinging, the vessels came together, both heading, probably, S. of E. That on the evidence the schooner held her course until the collision became inevitable. That the stoppage of the steamer's engine by the master when he first found that the vessels were near each other, was most proper, and probably saved her from striking the schooner at full speed. The officer in charge of her deck was either ignorant of the schooner's position, or he grossly misapprehended his duty. If he did know her position, he ought to have stopped his engine earlier. That on the statement of the first and second officers of the steamer, viz., that the schooner was discovered some seven to twelve minutes before the collision, heading in a northeasterly direction, a little on the starboard bow, the vessels then being a mile or a mile and a half apart, the second officer should not have starboarded his wheel as he did unless he was well assured that by so doing he could give the schooner a wide berth, and that by attempting the manoeuvre, he took the peril on his own ship. If he had ported his wheel, the collision would not have taken place; but the only prudent course was for him instantly to have checked the speed of his vessel. That under such circumstances, with a vessel so near in the night time, with her course not exactly known, he should have checked the speed of his boat, or have been sure of the effect of any manoeuvre before he ventured upon it. Had he put his wheel hard a-port instead of a-starboard, he would have undoubtedly cleared the schooner. But the court does not decide that even that would have been a prudent manoeuvre, without first, or at the same instant, slowing her engine. That the schooner held to the rule by keeping her course until the crew was thrown into confusion by the impending danger, and that when the second officer of the steamer starboarded his wheel, without checking her speed, he committed an error, for which she is liable.

Decree for libelant, with a reference.

[NOTE. Upon the coming in of the master's report, claimants filed certain exceptions, which were sustained, and the report referred for correction. Case No. 10,409. An appeal was subsequently taken to the circuit court, where the decree of this court in favor of the libelant was affirmed. Id. 10,410.

[Subsequently claimant applied in the circuit court for an order that a commission issue to examine certain witnesses whose depositions might be of value to the claimant on an appeal which he had taken to the supreme court. The motion was denied. Id. 10,411.]

Case No. 10,409.

The OCEAN QUEEN.[1]

District Court, S. D. New York. Nov. 8, 1866.[2]

COLLISION—MEASURE OF DAMAGES—CARGO—VALUE AT PORTS OF SHIPMENT AND DESTINATION.

[In case of a collision, the damages should not be computed by valuing the cargo as at the port of destination, but the value at the port of shipment should be taken, with the expense of navigation until the time of the collision and the expense of landing the cargo. On this amount interest should be allowed from the time of the collision. Smith v. Condry, 1 How. (42 U. S.) 28, followed.]

[Cited in The Mary J. Vaughan, Case No. 9,-217; The Aleppo, Id. 158.]

[This was a libel in rem by Seth Adams, Jr., against the steamer Ocean Queen, Cornelius Vanderbilt, claimant, for damages suffered by the schooner John L. Darling in a collision. A decree was entered for libelant, and a reference ordered. Case No. 10,408a. Heard on exceptions to the master's report.]

Mr. Choate, for libelant.

Mr. Rapallo, for respondent.

SHIPMAN, District Judge. This is a suit for collision. Upon full hearing, a decree was entered for the libelant, with an order of reference to compute the damages. The commissioner has made his report to this court, to which the claimant excepts, principally on the ground that the commissioner, in assessing the damages to the cargo, took the price it would have brought at the port of destination, instead of the price paid at the port of shipment. I think the exception to this point is well taken. It is open to the objections taken by Mr. Justice Story in the case of The Lively [Case No. 8,403]. Though that was not a case of damage by collision, it was a case of damage by another kind of tort. His remarks are therefore apt and to the point. To estimate the damages by what the cargo would have sold for if it had reached the port of destination partakes in some measure of conjecture, and assumes that for certain which is after all contingent. The schooner in this case might never have

1 [Not previously reported.]

2 [Affirmed in Case No. 10,410.]

reached her port of destination, even if she had not collided with the Ocean Queen. She was exposed to all the ordinary perils of navigation, collision, fire, and the numberless dangers which attend vessels on the sea. I understand the correct rule to be laid down by the supreme court of the United States in Smith v. Condry, 1 How. [42 U. S.] 28, 35, which is the value of the goods at the port of shipment. To this should be added the expense of navigating the vessel to the place where the collision occurred, including also the landing of the cargo on board. On this amount the libelant is entitled to 6 per cent. from the time of collision.

Let the report be referred back to the commissioner to be corrected in the particulars named, in conformity with this opinion.

[NOTE. On appeal to the circuit court, the decree of the district court was affirmed. Case No. 10,410. Subsequently claimant applied in the circuit court for an order that a commission issue to examine certain witnesses, depositions to be used on appeal. The motion was denied. Case No. 10,411.]

Case No. 10,410.

The OCEAN QUEEN.

[5 Blatchf. 493.][1]

Circuit Court, S. D. New York. Sept. 18, 1867.[2]

COLLISION—MEASURE OF DAMAGES—VALUE OF CARGO.

The rule for damages for the loss of cargo by a collision, is not the market value of the cargo at the port of destination, or any general increased market value thereof that took place between the time of the shipment and the time of the collision. The proper rule is the value of the cargo at the port of shipment, and all expenses of lading it on board and transporting it to the place of collision, and interest at the rate of six per cent. per annum from the time of the collision.

[Cited in The Mary J. Vaughan, Case No. 9,217; The Baltic, Id. 824; The Aleppo, Id. 158; Dyer v. National Steam-Nav. Co., Id. 4,225.]

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

This was a libel in rem, filed in the district court, by the owners of the schooner J. L. Darling, and the owners of her cargo, against the steamship Ocean Queen, to recover damages for a collision which occurred between the two vessels at a little after eight o'clock, p. m., on the 12th of January, 1863, some eight or nine miles off, and southward of, Barnegat light. The steamship was on her way down the coast, on a voyage from New York to Aspinwall. The schooner was on her way from Baltimore to Providence, Rhode Island. The district court decreed for the libellants [Case No. 10,408a], and the claimants appealed to this court.

Joseph H. Choate, for libellants.
Charles A. Rapallo, for claimants.

NELSON, Circuit Justice. I see no ground, on the proofs, for disturbing the decree in favor of the schooner and her cargo. The only question worthy of notice is that of damages in respect to the cargo. The owners of the cargo claim that they are entitled to the market value of the cargo, consisting of flour, corn, and feed, at the port of destination, Providence, or, at least, to the general increased market value that took place between the time of the shipment at Baltimore, and the time of the collision. The court below held, that the damages should be ascertained from the value of the goods at the port of shipment, including all expenses of transportation to the place of collision, and of the lading of the cargo on board, &c., together with interest, at the rate of six per cent. per annum, from the time of the collision. [Case No. 10,409]. This is the rule, substantially, as settled in the case of The Anna Maria, 2 Wheat. [15 U. S.] 327, and in Smith v. Condry, 1 How. [42 U. S.] 28, 35, as governing in all cases of marine torts. See, also, The Lively [Case No. 8,403].

The decree below is affirmed.

[NOTE. Subsequently claimant applied for an order that a commission issue to examine certain witnesses, depositions to be used on appeal. Case No. 10,411. An appeal was taken to the supreme court by Cornelius Vanderbilt on November 25, 1867. The appeal was dismissed by stipulation of counsel, May 18, 1868, under Sup. Ct. Rule 29.]

Case No. 10,411.

The OCEAN QUEEN.

[6 Blatchf. 24.][1]

Circuit Court, S. D. New York. Jan. 6, 1868.

APPEAL IN ADMIRALTY — COMMISSION TO TAKE TESTIMONY—TWELFTH RULE OF SUPREME COURT.

1. After an appeal has been duly taken from the decree of this court to the supreme court, by the claimant, in an admiralty suit, in rem, this court will not, on the application of the claimant, under the twelfth rule of the supreme court, order that a commission issue to examine witnesses who are named, so that their depositions may be made available to the claimant on the appeal, although he has prayed, in his petition of appeal, that the cause may be tried anew in the supreme court, as well upon the proceedings and evidence in the courts below, as upon such further depositions and evidence as the claimant may present to the supreme court.

2. The twelfth rule of the supreme court explained.

3. Under that rule, it is for the supreme court to decide, on a motion to be made to it, whether the evidence sought to be taken will be admissible in the case, before a commission can be issued by this court.

[Cited in Sorensen v. Keyser, 2 C. C. A. 92, 51 Fed. 32.]

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]
[2] [Affirming Case No. 10,408a.]

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

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

This was an application, on the part of the claimant in an admiralty suit, in rem, for an order that a commission issue, pursuant to the practice of the supreme court of the United States, to examine certain witnesses, who were named, so that the depositions of such witnesses might be made available to the claimant on an appeal which he had taken to the supreme court, from the decree made by this court in the cause. It was stated in the affidavit on which the application was founded, that the claimant had "duly appealed" to the supreme court, and had prayed, in his petition of appeal, that the cause might be tried anew in the supreme court, as well upon the proceedings and evidence in the courts below, as upon such further depositions or evidence as the claimant might present to the supreme court, according to the course and practice thereof; and that the desired proofs were very material and necessary to the claimant upon the appeal. The libel was filed in the district court for this district, to recover damages for a collision on the high seas. The district court decreed for the libellant [Case No. 10,408a], and this court, on appeal, affirmed the decree [Id. 10,410].

William M. Evarts and Joseph H. Choate, for libellant.

Charles A. Rapallo, for claimant.

BLATCHFORD, District Judge. This application is sought to be maintained under the twelfth rule of the supreme court, which is as follows: "(1) In all cases where further proof is ordered by the court, the depositions which shall be taken shall be by a commission to be issued from this court, or from any circuit court of the United States. (2) In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission, to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice; provided, however, that nothing in this rule shall prevent any party from giving oral testimony, in open court, in cases where, by law, it is admissible." This case, having been removed into the supreme court by appeal, this court has no longer any general jurisdiction over it. Any power which this court has to grant the application in question, must be derived from some special authority conferred upon it. The twelfth rule of the supreme court is the only authority that is invoked. Under that rule, this court has more authority to issue a commission than any other circuit court. The permission is general, and confers authority, in given cases, upon any circuit court. The purport of the rule would seem to be, that the commission is to issue from the circuit court having jurisdiction where the witnesses are to be found, so that the attendance of the witnesses may be enforced by subpœna, under section 1 of the act of January 24, 1827 (4 Stat. 197). In the present case, it is not shown where the witnesses reside or are to be found, nor is it shown that any order has been made by the supreme court for further proof in the case. The authority of this court, if the witnesses are within reach of its process, must, under the twelfth rule, rest solely upon the fact, that this is a case of admiralty and maritime jurisdiction, and that new evidence in it is admissible in the supreme court. But this court cannot determine whether such new evidence is admissible. The case being in the supreme court, it is for that court to determine as to the admissibility of the new evidence. There is no reported decision, as to the proper practice under the twelfth rule, in a case like this. The claimant insists that he has a right to the commission, leaving it to the supreme court, when the depositions are presented to it, to say whether the evidence shall or shall not be admitted; and that, as he has, in his petition of appeal, prayed for a trial in the supreme court, on the evidence below, and on new evidence to be taken, the case is thus brought within the class of cases mentioned in the second subdivision of the twelfth rule, where new evidence is admissible in the supreme court. The question is one not entirely clear, but I think the safer course is to deny the application, on the ground that it is for the supreme court to decide, on a motion to be made to it, whether the evidence sought to be taken will be admissible in the case, before a commission can be issued. If I should grant the application, and the supreme court should hold that the circuit court was without authority to do so, the claimant might suffer serious prejudice; whereas, if he now applies to the supreme court, and shows that an application to this court has been refused on the ground stated, the practice under the rule will be settled by the supreme court, and the claimant will not be liable to suffer any prejudice from an error in practice.

The motion is denied.

OCEAN QUEEN, The (ADAMS v.). See Case No. 64.

Case No. 10,412.

The OCEAN SPRAY.

[4 Sawy. 105;[1] 3 Cent. Law J. 773.]

District Court, D. Oregon. Nov. 4, 1876.

KILLING SEAL—FOREIGN VOYAGE—MARINERS—WAGES.

1. A vessel is not engaged in the violation of section 1956 of the Revised Statutes, which provides that "no person shall kill any * * fur-seal * * within the limits of Alaska territory," etc., unless such vessel is used or employed in the actual killing of such seal; and a mere preparation or intention upon the part of her master or owners so to employ her is not sufficient to constitute the offense, if for any reason no seal are killed.

2. A vessel enrolled and licensed for the fisheries does not violate section 4337 of the Revised Statutes, which prohibits such vessel from proceeding on a foreign voyage without being registered, by touching at or entering the foreign port of Victoria, for supplies or any purpose other than trade, on her way from San Francisco to the fishing grounds on the northwest coast.

3. All persons who are employed on a vessel to assist in the main purpose of the voyage are mariners, and therefore persons who shipped on the Ocean Spray at Victoria as sealers, to take seal in the northern waters—that being the object of the voyage—are mariners, and have a lien upon the vessel for their wages.

[Cited in The Minna, 11 Fed. 760. Distinguished in The Ole Oleson, 20 Fed. 384, 385; The Sarah E. Kennedy, 29 Fed. 266, 267. Cited in Telles v. Lynde, 47 Fed. 916.]

[Cited in Holt v. Cummings, 102 Pa. St. 216; Scarff v. Metcalf, 107 N. Y. 216, 13 N. E. 796.]

4. When a voyage is broken up or lost by the act or fault of the master or owner, the seamen are nevertheless entitled to their wages for the full voyage or the time which it would probably require to complete it.

5. The rule, freight is the mother of wages, does not apply to a fishing or sealing voyage, and appears to be abolished altogether by section 4525 of the Revised Statutes.

In admiralty.

Rufus Mallory, for United States.

John W. Whalley and M. W. Fechheimer, for Wilkins et al.

David Goodsell, for Gallagher et al.

DEADY, District Judge. On March 27, 1876, the schooner Ocean Spray, of eighty-three tons burden, being duly enrolled and licensed, at San Francisco, for "the fishing trade," sailed from that port, as appears by her shipping articles, for "Behring Sea or elsewhere, as the master may direct, on a fishing voyage"—Frank Howell, charterer, and Thomas Butler, master. The crew consisted of the first and second mate, four men before the mast, and a cook. She kept no log and had no manifest. Her cargo consisted of forty-five tons of salt, fourteen barrels of beef, two of pork, twelve of flour, forty-two butcher-knives, six guns, forty-eight water-casks, two fishing-lines and twelve hooks, and ship's stores, including eleven cases of whisky.

On the twenty-fifth day out, the vessel put into the port of Victoria, V. I., from which place, according to the consular certificate, she cleared on April 26 for "Wrangel, Alaska, on fishing license from San Francisco, Cal." At this port some trifling repairs were made to the vessel, and a crew of twenty-four Indians and two interpreters were hired to take seal "in the northern waters." A whale boat was also purchased there, and the vessel provided with some additional stores and goods for the slop-chest, besides seal clubs for killing seal.

On April 27, the schooner proceeded to Neah Bay, W. T., where the master procured three canoes and two spear-heads and staff. From there he sailed northward and made the Aleutian Islands, probably at Ounimak Pass, about June 1. Here he came to anchor for a few days, and supplied the vessel with wood and water, and then proceeding in the direction of the Pribylov Islands, Alaska T., came to anchor about ten miles southeast of one of that group, called Sea Otter Isle. Here a canoe was sent ashore with six Indians and the interpreter, Wilkins, under the charge of a Dr. Thatcher, who appears to have had some interest in the adventure, to reconnoiter the ground and ascertain whether there were any persons or seals upon it. On returning, the canoe was lost in a fog, and after being out four or five days, made the island of St. Paul's, distant about five miles from Sea Otter. The schooner remained off Sea Otter three days, going as near to it as two miles, and sending off two canoes to find the missing party. Then it sailed to St. Paul's, where the crew of the lost canoe were taken on board. Here it is probable that some disagreement arose between the master, Thatcher and Howell, which resulted in abandoning the voyage and starting homeward. At least, on June 30, the schooner had reached Makouchinskoy Bay, on the northwest side of Ounalaska, and about two hundred and fifty miles southeast of Sea Otter, on her return voyage. There the vessel was boarded by Woods, the deputy collector of the district, and taken to the town of Ounalaska, and there formally seized and taken to Sitka, and thence to this district for trial.

The libel of information was filed on August 25, and alleges two grounds of forfeiture: 1. That the schooner, being duly enrolled and licensed "to carry on the fishing trade for one year," did proceed on a foreign voyage to the port of Victoria, contrary to section 4337 of the Revised Statutes, which provides: "If any vessel, enrolled or licensed, shall proceed on a foreign voyage, without first giving up her enrollment and license to the collector

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

of the district comprehending the port from whence she is about to proceed on such voyage, and being duly registered by such collector, every such vessel, together with her tackle, apparel and furniture, and the merchandise imported thereon, shall be liable to seizure and forfeiture;" and 2. That in June, 1876, the schooner, "her tackle, apparel and furniture, Thomas Butler, master, was found engaged in killing fur-seals within the limits of Alaska territory," contrary to section 1956 of the Revised Statutes, which, among other things, provides: "No person shall kill any * * * fur-seal * * * within the limits of Alaska territory, or in the waters thereof; * * * and all vessels, their tackle, apparel, furniture and cargo found engaged in the violation of this section shall be forfeited."

The answer of the claimant, George Kentfield, to the libel of intervention by the Indians for their wages, admits that the latter were taken on board by the master at Victoria to go "to the islands of the Northern Ocean for the purpose of catching seals;" and avers that during all of said voyage the schooner was under charter to Frank Howell and Jacob Nibble, of San Francisco, "for a voyage of six months in the waters along the northern coast of the United States," in which the claimant had no interest, and during which he had no control of the vessel.

This being so, the charterers were the owners pro tempore, and the vessel is responsible for their conduct or that of their master, Butler, in navigating or employing her. But upon the evidence there can be no doubt but that the schooner left San Francisco for the purpose of engaging in killing fur-seals on and about Sea Otter Isle. The fishing voyage and license therefor were a mere cover for this unlawful purpose. No fish were taken or attempted to be taken during the voyage, except casually for consumption on board; nor was there any fishing tackle provided, at all adequate to the purpose of taking a cargo of fish.

The master went into Victoria for the purpose of procuring Indians to take and skin seal and preserve their skins; and the forty-five tons of salt was doubtless provided for that purpose.

But upon the evidence it cannot be said with any certainty that any seals were actually killed by any one on the schooner. No skins were found on board, and altogether it is not probable that any were taken.

After they came upon the seal ground, the enterprise seems to have been abandoned for some reason. In the language of one of the witnesses, the master's courage seems to have failed him at the last moment. It is quite likely that he feared he would be discovered by the people of the Alaska Fur Company, who must have become aware of the presence of the schooner in that vicinity by reason of the lost canoe coming ashore with its crew at St. Paul's.

However that may be, to be "found engaged in the violation of this section," a vessel must be engaged in killing seal; must be employed in the very act which is prohibited and made punishable by it, namely: killing seal. A person cannot be punished under this section for preparing, intending or attempting to kill seal. He must actually kill one contrary to the prohibition. "No person shall kill any * * fur-seal * * within the limits of Alaska territory," etc. Until the deed is done, the locus pænitentiœ is open to him, and he may abandon the illegal purpose, and avoid the punishment prescribed by the act. So with the vessel. It can only be engaged in violating this section when it is successfully used or employed to accomplish the same result. Upon this charge the libel is not supported by the proof.

As to the other charge, the evidence is satisfactory that, when the master of the schooner left San Francisco, he intended to go into Victoria for the purpose of procuring a crew of Indians, who were expert in the management of canoes at sea, and understood the business of taking seal; and probably to procure any repairs or stores which he might need when there.

But, according to the authorities, this alone was not a proceeding "on a foreign voyage," contrary to the statute. According to the established construction of section 8 of the act of February 18, 1793 [1 Stat. 308], now section 4337 of the Revised Statutes, a vessel licensed for the fishing trade may lawfully touch at a foreign port in the course of her voyage, provided she does not trade there.

Says Mr. Justice Story, in the case of The Three Brothers [Case No. 14,009]: "But, in my judgment, the foreign voyage intended by the act is where the vessel departs from the United States for a foreign port with an intent there to engage in trade, and without an intent to seek employment in the fisheries." In Taber v. U. S. [Id. 13,722], Mr. Justice Story also held that a whaling voyage was not "a foreign voyage" within the meaning of the act of 1893 [2 Story, Laws, 883] c. 62 [2 Stat. 203, c. 9], concerning the clearance of vessels bound on a foreign voyage. In this case, the facts were: The Isabella sailed from New Bedford, in 1834, on a whaling voyage, and did not return until 1838. During her absence she touched at foreign ports for supplies, but was employed exclusively in the whale fishery.

The object of the law is manifest. It is to prevent vessels engaged in the coasting trade and fisheries from becoming the medium of the introduction of smuggled goods, under the security and cover of their license. The Friendship [Case No. 5,124]. But if a vessel engaged in the fisheries only touches at a foreign port, in the course of her voyage, for supplies, or repairs, or for any other purpose than trade, she is not deemed to be engaged in a foreign voyage. The fisheries on our northwest coast are not so well known or

long established as those in the northeast, but they are every year growing in importance, and many vessels are engaged in gathering cheap and wholesome food from this never-failing harvest of the sea. The port of Victoria lies immediately on the route to the fishing grounds, and it is natural and convenient that vessels bound to and from them should touch there for many purposes other than foreign trade; and in so doing, according to the established construction of the act and the reason of the matter, they do not violate this section.

The information is therefore dismissed; but the vessel having proceeded to the waters of Alaska under a license to engage in the fisheries, but in fact for the purpose of taking fur-seal there, contrary to law, and being found there and seized under very suspicious circumstances, a certificate of probable cause will be allowed.

Charles F. Wilkins, Caspeo W. Lindsey and twenty-four others have filed a libel of intervention to enforce a claim for wages as sealers on the voyage from Victoria to Sea Otter Isle, and thence to this port. The twenty-four others are the British Columbian Indians who were shipped at Victoria to take seal in the northern waters; and Wilkins and Lindsey were employed and shipped at the same time as interpreters, the former at $55 per month, and the latter, together with the Indians, at $30 per month. This claim is resisted on the ground that the libellants were not shipped and did not serve as mariners, and their employment as sealers did not give them a lien upon the vessel for their wages.

Neither the charterer nor the master appear in the case as claimants or witnesses. Their absence is not explained, and it is to be presumed that their testimony would not be unfavorable to the claims of these libellants.

The facts of the case appear to be that the Indians were shipped with the consent of Dr. Wood, the Indian agent at Victoria, and upon an agreement with him for them. By this they agreed to ship to the northern waters to take seal, and to lend a hand on board whenever they were wanted, for the sum of $30 per month until they returned to Victoria, when they were to be paid off and discharged. They went on board on April 27, 1876, and remained with the vessel until they were put ashore at this port by the marshal on August 31. During that time, and especially upon the outward voyage, when head winds prevailed, they helped make and reef sail, heave the anchor and clear decks, but did not stand watch. They also were employed in procuring drift-wood and water for the use of the vessel. They messed by themselves in the hold of the vessel, and food was furnished them, and cooked by one of their number. They were under the control of the officers of the schooner, but communication with them was generally had through the medium of the interpreters. The smaller portion of them could understand and speak English enough for ordinary conversation.

No case has been cited upon the point of whether a sealer is to be considered a mariner, and therefore entitled to a lien upon the vessel for his wages. It is admitted that such persons as surgeons, carpenters, cooks, stewards and cabin-boys are considered mariners. But it is claimed that this is so for the reason that these persons all aid in the navigation and preservation of the vessel. But I think the better reason is found in the fact that they are co-laborers in the leading purpose of the voyage. Upon this ground, even if it be admitted that the libellants shipped and served as sealers only, they ought to be deemed mariners. They were certainly co-laborers, and the principal laborers, in the only purpose of this voyage—the taking of fur-seal. The seamen, who have an undoubted lien upon the vessel for their wages, only contributed to this purpose by navigating it. Without these sealers the voyage must have been profitless, because the purpose of it could not have been accomplished. That nothing was accomplished is not their fault, and therefore it should not operate to their prejudice.

A principle of law, as that the persons on a vessel who are employed in promoting the purpose of the voyage or aiding in her navigation shall have a lien upon her for their wages, must be applied to new cases within the reason of the rule, as they arise. Now, it would be impossible to give any sound reason why the cook, or even the sailors, on this vessel should have a lien upon her for their wages, and the sealers, upon whom mainly depended the success of the voyage, should not.

The correct doctrine upon this point is well set forth by Benedict in his Admiralty (section 241): "It is universally conceded that the general principles of law must be applied to new kinds of property, as they spring into existence in the progress of society, according to their nature and incidents, and the common sense of the community. In the early periods of maritime commerce, when the oar was the great agent of propulsion, vessels were entirely unlike those of modern times, and each nation and period has had its peculiar agents of commerce and navigation adapted to its own wants and its own waters, and the names and descriptions of ships and vessels are without number. Under the class of mariners in the armed ship are embraced the officers and privates of a little army. In the whale-ship, the sealing-vessel, the cod-fishing and herring-fishing vessel, the lumber-vessel, the freighting-vessel, the passenger-vessel, there are other functions besides those of mere navigation, and they are performed by men who know nothing of seamanship; and in the great invention of modern times, the steamboat, an entirely new set of operatives are employed;

yet at all times and in all countries all the persons who have been necessarily or properly employed in a vessel as co-laborers to the great purpose of the voyage, have, by the laws, been clothed with the legal rights of mariners, no matter what might be their sex, character, station or profession." And there is a special reason why this should be so in this case; for the master, in employing these libellants, explicitly pledged the vessel as security for the payment of their wages for the round trip, whether any seal were taken or not.

When it comes to be understood that fishers and sealers employed on the northwest coast are to be considered mariners, it is probable that there will be some special rule established by which the amount of their compensation will depend somewhat upon the result of their labors. In this case, at first blush, it seems a hardship that the vessel should be bound to the libellants for full wages for the round voyage when nothing was made or earned by it, and they had comparatively little or nothing to do. But that is not their fault. They kept their agreement. That the voyage actually contemplated by the master was illegal, they had no reason to know. The "northern waters," to which they agreed to go, includes waters outside the limits of Alaska. What effect, if any, the seizure of the vessel is to have upon the contract is a question that was suggested in the argument, but only touched upon by counsel. The capture and condemnation of a neutral vessel dissolves the seaman's contract for wages, and he can recover nothing for the voyage; but a mere capture, without a condemnation, does not; and, in the meantime, the contract is only suspended, and the seaman has a right to remain with the ship and abide the result. The Saratoga [Case No. 12,355]; Pitman v. Hooper [Id. 11,186].

But in this case the purpose of the voyage appears to have been abandoned and the vessel turned homeward before the seizure, and she has since been acquitted. And this was the act of the master, and cannot affect the rights of the libellants. But if we should regard the seizure as the cause of the failure of the voyage, the rule established by the authorities seems to be, that when the voyage is broken up, interrupted or lost by the act of the master or owner, the seamen are entitled to their wages for the full voyage, or damages upon the contract in the nature of wages. Hoyt v. Wildfire, 3 Johns. 520; The Maria, [Case No. 9,074]; The Uncle Sam [Id. 2,372]; The Littlejohn [Case No. 6,153].

Neither do I suppose that the rule, freight is the mother of wages, can be applied to a voyage like this. But if it could, the fact that the failure or abandonment of the enterprise appears to be attributable to the master and owner pro tempore would prevent its being applied so as to bar a recovery by the libellants in this case. Besides, the rule itself seems to be abolished by section 4525 of the Revised Statutes, which provides: "No right to wages shall be dependent on the earning of freight by the vessel."

It follows that the libellants are entitled to a decree for the wages specified for the term of four months and seven days.

William Gallagher, the first mate, and six others, being the second mate, four sailors and the cook, have also filed a libel of intervention to enforce a claim for wages for the whole voyage, at the rate of $75 a month for the first mate, $50 a month for the second mate and cook, and $35 a month for the sailors, less certain advances stated in the account annexed to the libel. No defense is made to this claim, and it is allowed from the sailing of the vessel from San Francisco until August 31.

The matter is referred to the clerk to ascertain and report the sum due each libellant according to the conclusions of this opinion.

OCEAN SPRAY, The (ERLANDSEN v.). See Case No. 4,518.

OCEAN STAR, The (O'CONNOR v.). See Case No. 10,419.

OCEAN STAR, The (ROBERTS v.). See Case No. 11,908.

OCEAN STEAM-NAV. CO. (ENGLISH v.). See Cases Nos. 4,490 and 4,490a.

Case No. 10,413.

OCEAN STEAM-NAV. CO. v. The REVENUE.

District Court, S. D. New York. Dec. 20, 1854.

SALVAGE SERVICE—COMPENSATION.

[A ship, valued, with her cargo, at $85,000, which had lost her masts and rudder, and was being navigated under jury masts and an extemporized rudder, was towed into port, during a hard blow in squalls, by a transatlantic liner, valued at $300,000, with a cargo valued at $500,000, which lost a day's time, parted two hawsers, and was slightly damaged in collision. *Held*, that it was a salvage service, and $6,000 was a reasonable allowance.

The libel was filed in this case to recover a salvage compensation for services rendered to the ship Revenue by the steamship Washington, owned by the libelants. The ship Revenue, of 546 tons burden, valued, with her cargo, at $85,000, sailed from Hampton Roads on the 5th of September, 1853, bound to Australia. When about five days out she encountered a severe gale, which threw the ship on her beam ends, and to right her the crew were compelled to cut away her main and mizzenmast. She also lost her foretopmast and jibboom, and her rudder, during the gale, which lasted about six hours. After the gale the crew proceeded to get up jury masts and a temporary rudder, which occupied about five days, and the ship then bore away for New-York to be repaired. On the morning of

the 28th they had made some 400 miles, and were then about 90 miles from Sandy Hook. The captain had been sick for several days before. About 9 in the morning of the 28th, they were hailed by the pilot boat David Mitchell, and an agreement was made that the pilot boat should tow the ship. She accordingly took hold and towed her until about 5 in the afternoon, when the steamship Washington, then bound from Bremen to New-York, offered her assistance to the ship, which was accepted. She took hold of the ship about 6 p. m., and the pilot boat then let go. The wind that night blew from the north and the northwest, blowing heavily in squalls. The Washington towed the ship till about 9 p. m., when the hawser parted, and the ship, having by this time been towed to anchorage ground, came to anchor. The weather was boisterous through the night, so that the Washington could not take hold of her again that night, but she remained by her, and in the morning took hold of her again with another hawser, and brought her late in the afternoon to the city of New-York, having parted the second hawser also in so doing. The Washington was worth $300,000. She was insured for $200,000, and had on board a cargo valued at $500,000, with over 200 passengers, and a ship's company of 104. She was delayed about a day, for which her running expenses are about $800. She was injured by a collision with the ship, while taking her in tow, to the amount of about $200, and it cost between $700 and $800 to replace the two hawsers. The owners of the Washington having filed their libel to recover salvage, the owners of the pilot boat also came in, claiming salvage, and were made colibelants.

Martin, Strong & Smith, for libelants.

Benedict, Scoville & Benedict and Mr. De Forest, for claimants.

Mr. Hamilton, for the pilots.

HELD BY THE COURT (INGERSOLL, District Judge): That the service rendered by the Washington was a meritorious one, and must be paid for as salvage service; that the Revenue was in a crippled and disabled condition, and would probably have been blown off to sea by the northerly and westerly winds, if it had not been for the assistance of the Washington, which rescued her from imminent peril. That the Washington jeopardized her insurance by her deviation, and, if her valuable cargo had been lost by the means, the owners would have been liable as common carriers for it; and that she was exposed to some peril herself by her delay. That six thousand dollars is a reasonable compensation for the services she rendered. The pilots' claim having been settled before the trial, their libel was dismissed.

Decree for the libelants, therefore, for $6,000, in which sum is included the actual loss and damage sustained by the Washington.

OCEAN TOW BOAT CO. (SONDERBURG v.). See Case No. 13,175.

Case No. 10,414.

The OCEANUS.

[5 Ben. 545.] [1]

District Court, S. D. New York. March, 1872. [2]

COLLISION OFF THE BATTERY — STEAMBOAT FOLLOWING ANOTHER—HOLDING COURSE.

1. The steam propeller O. and the steamboat N. came in collision off the Battery, in New York harbor. Each of them belonged to a line of vessels running from New York through Long Island Sound. The starting point of the N. was the upper side of pier 28, North river, and that of the O. was the lower side of pier 27, North river, and the hour for each to start was 4 p. m. On the afternoon of November 27th, 1867, both vessels started, the N. being the first to leave her pier. The tide was ebb, and the N., in order to avoid vessels at anchor below her pier, went out into the river a considerable distance to the westward of them, before turning down the North river. As she went out, the tide carried her down, and those in her pilot house lost sight of the O., and did not see her again till immediately before the collision. The O. left her pier almost at the same time, and turned down the river east of the vessels at anchor. Off the Battery were vessels lying at anchor, through which both steamers had to make their way, in order to turn into the East river. The N., which was the faster boat of the two, but had the farther distance to go, to get into the East river, turned towards it, so as to cross the bows of the O. The O. kept her course and struck the N. on her port side. The N. did not stop her engine till after the collision. The O. stopped and backed her engine as soon as it was seen that the N. was crowding on her course: *Held*, that, although the N. left her pier first, she was not, in view of the fact that the course she took was the longer one to enable her to reach the point where both courses entered the East river, the foremost boat, but the following boat.

2. The fact that no one in the pilot house of the N. paid any attention to the O., was negligence on the part of the N., and the cause of the collision.

3. The courses of the two vessels were not crossing, within the meaning of the 14th rule for avoiding collisions; and, even if they could be so considered, the N. did not keep her course, within the meaning of the 13th rule, but crowded on the O., and was solely responsible for the collision.

[Cited in The Express, 44 Fed. 397.]

In admiralty.

W. G. Choate, for libellants.

R. D. Benedict, for claimants.

BLATCHFORD, District Judge. The libel in this case is filed by the owners of the steamboat Newport against the steam propeller Oceanus, to recover for the damages sustained by the libellants, through a collision which took place between the two vessels on the afternoon of November 27th, 1867, shortly after 4 o'clock, p. m., in the harbor of New

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

[2] [Affirmed in Case No. 10,415.]

York. Both of the vessels were in regular lines, carrying merchandise and passengers—the Newport running betwen New York and Newport, Rhode Island, and the Oceanus running between New York and Providence, Rhode Island, and the hour for each to leave New York, on that day, was 4 o'clock, p. m. These facts were known to those in charge of both vessels. The course of each, for her voyage, was, from her berth, down the North river, around the Battery, into the East river, and up the East river, by way of Hell Gate, into Long Island Sound. The berth of the Newport was the upper side of pier 28, North river. The berth of the Oceanus was the lower side of pier 27, North river.

The libel alleges, that the Newport left her dock about 4 o'clock, p. m., the Oceanus at the time being at her dock, blowing off steam; that, on arriving at or about pier No. 1, North river, the Newport commenced to turn into the East river; that, as she so began to turn, she slowed and stopped, to allow a tug-boat with a tow to pass ahead of her; that she then proceeded, at a very moderate rate of speed, in her course around the Battery into the East river; that, as she rounded, several small vessels were observed lying at anchor, three of them on the shore or port side, with their heads towards Governor's and Bedlow's Islands, and another farther out in the river, on the starboard side; that the Newport was again slowed and stopped, to enable her to make a straight course between the said three vessels at anchor on her port side and the said vessel at anchor on her outer or starboard side, and was then started slowly ahead; that, when she was nearly abreast of the most southward of the three vessels at anchor on her port side, and while she was pursuing her usual course around into the East river, the Oceanus was observed running up at a high rate of speed on the port quarter of the Newport, nearly in a line with the most southward of the three vessels so lying at anchor, and endeavoring to pass the Newport, in the narrow space between her and the said last mentioned vessels; that the Oceanus, when near the most southward of said vessels, made a sheer to starboard, and ran into the Newport, striking the Newport an angular blow, with her stem, in the after part of the port wheel of the Newport, and breaking through her guard and her braces, and otherwise materially damaging her; that, from the time the Oceanus was first seen at her dock blowing off steam, to the time when she was so observed running up on the port quarter of the Newport, immediately prior to the collision, the Oceanus had never been seen by the pilots in charge of the Newport, nor had she at any time shown ahead of the Newport; that the collision was caused by no fault or negligence on the part of those in charge of the Newport, but was occasioned wholly by the bad navigation, carelessness and misconduct of those in charge of the Oceanus: (1.) In attempting to pass the Newport, as she was turning into the East river, at a place in said river where such passage could not be effected without imminent danger of collision, by reason of the narrow space intervening between the Newport and the vessels lying at anchor on her port side. (2.) In not having given way, as she ought to have done, to the Newport, as the foremost boat, and in not having slowed or stopped her engines until the Newport had got clear of the vessels anchored on either side of her, and a clear passage been thus made for the Oceanus to pass, had she been so minded. (3.) In making a sheer to starboard, when lapping the Newport's port quarter, so near to the Newport as to render collision inevitable.

The answer avers, that the Newport started from her pier a little ahead of the Oceanus, but went out much further into the river, so that, as the vessels went down the river, towards the Battery, the Oceanus was slightly in advance of the Newport; that, as the Oceanus went on, in her course to get into the East river, she was going at a moderate rate of speed, and there were vessels lying off the Battery and below, between which it was necessary for her to go, and she was proceeding cautiously and slowly, making her way through those vessels, when the Newport, which had been all the time outside of the Oceanus, suddenly, and without any reason or excuse, running faster than the Oceanus, undertook to cross directly ahead of the Oceanus, and did so cross the course upon which the Oceanus was proceeding; that, as soon as any indication was seen of the intention of the Newport thus to cross the track of the Oceanus, the engine of the Oceanus was stopped and reversed, but the collision could not then be avoided; and that the Newport had abundance of room to the starboard of the course which she actually pursued, and it was her duty either to have maintained a course to the starboard of the Oceanus, or, if she determined to cross such course of the Oceanus, to cross it astern of her, instead of ahead of her. The answer denies that the collision was caused by any bad navigation or carelessness or misconduct on the part of the Oceanus, and alleges that it was caused by fault and negligence on the part of the Newport. It denies that the Oceanus attempted to pass the Newport, and alleges that the Newport wrongfully and negligently attempted to pass the Oceanus. It denies that the Oceanus was bound to give way to the Newport as the foremost boat, and alleges that the Oceanus was the foremost boat. It denies that the Oceanus did not slow, stop, and back her engines, and alleges that she did slow, stop, and back them. It denies that the Oceanus made any sheer to starboard, and alleges that the Newport was in fault in turning so closely to the course of the Oceanus, in giving no signal, in not keeping a prop-

er lookout, in not stopping and backing in time, and in not porting her helm, so as to carry her free of the course of the Oceanus.

It is established, by the proofs, that, when the Newport left her pier, at the upper side of which she lay, parallel lengthwise with the length of the pier, with her head pointing outwards across the width of the river, the tide being ebb and running towards the Battery, around which she was to go, and which was on her port hand, and there being some vessels lying at anchor out in the river off some of the piers below pier 28, she went out into the river a considerable distance, and beyond and to the westward of those vessels, before heading down the river, instead of turning down nearer to the line of the piers. As she went out from her pier, the ebb tide against her upper side carried her down before turning, so that those in her pilot house naturally lost sight of the Oceanus, which was lying at her pier when the Newport left. The Oceanus, being at the lower side of a pier, and lower down the river, turned down the river inside of the said vessels at anchor, and, although she left her pier after the Newport left her pier, she got headed down the river before or as soon as the Newport did, and went down at a much less distance from the line of the piers than the Newport did. The ultimate destinations and courses of both vessels required that they should each of them describe a curve from the North river, around the Battery, into the East river. Their courses were, in no proper sense, crossing courses. Each was making her way to enter the path off the Battery and between that and Governor's Island, which led into and up the East river. The Oceanus was much nearer to such path than the Newport was, being much nearer to the line of the piers, and, even though the Newport's stem may have been, on lines drawn across the width of the North river, as the two boats went down, further down than the stem of the Oceanus, yet, in view of the objective point and path both were bound for, the Newport must be considered as the hindmost boat. This is also shown by the fact that she was the faster boat of the two. She had a much longer distance to traverse to reach such objective point and path, from where she was when the Oceanus left her pier, than the distance which the Oceanus had to traverse, to reach such objective point and path, from where she, the Oceanus, was, when she left her pier. The Newport did not make up that difference of distance until the vessels came together, notwithstanding she was the faster boat of the two, which shows that she was all the time really behind the Oceanus and overhauling her. Such overhauling, too, was interrupted by the slowing of the Newport at one time. Yet she persisted in trying to reach such objective point and path without paying the least heed to the Oceanus, which was pursuing her way between the Newport and the shore. The Oceanus kept her proper course, observing the Newport, and had no occasion to suppose that she would be crowded by the Newport. The Newport closed in upon the Oceanus, and, by doing so, caused the collision. The Newport was, on the evidence, and in the sense of the law, the following boat. The fact that she left her pier first, does not, in view of the course she took relatively to the course of the Oceanus, furnish the proper test of the question as to which boat was the foremost one, in the courses of the two towards the objective point and path before mentioned. The Newport, having abundance of room on her starboard hand, towards Governor's Island, improperly crowded the Oceanus, by closing in on the proper course of the Oceanus, so as to cut her off. It was her duty to have observed the Oceanus, and to have kept out of the way of the Oceanus. The latter kept her course. No one in the pilot house of the Newport paid any attention to the Oceanus. This was gross negligence, and was the cause of the collision. The moment the Oceanus saw that the Newport's movement would cause a collision, the Oceanus stopped and backed. The Newport did not stop or back. The Newport thrust herself against the Oceanus, and brought upon herself all the damage that ensued.

The courses of the vessels, as they went down the river, to reach such objective point and path, were not crossing, so as to involve risk of collision, within the meaning of the 14th article of the steering and sailing rules (Act April 29, 1864; 13 Stat. 60), so as to require the Oceanus, as having the Newport on her own starboard side, to keep out of the way of the Newport. And, even if they could be so considered, the Newport did not obey article 18, by keeping her course, so as to enable the Oceanus to keep out of the way, but crowded in on the course of the Oceanus, so that, on the evidence, the Oceanus, while carefully avoiding the vessels at anchor, by pursuing the only path open to her, was run into by the Newport. Nor were there any dangers of navigation or other special circumstances existing to justify what the Newport did.

The case is one entirely free from doubt, and the libel must be dismissed, with costs.

[On appeal to the circuit court, the decree of this court was affirmed. Case No. 10,415.]

Case No. 10,415.

The OCEANUS.

[12 Blatchf. 430.] [1]

Circuit Court, S. D. New York. Jan. 30, 1875. [2]

COLLISION—OVERTAKING VESSELS.

1. An overtaking vessel is not absolutely prohibited from passing the vessel she is overtaking, but she must see to it that she selects a time and

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

[2] [Affirming Case No. 10,414.]

place in which she can pass safely, if the other does nothing to thwart her endeavor.

[Cited in The Charles Morgan, 6 Fed. 914.]

2. Two steamers, the N. and the O., were on parallel courses going down a river, the O. being nearer the shore on the left hand of both of them, and both were to turn to the left to continue their proper voyages, the destination of each being known to the other. Before turning, the O. was a little ahead. The N. was the faster boat. The O. reached the point of turning before the N. reached the line of the beam of the O. The N. drew in on the course of the O., on a curve crossing the bow of the O. A collision ensued, in which the N. was damaged. She libelled the O. *Held*, that the N. was solely in fault.

3. Even if the N. had been slightly ahead, when she began her curve, she had no right to turn in on the course of the O. until she could cross the bow of the O. without collision, if the O. did nothing to prevent it.

4. In passing along concentric or nearly concentric curves, with a proximately common purpose or destination, one vessel has no right to cross the bow of the other unnecessarily, and so place the latter in danger.

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

[This was a libel by the owners of the Newport to recover damages sustained by reason of a collision with the steam propeller Oceanus. From a decree of the district court dismissing the libel (Case No. 10,414), libellants appeal.]

William G. Choate, for libellants.
Robert D. Benedict, for claimants.

WOODRUFF, Circuit Judge. The testimony herein is voluminous and greatly conflicting. After a painstaking examination of the whole, I am of opinion that the conflict results mainly from the difference in the position of the different witnesses, and the consequent difference in the view presented to their eyes, and not from intentional misrepresentation; and I think that the important and decisive facts are established without great doubt or uncertainty.

The libellants' steamboat, the Newport, left the upper side of her wharf in the North river, at about 4 o'clock in the afternoon of the 27th of November, 1867, for her voyage to Newport, which required her to pass around the lower extremity of the city, and pass between Governor's Island and the Battery, to enter and go up the East river. She went from her wharf, out into the North river, a considerable distance, before making a turn down on her course. The propeller Oceanus, lying at the south side of her wharf on the North river, 320 feet lower down than the berth of the Newport, left her wharf almost immediately after the Newport got out of her slip, and, instead of going out into the river to the westward, she swung at once around, headed down the river near the ends of the docks, and proceeded on her voyage around the lower extremity of the city, to enter and pass up the East river. Each vessel was, therefore, aiming to describe a curve around the Battery, to pass up the East river. The Newport, having passed out into the North river much further than the other, had the largest curve to describe, and the greater distance to go before entering the East river. She was, however, the fastest boat. The Oceanus passed down as near to the Battery shore as it was prudent to pass, avoiding, and barely avoiding, other vessels lying at anchor there; and, when she was within a short distance of the Staten Island ferry, she came in collision with the Newport, which had drawn around near to the course of the Oceanus, and, at the moment of collision, had her bow slightly in advance of the latter, so that she received the blow in her wheelhouse just abaft her shaft. The question, which of the two was, at or immediately before the collision, the leading vessel and which the following vessel, is the question of fact chiefly contested on the trial; and this is deemed important in view of the rule, that, when one vessel is overtaking another, it is the right and duty of the latter, in general, to keep her course, and it is, in general, the duty of the overtaking vessel to avoid a collision. She is not absolutely prohibited passing, but she must see to it that she selects a time and place in which she can pass safely, if the other does nothing to thwart her endeavor.

It is obvious, that, as these vessels straightened on their courses down the North river, those courses were parallel. It is equally clear, that, in the wide space between the Battery and Governor's Island, there was abundant room for both, and that their curves around the Battery could have been preserved without possibility of collision, had the transverse distance between them been maintained. They might have moved on concentric curves, and could not then have come in contact. The Oceanus could not, with safety, have gone nearer to the shore; and it was, therefore, the duty of the Newport to keep off, and at a sufficient distance, upon her larger curve or swing, unless it is proved that, in coming down the North river, and before danger of collision arose, she had run so much ahead of the Oceanus, that the latter was in the relation to her of a vessel overtaking another. In my judgment, this is not established. The witnesses in behalf of the claimants, especially those on board of the Oceanus and on the Bristol, show the contrary. The officers of the Newport do not contradict them, as they did not see the Oceanus until the danger of collision was imminent. The view taken by witnesses on shore depends upon their positions relatively to the vessels and their courses when they observed them. Thus, the two men who stood near the lower end of the Battery by the flag-staff, saw the vessels after the curve around the Battery by the Newport began, and the vessels came in sight south of the old fort called Castle Garden. Now, it is obvious, that, as the Oceanus was coming down near the shore above Castle Garden, and the Newport was much farther out in the

river, the latter might come into the view of those men (looking along a straight line from the flag-staff to the southerly edge or side of Castle Garden) before they could see the Oceanus; and their most natural inference would be that the Newport was ahead. No such inference necessarily results from that observation, for, a line across the beam of the Oceanus might show that the Newport was at that moment behind the latter, and, having reference to the purpose of both to enter the East river, very considerably behind the latter.

Without discussing the testimony in detail, and without attempting, in this or any other manner, to harmonize all the testimony, I think it clear, that, in coming down the North river, the Oceanus was a little ahead, when she drew near Castle Garden, notwithstanding the Newport was the fastest boat. The shorter distance the Oceanus passed enabled her to reach that place before the Newport, on her longer course, reached the line of her beam. The Newport, (instead of preserving her lateral or transverse distance from the Oceanus, which, having the wide field towards Governor's Island before her, she could easily have done,) drew in upon the course of the Oceanus, in a curve crossing the bow of the latter. This caused the collision. This she had no right to do. Even if, when she began her curve, she was slightly ahead of the Oceanus, making her shorter curve, she had no right to turn in upon the course of the latter. Such a movement was at her peril. It could not be justified unless nor until the Newport had advanced so far that she could cross that bow without collision, if the Oceanus did nothing to prevent it. I do not say that the Newport was bound to maintain the same lateral distance from the course of the Oceanus at which she found herself when she straightened down the North river, but I do say, that, upon the evidence, there was abundant room to have kept at a perfectly safe lateral distance, and she should have done so. The excuse that her master and pilots did not see the Oceanus till the moment of the collision, if it does not aggravate, certainly does not relieve them from the imputation of fault in the navigation. Before they drew in so close to the shore, to shorten their curve around into the East river, it was their duty to see what vessels might be affected by it.

It is a mistake to say, that the moment the bow of one vessel is ahead of the bow of another, the burden of escaping collision is at once cast upon the latter: and it is especially true, that, in passing along concentric or nearly concentric curves, with a proximately common purpose or destination, one vessel has no right to cross the bow of the other unnecessarily, and so place the latter in danger. These views are one of the grounds of the opinion of the court below [Case No. 10,414], and I place my conclusion upon them, not, however, without expressing my concurrence in the reasoning there employed.

Let the libel be dismissed, with costs.

Case No. 10,416.

The OCEAN WAVE.

[3 Biss. 317; 4 Chi. Leg. News, 486; 6 Alb. Law J. 407.] [1]

District Court, E. D. Wisconsin. Aug., 1872.

DUTY OF MASTER AFTER STRANDING.

1. After a vessel is stranded there is still an obligation upon the master to take all possible care of the cargo.

2. Where a barge is made leaky by an effort to remove her from a sand bar, it is the first duty of the master to stop the leak, and secure the cargo from the flow of water.

3. A shipper should not be required to prove negligence on the part of a master until evidence is given tending to show that the injury complained of came within an excepted clause in the bill of lading.

4. What constitutes unavoidable dangers of the river.

Libel by the Home Insurance Company of New York and the Merchants' Insurance Company of Chicago against the steamboat Ocean Wave and the barge Bill Fleming, to recover the amounts paid by them on policies of insurance issued to Beaupre & Kelley on a cargo of bulk wheat shipped by them at St. Paul on the barge Bill Fleming, in tow of the steamboat Ocean Wave, to be transported to Prairie du Chien.

N. J. Emmons, for libellant.
J. W. Cary, for respondents.

MILLER, District Judge. The usual exceptions of unavoidable dangers of the river and fire were contained in the bill of lading. It is alleged in the answer of claimants, "that at a point on the Mississippi river, between Nebesha, in the state of Minnesota, and Alma, in the state of Wisconsin, and while passing in the usual channel of the river and proceeding with due caution and care, the barge Bill Fleming struck a bar in the river and stuck fast, and the steamer and the other barge in tow, by their own impetus and the current of the river, were carried against the barge Fleming with great force, and caused the guards of the steamer to break down a fender part of the barge Fleming, tearing away the fastenings of the same below the water line of the barge, and crushing in the side of the barge. And an examination being made then and there, the barge was discovered to have sprung a leak and to make water freely."

The barge was new, well built, staunch and strong. The timber head of the barge was broke in, the bolts that her timber head were bolted with were driven through her side. The timber head was broken in, so that the top bolt of the timber head was driven through the sides, and the second bolt from the top nearly through; and the third bolt

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 6 Alb. Law J. 407, contains only a partial report.]

driven through the outside plank The timber head is fixed in and fastened to the barge in its construction in this wise: "The bottom of the timber head is bolted to the bilge keelson and top timber, also two screw bolts run through the outside and the top timber, through the side clamps inside and the timber head, being one inch bolts, having a big flat head on the outside, fastened on the inside with a nut and a washer." The effect of the drawing of the bolts in the manner described was to make the barge leak through the bolt holes on to the wheat. [The water would go right into the wheat, except what would run in behind the sheathing, the most of it would go into the wheat.] [2] Water did not show in the pump well until it had wetted the wheat, and ran down through the dunnage boards. The upper bolt was in a line with the water.

The barge ran on the bar at Beef slough in the forenoon of the day, in the month of May, and was taken off about six o'clock that evening, and towed down to Alma, about three miles, that night, when it was discovered that she had water in her, and pumping then commenced.

The usual way of getting barges off was not successful—that is to have lines from the barge to the boat, the boat backing and going ahead, sometimes one way and sometimes the other way. The engineer of the steamboat testified, that they pulled at the barge until the guards were torn off the steamboat. The captain then ordered us to drive her off the bar by running the boat against her and butting her off. In doing so we drove in one of the timber heads of the barge. The barge was got off in that way and landed at Alma. One hundred and fifty pounds of steam to the square inch was used in butting the barge off. We made a line fast to the barge and steamboat, giving the line twenty feet slack. The boat drifted back that twenty feet with the current, and then came ahead with both engines strong, and butted the barge off. The barge was struck right against her timber head. The pilot of the steamboat corroborated in substance the testimony of the engineer. The captain saw the injury to the barge, and he had two carpenters on board. The leak could have been discovered by going into the hatch, or by looking into either of the scuttle hatches, or by use of the pumps, which would take water at two inches depth.

The answer does not state truthfully the cause of the injury to the barge. Not one particle of evidence supports the answer in this respect.

In my opinion, the answer does not bring the respondent within the exception of unavoidable dangers of the river. The answer merely alleges that while passing in the usual channel of the river, and proceeding with due care and caution, the barge Fleming struck a bar in the river and stuck fast. It is not alleged that the bar was unknown, or that it could not have been avoided. The barge struck a bar, in broad daylight, which was well known to the pilots. The case of Transportation Co. v. Downer, 11 Wall. [78 U. S.] 129, is referred to as ruling this case. If the record of that trial had contained the facts proven by the master of the steamer, in which the plaintiff's coffee was stored, that he, the master, had not entered the harbor at Chicago for two years, and that he refused a tug, with the additional fact that the channel of the harbor was a shifting channel by means of sand, it is not probable that the supreme court would have decided that that harbor was a peril of navigation. The master was a comparative stranger to that harbor, and was incompetent to navigate his vessel in. With proper knowledge and due care, with the aid of a tug, he could have avoided the accident. With these facts proven, the circuit court, in my opinion, could not consider the defendant as within the exception. The master must be competent to the discharge of his duties before the exception should be allowed. If that case, as reported, is adhered to as law, all that the owners of steamboats are required, in order to bring themselves within the exception, is to show that they encountered shallow water and stuck. Before a shipper should be put to prove negligence on the part of the carrier, the carrier should furnish evidence tending to show that the accident was unavoidable. The allegation in the answer that they were passing down the usual channel and proceeding with due caution and care, may be seen in substance in almost every answer. The boat may have been in the channel, but the barge not. The respondent must show that the boat and barge were in the usual channel, and that the injury was caused by an excepted cause.

The holes knocked in the barge should have been sought for and plugged without delay. The upper hole was visible, and the lower holes might have been discovered by feeling down in the water, and by going into the hatches the leakage no doubt would have been detected. The flowage of water on the wheat was not discovered for several hours after the barge had been towed to Alma. It was the first duty of the captain to use all means in his power for the security of the cargo. For his negelect there is no possible excuse. He is clearly in fault for the damage to the wheat, and a decree must be made for libellants.

[NOTE. Pursuant to an order of reference, the commissioner reported the several amounts paid by the libellants of the loss with interest, to which the claimants filed exceptions, which were overruled. Case No. 10,417. An appeal was then taken to the circuit court, where the decree of this court was affirmed. Case unreported.]

NOTE. That after the stranding of a vessel the master is bound to take all possible care of

[2] [From 4 Chi. Leg. News, 486.]

the cargo, consult The Portsmouth [Case No. 11,295].

That striking on a concealed snag, in the ordinary channel, and not known to pilots, brings the carrier within the exceptions in the bill of lading of "unavoidable dangers of the river." The Keokuk [Case No. 7,721].

The carrier in order to relieve himself from liability for loss or damage must bring himself within the peril excepted in his bill of lading; and the burden of proof is upon him. Clark v. Bonnell, 12 How. [53 U. S.] 272; Chouteaux v. Leech, 18 Pa. St. 233; King v. Shepherd [Case No. 7,804]; Abb. Shipp. 478; 1 Smith, Lead. Cas. 315 et seq.; Fland. Shipp. § 257; Pars. Mar. Law. 348; Chit. Carr. 242.

As to what constitutes unavoidable dangers of navigation, consult same authorities, and The Northern Belle [Case No. 10,319], and authorities there cited.

For the right of a re-insurer who has paid the original insurer, to recover of the carrier, consult The Ocean Wave [Case No. 10,417].

Case No. 10,417.

The OCEAN WAVE.

[5 Biss. 378; [1] 5 Chi. Leg. News, 565.]

District Court, E. D. Wisconsin. Aug., 1873.[2]

LIBEL BY RE-INSURERS.

Re-insurers having paid to the insurer their proportions of a loss insured against, may maintain a libel in rem in their own names to recover of the carrier the amounts so paid, with interest, where the owner had been fully satisfied for the loss by the original insurer.

[Cited in The Robertson, Case No. 11,923.]

This was a libel by the Home Insurance Company of New York, and the Merchants' Insurance Company of the city of Chicago, re-insurers, against the steamboat Ocean Wave. The St. Paul Fire and Marine Insurance Company of the state of Minnesota made assurance upon a cargo of wheat shipped by Beaupre & Kelley on said steamboat, to be transported from St. Paul to Prairie du Chien. The libellants severally re-insured the St. Paul Company in a portion of the amount of its policy. A portion of the cargo being damaged, the St. Paul Insurance Company paid the amount of the loss to the insured. These two insurance companies paid to the St. Paul Company their respective portions of the loss, and bring this libel to recover of the steamboat the amount so paid, with interest, claiming to be subrogated to the rights and interests of the original insurer, and the owner and the shipper in the bill of lading.

In regard to the several policies of insurance, the answer of the claimant neither admits nor denies, but leaves the libellants to make such proof in reference thereto as they may be advised.

The evidence submitted at the hearing on the merits, was the policies of insurance and the receipts for the payment of proportions of the loss, according to the contracts of re-insurance. [A decree was entered for libellants. Case No. 10,416.]

Pursuant to an order of reference, the commissioner reported the several amounts, paid by the libellants, of the loss with interest, to which the claimant's counsel filed exceptions, that the libellants were not legally nor equitably subrogated to the rights and interests of the owners and shippers, and have not thereby any claim or right which they can enforce against the steamboat or the claimant. The libel alleges, that by reason of the re-insurance and the payment of the proportion of the loss, these libellants are subrogated to all the rights and interests of the St. Paul Insurance Company and of the owners and shippers in the bill of lading.

N. J. Emmons, for libellant.

J. W. & A. L. Carey, for respondent, cited [Carrington v. Com. Ins. Co., 1 Bosw. 152]; [3] Herckenrath v. American Mut. Ins. Co., 3 Barb. Ch. 63; Hastie v. De Peyster, 3 Caines, 190; Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Hone v. Mutual Safety Ins. Co., 1 Sandf. 137; King v. State Mut. Fire Ins. Co., 7 Cush. 1.

MILLER, District Judge. This libel is not founded on the privity of contract between the libellants and the shippers or owners of the cargo. There is no such privity of contract. The insured had no claim or demand, either legal or equitable, against these libellants upon their policies of re-insurance.

The libellants re-insured the St. Paul Insurance Company as to portions of its risk. Their contracts were directly with that company, and bound them to pay certain portions of the loss. The libellants indemnified the St. Paul Company against paying the whole loss, to the extent of their policies of re-insurance, which they have paid. They stood in the nature of sureties to the St. Paul Company. It is a certain and fixed rule in equity that sureties, upon paying the debt, or a portion of it, become entitled to collaterals or securities in the hands of the principal, not by privity of contract, but upon the principle of subrogation, or as equitable assignees.

The shipper has been fully satisfied for the loss by the St. Paul Insurance Company, but in part with funds contributed by the libellants upon their policies of re-insurance. The carrier is not presumed to know, or bound to inquire, as to the relative equities of parties claiming satisfaction for the loss. Nor can the carrier be allowed, in a court of admiralty, to set up as a defense the equities between the insurer and the insured, or between several insurers, unless he has made full satisfaction to the proper party in interest, as the owner or the shipper.

In admiralty, the insurer, if he has the equitable right to the whole or any part of

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

[2] [Affirmed by circuit court. Case unreported.]

[3] [From 5 Chi. Leg. News, 565.]

the damages, may intervene and become the dominus litis, when he can show an abandonment of the insured property, or satisfaction of the loss insured against.

The insured might have brought a libel for the use of these several insurance companies; or the St. Paul Insurance Company might have brought its libel for itself and for the use of these libellants. And if the use were not expressed in the record, the insurance companies, or any of them, could intervene for their interests, even after a decree. If such be the practice in admiralty, why should not these libellants be permitted to maintain this libel?

"A mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may be afterwards recovered from other parties on account of the loss. The effect of the payment of a loss is equivalent in this respect to that of an abandonment."

I have disposed of the exceptions without regard to the question whether the matter presented should not have been alleged in the answer.

The exceptions are overruled, and a decree is ordered for the libellants.

NOTE. An appeal was taken to the circuit court, and was heard at the April term, 1875, before Drummond, J., who, in a short oral opinion, expressed concurrence in the judgment of the district judge and affirmed the decree. [Case unreported.]

Phil. Ins. § 1723; The Keokuk [Case No. 7,721]; The Ann C. Pratt, [Id. 409]; The Monticello v. Mollison, 17 How. [58 U. S.] 152; Hill v. Nashville & C. R. Co., 13 Wall. [80 U. S.] 367.

Case No. 10,418.

O'CONNELL v. The TALLY HO.

[28 Hunt, Mer. Mag. 462.]

District Court, S. D. New York. May, 1853.

OWNERS OF VESSELS AND SHIPPERS OF CARGO.

[A vessel laden with corn put into Fayal in distress. Part of the cargo was jettisoned for the safety of the ship, and the balance, part of which was unfit for further transportation, was taken charge of by the American consul, who, being advised by the governor of the island that, owing to the scarcity of provisions, the people would resist its reloading, sold the same, against the protest of the master. *Held*, that the shippers were not bound by such sale, nor the ship owners entitled to freight at such place; that the shippers were entitled to recover the value of the cargo at the port of destination, deducting freight, or the proceeds of the sale at Fayal free of freight; and that the ship owners should contribute to general average on the value of the freight upon the cargo jettisoned.]

[This was a libel in rem by Morgan O'Connell against the brig Tally Ho for breach of a contract of affreightment.]

The vessel, laden with a cargo of corn, etc., from the United States to Londonderry, put into the port of Fayal in distress. A part of the cargo was thrown overboard for safety of vessel, and part was destroyed by perils of the sea, or greatly injured and unfit for further transportation. The vessel and cargo were taken charge of by the American counsel. The said part of cargo, as well as that rotted and perishing, was landed and stored at Fayal. On a survey, it was reported that a sale be made of the deteriorated corn, and the governor of the island advised sale of the said corn because of the scarcity of provisions at Fayal, and distresses of the inhabitants for want of food, and advised the United States consul that an attempt to reload and export the said corn would, no doubt, be resisted by force, and promote a popular rising. The consul ordered a sale of the whole cargo, and paid over part of the proceeds to agents of libelants, and holds balance in his hands. The captain of the vessel protested against the sale of her cargo. The owners of the vessel claim freight in toto, or pro rata itineris. The shipper of the cargo demands the value of the cargo discharged of freight.

HELD BY THE COURT (BETTS, District Judge) that the shippers of the cargo are not bound by the sales and acts of the United States consul at Fayal; that they did not in fact, nor by implication of law, accept delivery of the cargo at Fayal, or ratify the sale, and that the owners of the ship are not entitled to freight at that place; that the ship was bound to deliver the cargo at the port of destination to be entitled to freight; that the owners of the vessel are bound to contribute to general average, on the value of the freight, upon that part of the cargo thrown overboard and sacrificed for safety of vessel; that the libelants recover, at their election, the value of the cargo at the point of destination, deducting freight, or the proceeds of the sale at Fayal, with interest, free of freight; that the claimants are to be credited the amount remitted to libelants from Fayal and accepted by them.

Condemnation of the vessel for the amount, and reference to commissioner to ascertain and report the amount.

O'CONNOR v. The EMPIRE STATE. See Case No. 4,474.

O'CONNOR v. LANG. See Case No. 10,419.

Case No. 10,419.

O'CONNOR v. The OCEAN STAR.

O'CONNOR v. LANG.

[1 Holmes, 248.][1]

Circuit Court, D. Massachusetts. Aug., 1873.

GENERAL AVERAGE—STRANDING.

When a vessel is voluntarily stranded for the general safety of ship, cargo, and crew, the loss thereby is a general average loss.

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

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

Appeals in admiralty from the district court of Massachusetts. That court dismissed the libel of [Jeremiah] O'Connor, appellant, for contribution from the owners of the schooner Ocean Star, to indemnify him, as owner of her cargo, for damage to the cargo and expenses incurred by him, by reason of alleged wrong and negligence of the master, unnecessary stranding, and unjustifiable deviation; and made a decree in favor of the master of the schooner, [William] Lang, upon a libel brought by him against O'Connor, for a general average contribution for the damage to the vessel, upon the ground that it was caused by voluntary stranding. [Case unreported.] The two cases were heard together.

Lathrop, Abbot & Jones, for appellants.
Frank Goodwin, for appellees.

SHEPLEY, Circuit Judge. The schooner Ocean Star sailed from Halifax for Boston, with a cargo of metals and junk belonging to Jeremiah O'Connor. The vessel and cargo, in a gale of wind, were stranded on Nantasket Beach, the vessel having previously struck on "The Hardings," near the entrance of Boston harbor. The cargo was taken out and brought to Boston, the port of destination. The vessel was thereafter got off the beach and towed to Boston. O'Connor, the consignee and owner of the cargo, libelled the vessel for a contribution for the expenses of taking out the cargo on the beach, and for damage claimed by him to have been suffered by the cargo from the weather while on and near the wreck. By an amendment to his libel, he also claimed damages for alleged wrongful and negligent conduct of the master, and by reason of an alleged unjustifiable deviation.

The master of the Ocean Star, William Lang, shortly thereafter filed his libel for a general average contribution, alleging that he voluntarily stranded the vessel on Nantasket Beach, to save the property at risk and the lives of those on board. These libels were heard together, as one case, in the district court. An interlocutory decree was entered in that court for the libellant for a general average contribution, with a reference to a commissioner to assess the damages. On the coming in of the commissioner's report, the exceptions which had been filed by O'Connor's counsel to the report of the commissioner were overruled, and a final decree was entered in favor of William Lang, the master, against O'Connor, for the sum of nine hundred and twenty-four dollars and seventy-five cents.

On the libel of O'Connor against the Ocean Star, the district court made an interlocutory decree for an adjustment, with a reference to a commissioner to assess and report to the court the amount of damages sustained by the libellant. On the coming in of the report of the commissioner, "that no injury was done to the cargo by the stranding or discharging at the place of distress, as a foundation for the claim for a general average contribution," the court overruled the exceptions of O'Connor to the report of the commissioner, and declined to recommit the case to the commissioner, as prayed for by the libellant; and dismissed the libel, with costs for the claimant. An appeal was taken in both cases, and the two appeals were heard at the same time in this court.

I am not satisfied from the evidence in this case that there was any such wrongful or negligent conduct of the master, or any such unjustifiable deviation, as set up by O'Connor, preceding the stranding, as would render him liable for the loss, or deprive the vessel of the right to a general average contribution from the cargo, if the stranding was voluntary. If the stranding had been occasioned or rendered necessary by any such unjustifiable deviation, or wrongful or negligent act of the master, it must be attributed to that fault, rather than the sea peril, although the sea peril may coexist and enter into the case. The Portsmouth, 9 Wall. [76 U. S.] 682. It appears that on the morning of December 6, the vessel was about three miles from Cape Ann, when the schooner shaped her course for Boston light; that, fifteen or twenty minutes after leaving Thatcher's Island, a snowstorm set in, which increased in severity, soon becoming a blinding and furious storm; that the master, deeming it on the whole for the best under the circumstances, still held his course for Boston, the port of destination. Some hours after, the master found himself close to the rock known as "The Hardings," just outside of Boston harbor. In wearing to clear these breakers, the foresail came over and split, and the keel just grazed aft. The master then concluded that his best course was to beach the vessel, and headed her for Nantasket Beach. He shaped his course along the beach, and finally selecting the best place for the purpose, he put her head on Nantasket Beach. It is contended that the master should have made a harbor at Gloucester or Salem, or, if he ran for Boston, should have gone up Broad Sound instead of Light-House Channel. The testimony of the experts shows that it would have been more prudent to have made a harbor of necessity, if the necessity was seasonably apparent. But the evidence fails to show such an impending peril when off Cape Ann, as would certainly have rendered it incumbent on the master to deviate from his course at that time, and make a harbor. When, after passing the cape, the gale increased in intensity, and the thickness of the fog and snow increased, it was too late to have made either Gloucester or Salem. The master was more familiar with the harbor of Boston than with either of the others. Nor do I perceive how he could be charged with culpable negligence in choosing the main ship-channel as he did.

It is well settled in the courts of the United States, that where a vessel and cargo are in common peril, and the master, for the purpose of avoiding the greater peril, selects another and less peril, he can recover compensation in general average from the cargo thereby saved. When a vessel is voluntarily stranded with a view to promote the general safety, the damage to the vessel is a general average loss. It does not prevent a recovery if the stranding was the best thing to be done, regarding only the condition of the vessel. Here was a common peril; a voluntary sacrifice, so far as any such sacrifice which is the foundation for a general average claim is ever voluntary; for there must always be a forced choice,—in the words of Boulay-Paty, "Il faut qu'il ait volonté forcé,"—and a successful attempt to avoid the greater peril.

After careful revision of the exceptions, I see no reason to doubt the correctness of the judgment of the district court overruling the exceptions and confirming the report of the commissioner.

Decree of the district court affirmed with costs; and with interest in the case wherein Lang is libellant.

Case No. 10,420.

O'CONNOR v. The SARAH SANDS.

[See Case No. 3,115.]

Case No. 10,421.

The OCONTO.

[5 Biss. 460.] [1]

District Court, E. D. Wisconsin. Oct., 1873. [2]

STEAM-TUG INSPECTION.

1. A steam-tug employed in towing rafts and lumber on a river exclusively within the state, is not a common carrier, nor liable to seizure for not having been inspected.

2. A seizure must be alleged in order to give the court jurisdiction.

In admiralty. This libel of information was brought under the act of congress, approved February 23, 1871 (16 Stat. 440), entitled "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes," to recover of this steam-tug a penalty of five hundred dollars for not having been inspected.

It is charged that the steam-tug at divers times betwen the 25th day of May, 1871, and the 25th day of May, 1872, was used and employed in the business of towing boats, rafts, and vessels on the navigable waters of the United States, to wit, from the city and port of Oconto, to and about the mouth of the Oconto river, and to sundry ports and places to and upon Green Bay in this district.

The answer of respondents denies the said allegation, and alleges that the tug is a small steamer, and between the times stated in the information, or so much of the time as the Oconto river was not obstructed with ice, she was used and employed in towing rafts of lumber on the Oconto river, and over the bar to vessels, on to which the lumber was to be loaded, and in towing vessels in and about the mouth of the Oconto river for the convenience of loading or unloading the same. It is further alleged that the Oconto river is not a navigable water of the United States within the meaning and intent of the act of congress, and not, in fact, navigable for vessels employed in trade between two or more states; nor is said river susceptible of commerce over which trade or travel is or may be conducted in the customary mode of trade or travel by water; and that the tug was used exclusively in the said business at the mouth of the river, as vessels employed in commerce could not enter the river.

The respondents further allege in their answer that from the advice of counsel they did not believe that the tug so employed in said river came within the provisions, or object, or intent of the act of congress, but to avoid difficulties they had at several times within the said dates applied to the inspectors of hulls and boilers to inspect the tug, but for reasons stated, it was not done.

Levi Hubbell, U. S. Dist. Atty., for the Government.

Finches, Lynde & Miller, for claimants, cited the following: U. S. v. The Seneca [Case No. 16,251]; Act 1871 (16 Stat. 44) §§ 1, 41, 47, 58, 59; The Daniel Ball, 10 Wall. [77 U. S.] 557; The Farragut [Case No. 4,677]; The Bright Star [Id. 1,880]; Navigation Co. v. Dwyer, 29 Tex. 376; Veazie v. Moor, 14 How. [55 U. S.] 568; Elizabethport & N. Y. Ferry Co. v. U. S. [Case No. 4,362]; U. S. v. The Echo [Id. 15,021]; Conway v. Taylor's Ex'r, 1 Black [66 U. S.] 603.

MILLER, District Judge. By the proofs it appears that the Oconto river has its rise and flows into Green Bay within this state. and that boats not drawing over three feet of water may in the season of navigation pass up the river for a distance of about two miles to the small city of Oconto. The steam-tug Oconto was of about 40 tons burden, and from May 25th, 1871, to May 25th, 1872, she was employed in towing rafts and scows out of the river to vessels, and towing scows up to the town. The lumber was floated down the river and tied up at its mouth, and then the tug took the lumber in tow with a long line and towed it over the bar to the vessels lying in the bay, about three-fourths of a mile. After the rafts are towed to the side of the vessels the tug has

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

[2] [Affirmed in Case No. 9,330.]

nothing more to do with them. The vessels when loaded run to their said ports of destination on Lake Michigan. There is no harbor at the mouth of the Oconto river, and if the vessels could not pass over the bar into the river, they anchored in the bay in from 12 to 20 feet of water.

The boiler of the tug burst from the hydraulic test applied for the purpose of determining its strength and safety. The tug had no safety-valve, no water-gauge nor pump, no life preserver nor signal lights. For want of these things, and because of the bursting of the boiler, a certificate was refused. On the 23d of September, 1872, a certificate was given.

The act of 1871 [16 Stat. 440], under which this libel of information is brought, creates a full and well-digested system for the inspection, equipment and management of vessels propelled in whole or in part by steam, for the better security of life on board of such vessels. In the first section of the act it is provided that if any vessel, propelled in whole or in part by steam, shall be navigated without complying with the terms of the act, the owner or owners thereof shall forfeit and pay to the United States the sum of five hundred dollars for such offense, one-half for the use of the informer, and for which sum the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against by way of libel. This is the authority for bringing this libel of information.

Section 59 of the act provides "that the hull and boiler, or boilers of every tug-boat, towing-boat and freight-boat shall be inspected under the provisions of this act." In terms the tug Oconto is within the provisions of the act. But when we consider the constitutional power of congress to regulate commerce with foreign powers and among the different states, was it the intention of congress to require the inspection of a mere tow-boat employed in towing rafts and barges on waters within the state exclusively? The tug is clearly not within the scope of the act as indicated by its title, to provide for the better security of life on board. It had no means or arrangements for the accommodation of passengers. It does not appear that any arrangements were on board even for the accommodation or lodging of the men engaged in its navigation. The tug was not a common carrier of either passengers or freight. It discharged a mere towing duty for vessels employed in trade with this and other states.

The act of June 8, 1864 (13 Stat. 120) § 4, required the inspection of the hull and boiler of every vessel propelled in whole or in part by steam, and engaged as a ferry-boat or tug in towing boats or canal-boat, in all cases where under the laws of the United States such vessel may be engaged in the commerce with foreign nations or among the several states. Under this act a steam-tug employed in towing on the Connecticut river exclusively within the state of Connecticut, was not a vessel engaged in commerce and was not within the provisions of this act. The Farragut [Case No. 4,677].

Over domestic commerce within states congress has no control, although it may be carried on by means of the navigable rivers of the United States, and congress in its legislation steadily kept this in view, and a steamboat engaged in carrying passengers from one small town to others on a navigable river within one state is not required to be inspected. The Bright Star [Case No. 1,880]; Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1; Gilman v. Philadelphia, 3 Wall. [70 U. S.] 713.

From an examination of Act Feb. 28, 1871, section by section, and of all its directions and provisions in connection with the consideration of the constitutional grant of power to congress, the presumption is that the section requiring the inspection of hulls and boilers is not to be construed to embrace this tug. It is neither alleged in the libel nor proven that the tug had been seized. The libel of information will therefore be dismissed.

[On appeal to the circuit court the decree of this court was affirmed. Case No. 9,330.]

NOTE. "Coasting vessels, steamboats, canal boatmen and those on rivers, and ferry men are all common carriers, if their general occupation is to carry for the public." 1 Pars. Shipp. & Adm. 246, 247, note 1, cases there collected.

For a full discussion of what are navigable waters of the United States, and the relative right of control over them by congress and the states, consult The Daniel Ball, 10 Wall. [77 U. S.] 557; The Montello, 11 Wall. [78 U. S.] 411; City of Chicago v. McGinn, 51 Ill. 266–272.

As to the allegation of seizure, see The May [Case No. 9,329]. This case and The May [Id. 9,330] were on appeal to the circuit court affirmed by Judge Drummond in November, 1874.

OCONTO, The. See Case No. 9,330.

Case No. 10,422.

The OCTAVIA.

[1 Gall. 488.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1813. [2]

FORFEITURE IN REM—PLACE OF SEIZURE — JURISDICTION.

The place of seizure, and not the place of committing the offence, gives the court jurisdiction in cases of forfeiture in rem.

[Cited in The Waye, Case No. 17,297; The Fideliter, Id. 4,755; The Washington, Id. 17,222; The Belfast v. Boon, 7 Wall. (74 U. S.) 638; The Idaho, 29 Fed. 192.]

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

[1] [Reported by John Gallison, Esq.]

[2] Affirmed in 1 Wheat. [14 U. S.] 20.

The counsel for [William Nichols and others] the claimants in this cause suggested that the district court of this district had no jurisdiction over the cause, because the trial should be where the forfeiture accrued, viz. in South Carolina district, and not where the seizure was made.

George Blake, for the United States.
William Prescott, for claimants.

STORY, Circuit Justice. I consider that this question has been solemnly settled the other way, and that the place of seizure, and not the place of committing the offence, gives the jurisdiction. I have not therefore thought it necessary to call for an argument.

[On appeal to the supreme court the decree of this court was affirmed. 1 Wheat. (14 U. S.) 20. See Case No. 10,423.]

Case No. 10,423.

The OCTAVIA.

[1 Mason, 149.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1816.

ADMIRALTY—BOND FOR APPRAISED VALUE—PROCEEDING IN REM AGAINST OBLIGORS.

In proceedings in rem, upon a bond for the appraised value given jointly and severally, if one of the obligors dies, the court will proceed against the survivors, or, at the option of the plaintiffs, against the representative of the deceased also.

[Cited in The Wanata v. Avery, 95 U. S. 617; U. S. v. Ames, 99 U. S. 41.]

The ship Octavia was condemned in the circuit court, as forfeited to the United States [Case No. 10,422], and that decree was affirmed in the supreme court, and a mandate directed to the circuit court to proceed to a due execution of the decree. [1 Wheat. (14 U. S.) 20.] The ship, pending the suit, was delivered to the claimants, upon their giving a joint and several bond with surety for the appraised value with the usual condition. After the affirmation of the decree, William Nichols, one of the claimants, deceased; and the district attorney at this term, with a view to relieve the surety, prayed for a monition against the administrators of the intestate, to show cause why a summary judgment should not be rendered against them upon the bond aforesaid. The monition was accordingly granted, and at the return day the administrators did not appear, but made default. And now, the district attorney prayed the court to grant separate judgments and executions upon the bond aforesaid against the administrators, and also against the other parties to the bond. The court, considering this as a new point, in respect to which the practice had not been settled, took time to consider.

G. Blake, for the United States.
Prescott & Gallison, for the surety.

STORY, Circuit Justice. The bond in this case is joint and several, and being taken in a proceeding on the instance side of the court, it is to all intents and purposes a stipulation in the admiralty. It was not from any doubt entertained upon the subject, but simply with a view to consider, what ought to be the practice, that we took time to advise. When any one of the parties to a bond, or stipulation, dies, pending the proceedings, there is no doubt, that this court may, by monition, proceed against the administrators or executors of the deceased. The 31st section of the act of 1789, c. 20 [1 Stat. 90], applies more immediately to suits in personam; but, if it were necessary, we should think, that its equity extended to this case. It is not, however, necessary to place this point upon that statute; for independent of any positive acts, the court has a right, in the exercise of its general admiralty jurisdiction, to reach the effects of the deceased in the hands of his representative. In this case it is at the option of the attorney for the United States to take his separate judgments and executions against the surviving parties to the bond; or to proceed simultaneously against the administrator of the deceased obligor. One satisfaction only, however, can be taken upon the executions. If the surety in this case will bring the money into this court, subject to its order, we will, with the assent of the district attorney, in the exercise of the equitable jurisdiction of the admiralty, allow him to proceed against the principals in the bond and their representatives, in the name of the United States, to enforce his indemnity.

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

Case No. 10,424.

The OCTOROON CASE.

[See Cases Nos. 1,691 and 1,693.]

Case No. 10,425.

The ODDFELLOW.

[Blatchf. Pr. Cas. 372; 20 Leg. Int. 229.] [1]

District Court, S. D. New York. June 29, 1863.

PRIZE—BLOCKADE.

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

In admiralty.

BETTS, District Judge. This vessel and cargo were captured, as prize, at sea, off Little river, North Carolina, by the United States gunboat Monticello, April 15, 1863, and were duly libelled for condemnation in this court May 19 thereafter. No one intervened to claim the property. The master, who is the owner, testifies, on examination, that he re-

[1] [Reported by Samuel Blatchford, Esq.; 20 Leg. Int. 229, contains only a partial report.]

sides, with his family, in Wilmington, North Carolina; that he owns the vessel, and sailed her at the time of her capture; that she ran the blockade out of Wilmington, about 5 o'clock a. m., on the 15th of April, 1863; that she came out under Confederate colors, and was bound to Nassau, N. P.; and that the capture was made near Little river, on the North Carolina coast. The witness seems to say, in answer to the twentieth interrogatory, that "the papers she had on board were burnt, torn, thrown overboard, destroyed, or concealed," but the writing is so indistinct that it is difficult to distinguish whether those statements are asserted or denied by the witness. He says that he knew that the port of Wilmington was blockaded; that he intended, when he came out, to elude the blockade, if he could; and that the cargo was manufacture and produce of North Carolina. The evidence of the other two witnesses furnishes no defence of the vessel, nor is the case proved by the master changed in her favor. The prize was unquestionably enemy property, and was wilfully carried out to sea, in violation of the blockade of Wilmington.

A decree of condemnation and forfeiture must be entered against the schooner and cargo.

Case No. 10,426.

In re ODELL et al.

[9 Ben. 209;[1] 17 N. B. R. 73.]

District Court, S. D. New York. Aug., 1877.

MERCHANT OR TRADESMAN.

A person who keeps in his stable horses belonging to other persons, and feeds such horses with food which he buys, and receives pay for the food which such horses consume, in the amount paid for keeping the horses on livery, sells the food, and is "a merchant or tradesman" within subdivision 7 of section 5110 of the Revised Statutes of the United States, in respect to the discharge of a bankrupt.

[Distinguished in Re Duff, 4 Fed. 521.]

[Cited in Groves v. Kilgore, 72 Me. 491.]

[Application for a discharge. The application was opposed on the ground that the bankrupts [Albert S. Odell and Edgar Odell] had not kept proper books of account.] [2]

G. A. Seixas, for bankrupts.

Mitchell & Mitchell, for opposing creditor.

BLATCHFORD, District Judge. Subdivision 7 of section 5110 of the Revised Statutes provides that no discharge shall be granted to a bankrupt, if, "being a merchant or tradesman," he has not kept proper books of account. It is contended that the bankrupts in this case were neither merchants nor tradesmen. Until October, 1875, when they failed, they were copartners in business. Edgar Odell, in his testimony, describes such business as "livery stable keeping," "and, in addition, buying and selling horses, wagons, harness, and such things pertaining to the business." Further on, he says: "Buying and selling horses means, that, when it was necessary for the business to have any more horses we bought them, and we sold them again when they were disabled or unfit for the business, or slack times, or other reasons of that kind." He also says, that it was no part of the business of the firm to buy anything for the purpose of sale; that they never bought or traded for anything to sell again; that their business was a strictly livery business; that they did no trading of any kind; that they let coaches, horses, sleighs, harnesses, and all that sort of gear for hire, for so much an hour, or so much a month, or so much a day; that they kept horses on livery, for so much a month or so much a day; and that they bought feed, hay and oats, which they used up in the concern, but never sold any. Albert S. Odell says, that the business of the firm was "the livery business," including boarding horses and letting coaches, wagons and horses; that they sold only disabled horses, those that were of no use to the business, some horses not calculated for the business; and that they never bought a horse to sell again, and never sold any grain, hay, oats or feed. Again, he says: "Our firm never bought anything to sell again or to trade. Oh! we traded horses. We traded disabled horses for better horses suitable for the business. Except what we bought and sold or traded as unfit for the business, we never did any buying or trading."

It is stated by the bankrupts that they kept horses on livery or boarded horses, that is, kept in their stables horses belonging to other persons, and fed such horses with hay, oats, feed and grain, buying such food and receiving pay for the food which such horses consumed. This was as much a sale of the food as if it had been sold to be taken away from the premises and consumed by the horses of other persons elsewhere. The only difference is that it was sold to be consumed on the premises by the horses of other persons. The purchaser of the food from the bankrupts paid for it—not indeed by the pound or measure, as the bankrupts bought it, but in the amount paid per month or per day for keeping the horses on livery. It would seem, too, that the bankrupts bought some of their horse-feed on credit, for among their debts is a debt of $200 to one Bowne, a dealer in horse-feed.

The omission to enter in the books of the bankrupts the debts which in their schedule they allege they owe to Blanck, to Dohlman, and to Bowne, is sufficient ground for withholding discharges.

[The case was subsequently heard upon objection to confirmation of resolution of composition. Case No. 10,427.]

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

[2] [From 17 N. B. R. 73.]

Case No. 10,427.

In re ODELL et al.

[9 Ben. 247;[1] 16 N. B. R. 501.]

District Court, S. D. New York. Nov. 27, 1877.

COMPOSITION NOT A DISCHARGE—JURISDICTION—EXPENSES.

1. The mere fact that a bankrupt has been refused a discharge on a specification of objection, is not an absolute bar to a composition.

[Cited in Re Troth, Case No. 14,188; Re Joseph, 24 Fed. 138.]

2. A composition is not a discharge.

[Cited in brief in Clay v. Severance, 55 Vt. 302; First Nat. Bank of St. Albans v. Wood, 53 Vt. 493; Scott v. Olmstead, 52 Vt. 212.]

3. The pendency of a petition to review an order refusing a discharge does not deprive the court of jurisdiction to entertain proceedings for a composition.

4. In confirming a composition, the court ordered the bankrupt to pay to a creditor who opposed it his expenses and disbursements, other than counsel fees, in successfully opposing a prior application of the bankrupt for a discharge.

[In the matter of Albert S. Odell and Edgar Odell, bankrupts. See Case No. 10,426.]

G. A. Seixas, for bankrupts.

E. Mitchell, for creditor.

BLATCHFORD, District Judge. The mere fact that the bankrupts have been refused a discharge in bankruptcy, on a specification of objection, for a cause set forth in section 5110 [Case No. 10,426], is not an absolute bar to a composition. A discharge discharges a bankrupt from his debts, whether there are or are not any assets for distribution. Under a composition, a sum of money is paid in satisfaction of the debt. The debts are not discharged; they are paid and satisfied with the assent of the creditors. The resolution of composition, when confirmed by the court and recorded, is the resolution of all the creditors, and they all accept what is paid in satisfaction of their debts by their own voluntary assent, expressed in the manner specified, whether their names are found as assenting or not, and whether the amount paid be the full debt or less. A composition not being a discharge, the provisions of section 5110 in regard to a discharge do not apply to a composition; nor does the fact that a petition to review the order of this court refusing a discharge is pending in the circuit court, deprive this court of jurisdiction to entertain proceedings for a composition. Under the statutory provisions for composition, the case in bankruptcy is still pending in this court, although such petition of review is pending in the circuit court. A rule of this court, made April 25th, 1877, provides, that "a cause in bankruptcy is not deemed to be finally disposed of until an order is entered in the district court declaring its termination."

The objection as to the proof of debt and note of J. H. & C. S. Odell was not taken in the course of the composition proceedings, or in such manner or at such time that they could be heard in regard to it. It was not objected to when offered. The same observations apply to the objection to the letter of attorney of J. H. & C. S. Odell.

The proposed composition is five per cent., in money, on about $25,000, or about $1,250. There is no evidence that this is not as much as the assets can be expected to realize. The only creditor who opposes the composition is the creditor who successfully opposed the discharge. The creditors seem to be acting in good faith, for their own interests. There seem to be no assets of any value, and no probability of any dividend through an assignee in bankruptcy. The case is not like that of In re Hannahs [Case No. 6,033], in this court. There the composition proposed was one-half of one per cent., and it was clearly an attempt by friendly creditors, without any real benefit to themselves, to give to the bankrupt a satisfaction of his debts.

But I think the bankrupts must, as a condition of the confirmation of the resolution and before it is confirmed, pay to the opposing creditor, Bechet, her expenses and disbursements, other than counsel fees, in opposing the discharge.

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

Case No. 10,428.

ODELL v. FLOOD et al.

[8 Ben. 543.][1]

District Court, S. D. New York. Nov., 1876.

FRAUDULENT TRANSFERS—SECURITY FOR ANTECEDENT DEBT.

F., being insolvent and within six months previous to his being adjudged a bankrupt, made a conveyance of real estate to his wife through A., the consideration alleged being moneys previously given to F. by his wife, for which no evidence of indebtedness existed, and which had always been treated by him as his own property, with her consent. The wife had reasonable cause to believe that the conveyance was made by F. in contemplation of insolvency, and knew that the transfer was made to evade the bankruptcy act. After this conveyance F. took measures to build a house on the premises so conveyed, and for that purpose he bought lumber of J. E. P., holding himself out to J. E. P. as being the owner of the land. J. E. P. afterwards learned of the conveyance by F. to his wife, and, at his solicitation, F. and his wife joined in a mortgage of the premises to him to secure the amount due for the lumber, J. E. P. knowing at the time that F. had deceived him in the matter and that F. was not paying others whom he owed for building the house. An assignee in bankruptcy having been appointed, filed a bill to set aside the conveyances and the mortgage: *Held*, that the conveyance, must be set aside; that J. E. P., under the circumstances, did not occupy the position of a bona fide purchaser without notice.

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

2. Whether J. E. P. could have acquired a mechanic's lien on the premises for the lumber, or not, he had not done so, and he had acquired no right as against the other creditors of F.

This was a bill in equity filed by [James B. Odell] the assignee in bankruptcy of John Flood, to set aside certain conveyances of and a mortgage on real estate. The bill alleged that Flood was adjudged a bankrupt on the 3rd of January, 1874; that, on June 24th, 1873, Flood had made a conveyance to Alanson J. Prime of certain real estate owned by him at Yonkers; that Prime, on the same day, conveyed it to Margaret Flood, the wife of John Flood; that Flood was then insolvent to the knowledge of his wife and of Prime; and that, on the 15th of December, 1873, Flood and his wife mortgaged the premises to Jacob E. Parsons with the intent to give Parsons a preference. The circumstances under which Parsons obtained the mortgage in question are fully detailed in the opinion. The case was heard on bill and answer and proofs.

Charles W. Seymour, for plaintiff.

D. McMahon, for defendants.

BLATCHFORD, District Judge. It is impossible to resist the conclusion, on the evidence, that the transfer of the real estate by John Flood through Mr. Prime to Margaret Flood was entirely without consideration, and was an attempt by him to place his property out of the reach of his creditors. There was not subsisting, at the time, any bona fide recognized relation of debtor and creditor between John Flood and his wife. Whatever moneys had passed from her hands into his, whether such sum as she originally gave him in England or such moneys as she earned by her labor in various ways, had been treated by him always as part of his own property, with her consent, and no claim of indebtedness existed, down to the time he placed this real estate in his wife's name. This transaction took place within six months before the petition in bankruptcy was filed. The evidence shows that the bankrupt, in making this transfer of his real estate, was acting in contemplation of insolvency and that Mrs. Flood had reasonable cause to believe that her husband was acting in contemplation of insolvency and knew that the transfer was made with a view to evade the provisions of the bankruptcy act [14 Stat. 517].

The most important question in this case relates to the mortgage held by the defendant Parsons. The deeds by which the transfer to Mrs. Flood was effected were put on record on the 25th of June, 1873. During the summer of 1873, the bankrupt took measures to build a house upon the land he had transferred to his wife. With this view he purchased lumber for the house from Parsons, concealing from Parsons the fact that the land had been conveyed to Mrs. Flood and holding himself out to Parsons as still the owner of the land. By November 20th, 1873, he owed Parsons for such lumber, beyond the sum of $158 which he had paid on account, the sum of $566.69. For this he gave to Parsons three notes, ante-dated to November 1st, 1873, two for $150 each, due severally at two and three months from date, and one for $266.69, due at four months from date. After that and prior to December 10th, 1873, the indebtedness of the bankrupt to Parsons for lumber was increased $26.26. After that, Parsons learned that the bankrupt had conveyed the property to his wife, and, at his solicitation, the bankrupt and his wife executed to him a mortgage on the property, on the 13th of December, 1873, to secure the payment of the sum of $602.95, being the amount due for the lumber, and the sum of $10 for the expense of drawing the papers. The petition in bankruptcy was filed on the 22nd of December, 1873.

It is true that Parsons was deceived by the bankrupt as to the ownership of the land when he furnished the lumber, and that he furnished it believing that the bankrupt owned the land; and it may well be that he would not have furnished it on the order of the bankrupt if he had supposed that the bankrupt's wife held the title to the land, and that he had an idea that, as he was furnishing the lumber to the owner of the land, to build a house on the land, he could, if necessary, secure a mechanic's lien on the land and building for the price of the lumber. But the deeds, whereby the title was placed in the bankrupt's wife, were on record, and Parsons thus had the means of learning that the title had passed from the bankrupt, before he furnished any of the lumber. When he learned, after the 9th of December, that the property had been transferred to the bankrupt's wife, he chose to waive all other remedy and take the mortgage. At the same time that he learned that the bankrupt's wife held the title to the land, he learned also that the bankrupt was not paying others whom he owed for work in building the house, and he knew that the bankrupt had deceived him and had acted dishonestly, and he told him so. He was clearly put on inquiry, before taking the mortgage, as to the circumstances under which the transfer was made to the wife, and he parted with no property or money as a present consideration for the mortgage. He does not occupy the position of a bona fide purchaser without notice. Sedgwick v. Place [Case No. 12,621].

It is urged that Parsons, if he had not received the mortgage, would have placed a statute lien on the premises, and that, therefore, he is to be regarded as having merely put one security in the place of another. But he had in fact placed no lien on the premises, and the mortgage was not substituted for any other existing lien. Moreover, it is difficult to see how any other lien created on the 13th of December, under the circumstances, in favor of Parsons and against

the land as owned by the wife, would have been of any more avail as against the plaintiff, than the mortgage given by the wife. Whatever inchoate unperfected lien, if any, Parsons may have had a right to, in respect of the land and the building on it, based on the fact that lumber furnished by him entered into the construction of the building, whoever was the owner of the land, Parsons acquired no perfected lien before the rights of the general creditors, represented by the plaintiff in this suit, intervened. He, himself, is one of such general creditors.

There must be a decree for the plaintiff according to the prayer of the bill, with costs against the defendants who have answered.

ODELL v. The WASHINGTON IRVING. See Case No. 17,243.

ODENHEIMER (ASKEW v.). See Cases Nos. 586 and 587.

Case No. 10,429.

ODENHEIMER v. HANSON et al.

[4 McLean, 437.] [1]

Circuit Court, D. Ohio. July Term, 1848.

EQUITY—FRAUDULENT CONVEYANCE—PARTIES TO THE FRAUD.

1. Whatever subterfuges may be resorted to to defeat the claims of creditors, a court of chancery will reach the property conveyed or covered.

2. As between the individuals who have concocted the fraud, chancery will not interfere.

3. Circumstances, in such matters, are sometimes strong enough to stamp the transaction with fraud, although against the oaths of the parties concerned.

In equity.

Hunter & Stanbery, for complainants.

OPINION OF THE COURT. At a former term a decree was entered between the present parties, in which a conveyance of ninety-three and three-fourth acres of land conveyed by A. V. Taylor, one of the defendants, to Miles Hanson, another of the defendants, was held to be fraudulent and void against the complainant, who had obtained a judgment against John Hanson, the land being his property, he having conveyed it to Taylor in fraud of creditors; and the conveyance from Taylor to Miles, the son of John Hanson, being with full notice of the fraud, and he being a participator in it. The only point which remained unsettled by the former decree was, as to the ownership of six hundred dollars which Taylor received from Miles Hanson, on the conveyance to him of the above tract of land.

From the investigation in this case, John Hanson, his son Miles Hanson, and A. V. Taylor, have been held to have acted fraudulently in the transfer of the land, to defeat the claim of the plaintiff, and the only question now is, whether the sum in controversy belonged to John Hanson or his son Miles. Taylor having received the money from Miles, on the fraudulent conveyance of the land, is liable to account for it to the complainant, as a creditor of John Hanson, if the money was advanced by him. Neither John Hanson nor his son Miles could recover the money from Taylor, as no court will ever interpose its authority to settle a matter between particeps criminis. They are left as between themselves, where their own fraudulent acts have placed them. But a court of equity, in such a case, will interpose in behalf of creditors, and for their benefit, reach the property which has been fraudulently covered, and unjustly withheld from them. The original bill charges, that prior to the sale of the above tract, by Taylor to Miles Hanson, John Hanson, "in his own right held a promissory note on John Greenwood, of the city of Columbus, for six hundred dollars, loaned by him to said Greenwood," etc. The answer to the bill by Miles Hanson avers, "that on the 11th February, 1842, he paid said Taylor one hundred and fifty dollars in cash, and gave him a note on John Greenwood for six hundred dollars, which note was given by him to John Hanson. That the note of Greenwood did not belong to his father but to him. That previous to the date of said note, he had laid by the sum of six hundred dollars, and preferring to have it in responsible hands, he sent it to Columbus by his father, who placed it in the hands of John Greenwood, who drew a note payable to his father, which his father, so soon as he returned from Columbus, indorsed to him." The bill charges that the said Taylor fraudulently obtained possession of said note and appropriated it to his own use.

John Hanson, in his answer, denies that he had any interest, equitable or otherwise, in said note, at the time it was assigned to Taylor. It is proved that John Hanson loaned the money to Greenwood, and took the note payable to himself, no statement being made or intimated at the time, that Miles Hanson had any interest in it. And at the same time the note was executed, seventeen dollars interest was paid to John Hanson, due on sums which, being united, made up the amount of six hundred dollars, for which the note was given. The statements in regard to this money, given by John Hanson and Miles, are not consistent with each other, nor with the statements made at different times by themselves. The land purchased did not belong to Taylor but to John Hanson as this court have determined, and this purchase being fraudulent, it is by no means probable, that the money paid by Miles was his own. He had a full knowledge of the transaction, and it is unreasonable to suppose that he would pay six hundred dollars on a fraudulent contract. The fraud was concocted between the three defendants, with the view of

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

defrauding the creditors of John Hanson; he was most interested in putting the property beyond their reach. The payment to Taylor was made to cover the fraud, and the presumptions arising from the facts are strong that the money as well as the land, was furnished by John Hanson. He loaned it as his own, received interest on it, which was an important element in the deliberate fraud that was committed. The acts in regard to the land are so connected that the transaction can not be viewed as a whole, without coming to the conclusion that the whole was fraudulent. In the nature of things, one part, the conveyance of the land, could not be fraudulent, if the money was paid by Miles Hanson. But he acted fraudulently, as we have already determined, and connected together as the parties were, it would seem to be impossible, that a matter in which the fraud consisted, should, in any one of its parts be bona fide. We are satisfied that the money paid for this land by Miles Hanson to Taylor was advanced by John Hanson. And the question that remains is, whether Taylor, who has appropriated it to his own use, shall be held to account for it to the complainant. Taylor has paid no value for it, as the land on which it was paid did not belong to him, but to John Hanson. The money paid, equally with the land, we think, belonged to John Hanson, and is liable to the claims of his creditors. We shall, therefore, decree that the six hundred dollars and interest thereon, from the time it was received, shall be paid to the complainant in —— days, and on failure to pay, that execution shall issue, etc.

ODER, The (WOOLF v.). See Case No. 18,-027.

Case No. 10,430.

ODIORNE v. AMESBURY NAIL FACTORY.

[2 Mason, 28;[1] 1 Rob. Pat. Cas. 300.]

Circuit Court, D. Massachusetts. May Term, 1819.

PATENTS—TWO PATENTS FOR SAME INVENTION.

An inventor cannot, under the patent act of the United States, have two subsisting valid patents at the same time, for the same invention. The first patent, while it remains in full force and unrepealed, is an estoppel to any subsequent patent by the same person for the same invention, and the time of his exclusive right begins to run from that period.

[Cited in Eagle Manuf'g Co. v. Bradley, 35 Fed. 297; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 38; Miller v. Eagle Manuf'g Co., 151 U. S. 186, 14 Sup. Ct. 315.]

This was an action of trespass on the case brought by the plaintiffs against the defendants for the violation of a patent right [No. 4,714] obtained by one Jesse Reed, in the year 1807, for a new and useful improvement in machinery for cutting, griping and heading nails of various sizes at one continued operation, and assigned by said Reed, to the plaintiffs. The defendants pleaded the general issue, and filed the following specification of special matter, to be given in evidence. 1st. That the machine, or combination of machinery claimed by the plaintiffs under the patent stated in the declaration in this cause was not originally discovered by the said Jesse Reed, but by a certain Jacob Perkins, and that the said Jesse Reed has surreptitiously obtained the said patent for the discovery of another person, to wit, of the said Jacob Perkins. 2d. That the machine, or combination of machinery claimed by the plaintiffs under the patent stated in the said declaration was not originally discovered by the said Jesse Reed, but was described in a public work anterior to the said supposed discovery, to wit, in a certain patent issued by the secretary of state, to a certain Jesse Reed, dated the 16th day of September, 1810, and also in a certain patent issued to Guppy & Armstrong, assignees of Jacob Perkins, dated 14th of February, 1799. 3d. That the discovery or invention contained or described in the patent stated in the said declaration, is contained or described in a certain patent issued to the said Jesse Reed, dated 16th of September, 1810, which is still unrepealed, and that a patent of the date last mentioned was granted to the said Jesse Reed for the whole or part of the same invention or discovery patented by the patent stated in the said declaration. 4th. That the patent stated in the said declaration is broader than the discovery or invention of the said Jesse Reed in this, that certain parts of the said alleged discovery or invention were in use prior to the said supposed discovery or invention, and there is nothing in the said patent, by which the said parts can be distinguished from other parts, of which the said Jesse Reed may have been the inventor, and that the parts so in use before the said discovery are the following, to wit, the horns, conductor, clearer and gauge. 5th. That the patent described in the plaintiff's declaration is also broader than the invention or discovery of the said Jesse Reed in this, that a part of the improvement, alleged to have been invented and discovered by the said Jesse, consists in the combination and application of certain parts of the machine described in his said patent, and of certain mechanical powers, which combination and application were in use prior to his alleged discovery. 6th. That the improvements, alleged by the plaintiffs to have been invented by said Reed, contain no new principle or application of principles, or mode of operation, or combination of machinery not before known and in use. 7th. That the machine and combination of machinery, described in the plaintiff's patent and specification recited in the declaration, is the same with the machine and combination of machinery described in a certain patent and

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

specification, issued by the secretary of state to the said Jesse Reed, dated 22d of February, A. D. 1807, which patent, at the circuit court of the United States for the district of Massachusetts at the October term thereof, A. D. 1815, was adjudged to be vacated.

Evidence was produced by the defendants, in the opening of the defence, to prove, that the plaintiffs, in the year 1810, had obtained a patent for the same invention and improvements contained in the patent, for a violation of which this action was brought, and this fact was not denied by the plaintiffs.

George Sullivan, for plaintiffs.

Benjamin R. Nichols, for defendants.

STORY, Circuit Justice. Independent of every other objection, there is one, which seems admitted in point of fact, and is certainly established in evidence, that is decisive against the plaintiffs. It appears that the plaintiffs obtained a patent in September, 1810, substantially for the same invention, and improvements, which are contained in the patent, on which they now sue. That patent remains in full force and unrepealed. It cannot be, that a patentee can have in use at the same time two valid patents for the same invention; and if he can successively take out at different times new patents for the same invention, he may perpetuate his exclusive right during a century, whereas the patent act confines this right to fourteen years from the date of the first patent. If this proceeding could obtain countenance, it would completely destroy the whole consideration derived by the public for the grant of the patent, viz. the right to use the invention at the expiration of the term specified in the original grant. I hold it to be the necessary conclusion of law, that the inventor can have but a single valid patent for his invention; and that the first he obtains, while it remains unrepealed, is an estoppel to any future patent for the same invention founded upon the general patent act. The public have by the first patent acquired an inchoate interest, which cannot be defeated by any merely ministerial acts of the officers of the government.

[For another case involving this patent, see Case No. 10,432.]

Case No. 10,431.

ODIORNE v. DENNEY.

[3 Ban. & A. 287;[1] 1 N. J. Law J. 183; 13 O. G. 965.]

Circuit Court, D. New Jersey. May, 1878.

PATENTS—EQUIVALENTS—NOVELTY—PRIOR PATENT.

1. Though the defendant's machine be more simple, cheaper, and possibly better than the complainant's patented machine, yet if its chief efficiency arises from the use of equivalents to the complainant's patent, it is infringement.

2. A prior patent of which no notice has been given will not be considered as bearing on the question of novelty.

3. Letters patent No. 149,480, dated April 7th, 1874, granted to John C. Hurcombe, for an improvement in machines for fixing metallic rings to umbrella-cases, held to be valid.

[This was a bill in equity by David W. Odiorne against John G. Denney.]

B. F. Lee and F. C. Bowman, for complainant.

Amos G. Hull and R. J. Gwillem, for defendant.

NIXON, District Judge. The bill is filed in this case for an injunction, profits and damages against the defendant, for infringing certain letters patent No. 149,480, and dated April 7th, 1874, for an "improvement in machines for fixing metallic rings to umbrella-cases," originally granted to John C. Hurcombe, and by him assigned to the complainant. The answer of the defendant denies the infringement, and justifies under letters patent No. 182,913, dated October 3d, 1876, and issued to one Robert J. Gemmill, for improvement in apparatus for attaching rings to umbrella-cases. It contains some general allegations, in paragraph 111, that Hurcombe was not the original and first inventor of any material or substantial part of the thing patented and described in the bill of complaint, and that the same has been in public use or on sale in this country for more than two years before his application for a patent. But as no notice was given to the complainant of any special matters to be proved in support of such general allegations, I shall pass at once to the only issue raised in the pleadings.

The complainant's patent is for a machine to be employed in the manufacture of umbrella cases. It embraces mechanism not new in itself, but never before combined in the same manner, or applied to the specific object for which it was designed. Umbrella-cases were usually made of enamelled cloth, and, before the invention described in the patent of the complainant, much difficulty and loss were experienced in their manufacture. The two longitudinal side edges were sewed together inside out. A grooved metallic ring was inserted in the smaller end of the case, and a string was tied around the cloth, pressing it into the groove, so as to attach the end of the case to the ring. It was then necessary to turn the case, and this was accomplished by pressing it over an umbrella, or over a stick of the general shape of an umbrella, and stripping it down from the top or larger end. Sometimes the turning was effected by using a pair of sticks —the case being peeled off one stick onto the other, after the ring had been attached in the mode above described. These processes,

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

however, were slow and comparatively costly— there being a great loss of material from the breaking and cracking of the enamel on the cloth, which could only be avoided by the application of heat to the case when turned. In this state of the art, Hurcombe invented and patented the machine now owned by the complainant. He had two objects in view: (1) To fasten the ring to the umbrella-case more expeditiously and securely than by the old method of tying; (2) to warm the post on which the case was placed inside out, in order to attach the ring, so that the case could be stripped off and turned without delay, and without loss by the cracking and chipping of the enamelled cloth. In the specifications of his patent he describes his invention as follows: "My invention consists, broadly, of a machine for clasping metallic ring-binders to the ends of umbrella-cases and to the ends of the gores of umbrella-covers, so as to confine the fabric between the edges of the metal binder; such machine consisting of an anvil carrying a spring or yielding poppet-holder for the metal binder, and mounted upon a hollow heating-post, so as to retain and present the binder to the action of a clasping-hammer, the heating-post serving to heat and hold the article while being united with the binder, and the spring poppet-holder performing the function of securing the clasped binder upon the anvil, to hold it in position to allow the umbrella-case to be turned right side out in effecting its removal in a heated condition from the post, while such machine combines in its construction a tubular standard connecting with the holding-post and a suitable heater, through which the anvil-post and the standard heated water is made to circulate. The object of such heating apparatus, in connection with the case-holder, is to allow the case to be withdrawn from the anvil post without danger of cracking, defacing, or tearing the glazed case, as would result from its removal in a cold condition." After describing the drawings which accompany the specifications, he then makes eight claims, with none of which we have anything to do in the present case except the fifth, which, complainant alleges, the defendant's machine infringes. The claim is: "In a machine for clasping the metal binders to umbrella covers and cases, a hollow heated post or holder, E, for the umbrella-case, for the purpose stated." The purpose is clearly stated in the specifications, and to these we are entitled to look for the construction of the claim. Thus interpreting it, I am inclined to hold, in accordance with the views of the counsel for the complainant, that the essence of the invention is the use of an iron anvil-post heated at its surface, which comes in contact with the glazed surface of the cloth, thereby softening it at the moment the ring is being clasped to the cloth at the top of the anvil-post, so that it can at once be stripped from the post, and turned right side out as soon as the ring has been compressed and secured by the hammer.

The sole question presented by the pleadings and evidence is: Does the defendant's machine infringe the complainant's? His patent was taken out to accomplish the same results that were attempted in the Hurcombe invention. He calls it "an improvement in apparatus for attaching rings to umbrella-cases." He states that: "The object of his invention is to provide a simple and efficient machine for expeditiously attaching grooved metallic binding-rings to the ends of umbrella-cases and the gores of umbrella-covers, and to allow of the umbrella-case, clamped at its ends by the binding-ring, being turned right side out and removed from its holding-post without tearing or cracking the material of which said case is composed." He substitutes for the hollow, fixed, internally heated iron post of the complainant's patent a solid removable and externally heated iron post, over which the umbrella-case, having been drawn inside out, is drawn or passed. The metallic ring, which is to be affixed to the smaller end of the umbrella-case, is fitted over the end of the anvil-post, and then, instead of bringing down the hammer upon the post, he raises up the post by means of a treadle until it strikes an immovable case having a hollow, into which the top of the post enters, whereby the clasping of the ring to the umbrella-case is effected.

In the two machines there are a number of variations in the details of mechanical construction. But it seems to me that Gemmill has seized the principle of the complainant's patent and its mode of operation, and has studiously sought, by varying the instrumentalities, to avoid the charge of infringement. The language of the late Justice McLean, in Pitts v. Edmonds [Case No. 11,-191], is pertinent here: "A patent, in calling for a specific mode, embraces in law all mechanical equivalents, or modes which operate on the same principle; consequently all modes, however changed in form, but which act substantially on the same principle, and effect the same end, are within the patent. If this were not so, a patent right would be of no value, as it might be avoided by any one who possessed ordinary mechanical skill." The defendant's machine is more simple, cheaper, and possibly better. But its chief efficiency arises from the use of equivalents to the complainant's patent, and the law does not allow even so meritorious a class of men as inventors to appropriate the property of other people to their own use without making satisfactory compensation, or, at least, acknowledging their obligations. The defendant has exhibited in his case a patent granted to one Shadrick H. Pierce in 1868, and his counsel on the argument laid much stress upon its specifications, claiming that they anticipated all the most valuable parts of the Hurcombe patent. But I have given no attention to it in consid-

ering this case, for the reason that the defendant is not allowed to surprise the patentee by evidence of a prior invention of which he has given no notice. See O'Reilly v. Morse, 15 How. [56 U. S.] 110.

I have been inclined to give a benign construction to the complainant's patent, not only because the court should not hasten to deprive patentees of the advantages of a real and meritorious invention on account of the awkward and clumsy manner in which their claims are stated, but also because the evidence strongly suggests, if it does not lead to the conviction, that the defence is a combination on the part of the defendant and his son-in-law, Gemmill, and the inventor, Hurcombe, to deprive the complainant, who has bought and paid liberally for the Hurcombe patent, from enjoying the fruits of his purchase.

Let a decree be entered for an injunction and an account.

Case No. 10,432.

ODIORNE v. WINKLEY.

[2 Gall. 51;[1] 1 Robb, Pat. Cas. 52.]

Circuit Court, D. Massachusetts. May Term, 1814.

PATENTS — LIMITATION TO PARTICULAR IMPROVEMENT—IDENTITY OF TWO MACHINES—WITNESS—COLLATERAL QUESTION TO TEST CREDIBILITY.

1. A witness cannot be asked a collateral question not relevant to the matter in issue, barely to test his credibility.

See Crowley v. Page, 7 Car. & P. 789; Harris v. Tippett, 2 Camp. 637; Com. v. Buzzell, 16 Pick. 157; Ware v. Ware, 8 Greenl. 42; Howell v. Lock, 2 Camp. 14; Perigal v. Nicholson, Wightw. 64; Greenl. Ev. § 423, and cases cited in note.

[Cited in Union Pac. Ry. Co. v. Reese, 5 C. C. A. 510, 56 Fed. 291.]

[Cited in Linn v. Gilman, 46 Mich. 633, 10 N. W. 46; Van Wyck v. McIntosh, 14 N. Y. 447.]

2. The original inventor, is, at all events, entitled to the patent for his invention.

3. If a person invent an improvement only on a machine, he is not entitled to a patent of the whole machine.

See Whittemore v. Cutter [Case No. 17,601].

[Cited in brief in Stevens v. Head, 9 Vt. 175.]

4. The identity or diversity of two machines depends, not on the employment of the same elements of powers of mechanics, but upon the producing of the given effect by the same mode of operation, or the same combination of powers.

[Cited in Whitney v. Emmett, Case No. 17,585; Hotchkiss v. Greenwood, 11 How. (52 U. S.) 269; Singer v. Walmsley, Case No. 12,900; Crompton v. Belknap Mills, Id. 3,406; Converse v. Cannon, Id. 3,144; Willimantic Linen Co. v. Clark Thread Co., Id. 17,763.]

[Cited in Jackson v. Allen, 120 Mass. 75.]

[5. Cited in Whitney v. Emmett, Case No. 17,585, and in Davis v. Bell, 8 N. H. 503, to the point that a patent must not be broader than the invention, or it will be void, not only for so much as had been known or used before the application, but also for the improvement really invented.]

[6. Cited in Delano v. Scott, Case No. 3,753, as to what defenses may be shown under the provisions of the sixth section of the act of 21st February, 1793, in a suit by a patentee for an infringement of his patent.]

Case for infringement of a patent right [No. 4,714] of one Jesse Reed for cutting and heading nails at one operation. The plaintiff claimed as assignee of said Reed. At the trial, the plaintiff produced and proved the patent of said Reed, dated the 22d of February, 1807, and an assignment to himself of the whole of Reed's patent right. He also proved, that the machine was a highly useful invention, and that the defendant used two machines, which, in the opinion of the plaintiff's witnesses, cut and headed nails at one operation, substantially upon the same principles, and by the same mode of operation, as the plaintiff's machines, though there were some differences in the structure and operations of some particular parts. The plaintiff also gave evidence of the value of the use of the machines, so used by the defendant, during the time stated in the declaration, and claimed damages to the amount of the value so proved. The defendant, in his defence, relied on three points: 1. That the machines used by him were not substantially, in principles and mode of operation, like the plaintiff's. 2. That if they were, still that the plaintiff ought not to recover, because the machines so used by him were the invention of one Jacob Perkins, under whom he claimed, who had invented, used and patented the same, long before the invention and patent of the said Jesse Reed; that Reed's patent was too broad, it including Perkins's invention aforesaid, upon which invention Reed had made some improvements, but could not thereby entitle himself to a patent for more than his improvement. 3. That Reed had surreptitiously obtained his patent for the discovery of another man, to wit, of Jacob Perkins. The defendant filed a specification of special matter to be given in evidence under the general issue. The defendant then produced and proved a patent to Jacob Perkins, dated the 14th of February 1799, and models were introduced, and exhibited to the jury, of Reed's machine, and Perkins's machine,—and a number of witnesses were examined by each party, to prove the identity or diversity of the two machines, in all substantial respects, in their principles and modes of operation. One of the defendant's witnesses, Allan Pollock, having been examined, and having testified, that in his judgment the principles and modes of operation of both machines were substantially the same, and having, with reference to the models before him, explained his reasons for his opinion, and described the powers, principles and adjustments of both machines, the counsel for the plaintiff produced the model of another nail machine, invented and used by a third person, under whom nei-

[1] [Reported by John Gallison, Esq.]

ther party claimed, long before the machine either of Reed or of Perkins existed, and proposed to interrogate the witness, as to the principles and mode of operation of said machine, and how far it coincided with, or differed from Perkins's machine; in order, as the counsel stated, to show by his answers, and by other testimony, the incorrectness of the witness in his preceding examination, and in his knowledge of mechanics, and to enable the jury the more fully to estimate the testimony of the witness. This was objected to on the part of the defendant's counsel.

Mr. Fairbanks and B. Whitman, for plaintiff.

Selfridge & Prescott, for defendant.

STORY, Circuit Justice. I am of opinion, that it is an improper inquiry, and overrule it. It can, at best, amount to no more, than going into collateral inquiries, not relevant to the matter in issue, barely to prove a witness to be incorrect. And I hold it a clear rule of law that a witness cannot be asked, as to a mere collateral fact, having no relevancy to the issue, in order to draw from him an answer, which might, by other evidence, be shown incorrect, and thereby to discredit him. Besides, if the inquiry were gone into, it would embarrass the jury, by drawing their attention to the principles of a machine not in controversy before the court, and, whichever way the question as to such machine might be settled, it could have no legal tendency to prove the identity or diversity of the two machines in controversy.[2]

STORY, Circuit Justice (charging jury). The first question for consideration is, whether the machines used by the defendant are substantially, in their principles and mode of operation, like the plaintiff's machines. If so, it was an infringement of the plaintiff's patent to use them, unless some of the other matters offered in the defence are proved. Mere colorable alterations of a machine are not sufficient to protect the defendant. The original inventor of a machine is exclusively entitled to a patent for it. If another person invent an improvement on such machine, he can entitle himself to a patent for such improvement only, and does not thereby acquire a right to patent and use the original machine; and if he does procure a patent for the whole of such a machine with the improvement, and not for the improvement only, his patent is too broad, and therefore void. It is often a point of intrinsic dufficulty to decide, whether one machine operates upon the same principles as another. In the present improved state of mechanics, the same elements of motion, and the same powers, must be employed in almost all machines. The lever, the wheel, and the screw, are powers well known; and if no person could be entitled to a patent, who used them in his machine, it would be in vain to seek for a patent. The material question, therefore, is not whether the same elements of motion, or the same component parts are used, but whether the given effect is produced substantially by the same mode of operation, and the same combination of powers, in both machines. Mere colorable differences, or slight improvements, cannot shake the right of the original inventor. To illustrate these positions; suppose a watch was first invented by a person, so as to mark the hours only, and another person added the work to mark the minutes, and a third the seconds; each of them using the same combinations and mode of operations, to mark the hours, as the first. In such a case, the inventor of the second-hand could not have entitled himself to a patent embracing the inventions of the other parties. Each inventor would undoubtedly be entitled to his own invention and no more. In the machines before the court, there are three great stages in the operations, each producing a given and distinct effect; 1. The cutting of the iron for the nail; 2. The griping of the nail; 3. The heading of the nail. If one person had invented the cutting, a second the griping, and a third the heading, it is clear, that neither could entitle himself to a patent for the whole of a machine, which embraced the inventions of the other two, and, by the same mode of operation, produced the same effect; and, if he did, his patent would be void. Some machines are too simple to be thus separately considered; others again are so complex, as to be invented by a succession of improvements, each added to the other. And, on the whole, in the present case, the question for the jury is, whether, taking Reed's machine, and Perkins's machine together, and considering them with their various combinations, they are machines constructed substantially upon the same principles, and upon the same mode of operation. If they are, then Reed's patent is void, and the plaintiff is not entitled to recover; and the finding of the jury upon the first special point stated in the defendant's specification of defence must essentially depend upon their decision upon this question.

As to the question, whether the patent was surreptitiously obtained, there is no direct or positive proof, that Reed had ever seen Perkins's machine before he obtained a patent, but there is evidence, from which the jury may legally infer the fact, if they believe that evidence. It is a presumption of law that when a patent has been obtained, and the specifications and drawings recorded in the patent office, every man, who subsequently takes out a patent for a similar machine, has a knowledge of the preceding patent. As in chancery it is a maxim, that every man is presumed to have notice of any fact, upon which he is put upon inquiry by documents within his possession, if such fact could, by ordinary diligence, be discovered upon such inquiry. It is also a

[2] See, s. p., Rex v. Watson, 2 Starkie, 149–151; Spenceley v. De Willott, 7 East, 108.

presumption of fact, that every man, having within his power the exact means of information, and desirous of securing to himself the benefit of a patent, will ascertain for his own interest, whether any one on the public records has acquired a prior right.

The jury will judge, under all the circumstances of this case, whether either or any of the points of defence are sustained by the evidence; and if so, they will find their verdict accordingly. If they find a verdict for the plaintiff, the court will treble the damages.

Verdict for the defendant.

A motion for a new trial was afterwards made and abandoned, and judgment was entered upon the records of a vacatur of the patent.

[For another case involving this patent, see Case No. 10,430.]

Case No. 10,433.

ODLIN v. INSURANCE CO. of PENNSYLVANIA.

[2 Wash. C. C. 312;[1] 2 Hall, Law, J. 221.]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

MARINE INSURANCE—TOTAL LOSS—CONTRACT RENDERED UNLAWFUL BY ENACTMENT—RIGHTS OF PARTIES—EMBARGO ACT OF DEC. 22, 1807.

1. Insurance was effected, 21st December, 1807, on the Hazard, to Havana. She cleared on the 21st December, and sailed on the same day, but was detained by head winds, and was afterwards arrested in the bay of Delaware, and prevented from proceeding, under the embargo law, passed 22d December, 1807 [2 Stat. 451], and promulgated at Philadelphia on the 24th December, 1807; in consequence of which, she returned to port, and was abandoned by the plaintiff to the underwriters. The insured was held to be entitled to recover for a total loss.

2. It is a general principle of law, that where a contract is lawful when made, and a law afterwards renders performance of it unlawful, neither party to the contract shall be prejudiced, but the contract is to be considered at an end.

[Cited in Tait v. New York Life Ins. Co., Case No. 13,726.]

[Cited in Potter v. Rio Arriba L. & C. Co., 4 N. M. 322, 17 Pac. 614; Macon & B. R. Co. v. Stamps, 85 Ga. 1, 11 S. E. 444; Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 621.]

3. An embargo does not render the performance of a contract, the execution of which it prevents, unlawful, but only suspends its execution.

[Cited in Kelly v. Johnson, Case No. 7,672. Distinguished in Gray v. Sims, Id. 5,729.]

4. If a law forbid the performance of a contract in part only, he who is bound by it must still perform what he lawfully may.

5. Under the decisions in the English courts, the embargoes laid by governments were considered as temporary restraints only, which did not avoid, but merely suspended the performance of contracts on charter parties, and for seamen's wages.

6. There is no good reason why one may not, for a valuable consideration, in relation to a real transaction concerning property, agree to indemnify another against a loss which would result, in case an embargo, or such a measure, should be adopted by the government.

[Cited in Merchants Ins. Co. v. Davenport, 17 Grat. 156.]

The following case was agreed by the parties, to be considered as a special verdict. The plaintiff caused insurance to be made at the office of the defendants, by a policy dated the 21st of December, 1807, upon the schooner Hazard, valued at 3,500 dollars, for a premium of five per cent. at and from Philadelphia to Havana, prout policies and warranties. The policy was duly sealed by the defendants, the premium paid by the plaintiff, and the vessel was American property. The vessel, with a valuable cargo on board, cleared out at the custom-house of Philadelphia on the 21st of December, 1807, and sailed on the voyage insured; but, owing to head winds, was obliged to stop at Reedy Island, in the river Delaware, and while lying there waiting for a wind, she was arrested, stopped, detained, and prevented from proceeding, by the officers of a revenue cutter, acting under the authority of the president of the United States, in pursuance of an act, entitled "An act laying an embargo on all ships and vessels in the ports and harbours of the United States," passed on the 22d day of December, 1807; which act was received and promulgated by the collector of the port of Philadelphia, on the 24th of December, 1807. The said officers took away all of the ship's papers. Being so, as asserted, prevented from proceeding on her said intended voyage, the said schooner lay at Reedy Island, for some time, after which she was ordered to the city of Philadelphia, by mutual consent of the plaintiff and defendants, without prejudice to the rights or pretensions of the parties in any respect; and has since been sold, by the same mutual consent, for the benefit of whom it might concern. The plaintiff, having received information of the said vessel being so prevented from proceeding, on the 29th of December, 1807, communicated the same to the defendants on the next day, repeated the notice on the 8th day of January, 1808, and, soon after, he abandoned to the defendants, and claimed payment for a total loss. The question submitted to the court is, whether, on the facts stated, the plaintiff is entitled to recover for a total or a partial loss, or whether the defendants are entitled to judgment.

Hopkinson & Dallas, for plaintiff.

Rawle & Lewis, for defendants.

WASHINGTON, Circuit Justice. The question is, whether an embargo, imposed by the government to which the insurer and insured belong, subsequently to the commencement of the risk, furnishes a legal ground of abandonment? The question is thus generally stated, because it will be necessary to inquire—First, whether such an

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

obstruction is within the perils of "arrest, restraint, and detainment of princes, &c.;" and secondly, whether, if comprehended within those expressions, such a contract be repugnant to any principle of law? It is admitted, that this precise case has never received a judicial decision in any of the courts of Great Britain or of the United States, although it has frequently been glanced at by the judges; from whom, however, nothing beyond hints of their opinions can be collected. We are sensible of the difficulty of the question, as well as of its importance to the parties, in this and other similar cases; we derive consolation, however, from reflecting, that our opinion, if wrong, is subject to a revision elsewhere.

The first question to be considered, is, whether a domestic embargo amounts to an arrest, restraint, or detainment of the government? That the expressions used in the policy, are broad and strong enough in themselves to include the case of embargo generally, can scarcely be denied, and is established by the decisions which have taken place in relation to foreign embargoes. Still, however, the question remains, whether an exception is to be implied in relation to an embargo imposed by our own government, upon the ground stated by Valin, that no person is presumed to guaranty the acts of his own prince, without an express stipulation. How it should happen that this question should never have occurred in England, it is impossible for us, with any certainty, to determine. This circumstance has been laid hold of by each side in this cause, and each has endeavoured to turn it to his own advantage. Arguments derived from this source, in general, cut both ways. Although neither can rely upon it as decisive in this case, we think the pretensions of the insured to the benefit of it are best founded, for the following reasons. It is believed that he is quite as apt to claim, in every case where there is a chance of success, as the insurer is to resist; perhaps more so. It is not probable that the former would easily surrender a right, for which the general expressions of the contract seem to afford at least a plausible ground, unless there were some evidence of a usage to qualify and restrain the literal construction. It is much more likely, that the latter, acquiescing in the natural import of the expressions, would be induced to pay the loss, without perceiving, that in principle there could be a distinction between a foreign and a domestic embargo. Another reason, and one which has no inconsiderable weight with the court, is, that this seems to have been the opinion of the French jurists; and although they may have been founded upon positive ordinances, yet it is probable they would in this, as we know they have been in other instances, be regarded by commercial men as evidence of the general law of merchants upon this subject; no judicial decision, and no custom, appearing to the contrary. The sea laws and state ordinances of many of the maritime countries of Europe, have, with some exceptions, gradually become incorporated with the commercial law of England, by a kind of tacit adoption, and are, in these cases, considered as evidence of the custom of merchants. These regulations are read in the British and American courts, and have frequently furnished rules of decision, where the positive law of the country, or former decisions upon the point, had not prescribed a different one. Without taking time to go through, in detail, the different passages from Roccus, Le Gierdon, Valin, Emerigon, and Pothier, we think it may fairly be deduced from what they say, that if a vessel be detained by an embargo, or other temporary restraint, laid by the authority of the French government, after the risk has commenced, the insured may abandon; and the passages where they appear to differ may be reconciled, by considering them as sometimes speaking of a restraint imposed before, sometimes after, the risk has commenced; or differing upon the point, whether the words "commencement of the voyage," in the ordinance of Louis XVI., mean what they express, or, commencement of the risk. These opinions taken in connexion with the unqualified expressions of the contract itself, create a presumption, which is almost irresistible, that the absence of a positive English authority upon this subject, has arisen from a general understanding among merchants and underwriters, that a domestic embargo, equally with a foreign one, is a peril within the words of the policy. In a case where no express authority is to be found, the opinions of men learned in the law, and the dicta of judges, which in other instances should be relied upon with great caution, may not be improperly resorted to, as corroborative evidence of the law. These will now be noticed.

Much greater reliance might be placed on the dictum of Lord Holt, in Green v. Young, 2 Ld. Raym. 840, 2 Salk. 444, if it had been purely a case of embargo; yet it is quoted by Park and Marshall, as if the other circumstances of the case had not influenced the opinion. In Rotch v. Edie, 6 Term R. 413, it is obvious that Lord Kenyon, as well as the counsel on each side, were not impressed with any distinction between a foreign and a domestic embargo; for the judge, after stating that Roccus, Le Gierdon, and Green v. Young, are, upon examination, all one way, and that in favour of the assured; concludes by saying, that as to a domestic embargo, there would perhaps be but little difficulty in deciding it. There can exist very little doubt on which side the inclination of his mind was. In Goss v. Withers, 2 Burrows, 694, the expressions used by Lord Mansfield are certainly very general; and although both Park and Marshall have

pressed them into the service to support their opinions, it is not clear that he had in his view a domestic embargo. In the case of Hore v. Whitmore, Cowp. 784, there is every reason to infer, that the opinion entertained by the bench and bar, was that a domestic embargo affords a cause of abandonment; because, if the contract in that case was either suspended or put an end to, as a consequence of that circumstance, it was perfectly immaterial whether the warranty had been complied with or not. In neither case, could the insured have recovered. In addition to all this, the opinions of Park and Marshall in favour of the right of abandonment, are deserving of respect.

The cases relied upon by the defendants' counsel, will be examined hereafter. At present, it seems proper to inquire whether this construction of the contract is opposed to any principle of law, or to the sound policy of the nation. It is stated on the part of the underwriters, as a general rule, that where a contract is lawful at the time it is made, and a law afterwards renders a performance unlawful, neither party shall be prejudiced, but the contract shall be considered as at an end. This, as a general rule, will not be controverted. But there is an obvious distinction between a law which renders the performance unlawful altogether, and one which merely suspends the performance, without condemning the subject of the contract. If the trade between this country and any other be wholly interdicted, or partially so in relation to particular articles; or if, after the contract to carry goods from this to that other country, war should break out between them, the subject matter of the contract becomes unlawful: the prohibition acts directly upon it, and forbids the performance. It is no answer, that the prohibition may, upon a change of circumstances, be removed: the prohibition defeats the contract, and releases the parties from all its obligations. But, in the case of a temporary restraint upon the performance of the contract, the subject matter of it is not declared to be unlawful—the trade itself is not condemned—the legality of it is rather admitted; but it is not permitted to be performed for the present. Here the rule applies, that if a law forbids performance of a contract in part only, he who is bound by it must still perform what he lawfully may. In the case of an embargo, for example, the ship owner is disabled from commencing his voyage at the specified time; but he is bound to go, when the prohibition is removed. A strict performance is prevented by law, and the law excuses it. What is an embargo? In its nature and design, it imposes a temporary restraint: it is a measure of precaution and state policy, intended by the government either to distress some foreign nation, or to protect the property of its own citizens. It is true, that the embargo imposed by our government, in December 1807, was unlimited as to time, by the terms of it; and the concurrence of the legislative and executive branches of the government, was necessary to remove it. But it was still an embargo. It suspended our intercourse with foreign nations, but did not declare, or mean to declare, that intercourse in itself unlawful. The British embargo, imposed on the 27th of July 1796, in relation to Tuscany, was to continue until the further order of the council; and the Russian embargo was made to depend, for its continuance, upon the compliance of Great Britain with the convention, on her part, in respect to Malta. Both were dependent upon events, which the governments imposing them could not control, and the former did, in fact, continue between two and three years. Yet the nature and essence of the measure were not changed. They were considered as temporary restraints which did not avoid, but merely suspended the performance of contracts upon charter parties, and for seamen's wages, the only cases which were brought judicially into discussion.

Let us now see whether a contract by one person to indemnify another, against loss arising from an embargo, which the government to which the parties belong, may, at any future time impose, is inconsistent with the sound policy of the nation. If it be, it is admitted to be void. If such a contract be made pending the existence of the embargo, it is clearly void; because, unless it is meant that the vessel should sail in defiance of the embargo, the contract itself would be nugatory. We do not mean to speak of contracts to be performed after the restraint is removed. We can see no good reason why one man may not, for valuable consideration, and in relation to a real transaction, concerning property, agree to stand in the shoes of another, as to any loss which may result to that other, in case a measure of this sort should be adopted by the government. The effect of an interest created in one man by such a contract, in opposition to the measure itself, is too remote, as to its influence upon the conduct of the government, to be regarded. If a contract can be avoided, because it may possibly become the interest of one of the parties at some future day, to oppose the passage of a law, which may then be thought beneficial to the state, it is not easy to foresee all the consequences of such a principle; because, there is no supposable subject concerning which a contract may be made, which may not, at some time or other, become also a subject of legislative consideration; and it can seldom happen that any interference of the government, in relation to that subject, will be equally beneficial to both parties. In the case of Hadley v. Clarke [8 Term R. 259], the contract of affreightment raised as strong an interest in the ship owner in opposition to the embargo, as if he had bound himself to indemnify the freighter against it. Yet this

circumstance was not even thought of by the counsel, who argued in opposition to the obligations of the contract. In Touteng v. Hubbard, 3 Bos. & P. 291, which respects the embargo laid by Great Britain on Swedish vessels, Lord Alvanley declares, in the most unqualified terms, that a common embargo does not put an end to any contract between the parties, but that it is to be considered as a temporary suspension of it only; and that the parties must submit to whatever inconveniences may arise, unless they have provided against it by the terms of their contract. He goes on to state the principle of Hadley v. Clarke to be, "that an embargo is a circumstance against which it is equally competent to the parties to provide, as against the dangers of the sea." Now, it is apprehended that in this case, the effect of the American embargo is provided against by the general terms of the policy, and these cases declare explicitly, that such a provision is lawful. Neither is it perceived by the court, that an insurance against a domestic embargo, has a tendency to induce a violation of the law, in case it should be enacted. If the insured be at liberty to abandon, and to recover his indemnity, every temptation to a breach of the law, to which he would have been exposed, if not insured at all, or if he were not at liberty to abandon, is taken away. If he were even bound by a warranty to depart by a certain day, still it could not be his interest to violate the embargo; because, by so doing, he would lose the benefit of the policy, as certainly as he would have done by not complying with the warranty, and would stand precisely in the situation of one who had not insured at all. Upon general principles, therefore, the court is satisfied that such a contract would infringe no rule of law, and would in no respect be inconsistent with the sound policy of the nation. We agree with Lord Alvanley, "that there is no great reason, why one British subject may not insure another against the effects of an embargo laid on by the British government: that the policy of the state is not concerned in preventing such an insurance." 3 Bos. & P. 291. We cannot, however, yield our assent to the hypothesis stated by this learned judge, and which was strongly pressed upon us by the counsel for the defendants in this cause, by which the individual is identified with his government, in order to expose him to the rule of law, that he, who, by his own conduct, prevents the fulfilment of a contract, shall not take advantage of a non-performance on the other side. The doctrine is too refined to be safely applied to the common transactions between man and man. Were we to follow its light, it would probably lead us too far from those legal and practical principles, in relation to questions upon contracts, which the wisdom of ages has matured.

A short examination of the authorities cited by the defendants' counsel, will close this opinion. The general proposition laid down in Salk. 198, Rolle, Abr. 451, Dyer, 28, 1 Ld. Raym. 321, 1 Mod. 169, and some other books, that wherever a contract is lawful when made, and a subsequent statute makes it unlawful, the contract becomes void, has been already noticed, and the distinction taken between a contract declared to be illegal, and one, the performance of which is only suspended. The quotation from Park, 234, does not support the point contended for by the defendants' counsel; that a domestic embargo puts an end to a contract of insurance previously made and in operation. If it did, that author would contradict an opinion which he had before expressed. In the pages referred to, he obviously alludes to an insurance made, pending an embargo, as is manifest from the case of Dalmady v. Motteux, 1 Term R. 89, note, which he cites in support of the principle. The case of Kellner v. Le Mesurier, 4 East, 396, decides only, that an insurance against capture, generally, does not include a capture as prized by the government of the country where the policy was made, for a reason before acknowledged to be a sound one; because such an engagement, eo nomine, would be illegal, being obviously repugnant to the interest of the state. It is for a similar reason that a policy is void, if war should afterwards take place between the respective countries of the assurer and assured. The case of Lacaussade v. White, 7 Term R. 535, is certainly very strong. 2 Esp. 631, was looked at by the court, with a view to discover the ground upon which the wager in that case, was admitted by the counsel to be illegal. We agree with Lord Kenyon, in the general proposition, that a wager, or a contract of any kind, cannot support an action which is contrary to the policy of the state; but we are compelled to differ from him in the application of the principle to that case. Allen v. Hearn, 1 Term R. 56, and Cotton v. Thurland, 5 Term R. 405, are referred to in the nisi prius report of that case. The first was the case of a wager between two voters, as to the success of the respective candidates of each; and every person must yield his assent to the reasons assigned by Lord Mansfield, against the validity of such a wager. The latter case was a wager upon a boxing match, the illegality of which cannot be questioned. It will be found very difficult, we think, to reconcile the principle admitted in Lacaussade v. White, with that laid down in Jones v. Randall, Cowp. 37. There is, however, this difference between the former case and that now before the court. That is a mere gambling contract, nor could any injury arise to either party, by declaring it void. This is a contract of indemnity, against a real loss of property, which a certain measure of government might produce.

Upon the most mature consideration which

it has been in the power of the court to give to this cause, we think, that upon legal principles, upon the reason and policy of the thing, and upon a fair construction of the contract, the plaintiff is entitled to recover for a total loss.

Case No. 10,434.

In re O'DONNELL.

[14 O. G. 379.]

Circuit Court, E. D. Missouri. Sept. 19, 1878.

TRADE-MARKS—SEARCH-WARRANT—ACT OF AUG. 14, 1876.

1. In the absence of any proper proof of the right or title of the applicants, and because the affidavit was lacking in that definiteness and particularity necessary to justify a search-warrant, relief by such process, under section 7, Trade-Mark Act Aug. 14, 1876 [19 Stat. 142], denied.

2. It is dangerous practice to issue search-warrants against several individuals not associated together, or against their premises, because a general sweeping affidavit is made.

This was an application [by James M. O'Donnell] for search-warrant made under section 7 of the penal act of August 14, 1876, in relation to trade-marks, upon affidavit of the alleged agent of the owners of the registered mark. The single affidavit specified several distinct parties, having different places of business, against whom process was desired.

TREAT, District Judge. An application has been made to me, based on an affidavit, for the issue of a search-warrant under the provisions of the United States statutes concerning "trade-marks." Such application, by the terms of the statutes, may be made to any United States circuit court, or district judge, or United States commissioner. I have no time under the press of business to enter upon an extended examination of the questions necessarily arising in this ex parte matter; nor should many of the grave propositions involved be ignored or decided without full hearing. It is supposed by the applicant that a simple presentation of an affidavit, together with the certificate of the commissioner of patents as to the registered trade-mark, entitles him to the writ. The act of congress says said officers "may, within their respective jurisdiction, proceed under the law relating to search-warrants." To what law is reference made? As there is no general law by United States statutes on that subject, and constitutional provisions exist founded on known controversies in England on the subject-matter, it must be held that the general laws to which the constitution refers were intended.

Without passing upon the grave question as to the validity of the act of 1876, or discussing the points involved in the act of 1870, reproduced in the United States Revised Statutes so far as trade-marks are concerned, I refuse the application made, on the ground that the known requirements as to search-warrants, with respect to definiteness and particularity, have not been observed; and also that there is no proper proof that assignment of any supposed or alleged right to such trade-marks have been made to the applicants. It is a dangerous doctrine that "searches and seizures" which, if unreasonable, are forbidden by the United States constitution should be issued against several persons not associated together, or their premises, in one warrant, because a general and sweeping affidavit is made. Such practice would soon bring about the very evils involved in the English controversies concerning general warrants, and provided against by the United States constitution.

Writ refused.

Case No. 10,435.

In re O'DONOHOE.

[3 N. B. R. 245 (Quarto, 59).] [1]

District Court, D. Maine. March 4, 1869.

WITNESS—PRIVILEGE OF ATTORNEY.

When an attorney is not privileged from answering, being called as a witness.

At Bangor, March 4th, 1869, before Charles Hamlin, Esq., register in bankruptcy.

Edmund W. Flagg, of said Bangor, being first duly sworn, and examined at the time and place above mentioned, upon his oath, says, in answer to the questions proposed by H. M. Plaisted, Esq., assignee: Q. 1. Did you have charge or direction of the sale, at auction, of the John O'Donohoe stock of goods, in No. 2 Harlow's Block, Dec. 7th and 9th, 1868? Interrogatory objected to by deponent, who assigns the following reasons therefor: I am a lawyer and member of the Penobscot bar, and admitted to practice in all the courts of the state. I am a stranger to any of the facts inquired of in the interrogatory, and to all and any facts in the cause, except so far as they have been communicated to me by my clients as their professional adviser, and all that has been done by me has been done from information derived from them, and by their direction. I do not consider myself at liberty, and do not believe the law requires counsel to divulge in a court of justice what has been communicated to him by his clients, or what he did while acting in their behalf. My clients are Dennis J. Mullen, and Timothy Sullivan. Q. 2. Did you receive the proceeds of the sale of said stock? Interrogatory objected to by deponent as above, and for same reasons. Q. 3, What was the amount of the sale of said stock of goods?

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Interrogatory objected to by deponent as above, and for same reasons. Q. 4. Did you have in your possession or control the proceeds of said sale, at the time you were served with an injunction from the United States district court for the district of Maine, restraining you from paying over the same to your clients or other parties? Interrogatory objected to by deponent as above, and for same reasons. Q. 5. Have you in your possession or control the proceeds of the sale of said stock of goods? Interrogatory objected to by deponent as above, and for same reasons. Q. 6. Have you ever received, or had in your possession or control, the proceeds of said sale? Interrogatory objected to by deponent as above, and for same reasons. Q. 7. Were you, on or about the 12th of December, 1868, served with an injunction from the United States district court, for the district of Maine, issued on petition of creditors of John O'Donohue, a bankrupt, restraining you from paying over the proceeds of said sale of goods to your clients or other persons? Interrogatory objected to by deponent as above, and for same reasons. A. I was.

On motion of assignee referred to the court, as provided by the act of congress, approved March 2, 1867, § 7 [14 Stat. 520].

By CHARLES HAMLIN, Register:

Were the objections of Mr. Flagg, the witness, against the questions propounded by the assignee, valid, or should they be overruled, and the witness required to answer? This depends upon whether the subject-matter inquired into was a field of legitimate inquiry, and the extent of the privilege allowed by law, which forbids counsel from being compelled to disclose the secrets of his clients. There can be no doubt of the reason for the inquiries of the assignee who proposed the questions. He claims that he can show the witness did have charge of the auction sales, and expects to prove that the proceeds of the sale went into his hands. The inquiry being pertinent, how far is the witness protected from answering, because of his peculiar relations to Mullen & Sullivan, they being clients?

The bankrupt has disclosed on his examination facts tending to show, that when he executed mortgages to those persons and others, he was insolvent, the mortgages being executed September 7th, 1868; that November 7th and 9th, 1868, the stock of goods covered by the mortgages was sold at public auction, the bankrupt having previously executed to Mullen a bill of sale of all his interest as mortgagor, and that Mr. Flagg, the witness, made the writings or mortgages. The question was discussed before me, and some authorities adduced. The assignee relied mainly on section 24, 1 Greenl. Ev., on the ground that the deponent is a party to the transaction, i. e., the sale of the property and the disposition of the proceeds. The law which protects parties in such matters is clearly stated by Greenleaf in 1 Greenl. Ev. c. 13. He says: "The rule is clear and well settled, that the confidential counselor, solicitor, or attorney of the party, cannot be compelled to disclose papers delivered, or communications made to him, or letters or entries made by him in that capacity." If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers, in any court of law or equity, either as a party or as a witness.

And the reason and foundation of the rule is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. Says Chief Justice Shaw: "The law has considered it the wisest policy to encourage and sustain this confidence, by requiring, that on such facts the mouth of the attorney shall be forever sealed." See remarks of Metcalf, J., in Barnes v. Harris, 7 Cush. 576; and the same jurist observes, in Hatton v. Robinson, 14 Pick. 422: "But the privilege of exemption from testifying to facts actually known to the witness, is in contravention to the general rules of law; it is therefore to be watched with some strictness, and it is not to be extended beyond the limits of that principle of policy upon which it is allowed." Such is not only the well-settled rule of law, but the reason and philosophy on which it is founded. How does this cause stand when referred to the rule? Certainly the acts of counsel who took charge of an auction sale, and handled the money arising from such sales, cannot be called privileged communications. They are not matters which comes within the ordinary scope of professional employment. The interests of justice demand, and the administration of justice, especially in a bankrupt court, require, that the fullest examination of the acts of counsel be allowed in such a cause as this.

The privilege in question is confined to communications, and does not apply to the acts of parties. Kelly v. Jackson [13 Ir. Eq. 129], cited in Adams, Eq. (4th Am. Ed.) p. 113.

FOX, District Judge. It is a mistake to suppose that an attorney is privileged from

answering as to everything which comes to his knowledge while he is acting as attorney. The privilege only extends to information derived from his client as such. Information derived from other persons or sources, although derived or obtained while acting as attorney, is not privileged. 7 East, 357. The principle of the rule does not apply to the discovery of facts within the knowledge of an attorney, which were not communicated or confided to him by his client, although he became acquainted with the facts while engaged in his professional duty as the attorney of the client. In 1 Hill, 33, it was decided that if an attorney was present at any transaction in the way of business between his client and a third person, he is not privileged as to what then took place. In Whiting v. Barney, 30 N. Y. 330, the marginal note is: "The rule which protects professional communications of clients to their attorneys from disclosure, should only be held to extend to such communications as have relation to some suit, or other judicial proceeding either existing or anticipated." This is somewhat in conflict with other authorities, but it seems to me to be well sustained by the principles upon which the rule is supposed to rest. In this case Ingraham, J., says, in his opinion: "The decisions settle the rule, that when the disclosures are made in the presence of a third party, they are not privileged."

The answers to the questions propounded to Mr. Flagg in the present case could not possibly have disclosed any privileged communication; they only called upon him to state his own proceedings in the disposition of a stock of goods and the amount he received therefor. It was solely his own acts which he was required to disclose, and not anything whatever which his clients ever communicated to him; these acts were not professional; did not appertain to the duty of an attorney, but were such as any agent could have done, being the ordinary proceedings of an agent in selling the property of his principal, and paying over the proceeds which were the subject of investigation and inquiry. Whatever this witness had done in this behalf was not in his capacity of an attorney or counsel, but was in the character of an ordinary agent of a third party, transacted openly, with the knowledge of many other persons, and with nothing secret or confidential in any respect, so far as appears. In 15 La. Ann. 331, the same course of inquiry was made to a witness, and he was required to answer who was his client, when that relationship commenced and terminated, what money he had received and paid over, and to whom paid.

The law required of Mr. Flagg an answer to each of the questions propounded to him on this examination, and I have no doubt that he will at once make the requisite replies on learning the opinion of the court.

Case No. 10,436.

ODORLESS EXCAVATING APPARATUS CO. v. McCAULEY et al.

[2 Ban. & A. 570.] [1]

Circuit Court, D. Maryland. March, 1877.

PATENTS—VALIDITY—INFRINGEMENT.

The complainant's patents, viz.: one granted to Louis Straus, dated January 28th, 1868, for an "improvement in apparatus for cleaning privies;" one granted to William Painter, dated August 5th, 1873, for an "improvement in pump-valves;" and one granted to William Painter and Lewis R. Keizer, dated October 6th, 1874, for an "improvement in pumps for emptying cesspools"; *held*, to be valid, and that the defendants infringe the same.

[This was a bill in equity by the Odorless Excavating Apparatus Company against Reuben A. McCauley and others.]

J. H. B. Latrobe and Benjamin Price, for complainant.

S. Wilmer and G. H. Howard, for defendants.

GILES, District Judge. The questions in dispute grow out of three patents: one granted to Louis Straus, dated January 28th, 1868 [No. 73,938], for "a new and useful improvement in apparatus for cleaning privies"; another, granted to Wm. Painter, dated August 5th, 1873 [No. 141,587], for "a new and useful improvement in pump-valves"; and a third, granted to Wm. Painter and Lewis R. Keizer, dated October 6th, 1874 [No. 155,670], for "a new and useful improvement in pumps for emptying cesspools." About the complainant's title there is no difficulty; it is admitted. The only questions for consideration relate to the validity of the patents and the alleged infringement thereof.

Taking them in their order, and beginning with Straus' patent, I understand it to mean a tank, a deodorizer and a forcing-pump; or, in other words, a pump which, in addition to the power of creating a vacuum—thereby drawing the matter to be removed into its barrel—has the power of forcing it through a suitable hose-pipe into the tank. Bearing this in mind, we have at once a standard by which to compare the inventions which have been offered in evidence in the shape of letters patent and printed publications. Without going into the examination of these in detail, it is enough to say, that in not one of them have I been able to find an anticipation of the combination described in Straus' first claim, to wit: A reservoir or receiving-tank, a deodorizer and a forcing-engine, by which, as already said, I understand a forcing-pump. Certainly, Poole's endless chain with buckets attached, cannot be regarded as a forcing-pump, and other supposed anticipations are open to the same criticism.

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

In the Painter patent, the third claim is as follows: "In combination with a flap-valve, the stiffeners or braces F, F, arranged at the base to prevent collapsing, substantially as described." Straus, in his forcing-pump, used slide-valves, and one of his claims was for constructing them with cutting edges, so as to facilitate the passage, through his engine or pump, of matter that, if uncut, might choke the valves. Although this machine was an operative one, it was susceptible of improvement, and this was apparently the object of Painter, who employed a valve of india-rubber, whose opposite faces, clasping around any hard object passing between them, would make a tight joint. But a valve of this form was liable to be turned inside out, or, as the witnesses say, technically, to "introversion." To obviate such a result, the stiffeners or braces described in the specification were employed by Painter, whose valve thus became a combination of the flexible and inflexible features.

It has been urged that the Rice patent, which was a contrivance for getting out gravel from the bottom of a well made by boring, was in anticipation of the Painter patent, and much stress was laid on it in the argument. I do not so consider it, neither do I so regard any other of the patents or foreign publications offered in evidence by the defence. It was argued, too, that there was a change in the Straus combination, by the use of the Painter valve in place of the slide-valve of the patentee, which brought this case within the operation of the well-known doctrine laid down in Seymour v. Osborne [11 Wall. (78 U. S.) 516], and Gill v. Wells [22 Wall (89 U. S.) 1], in regard to equivalents. But I do not so hold. The pump or forcing-engine of Straus still remained a forcing-pump, whether it used the other valve with cutting edges or the valve of Painter—the combination was unchanged. Other supposed anticipations of the Painter valve have been offered in evidence, but while in some I find the flexible element, in none of them do I find it combined with stiffeners or braces, as described in his patent.

I now come to the consideration of the Painter and Keizer patent. Three claims of this are alleged to be infringed. The first is for a pump-cylinder with open ends, combined with a valve-piston with rods adjacent to the interior walls of the cylinder, and valves seated practically parallel with its axis; the second is for a modification of the first claim, looking to the same general results; and the third is for a portable pump, in this connection, mounted on an inclined platform. Numerous defences to the alleged infringement of this patent, consisting of supposed anticipations and foreign publications, were made, and I have carefully examined them all. In some there are similar elements to be found, but in none of them is there the same combination, so that I have to hold the defence, resting on the ground of want of originality, as not sustained, and that the prima facie proof of originality, which the production of the patent has given to the complainant, has not been overthrown.

There remains but one question to be considered, viz. the question of infringement, and here the burden of proof is upon the complainants. The exhibits of the machines have afforded great aid to the court. They are undisputed. Portions of two of the machines themselves, employed respectively by complainant and defendants, have been produced in court, as also drawings of the whole apparatus as actually used. A working model, with a glass cylinder, in which the respective valves could be employed alternately, has also aided the court, and from their inspection I hold them to operate upon the same principle, and in the same way. They are both flexible valves, and both are stiffened at the base—complainant's with straps of metal, and defendant's with metal in one piece. They both are, therefore, the same device. This is not a case of equivalents, but is one that comes within the principle laid down by the supreme court, in Gould v. Rees, 15 Wall. [82 U. S.] 192: "Mere formal alterations of a combination in letters patent do not constitute any defence to the charge of infringement, as the inventor of a combination is as much entitled to suppress every other combination of the same ingredients to produce the same result, not substantially different from what he has patented and caused to be patented, as the inventor of any other patented improvement."

The above considerations, together with the oral and uncontradicted testimony, have left no doubt in my mind that the infringements are palpable, and I will sign a decree granting a perpetual injunction and an account.

[NOTE. For another case involving this patent, see Odorless Excavating Co. v. Lauman, 12 Fed. 788. The plaintiffs were the owners also of another patent assigned from Lewis R. Keizer, assignee of Henry C. Bull, patent No. 6,962, reissued February 29, 1876. This patent was declared valid by circuit court (Case No. 10,437), but the supreme court reversed this decision (109 U. S. 641, 3 Sup. Ct. 525).]

Case No. 10,437.

ODORLESS EXCAVATING APPARATUS CO. v. CLEMENTS.

[4 Ban. & A. 540; [1] 16 O. G. 854.]

Circuit Court, D. Maryland. Sept., 1879.[2]

PATENTS—VALIDITY OF REISSUE.

The validity of reissued letters patent, dated February 29th, 1876, No. 6,962, granted to Lew-

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

[2] [Reversed in 109 U. S. 641, 3 Sup. Ct. 525.]

is R. Keizer, assignee of Henry C. Bull, reaffirmed.

[Bill of complaint and for injunction to restrain the alleged infringement, by William E. Clements, of the first and third claims of patent No. 6,962, reissued February 29, 1876, to Lewis R. Keizer, assignee of Henry C. Bull, for apparatus for cleaning privies. The original letters patent, No. 115,565, were granted to Henry C. Bull June 6, 1871.] [3]

William Price, for complainant.

George W. Dyer and O. F. Bump, for defendant.

BOND, Circuit Judge. The validity of this patent, as reissued, was established by this court in the case instituted by the present complainant against Quillan, which was decided by the late Judge Giles, and all the questions as to the validity of the reissue, and the identity of the apparatus covered by this patent, with the apparatus used by the defendant, having been considered and passed upon by Judge Giles in that case, we should not, without most cogent reasons, disturb that decision. The only defence now made, which appears to have been less fully brought to the attention of the court in the Quillan Case, is that of want of novelty in the invention for which complainant's patent was obtained, and to determine this point we have examined all the alleged anticipating inventions which, with much industry and ingenuity, have been brought to our attention, and explained by experts and counsel.

As anticipating the first claim of the complainant's patent, commonly called the "Bull" patent, our attention has been directed to the exhibits showing the patents designated in the testimony as "Straus," "Lesage," "Courdier," "Walter," and "Cherrier." All of these are inventions for cleaning privy-vaults, but the first three are essentially different from the "Bull" patent in principle, being contrivances operated by a force-pump, which draws the material to be removed into the pump and forces it thence into the receiver, not making use of a vacuum in the receiver at all, and not suggesting either the principle or the arrangement of the "Bull" apparatus.

The "Walter" and the "Cherrier" patents are indeed inventions in which, as in the "Bull" patent, atmospheric pressure is used to force the material directly into the receiver, in which a vacuum has been created; but in neither of these do we find any anticipation of the complainant's particular combination, or any thing substantially like it. The "Walter" patent describes a large receiving tank or tun mounted on wheels, with two air-pumps attached to it, which are operated by the turning of the wheels in drawing the machine along, by which a vacuum is created in the large tun or receiving-tank. When the apparatus arrives at the place to be cleaned, one end of a pipe is attached to the receiver, and the other dropped into the material in the vault, and then, by opening the pipe into the receiver, the atmospheric pressure forces the material to run up into the receiver. It is plain, we think, that this cumbersome machine lacks all the essential features of the "Bull" patent, and particularly those by which its inventor designed to give it practical utility in cleaning deep vaults where the atmospheric pressure would not force the material to the surface of the ground, and in allowing the use, as receivers, of such casks as could be easily handled and transported when filled.

The "Cherrier" patent, as shown by the exhibits filed by the defendant, admitting all his exhibits to be properly before us, is an apparatus operated by an air-pump, and a deodorizer arranged with reference to the receiver and the pipe leading to the vault, substantially as in the "Bull" patent; but the receiver, so far from being independently movable, is firmly fastened to a rigid frame at a considerable height above the ground, with a secondary receiver, also firmly fastened, beneath it, and still beneath that the movable vessel in which the filth is to be carried away. It is not, and it never was intended to be an apparatus which could clean a deep vault, or from which the filth could be carried away in the same receiver into which it was forced by atmospheric pressure, and it has not the simplicity and general practical utility which distinguishes the "Bull" patent, and we do not find the two inventions at all in conflict.

The third claim in the complainant's patent, which is for the combination of a portable night soil cask and float-valve, was also passed upon and sustained by the decree in the case against Quillan, and none of the exhibits of other devices and inventions which have been shown and explained to us satisfy us that this contrivance, or any substantially the same, had been patented or was in common use prior to the "Bull" patent. Float-valves do appear to have been very commonly used in connection with water-tanks, steam-boilers, &c.; but the application of a float-valve, in the manner described and designed by the "Bull" patent, to the air-outlet orifice of an air-tight cask so as thereby to stop the working of the air-pump and the inflow of the fluid material at another orifice, we think was a patentable and useful invention, which we have not been satisfied had ever been known before.

The fact of infringement is admitted, if the complainant's patent is sustained, and a decree will be passed in accordance with this opinion, and the cause referred to a master to ascertain the damages.

We have been greatly aided in our examination of the issues raised in this case by the excellent manner in which the testi-

[3] [From 16 O. G. 854.]

mony was taken, and has been printed and presented, and by the able arguments of counsel, and the carefully prepared briefs which were submitted, and which have essentially assisted us.

[On appeal to the supreme court the decree of this court was reversed. 109 U. S. 641, 3 Sup. Ct. 525.]

Case No. 10,438.

ODORLESS RUBBER CO. v. NORTH BENNINGTON BOOT & SHOE CO.[1]

Circuit Court, D. Connecticut. June 16, 1876.

FACTORS—LIABILITY—FAILURE TO INSURE.

[Where the contract between a factor and his principal contained no written or parol agreement that the factor should keep the goods insured, and the principal failed to show that the factor was instructed to insure, or that the usage of trade or habit of dealing between them raised an implied obligation to insure, a subsequent parol undertaking by the factor to "see to" or provide his own insurance did not render him liable for the loss of the principal's goods by fire.]

[This was an action at law by the Odorless Rubber Company against the North Bennington Boot & Shoe Company on account, and for failure to insure goods lost by fire.]

Chas. E. Perkins and Samuel L. Warner, for plaintiffs.

Chas. R. Chapman and G. Collier, for defendants.

SHIPMAN, District Judge. This case was tried by the court, a trial by jury having been waived by written stipulation of the counsel of the respective parties. The facts which are found by the court to have been proved are as follows: The Odorless Rubber Company is a corporation duly incorporated in pursuance of the laws of the state of Connecticut, established and having its office in the city of Middletown in said state. The business of said corporation was, at the time hereinafter mentioned, the manufacture of India rubber goods. The North Bennington Boot & Shoe Company is a corporation duly incorporated in pursuance of the laws of the state of Vermont, and located in the town of North Bennington in said state, and whose business was, at the time hereinafter mentioned, the manufacture of leather boots and shoes, and the sale of all kinds of foot gear. Charles Hall and Thomas B. Harlow, composing the firm of Hall & Harlow, were, on the 2d day of September, 1871, the agents of the defendants, in the city of Chicago and state of Illinois, for the sale of their goods, and of other goods which were consigned to said company, and said agents were fully empowered to enter into the contract hereinafter mentioned. On the 2d day of September, 1871, the plaintiffs, by Horace L. Hall, their duly-authorized agent, and the defendants, by said firm of Hall & Harlow, entered into and executed the written contract, a copy of which is hereto annexed and marked "Exhibit A." Prior to the date of said contract, the defendants had never been the agents or consignees of the plaintiffs. Before and at said date Bigelow was the agent of the plaintiffs in Chicago, and had in his hands a large quantity of their goods to the amount of about $15,000 in value. These goods were, immediately upon the execution of the contract, A, removed from the store of said Bigelow and deposited in the store of the defendants. Additional goods were sent from Middletown to the defendants in Chicago, at the request of said Hall & Harlow, to the value of about $1,000. I do not find that the defendants were ever requested by the plaintiffs to insure, or promised by parol to insure, any of said goods, but the day after the execution of said contract, A, the said Charles Hall had a conversation with said Horace L. Hall in regard to the insurance of all goods which were to be delivered by the plaintiffs to said Hall & Harlow, and which conversation had, in my opinion, immediate reference to the insurance of the goods which were to be turned over to them from said Bigelow. The said Charles Hall informed the said Horace L. Hall that he (Charles) wished to have no misunderstanding in regard to insurance, to which remark Horace L. Hall replied that "there was no misunderstanding; they would see to their own insurance." The defendants did not insure the plaintiffs' goods, and took out no policies after May 20, 1871. The great fire at Chicago, on November 8, 1871, completely destroyed the defendants' store and its contents and all their books and papers. Prior to said fire, the defendants had sold some of the plaintiffs' goods, and were on said day indebted to the plaintiffs for said goods so sold in the sum of $107.99, as nearly as the same can be ascertained, which sum, with the interest thereon, is still due. At the time of said fire, the defendants had goods in their store of the plaintiffs to the amount and value of $15,000, as nearly as the same can be ascertained. The destruction of all the defendants' books and papers renders it impossible to make a more accurate estimate. There was no evidence that there is or was any usage of trade that factors should insure for the benefit of the consignors, in the absence of an agreement or of instructions to that effect.

The conclusions of law are:

1. The contract, A, contains no promise or agreement on the part of the defendants to insure the goods of the plaintiffs. The plaintiffs agree to deliver the goods, which they are to furnish the defendants as the plaintiffs' factors, at the defendants' store in Chicago, with all expenses, including insurance, paid; but the defendants do not, in the contract, assume the burden or duty of effecting insurance, without instructions. They do

[1] [Not previously reported.]

not promise, or place themselves under obligations, to insure.

2. Inasmuch as the defendants have not promised to keep the plaintiffs' property insured, by written or parol agreement, and it is not proved that they received instructions to insure, or that the usage of trade or the habit of dealing between them and their principals raised an implied obligation to insure, but the plaintiffs did by parol, subsequently to the date of the contract, undertake to "see to" or to provide their own insurance, there was no violation of contract obligations, or of instructions, or of duty, by the defendants.

3. Judgment should be rendered in favor of the plaintiffs for $107.99 and interest from November 9, 1871.

Exhibit A.

Chicago, Sept. 2nd, 1871.

It is agreed between the Odorless Rubber Company of Middletown, Connecticut, parties of the first part, and the North Bennington Boot & Shoe Company, of North Bennington, Vermont, parties of the second part, as follows: The Odorless Rubber Company, parties of the first part, in consideration of the agreements hereinafter mentioned, do appoint the North Bennington Boot & Shoe Company, parties of the second part, to act as their agents in Chicago, Illinois, for the exclusive sale of their rubber boots and shoes and water-proof foot gear, and they agree to furnish the parties of the second part with a full line of the same as they may order, at such time and in such quantities as their sales may require, delivering all goods to the parties of the second part at their store in Chicago, Illinois, with all expense paid, including insurance, and they also agree to pay the said parties of the second part five per cent. commission and two and one-half per cent. guaranty, on all sales of their goods which the parties of the second part may make. And the parties of the second part, in consideration of the above, agree to receive the said goods at their store in Chicago, Illinois, and to use their best efforts to sell the same at market rates, not exceeding forty and ten per cent. off from list price, guarantying to the parties of the first part all sales made by them. And the said parties of the second part further agree that they will render an account of sales every thirty days, and pay the same either in cash or notes.

The Odorless Rubber Co.
(Signed) H. L. Hall, Agt.
North Bennington Boot & Shoe Co.
(Signed) Hall & Harlow, Agts.

Filed in court, February 19th, 1872.
Test: Vinal, Clerk.

Case No. 10,439.

In re O'DOWD.

[8 N. B. R. 451.][1]

District Court, S. D. Georgia. Sept., 1873.

BANKRUPTCY—WHAT PASSES TO ASSIGNEE — USUFRUCT IN PROPERTY.

Where the bankrupt has only a usufruct in property, not capable of being transferred by sale, except with the owner's permission, such usufruct does not pass to the assignee in bankruptcy.

[In the matter of Michael O'Dowd, a bankrupt.]

By ALBERT G. FOSTER, Register:

Upon the appointment of the assignee, the entire property of the bankrupt and all interest held by him in property, under the provisions of the fourteenth section of the bankrupt act, are vested in said assignee in the same manner and to the same extent as the same was held by the bankrupt at the time of the filing of the petition against him.

The question as to what interest the assignee took in said property must be determined and controlled by the terms of the written instrument conveying the same from Schley to O'Dowd. The verbal contract in reference to said lease, existing between the parties prior to the execution of said instrument, was on the execution of same merged into and is controlled by it. What interest, then, did O'Dowd take in the property under said instrument? It cannot be that he took an estate for years, for such an estate passes as realty (Irwin's Rev. Code, § 2249), and "the owner has as absolute a right to use the property, as if he had a greater estate, not injuring the revenue" (43 Ga. 226), and the seller's only remedy for unpaid purchase money would be by a common law action, and not by distress, and in that event the relation of landlord and tenant could not exist. In this case, however, the relation of landlord and tenant does exist, it being so expressly stipulated, and this instrument has one of the most marked ingredients of a lease, to wit: The agreement to pay rent; thereby clearly creating the relation of landlord and tenant. The interest of the tenant under said instrument would cease and determine at any time upon the non-payment of the rents, as set forth therein, and the landlord could re-enter, oust the tenant and distrain for rent, which he could not do if O'Dowd's interest in said property was an estate for years.

For these reasons the register is of the opinion that O'Dowd took simply the right to possess and enjoy the use of said property as the tenant of Schley, and not such an interest as could be conveyed by him to a third party without the consent of Schley. Irwin's Rev. Code, § 2253; 41 Ga. 594; 43 Ga. 226; 38 Ga. 121. All of which is respectfully submitted.

ERSKINE, District Judge. I have given the matter involved in this question, certified to me by Register Foster, careful consideration, and my conclusion is that the view he presents in regard to the effect of the lease, &c., is correct, and I affirm his opinion.

Case No. 10,440.

OEBRICKE v. PITTSBURGH.

[See Case No. 10,442.]

1 [Reprinted by permission.]

Case No. 10,441.

In re OEHNINGER.

[8 Ben. 487.][1]

District Court, S. D. New York. July, 1876.

ACT OF BANKRUPTCY — DISSOLUTION OF PARTNERSHIP BY DECREE OF COURT.

W., a member of a firm composed of W., O. & M., brought a suit in a state court against the other two members for a dissolution and closing up of the business of the firm, in which a decree was made dissolving the firm and appointing a receiver of the property to close up the business. O. thereafter filed a petition in bankruptcy, for himself and against W. and M., alleging the insolvency of the firm as a ground of adjudication. *Held*, that the petition for an adjudication, as to W. and M., must be denied.

This was a hearing on a petition for adjudication in bankruptcy. The petition was filed by John Ulrich Oehninger and set up that he, with Henry Wettstein and Albert Meyer, partners in business, under the name of Wettstein, Oehninger & Co., had for six months preceding the filing of the petition, carried on business in New York City, where Wettstein and Meyer had, during that period, resided, the petitioner having till recently resided in France; that the members of the co-partnership owed debts exceeding $300, and were unable to pay their debts in full; that the petitioner was willing to make a surrender of his property and of the property of the partnership for the benefit of creditors and desired to obtain the benefit of the bankruptcy act, but that Wettstein and Meyer refused to join him; and that a receiver had been placed in possession of the assets of the firm, by the collusion of the other two partners, and was disposing of the assets of the firm to the detriment of the creditors. The petition contained other former allegations. It was filed May 11th, 1876.

The other two partners answered separately, setting up, among other things, that Wettstein had brought a suit in the supreme court of the state of New York against the other two partners, for a dissolution of the firm and a winding up of the business; that the other two partners appeared in the action; and that, on May 1st, 1876, a judgment was entered in that action, dissolving the partnership, and appointing a receiver to take the property and close up the affairs of the firm. The issues were referred to the clerk, and, on his report, the matter was brought to a hearing before the court.

J. T. Langan, for Oehninger.

J. C. Bushnell, for Wettstein.

J. A. Balestier, for Meyer.

BLATCHFORD, District Judge. I am not furnished with the copy of the judgment record in the suit in the state court, which was put in evidence before the referee, but I assume that the facts set up in the answers put in, in this court, by Wettstein and Meyer, are true, and that the papers annexed to those answers are authentic. If this be so, it is apparent that the state court acquired jurisdiction of the persons of the three copartners and of their co-partnership property, before the proceedings in bankruptcy were instituted. Those proceedings were not instituted by creditors, and the ground alleged for an adjudication is merely insolvency. This being so, an adjudication as to Wettstein and Meyer must be refused.

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

Case No. 10,442.

OELRICH et al. v. PITTSBURGH.

[1 Pittsb. Rep. 522; 6 Pittsb. Leg. J. 446; 7 Am. Law Reg. 725; 6 Pa. Law J. Rep. 485.]

Circuit Court, W. D. Pennsylvania. May 23, 1859.

MUNICIPAL CORPORATIONS — POWER TO ISSUE BONDS IN AID OF RAILWAY—ASSIGNMENT OF COUPONS.

[1. A statute authorizing "any incorporated company, city or borough, to subscribe to the stock of the railroad as fully as any individual" (Act Pa. April 4, 1837), gives a municipal corporation no authority to issue bonds in payment of its subscription to such stock.]

[2. Under a statute authorizing a municipal corporation to subscribe to the stock of a railroad company, and to borrow money to pay therefor, and to make provision for the payment of principal and interest, but declaring that any certificates or bonds issued therefor "shall be transferable only on the books of the city" (Act Pa. April 21, 1852; Laws 1852, p. 418), interest coupons, which have been attached to the bonds, are not transferable, except in the same manner as the bonds themselves, and one suing upon the coupons cannot recover without showing a legal assignment of the bonds to him. His mere possession of the coupons creates no presumption that he is entitled to the interest.]

[3. Under a statute giving the city full authority to make the bonds and coupons transferable as shall be directed by the city corporation, the fact that the city has issued coupon bonds will raise the presumption that it authorized their issuance in that form by a proper ordinance, although no such ordinance is shown.]

[This was an action by Oelrich and others composing the firm of Oelrich & Co., against the mayor, aldermen, and citizens of Pittsburgh, to recover upon coupons of certain municipal bonds.]

GRIER, Circuit Justice (charging jury). The plaintiffs are a mercantile firm in Hamburg, and have instituted this suit against the mayor, aldermen, and citizens of Pittsburgh, a municipal corporation, chartered by acts of assembly of March 18, 1816 [6 Smith's Laws Pa. p. 357]. The claim set forth in the declaration is for 566 coupons, for interest due on certain bonds issued by the corporation under their seal and signed by the mayor and attested by the treasurer. These coupons are severed from the bonds, as their name shows was intended. Each is for six months' interest on a bond for $1,000, viz. $30. The

execution of them has been proved by the officer who signed them, and is not denied. The bonds to which they were originally attached were given to three several railroad corporations in payment of subscription of stock. The coupons differ (not materially perhaps) in their form, and will be noted hereafter. The declaration claims to recover 566 coupons of $30 each. The plaintiffs have given in evidence but 539 of these; 403 are cut from bonds issued to the Allegheny Valley road, 102 from bonds given to the Pittsburgh & Steubensville road, and 34 to the Chartiers Valley Railroad.

Notwithstanding the many matters which have been introduced into the case, with so much apparent (and, I doubt not, real) earnestness, and no inconsiderable power of rhetorical declamation, the matters to be considered by the court and jury are, as in other cases, questions of law to be decided by the court, and questions of fact to be decided by the jury. The Magna Charta of England, the brave resistance by Hampden and Sidney to the illegal exactions of the crown, the resistance of the American colonies to the stamp act and tea tax, though appropriate in Fourth of July or other harangues, cannot be cited as cases in point to a court and jury, who are bound on their oaths to decide the case according to the laws of the state, as declared by your legislature and construed by your courts. We are here to decide according to the law as it is, not to deliberate what it ought to be. A true verdict, which you are sworn to render, must accord with the evidence before you and the law as expounded to you by the bench. Neither courts nor juries have sovereign or legislative powers to amend the laws where we consider them unwise or tyrannical,—productive only of corruption on one side, and individual hardship on the other.

When the demand for great public improvements by means of railroads and canals first commenced, no man doubted the power of the legislature of the state to make them, and to borrow money, contract loans, issue bonds, and lay taxes on the people to pay both interest and principal. Yet very many of the citizens were opposed to the exercise of this power, and protested that it was in fact mortgaging their property to make improvements whose benefits, if any, would be experienced by but a portion of the people. That this system of lavish borrowing and expenditure by state officials would be the source of much corruption and fraud, if not anticipated, might easily have been foreseen. It was pursued, nevertheless, till the state had accumulated a debt of forty millions, and ended only when she had lost her credit and could borrow no more. The great panic of 1842–43, which reduced the state, for a short time, to a state of temporary insolvency, put a sudden stop to this system of making public improvements by the government, at the expense of the people. The expenditure of such immense sums made flush times, and all were delighted with the system; yet, when they were past, and the hard times, with direct taxation to pay the interest, had arrived, no man thought of repudiating the debt because it was inconvenient to pay, or because some had opposed the system, and many were not benefited by it, or because people who lived out of the state had no opportunity to vote for or against it, or because each particular law had not been submitted to a direct vote of the people. When, therefore, credit was resuscitated, and money became plenty, seeking investment and subjects of speculation—when the mania for railroads again spread over the community—when it was anticipated that every railroad, from any place to another place, or no place, would produce large profits on the investment, would convert villages into cities, and make every city a London, and double and treble the value of land in every county through which they passed, the state being unwilling to involve herself in further debt, and risk a second insolvency, the scheme of city, county, and borough subscriptions was invented and put in practice. This had the appearance, if not the reality, of greater justice and fairness than the original plan of state subscriptions; for the distant counties and boroughs, whose people were not benefited by a particular road, were not compelled to pay for making it, and only those who partook of the expected benefit would have to pledge their credit for the cost of its erection. In this respect only, the scheme differed from the former; and when the legislature would no longer pledge the credit of the state for loans for this purpose, they authorized the inferior municipal corporations to pledge their own if they saw fit. They were presumed to be the best judges of what would contribute most to the prosperity of their respective constituents or corporations. The inhabitants of cities acted through their own councils or legislative representatives; the county, as a quasi corporate body, by their commissioners. These officers were elected directly by the people to attend to their interests; consequently the majority must govern. A minority must necessarily submit to laws enacted by the majority. If the officers elected by a majority had authority in the premises to make a contract, the minority cannot repudiate it. Those who opposed or refused their assent to the act may, with good conscience question its validity, and deny the power of the majority to bind them; but if the act be decided to be legal, they cannot refuse their submission. If they have the benefit of the constitution and laws for their protection, they must be governed by them as construed by their own courts selected for that purpose. The fact that the acts of their officers or legislators have been unwise, and instead of increasing the wealth of the people, have turned out disastrous, cannot be a reason for refusing their obedience to them. They are

their own acts, by imputation, whether they assented or not.

After these general remarks, let us proceed to examine the questions properly arising in the case. Had the corporate authorities of the city of Pittsburgh power to bind the people or corporators by the bonds or securities in question? On the solution of this question your verdict will depend; for I find no dispute about the material facts in evidence. As there are three several and distinct sets of bonds, issued to three corporations under different acts of assembly and ordinances of the corporation, it will be necessary to notice them separately; for it may be possible that the officers acted without authority in one or more, and not in all.

1. The first in order are the bonds issued to the Allegheny Valley Railroad. In support of this authority, we have been referred to the following acts of assembly: (1) The first act affecting this subject was passed April 4, 1837, entitled "An act for the incorporation of the Pittsburgh, Kittanning and Warren Railroad." Although thus named, none of these places are made necessary points in the road or termini thereof, for the company is authorized to make a road from the Allegheny river at the borough of Tarentum to the Ohio river at or near the borough of Beaver. This, however, is immaterial. The first section authorizes certain commissioners to open books and receive subscriptions to the capital stock, and when two thousand shares are subscribed, and four dollars paid on each share, they are to certify this fact to the governor, who is authorized thereon to issue letters patent, constituting the subscribers a body corporate, etc. By the second section of this act, it is enacted that "any incorporated company, city or borough, shall have authority to subscribe thereto, as fully as any individual." The 17th section requires the road to be commenced within five years, and finished within ten years; otherwise the charter shall be void. No charter ever issued, nor was any corporation constituted, under this act, within ten years. (2) But on the 16th of March, 1847, an act [Laws 1847, p. 443] was passed, called a supplement to the first, extending the time for commencing the construction of the road till the 1st day of June, 1852, and of completing it till the 1st of June, 1862. (3) A second supplement thereto was passed April 15, 1851, giving the said company (although no company was yet incorporated) authority to construct a road from Pittsburgh to Kittanning, and thence to the New York state line, and repealing so much of the first act as made Beaver and Franklin termini or points therein. (4) On the 10th of January, 1853, a charter of incorporation was issued by the governor to the "Pittsburgh, Kittanning and Warren Railroad Company." (5) On the 14th of April, 1852, a further supplement was passed [Laws 1852, p. 335], changing the name of the corporation to the "Allegheny Valley Railroad Company," and making some other changes. Section 4 enacts that it shall be lawful for the counties and cities subscribing to the stock "to pay the amount of their subscription, if agreed upon by the parties, by the transfer of stocks held by them in other incorporated companies." (6) Section 6 enacts "that the several acts of the general assembly, limiting the amount of corporate debts of the cities of Pittsburgh and Allegheny, shall not prevent either of said cities from subscribing to the stock of said company."

Have we here any authority to the defendant to issue these bonds and the coupons annexed? This is a question of great magnitude and importance, and my sense of responsibility is somewhat relieved by the knowledge that any opinion I may hastily have formed may be hereafter reviewed by another tribunal; and as I have neither leisure nor opportunity in the haste of a trial at bar to defend by argument the conclusions to which I have arrived, I can but state them briefly, without attempting to vindicate their correctness. The municipal corporation of the city of Pittsburgh, though it acts through a special legislature elected by the citizens, is invested with special, not general, powers. It may pass ordinances in regard to its internal affairs to preserve the peace and the health of the citizens, to regulate the streets of the city, and, in fine, all other matters connected with it which come under the denomination of internal police, for the better government of the city. It may borrow money for the special purposes of the trust and authority confided to it, and lay taxes to raise money for these purposes. But it has no power, by virtue of its act of incorporation, to exercise any discretion in making ordinances for the construction of canals, turnpikes, or railroads, beyond the territorial limits of its jurisdiction. It cannot compel the citizens to become partners or stockholders in private corporations, or pledge or encumber the individual property of the citizens in speculative undertakings. Its powers are only coextensive with its duties. Hence the necessity of a special license from the legislature to a municipal corporation to subscribe for stock in such corporations. Whether the legislature of the state may confer upon the officers of such municipal corporations the power to bind the people of a city or county by bonds, and to burthen them with taxes to raise money for external objects, even of general public interest, or to compel them to become partners in any and every incorporated association, is a question on which much difference of opinion exists. In this state, however, this question has been decided by your own supreme court, the only expounders of your constitution and statutes. To their decision it is your duty to submit, without questioning its propriety.

Assuming, then, that the legislature has the constitutional power to authorize the officers of a municipal corporation to bind the cor-

porators by instruments such as those now declared on, with or without their individual consent, have they been conferred in clear and distinct terms? It is too important and dangerous a power to be assumed from inference or construction. "A statute may invest a corporation with powers contrary to the general rules of law, but they must be granted in clear and unambiguous terms. They must not be implied or presumed, and they must be exercised according to the strict interpretation of the grant. Wilcox, Corp. 26; Kirk v. Norvill, 1 Durn. & E. [1 Term R.] 124. The jurisdiction of a municipal corporation is local, its duties and its powers are local, and any power to act on subjects without must be conferred by the legislature in language which cannot be mistaken."

The second section of the act of April 4, 1837, which is supposed to authorize the execution of the bonds in question, authorizes "any incorporated company, city or borough to subscribe to the stock of the railroad as fully as any individual." It is a bare authority to subscribe for stock, or to become a stockholder in another corporation, as any individual might do. If the subscriber has money to invest in stocks, he may so invest it in this railroad stock. The law gives the municipal officers that permission and nothing more. It confers no authority to issue bonds with or without coupons, or to tax the property of the corporators to pay or lift the bonds, or pay the interest on them. The fourth section of the act of April 14, 1852, authorizes them to pay the amount of their subscription by transfer of other stocks held by them in other corporated companies; and the sixth section of the same act provides that the acts limiting the amount of corporate debts shall "not prevent either of said cities from subscribing" to the stock of the railroad. Here they are authorized to pay in stocks owned in other corporations, but not to contract debts or give bonds. And the release of a former disability cannot be construed to confer a power not before granted.

To support the plaintiff's case on this point, we must decide that the officers of the corporation have an unlimited power to subscribe the whole stock to build the road, say five to ten millions of dollars; and not only so, but to issue bonds binding the corporators to pay principal and interest, and to lay taxes on their property for that purpose,—in other words, to mortgage the whole income of the people of Pittsburgh. The court must instruct you that such an erroneous and irresponsible power as is here claimed is not to be found, either in direct terms or by any legitimate inferences, in the acts of assembly in question. The power is to the full extent I have stated, or it does not exist at all. You are therefore instructed that the officers of the corporation (defendant) had no authority whatever to issue the bonds and coupons declared upon and now produced. This disposes of the case as far as regards the 403 coupons on the bonds issued to the Allegheny Valley Railroad.

2. Let us now examine the authority to issue the bonds to the Pittsburgh & Steubensville Railroad Company. These are issued under two several acts of assembly, which we will examine separately: (1) The first issue is by virtue of the authority conferred by the 3d section of the act of April 21, 1852, which is as follows: (The court here read from the act as set forth on pamphlet, p. 227.) Here we have a direct authority given not only to subscribe for 5,000 shares of the stock of the railroad company, but also to borrow money to pay therefor, and make provision for the principal and interest of the money so borrowed. But it is also enacted that "no certificate of loans or bonds shall be for a less sum than $100, and shall be transferable only on the books of the city." Are these bonds and coupons within the authority thus conferred? (Bond read.) The bonds do not set forth how they are to be transferred, but refer to this act which authorizes their issue. This suit is on the coupons provided for in the bond. The coupons are not directly authorized, but the covenant of the bond is to pay to the railroad company and their assigns. On the back of the bond is endorsed a blank power of attorney to make an assignment on the books; but no assignment has been made. The interest is but an incident to the debt; and unless the plaintiff had the bond assigned to him according to the act, he has no right to demand the interest. There is no covenant to pay to the holder or bearer of the bond, and the interest is due only to the legal holder by assignment, and cannot be made payable to a third person. The act gives no authority to the city officers to make such negotiable instruments having a different mode of transfer from the bonds to which they were attached. Where a bond is payable to bearer, the bearer of the coupons shows a prima facie title to have the interest, because he was owner or holder of the bond when he cut it off. But where no one can show a legal title to the bond but an assignee of the bond, there can be no presumption that he is entitled to the interest by mere possession of a coupon. The plaintiff cannot therefore recover, on the evidence, on any of the coupons taken from bonds of the first issue. (2) As to the second issue: The act is defined, "Act of May 8, 1854" [Laws 1854, p. 709]. (Act read to the jury.) This act does not restrict the bond to assignees on the books of the city, and provides for and authorized the issue of coupons.

3. Lastly, the Chartiers Valley Railroad: (Act Feb. 7, 1853 [Laws 1853, p. 43], § 6, read.) Here is full authority to make the bonds and coupons transferable as shall be directed by the city corporation. There is no city ordinance shown directing that the bonds shall be coupon bonds, but the corporation has issued them in that form; it will be presumed that it was so directed by them. I see no

reason why the plaintiff should not recover on these coupons on the evidence in the case, if believed by the jury.

Thirty-six points or prayers for instruction have been presented by plaintiffs' counsel. The first ten are refused. The eleventh has been given on the charge. Twelfth: It matters not who paid the treasurer for his trouble; the rest of the point is answered in the affirmative. Thirteenth is refused, as also the fourteenth, except as already given. Fifteenth refused. Sixteenth refused; the act authorized the issue of coupons. Seventeenth is given as prayed. Eighteenth is refused. Nineteenth refused. Twentieth refused. Twenty-first refused. Twenty-second refused. Twenty-third has been given; makes twenty-fourth, twenty-fifth, twenty-sixth, and twenty-seventh unnecessary and superfluous. Twenty-eighth has been given. Twenty-ninth, thirtieth, thirty-first, thirty-second, and thirty-third refused. Thirty-fourth refused, the evidence proving the contrary. Thirty-fifth refused under the evidence. Thirty-sixth refused. The plaintiffs have a right to interest on the coupons which the jury shall find to have been legally issued under the previous instructions, with interest from day of payment.

[NOTE. Plaintiffs subsequently sued out a writ of fi. fa., and levied on 656 shares of the capital stock of the Pittsburgh Gas Company, held in the names of the defendants on the books of the corporation. An application to set aside the execution and the levy was refused. Case No. 10,444.]

OELRICH v. PITTSBURGH. See Case No. 10,444.

Case No. 10,443.

OELRICH v. BARNEY.

Circuit Court, S. D. New York. Jan. 18, 1886.

[Cited in Tomes v. Barney, 35 Fed. 115. Reversed by supreme court sub nom. Barney v. Oelrichs, 138 U. S. 529, 11 Sup. Ct. 414. Nowhere reported; opinion not now accessible.]

Case No. 10,444.

OELRICH et al. v. PITTSBURGH.

[17 Leg. Int. 4;[1] 3 West. Law Month. 14; 2 Pittsb. Rep. 93; 7 Pittsb. Leg. J. 81, 249.]

Circuit Court, W. D. Pennsylvania. Sept. 20, 1859.

MUNICIPAL CORPORATIONS—EXECUTION.

Stock owned by a municipal corporation, may be taken in execution and sold under a fi. fa. issued out of circuit courts of United States.

At a recent session of the United States court, this suit, brought against the mayor, aldermen, and citizens of Pittsburgh, was for the interest on city bonds. The plaintiff obtained judgment in the suit for two thousand dollars, and an execution was issued to the marshal. [Case No. 10,442.] The marshal seized upon city gas stock, and threatened to sell it to satisfy the claim. An application was made to Judge M'Candless, to set the levy aside as alleged.

Judge Shaler, for plaintiffs.

Thomas Williams, for defendant.

M'CANDLESS, District Judge. This case was tried at the late term of the circuit court, a verdict rendered in favor of the plaintiffs, and judgment entered on the 23d of May last. Defendants having failed to file their writ of error, issue their citations, give bail, and remove their case to the supreme court of the United States, plaintiffs sued out a fieri facias on the second day of September, and levied on six hundred and fifty-six shares of the capital stock of the Pittsburgh Gas Company, owned by defendants and held in their names on the books of the corporation. An application was made to this court to set aside the execution and the levy, upon the ground that the writ of fieri facias is not the proper remedy and will not lie against a municipal corporation; and that under the law of the state recognized in this court, the process of fieri facias is not the proper one for the seizure and sale of the corporation stock held by the defendants.

This court is impressed with the gravity of the questions presented, and has given to them the consideration which their importance demands.

1. It is contended that the act of the 15th of April, 1784, creating counties and townships bodies corporate, is applicable to cities and boroughs, and that the plaintiffs are limited to the remedy provided in that act. We think not; cities are no where mentioned, except when embraced within a county, and it is declared that they shall form a constituent part of it, reserving to them all the franchises conferred by their respective charters. They were independent bodies politic, capable in law of suing and being sued, and of holding real and personal estate. They were not merged in the counties, and being already corporate bodies, having all the immunities and subject to all liabilities as such, there was no legal necessity for the application of the law to them. Counties, on the contrary, were nondescript bodies, called by the courts, before the passage of the act, quasi corporations, against which the creditor had but an imperfect remedy. They were represented by commissioners, as they are now, but with limited and undefined duties and responsibilities. 10 Serg. & R. 290. It was to remedy this defect that the law was passed. Rep. Comm. Civ. Code, Jan. 4, '89, p. 5. It would be manifestly impracticable to execute the act of '34 as to cities. Upon whom would you serve the writ, which

[1] [Reprinted from 17 Leg. Int. 4, by permission.]

commands the commissioners to pay the judgment out of any unappropriated moneys, or if none, out of the first money that may come into the treasury? Upon the mayor, who represents the general police of the municipality? Upon the controller, treasurer or finance committee, who may have the custody of the public funds, or upon the select and common councils, the legislative body of the city? The act is silent as to cities. There is no provision rendering the corporation officers amenable to the law for this neglect of duty. And when it is remembered that disobedience to the writ is followed by attachment and imprisonment for contempt, and a suspension of the functions of all these public officers, so indispensable to the good order and welfare of the city, there must be some positive enactment, something more than a doubtful construction of an act relating to a different body politic, before this court will apply such a remedy. It would not be equivalent to the issue of a high prerogative writ, resulting in similar consequences, the assumption and exercise of an extraordinary power not expressly given by statute.

It has been urged that inasmuch as municipal corporations are clothed with some attributes of sovereignty, as, for instance, the taxing power, they should not be subject to the exigencies of a writ of execution in the hands of a marshal. But the sovereignty delegated is at least of a bastard nature. Like a fee, the highest estate in realty, when coupled with a qualification, it is denominated a base fee. The corporation is limited and contracted in its powers, which is repugnant to all our conceptions of sovereignty.

We now approach the second point submitted.

2. In the early period of the English law, goods and chattels, or those which are visible or tangible, constituted the great mass of personal property, though the value of them bore no proportion to that of real estate. Bonds, stocks, and other evidences of debt were little known or regarded in the law, and upon writs of fieri facias, the sheriff took only that which could be sold for money. Such was the law of Pennsylvania until alterations made by the act of assembly, passed in 1817, in case of execution against a corporation, authorizing the levy upon current coin of gold, silver, and copper, if other personal property could not be found; and by the act of 1819, which provided that the stock of any body corporate owned by any individual or individuals, body or bodies politic or corporate, in his, her, its or their own name or names, shall be liable to be taken in execution and sold, in the same manner that goods and chattels are liable in law to be taken and sold. Still much remained to be done to give creditors the full benefit of the property of their debtors. The commissioners to revise the Civil Code recommended an execution to be levied on bonds, mortgages, credits, &c., as well as upon stocks of incorporated companies. Report, '35. This was followed by the act of 1836, directing the mode of levying upon stocks by attachment and scire facias, and by another act of the same year, regulating the levy of executions against corporations, followed by sequestration.

Municipal corporations are exempt from the operation of both these acts, and it is admitted with great candor by the learned counsel for the defendant that they are foreign to the case before the court. He contends, further, that although these acts afford no remedy against a municipal corporation, they are part of a general system, which repeals and supplies all former laws. To this it may be replied, that the act of 1836 contains no repealing clause, and the commissioners of the code themselves in their report of January 15, '36, do not treat it so, but say, "in this bill are proposed some important additions to the law." Besides, the supreme court of Pennsylvania had this very question before them in the case of Lex v. Potters, 4 Harris [16 Pa. St.] 295, and decided that the second section of the act of 1819, above quoted, is not repealed by the act of June, 1836. In this opinion this court concurs.

It becomes us here to inquire how the practice in the courts of the United States is affected by this state of the law in Pennsylvania. State laws cannot control the exercise of the powers of the national government, or in any manner limit or affect the operation of the process or proceedings of the national courts. The whole efficacy of such laws in the courts of the United States depends upon the enactments of congress. So far as they are adopted by congress, they are obligatory. Beyond this they have no controlling influence. Congress may adopt such state laws directly by substantive enactments, or they may confide the authority to adopt them to the courts of the United States. [Beers v. Haughton] 9 Pet. [34 U. S.] 359. Examples of both sorts exist in the national legislature. The process act of 1789, c. 21 [1 Stat. 93], expressly adopted the forms and modes of process of the state courts in suits at common law. The act of 1792 [Id. 275], permanently continued the forms of writs, executions, and other processes then in use in the courts of the United States, under the act of '89, but with this remarkable difference, that they were subject to such alterations and additions as the said courts should, in their discretion, deem expedient. The constitutional validity and extent of the power thus given to the courts of the United States, was fully considered by the supreme court of the United States, in the cases reported in [Wayman v. Southard] 10 Wheat. [23 U. S.] 1, and [Bank of U. S. v. Halstead] Id. 51. It was there held that this delegation of power by congress was perfectly constitutional; that the power

to alter and add to the process and modes of proceedings in a suit, embraced the whole progress of such suit, and every transaction in it from its commencement to its termination, and until the judgment should be satisfied, and that it authorized the courts to prescribe and regulate the conduct of the officer in the execution of the final process, in giving effect to its judgments. [Bank of U. S. v. Waggener] 9 Pet. [34 U. S.] 399. But the present case does not depend simply upon the acts of '89 and '92, but is directly within and governed by the process act of 19th May, 1828, c. 68 [4 Stat. 278]. The third section declares that writs of execution and other final process, issued on judgments and decrees rendered in any courts of the United States, and "the proceedings thereupon," shall be the same in each state respectively, as are now used in the courts of such state. Provided, however, that it shall be in the power of the courts, if they see fit, in their discretion, by rules of courts so far to alter final process in such courts, as to conform the same to any change which may be adopted by the legislature of the respective state, for the state courts.

It results, then, that the forms of execution (except their style) from the courts of the United States, their force and effect, and the duty of the marshals in levying, advertising, and selling, are to be ascertained by reference to the laws of the respective states, as they were on the 19th May, 1828, except where the judges by rules of courts have changed the same. Conk. 464. This course was no doubt adopted, as one better calculated to meet the views and wishes of the several states than for congress to have framed an entire system for the courts of the United States varying from that of the state courts. They had in view, however, state systems then in actual operation, well known and understood, and the propriety and expediency of adopting which, they could well judge and determine. Hence, the resolution in the act now used and allowed in the several states. There is no part of the act, however, that looks like adopting prospectively by positive legislative provisions, the various changes that might thereafter be made in the state courts. Had such been the intention of congress, the phraseology of the act would doubtless have been adapted to that purpose. It was, nevertheless, foreseen that changes probably would be made in the process and proceedings in the state courts, which might be fit and proper to be adopted in the courts of the United States; and not choosing to sanction such changes absolutely in anticipation, power is given to the courts over the subject, with a view, no doubt, so to alter and mould their processes and proceedings as to conform to those of the state courts as nearly as might be, consistently with the ends of justice. The general policy of all the laws on this subject is very apparent. It was intended to adopt and conform to the state process and proceedings, as a general rule, but under such guards and checks as might be necessary to insure the due exercise of the powers of the courts of the United States. [Bank of U. S. v. Halstead] 10 Wheat. [23 U. S.] 60. What, then, was the law of Pennsylvania at the date of the passage of this act of congress, on the 19th of May, 1828? Undeniably the act of 1819 was in full force, and it authorized the stock of any body corporate, owned by bodies politic, like the city of Pittsburgh, to be taken in execution under a fieri facias, and sold in the same manner as goods and chattel. The act of 1834, relative to counties and townships, was not then in existence. It has never been adopted by rule of court, as part of the final process of this court, and with the view we have expressed of its provisions, it cannot be as applicable to cities. The sequence to this opinion is that the fieri facias issued in the present case is legal and proper; that the levy upon the stock held by the city of Pittsburgh, in the Pittsburgh Gas Works, has been regularly made; that we must refuse the motion to set them aside; and that the marshal must proceed with the execution of his writ.

Motion refused.

[See Parke v. Pittsburgh, 1 Pittsb. 218.] [2]

OELRICHS (TUCKER v.). See Case No. 14,225.

Case No. 10,445.

In re O'FALLON.

[2 Dill. 548.] [1]

Circuit Court, E. D. Missouri. 1873.

SALE OF PROPERTY BY ASSIGNEE IN BANKRUPTCY —APPROVAL BY COURT.

S. W. Dooley, for purchaser.

S. S. Boyd, for assignee.

PER CURIAM. Where a public sale of the real estate is made by the assignee in bankruptcy under the order of the bankruptcy court, and the property is struck off to the highest bidder, such sale is subject to the approval of the court, which has a discretion to refuse to confirm it for mere inadequacy of price. It is not necessary that there should be fraud or such gross inadequacy of price as to be evidence of fraud.

O'FALLON (UNITED STATES v.). See Case No. 15,911.

[2] [From 2 Pittsb. Rep. 93.]

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

Case No. 10,446.

In re O'FARRELL et al.

[3 Ben. 191;[1] 2 N. B. R. 484 (Quarto, 154); 2 Am. Law T. 106; 1 Am. Law T. Rep. Bankr. 159.]

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

DEATH OF BANKRUPT—DISCHARGE.

If a bankrupt dies during the bankruptcy proceedings, so that he cannot comply with section 29 of the bankruptcy act [of 1867 (14 Stat. 531)], a discharge cannot be granted to such bankrupt, notwithstanding the provision of section 12 of the act, that, "if the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived."

In this case, after the first meeting of creditors, one of the bankrupts, Matthew O'Farrell, died. In the course of the subsequent proceedings, a witness was called on behalf of the dead bankrupt, to give certain evidence with a view that a discharge of such bankrupt might be issued. The evidence was objected to, and the register certified to the court the question, whether, if the debtor dies, after the issuing of the warrant in bankruptcy, the proceedings may be continued and concluded and a discharge granted, as to him, in like manner as if he had lived.

By HENRY WILDER ALLEN, Register: [I, Henry Wilder Allen, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said matter before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Mr. John Todd, who appeared for the bankrupts, and Mr. J. A. Seixas, who appeared for Spies, Christ & Jay, creditors of said bankrupts.

[Mr. William Graham, having been produced as a witness on behalf of the bankrupt, Matthew O'Farrell, was asked the following question: "Had Matthew O'Farrell any interest, directly or indirectly, in any property purchased by you at the assignee's sale of Matthew & Daniel O'Farrell?"

[This question was objected to by the counsel for the creditors, as immaterial, so far as the testimony is offered for the purpose of negativing the testimony heretofore offered by creditors against Matthew O'Farrell, or for the purpose of entitling said Matthew O'Farrell to his discharge in bankruptcy. It is conceded that Matthew O'Farrell died after the issuing of the warrant herein and after a first meeting of creditors, and in the month of November, 1868.

[This testimony is offered with a view that a certificate of discharge may be issued to the said Matthew O'Farrell, notwithstanding his death. The question of law arising, is, if the debtor dies after the issuing of the warrant in bankruptcy, the proceedings may be continued and concluded, and a discharge granted as to him in like manner as if he had lived.

[And the said parties requested that the same should be certified to the judge for his opinion thereon.][2]

BLATCHFORD, District Judge. Although the 12th section of the act declares, that, "if the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived," yet, in view of the fact that the provision is found in a section which relates, exclusively, to proceedings to appropriate the debtor's property to the payment of his debts, and of the further fact that, if the bankrupt is dead, he cannot apply, under section 29, for a discharge, and cannot sign the petition, form No. 51, and cannot take and subscribe the oath required by section 29, I do not think that the word "proceedings" in section 12, can be held to include a discharge, unless there is a compliance with the requirements of section 29, in regard to the application for a discharge and the oath.

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

[2] [From 2 N. B. R. 484 (Quarto, 154).]

OFFICER (METCALF v.). See Case No. 9,496.

OFFICERS AND CREW OF THE SAVANNAH (UNITED STATES v.). See Case No. 16,226a.

OFFLEY (MATTHEWS v.). See Case No. 9,290.

Case No. 10,447.

OFFUT v. HALL.

[2 Cranch, C. C. 363.][1]

Circuit Court, District of Columbia. Nov. Term, 1822.

PLEADING STATUTE OF LIMITATIONS AT TRIAL TERM—REPLICATION.

Where an administrator is defendant, the court, sitting in Alexandria, will permit him to plead the statute of limitations at the trial term; to which plea the plaintiff cannot make more than one replication.

[This was an action at law by Offut's executor against Hall's administrator.]

At May term, 1821, the jury in this cause not being able to agree, a juror was withdrawn; after which, upon the defendant's motion, the court permitted him to plead the statute of limitations.

Mr. Mason, for plaintiff.

Mr. Taylor, for defendant.

At the present term, Mr. Mason, for plaintiff, offered several replications to the plea of limitations, supposing he had a right so to do, under the equity of the statute of Virginia, of the 12th of December, 1792, § 40,

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

by which it is enacted that "the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence."

But THE COURT (THRUSTON, Circuit Judge, absent) said he must confine himself to one replication, which must not be double.

Case No. 10,448.

OFFUTT v. BEATTY.

[1 Cranch, C. C. 213.] [1]

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

OYER AT SUBSEQUENT TERM—DEMURRER—AMENDMENT.

1. After oyer prayed and demurrer by the defendant, the plaintiff is not bound to give oyer at a subsequent term. The defendant should have spread the oyer upon the record.

2. The court will not give leave to amend a demurrer, unless it goes to the merits of the case.

The defendant prayed oyer of the letters testamentary, and demurred thereon to the writ and declaration, especially, because the letters testamentary were not granted in the District of Columbia.

Mr. Morsell, for defendant, had not set forth the letters, but merely stated that oyer was granted in the words following, &c., and then demurred, without having, in fact, had oyer, so that the letters testamentary did not appear, for the plaintiff is not obliged to produce the letters after the term at which they are offered.

Demurrer overruled, and no leave given to pray oyer anew, it not being a demurrer on the merits.

OFFUTT (CUNNINGHAM v.). See Case No. 3,484.

Case No. 10,449.

OFFUTT v. HALL.

[1 Cranch, C. C. 504.] [1]

Circuit Court, District of Columbia. July Term, 1808.

BILLS AND NOTES—BLANK INDORSEMENT—ENGAGEMENT TO PAY IN CASE OF INSOLVENCY OF MAKER—WHAT IS INSOLVENCY—AVERMENT OF CONSIDERATION.

1. If a person who is not party to a promissory note, indorses his name upon it in blank, with intent to give it credit, the plaintiff may write over it an engagement to pay it in case of the insolvency of the maker.

[Cited in McComber v. Clarke, Case No. 8,711.]

2. Ability to pay part of his debts, is not evidence of a debtor's insolvency.

3. Such indorser may insist on the usual demand and notice.

[Cited in McComber v. Clarke, Case No. 8,711.]

4. A count upon a promise to pay the debt of another in a certain event, must aver a consideration.

5. An averment that the defendant put his name on the back of a note with intent to give it a credit, and to induce the plaintiff to accept the same, and that the note so indorsed, was delivered to the plaintiff for a full and valuable consideration, is a sufficient averment of a consideration for the promise.

6. Insolvency of the maker, in Virginia, dispenses with suit and demand and notice.

Assumpsit on a note for $625.95, drawn by Henderson & Company, payable to the plaintiff or order, and the name of the defendant written on the back of it. The plaintiff's attorney had filled up the blank indorsement, in this manner, viz: "In case the within Alexander Henderson & Company, should fail to pay the within-mentioned sum when it becomes due, and should then be insolvent, I then promise to pay the same to the within-mentioned Rezin Offutt. William James Hall."

Mr. Swann, for plaintiff, contended that if he satisfied the jury that the note was indorsed by Hall to give a credit to Henderson & Company with the plaintiff for the amount of the note, then he had a right to fill up the indorsement as he had done, and to recover in this action. Russel v. Langstaffe, Doug. 514; Chit. Bills, 117; Jordan v. Neilson, 2 Wash. [Va.] 164.

E. J. Lee, contra. The plaintiff had no right to fill it up. If anybody had, it was Henderson & Company, for whose benefit it was indorsed. But no one had a right to fill it up. No principle of the common law justifies it. Russel v. Langstaffe was upon the custom of merchants; but this note is not within that custom. In Jordan v. Neilson, there was a written authority to fill the blank. If it is any thing, it is an agreement to pay the debt of another, and the whole agreement ought to be in writing, according to the statute of frauds. It was no promise until it was filled up. No consideration is stated in the indorsement; the consideration forms a part of the agreement. Wain v. Warlters, 5 East, 10.

CRANCH, Chief Judge. Is the word "promise" in the English statute? The words used in the act of assembly are, "promise or agreement."

E. J. Lee. There must be a good and valuable consideration moving from the plaintiff to the defendant. There must be a benefit to the defendant, or the plaintiff must have parted with some right or property on the credit of the defendant. 2 Bl. Comm. 445; 1 Fonbl. 331, 332; Rann v. Hughes, 7 Term R. 350, note.

Evidence was offered by the plaintiff to prove that upon bargaining with Henderson & Company for his tobacco, they offered him

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

their note, payable to himself, without an indorser; that he refused to accept it; when they brought the note again with the defendant's name indorsed upon it.

THE COURT instructed the jury, that if they should be satisfied by the evidence that the note was indorsed by the defendant under the circumstances stated, and for the purpose of giving a credit to Henderson & Company, and to induce the plaintiff to sell his tobacco to Henderson & Company, the defendant is liable to the plaintiff upon such indorsement; but that it was necessary for the plaintiff to prove that the payment of the note was demanded from Henderson & Company, when due, and that reasonable notice of non-payment was given to the defendant.

E. J. Lee then prayed, but THE COURT refused to instruct the jury that if, when the note became due, viz., 18th January, 1804, Henderson & Company had property sufficient to pay this note, and did pay debts to the amount of $14,375,95, and continued to pay their debts until the month of March, 1804, the plaintiff cannot sustain this action.

Bill of exceptions taken by the defendant.

On prayer of Mr. Lee, THE COURT instructed the jury that if they should be satisfied by the evidence that the note would have been paid by Henderson & Company, if it had been regularly demanded, and that it was not so demanded, they ought to find for the defendant.

The jury could not agree. But there was a verdict for the plaintiff at November term, 1808, on the three first counts, and for the defendant on the fourth count [case unreported], and the defendant moved in arrest of judgment [Id. 10,450].

Case No. 10,450.

OFFUTT v. HALL.

[1 Cranch, C. C. 572.][1]

Circuit Court, District of Columbia. Nov. Term, 1809.

PLEADING—AVERMENT OF CONSIDERATION—INDORSEMENT—INSOLVENCY OF MAKER.

1. A count upon a promise to pay the debt of another in a certain event, must aver a consideration.

2. An averment that the defendant put his name on the back of a note with intent to give it credit, and to induce the plaintiff to accept the same, and that the note so indorsed was delivered to the plaintiff for a full and valuable consideration, is a sufficient averment of a consideration for the promise.

3. Insolvency of the maker, in Virginia, dispenses with suit and demand and notice.

Assumpsit. Verdict for the plaintiff, at November term, 1808, on the three first counts, and for the defendant on the last count. [Case unreported. See Case No. 10,449.]

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

Motion in arrest of judgment. 1. Because the undertaking, set forth in the counts upon which the verdict is taken, is void in law. 2. Because the declaration does not aver that payment of the note was ever demanded of Henderson & Co. 3. Because the declaration does not aver that the defendant had notice of the non-payment of the note by the makers. 4. Because the whole proceedings and verdict are informal and insufficient in law.

The 1st count of the declaration. Whereas on the 17th of September, 1803, Alexander Henderson & Company, by their note in writing, promised to pay to the plaintiff, or order, $625.95 in one hundred and twenty days after date, for value received. And the defendant afterwards, the same day, by his writing, indorsed upon the back of the said note and by him subscribed, did promise the plaintiff that he would pay the plaintiff the amount of the said note in case the said H. & Co. should fail to pay the same and should be insolvent when it became due as aforesaid. And the plaintiff in fact saith that the said A. H. & Co. altogether failed to pay the said note when it became due as aforesaid, and were altogether insolvent when the note became due as aforesaid, namely, on the 17th of January, in the year aforesaid. (1803.) By means whereof the defendant became liable and bound to pay the plaintiff the amount of the note as aforesaid, and being so liable, in consideration thereof afterwards, &c., promised to pay the amount of the said note on demand. 2d count. And whereas H. & Co. on the 17th of September, 1803, in consideration that the plaintiff had sold and delivered to the said H. & Co. a quantity of tobacco, promised to deliver to the plaintiff their promissory note for the same with an indorser upon the said promissory note. And the plaintiff in fact saith that H. & Co. in pursuance of their said promise, namely, on the —— at —— did pass to the plaintiff their promissory note by them subscribed, whereby they promised to pay to the plaintiff, one hundred and twenty days after date, $625.95 value received, which said promissory note after being so made as aforesaid, H. & Co. presented to the defendant for his indorsement, who indorsed it, by which indorsement he promised the plaintiff to pay him the amount of the said note in case H. & Co. should be insolvent when it became due, and should fail to pay the same. And the plaintiff in fact saith that H. & Co. were insolvent when the said note became due, and altogether failed to pay the same or any part thereof to him. By means whereof the defendant became liable and bound to pay the plaintiff the amount of the said note, and being so liable, in consideration thereof, &c., promised to pay on demand. 3d count. And whereas also, H. & Co. on the 17th of September, 1803, at &c., by their certain

writing commonly called a promissory note, by them subscribed, promised to pay the plaintiff, one hundred and twenty days after date, $625.95, for value received, and the defendant afterwards, on the same day, at &c. to give a credit to the said note and to induce the plaintiff to accept the same, did by his certain writing indorsed on the back of the said note with his proper hand and name thereto subscribed, promise to pay to the plaintiff the amount of the said note in case the said H. & Co. should fail to pay the same, and should be insolvent at the time it became due as aforesaid, which said note so indorsed as aforesaid, was delivered by the said H. & Co. to the plaintiff for a full and valuable consideration. And the plaintiff in fact saith that H. & Co. failed to pay to the plaintiff the said note or any part thereof when it became due as aforesaid, and were at that time altogether insolvent, in consequence of which the defendant became liable and bound to pay to the plaintiff the amount of the said note, and being so liable, in consideration thereof afterwards, &c. promised to pay on demand.

CRANCH, Chief Judge, after stating the substance of the three first counts, delivered the opinion of the court, as follows.

These are the counts upon which the verdict is taken. The two first are bad, because they aver no consideration for the written promise contained in the indorsement. The third count avers that the defendant indorsed the note to give it credit and to induce the plaintiff to accept the same, and that the note so indorsed was delivered to him by H. & Co. for a full and valuable consideration. If a consideration be necessary to support an action upon a promise made for such a purpose and under such circumstances, it is supposed that the circumstances themselves will amount to a good consideration in law. This point seems to be decided by the supreme court in the case of Violett v. Patton, 5 Cranch [9 U. S.] 142. Two other questions, however, occur upon this count. 1. Whether the defendant was liable to an action before demand of payment had been made of H. & Co., and 2. Whether the defendant was liable before he received notice of the non-payment. Or in other words, whether the insolvency of H. & Co. at the time the note became payable, is an excuse for the omission to demand payment from them, and to give notice to the defendant. In the case of Ish v. Mills [Case No. 7,104], at the last term, this court decided that the indorser of a promissory note not negotiable, was not, under the Virginia law, entitled to notice; and it was there said that the undertaking of such an indorser was only to pay if the holder, after using due diligence, should fail to recover it from the maker; but that if due diligence has been unsuccessfully used, the indorser becomes absolutely liable, whether he had notice or not, of the steps which the holder had taken to compel payment from the maker. It is not supposed necessary to state in the declaration, all the steps which the plaintiff has taken to compel such payment, and which amount to due diligence. Is it necessary to state any of them? If suit has been brought against the maker, is it necessary in any case to state it in a declaration against the indorser? If insolvency of the maker be averred, it is certainly not necessary to aver that a suit has been brought, because the insolvency dispenses with the necessity of a suit. If insolvency of the maker be averred, is it necessary to aver a demand from the maker. I think not. For if a suit would be unavailing, à fortiori would be a demand. The same reason which would dispense with a suit in case of insolvency will dispense with a demand. And if a demand be not necessary, it cannot be necessary to aver it. It is no objection therefore to this declaration that it does not aver a demand of payment from Henderson & Co. And if a demand be unnecessary, it cannot be required that the defendant should have notice of a demand. Upon the whole, then, we think the third count can be supported; and, as by the Virginia law the judgment cannot be arrested if there be one good count, judgment ought to be rendered for the plaintiff upon the third count.

Case No. 10,451.

OFFUTT v. HENDERSON.

[2 Cranch, C. C. 553.] [1]

Circuit Court, District of Columbia. April Term, 1825.

SCIRE FACIAS TO REVIVE JUDGMENT — LIMITATION AS TO TIME—PLEA OF NUL TIEL RECORD—EXECUTION RETURNED.

1. The English statute of Westm. II. (13 Edw. I. c. 45), which gives a scire facias to revive judgments in personal actions, is still in force, in Virginia, for that purpose.

2. The act of Virginia of the 19th of December, 1792 (section 5), limiting the time of issuing writs of scire facias, in certain cases, is an act of limitations, and must be pleaded.

3. The defendant cannot avail himself of it by plea of nul tiel record, nor by motion to quash the scire facias, nor by motion in arrest of judgment.

4. It does not apply to a case where an execution has issued and been returned.

Scire facias, issued in May, 1824, to revive a judgment rendered on the 6th of December, 1805, in favor of [Offutt,] the plaintiff's testator, against the defendant Henderson. Plea, "no such record," general replication, and issue.

Mr. Taylor, for defendant, contended that it appeared upon the face of the scire facias

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

itself, that it ought not to have issued, because the year and day since the judgment had elapsed, and the case was not within the provisions of section 5 of the Virginia statute of the 19th of December, 1792, an execution having been issued and returned; and the act applies only to the case "where execution hath not issued," "or where execution hath issued and no return is made thereon." In the first of which cases, the plaintiff may have a scire facias within ten years after the judgment; and in the second case, may, within the ten years, have other executions, or move against the sheriff or his sureties, for not returning the same; but it makes no provision for a scire facias, in case an execution has been returned. By the common law no execution could issue after the year and day, nor could the plaintiff in a personal action have a scire facias. A scire facias in such case was first given by the statute of Westm. II. (13 Edw. I. c. 45), but that statute, and all the other English statutes, which were, by an ordinance of the convention, in May, 1776, declared to be in force until the same should be altered by the legislative power of the colony, ceased to be in force upon the repeal, on the 27th of December, 1792, of so much of that ordinance as related to those statutes; so that there is now no law authorizing a scire facias in a personal action, except in the case where an execution has not issued. In the present case the scire facias is brought by the executor of the original plaintiff, which is a case not provided for by law.

Mr. Mason, for plaintiff, contrà. This question cannot arise upon the issue of nul tiel record. The statute of 19th December, 1792, § 5, is an act of limitations, and must be pleaded. Gee v. Hamilton, 6 Munf. 32.

Mr. Taylor, in reply. This is not an act of limitations, but an enabling act. An act of limitations supposes a previous right which it restrains; but we rely upon the want of authority in the court to issue a scire facias at all in this case. If the issue of nul tiel record be found for the plaintiff, the defendant may still move in arrest of judgment.

CRANCH, Chief Judge. The fifth section of the act of Virginia, of the 27th of December, 1792 (page 291), repealing so much of the ordinance of the convention passed in May, 1776, as declared the English statutes to be in force until altered by the legislative power of the colony, saves to every person the right and benefit of every writ remedial and judicial which might have been legally sued out before the passing of that act, and with the like proceeding thereupon to be had, as fully as if the act had not been made. By this clause the right to the writ of scire facias to revive judgments is saved. The act of the 19th of December, 1792 (page 108, § 5), was passed while the English statutes were in force; and must be considered as an act of limitations. It limits the action of debt as well as the scire facias. The question then is whether it must be pleaded; or may it be moved in arrest of judgment? The use of a special plea is to state what does not already appear upon the record. It would only state the date of the judgment and the time of the issuing of the scire facias, both of which already appear upon the face of the scire facias. If the statute of limitations had been pleaded the plaintiff might have replied an execution taken out within the year, which, although not returned, would, as I understand the act, take the case out of it as to the remedy by scire facias, although the plaintiff could not have a new execution or move against the sheriff; or the plaintiff might perhaps reply infancy, or imprisonment, or non compos mentis, or out of the district, or some other matter to avoid the bar. Perhaps these matters might be shown upon a motion to quash the scire facias; but I do not think they could be made to appear judicially to the court upon a motion in arrest of judgment; and therefore I think the statute of limitations is not a good ground for such a motion. I believe the defendant's remedy is by motion to quash the scire facias; or by plea; but I think the court should not now let in the plea, without affidavit of merits.

At the subsequent term, (November term, 1825,)

Mr. Taylor stated that he was satisfied that he could not support a motion to quash the scire facias, but moved for leave to plead specially the statute of 19th December, 1792, § 5; and, as a ground for the motion, alleged that he had not supposed it necessary to plead it, as he was not aware that the statute of Westm. II., giving a scire facias, was in force in Virginia, and offered to make affidavit of that fact, and that the defendant had instructed him to rely on the statute of limitations.

Mr. Mason, contrà. An execution was issued immediately after the judgment, and was returned, and the defendant was discharged under the insolvent act. The act of the 19th of December, 1792, applies only to a case where no execution has been issued; or if refused, has not been returned. It does not apply to this case; and therefore there would be no use in pleading it. The plea would be bad upon demurrer. There is no limitation but that which may be inferred from the lapse of time.

In 1816, a motion was made to issue an execution under the saving clause of the statute of 19th December, 1792, § 6. An execution was issued upon that motion and was returned. The plaintiff then died, and the executor was obliged to bring his scire facias.

The motion was continued under cur. ad. vult., and Mr. Mason and Mr. Taylor were to examine the case further and furnish the

court with notes of authorities, &c. But the question does not seem to have been moved again.

Case No. 10,452.

OFFUTT v. PARROTT.

[1 Cranch, C. C. 139.] [1]

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

COSTS—SECURITY.

Security for costs cannot be given in the clerk's office.

A rule was laid at December term, 1802, for security for costs. At the former sitting of this term, judgment of nonsuit nisi, was entered. Since the last sitting, Abner Cloud applied to the clerk's office, and offered to become the security. Quære, whether this is a compliance with the rule.

THE COURT thought it was not; that it must be done in court.

Present, KILTY, Chief Judge, and CRANCH, Circuit Judge.

Case No. 10,453.

OFFUTT v. PARROTT.

[1 Cranch, C. C. 154.] [1]

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

CONTRACTS—WANT OF CONSIDERATION—CONTEMPT—JURORS ESCAPING FROM JURY ROOM.

1. A promise, in writing, made under a supposed previous legal liability which did not exist, is void for want of consideration.

2. Jurors escaping from their room may be fined for their contempt.

Assumpsit. Gabriel Greenfield had given a promissory note to Offutt in these words: "Georgetown, June 4, 1795. Sixty days after date, I promise to pay Thomas B. Offutt, or order, four hundred and six dollars, for value received. Gab'l Greenfield"—which note was indorsed by Parrott, in blank, by writing his name upon the back of it. There was also written on the back of the note, an engagement in the following words: "I do hereby promise and oblige myself, my heirs, executors and administrators, to pay or cause to be paid unto the within named Thomas B. Offutt, his heirs or assigns, the within sum of four hundred and six dollars, in the said note mentioned, in case the said Gabriel Greenfield fails to do the same. Witness my hand, this 22d day of March, Anno Domini, 1796. Rich'd Parrott. Witness, Jas. S. Morsell."

Mr. Key admitted that the blank indorsement, by Parrott, did not create any legal obligation on him to pay.

Mr. Mason, for defendant, insisted that the written engagement of Parrott on the back of the note was made under a misapprehension of the legal effect of his former indorsement, and therefore void, as being without a consideration, like money paid under a mistake.

Mr. Morsell was sworn as a witness, and called to testify as to the instructions given to him by J. M. Gantt, the agent of the plaintiff, and the declarations of Gantt to the defendant, as to the legal obligation which his blank indorsement had created, by which the defendant was induced to sign the engagement; Mr. Gantt being an attorney of this court, and within the reach of its process.

Mr. Key objected.

THE COURT admitted the evidence. CRANCH, Circuit Judge, doubting.

A bill of exceptions in this case stated: 1. The note of Greenfield to Offutt. 2. The engagement of Parrott written on the back. 3. That this engagement was proved by J. S. Morsell, the subscribing witness. 4. The defendant offered to prove by the said Morsell that previous to the making of the engagement, the note with Parrott's name indorsed in blank thereon, was put into the hands of J. M. Gantt, attorney at law, by the plaintiff to sue Parrott. That the said Morsell, being a student at law in Gantt's office, Gantt put the note with the blank indorsement thereon into Morsell's hands, to write a declaration. That Morsell not finding any precedent, returned the same to Gantt, who was of opinion that an action would lie against Parrott on that blank indorsement, and told Morsell to take the note to Parrott and tell him he was liable upon the blank indorsement to pay the amount of the note; but that if Parrott would enter into a written engagement to pay the same, that he, Gantt, would indulge him as to time. That Morsell informed Parrott of Gantt's opinion as to his liability, and made the proposition to him, as directed by Mr. Gantt; whereupon Parrott agreed to enter into the engagement to pay the amount of the note in the event of the plaintiff's not being able to recover the same from Greenfield; and in pursuance thereof Morsell wrote the engagement on the back, and Parrott signed it. 5. The record of a suit in Maryland, by Offutt, against Parrott, and offered to prove the identity of the parties. This record shows that Offutt had pursued legal steps to recover the money from Greenfield, but failed to recover.

No further or other evidence was offered.

The plaintiff prayed the direction of the court to the jury, that if, from the evidence in the cause, they were of opinion and found that the name of Parrott was by him indorsed on said note to give credit thereto, and that the said note was passed to Offutt with the name of Parrott indorsed thereon, that then the said Parrott is liable on his special engagement of 22d March, 1796, on the said note made, although no suit at law could be supported on his original blank indorsement, and the plaintiff entitled to recover.

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

THE COURT refused, but directed the jury that on the whole of the evidence offered as aforesaid, the plaintiff is not entitled to recover, and their verdict ought to be for the defendant.

CRANCH, Circuit Judge, absent.

A juror was withdrawn, by consent, three of the jurors having escaped out of the jury-room, through the window, contrary to the express command of the bailiff, as stated in his affidavit. One of them, John Dunlop, being informed that he might, if he thought proper, state anything, on oath, in exculpation of the charge, was sworn; and stated, that finding the jury not like to agree, and there being a great deal of warmth among them, he thought it would be productive of no good to remain together, and made the best of his way out. The two others, Richard Bover and Henry O'Reily, being also sworn, and stating only a similar excuse, were each fined by THE COURT fifteen dollars.

OGDEN (ALLEN v.). See Case No. 233.

Case No. 10,454.

OGDEN v. BARNEY.

[5 Blatchf. 189.] [1]

Circuit Court, S. D. New York. Nov. 10, 1863.

CUSTOMS DUTIES—HALF STORAGE—GOODS REMAINING IN "VESSEL, AS WAREHOUSE."

1. Where no warehouse entry of imported goods was made, but the importer wrote on the entry the words "vessel, as warehouse," and the goods remained in the vessel only two days beyond the period allowed for the discharge of the cargo, and the collector exacted ten dollars for half storage: *Held*, that the charge was illegal.

2. This case distinguished from that of Irvin v. Schell [Case No. 7,072].

This was an action [by David Ogden] against [Hiram Barney] the collector of the port of New York, to recover back the sum of $10, paid under protest as half storage on imported goods.

Sidney Webster, for plaintiff.

E. Delafield Smith, Dist. Atty., for defendant.

NELSON, Circuit Justice. I had occasion, in the case of Irvin v. Schell [Case No. 7,072], to look into the question involved in the present case, and came to the conclusion that the charge was one wholly without any legal foundation, and arbitrary; but I denied the right of the plaintiffs to recover, on the ground that, under the circumstances of the case, the payment was voluntary, and therefore not the subject of an action. In that case, the plaintiffs had entered their goods for warehousing, in the accustomed way, and had, by the authority of the law, designated one of the authorized warehouses to receive them. They afterwards, and before the removal of the goods, changed their minds, and applied to the collector to withdraw the warehouse entry, and to get a permit to land the goods for consumption. Under the regulation of the customs this could be done, on payment of half storage. I said, in that case, that the charge was made for the favor granted to the merchant in permitting him to land the goods for consumption after he had entered them for warehousing; and that the collector might, doubtless, have compelled the merchant, after having thus entered his goods, to procure them in the usual way, through the warehouse, which would have increased considerably the expense. It was admitted, in that case, that there was no law authorizing the charge of half storage, and that the collector might have adopted any other rule of compensation; and that, instead of charging the $98.26, he might have charged $500 with equal authority. But the merchant preferred paying the sum charged to the delay and expense of following his goods through the warehouse, which he might have done, and hence the payment was voluntary.

In the present case, the claim of the collector goes far beyond the former one. No warehouse entry was made by the plaintiff at all. The whole foundation of the claim is a fiction. It is true there appears on the entry, in the handwriting of the plaintiff, the words, "vessel, as warehouse." But I know of no law, nor has any been referred to, which authorizes the collector to convert the vessel in which the goods arrive into a warehouse, and, by this contrivance, to lay a foundation for charges incident to the warehousing system as established by law. On this entry, the merchant could not have removed his goods to a warehouse on land, nor could the collector have compelled him to remove them. On the contrary, the collector was bound to give a permit, when requested, to land the goods on payment of the duties. The case shows that the note made on the entry, "vessel, as warehouse," was intended simply as a request that the goods might remain in the vessel for the present, and which was acceded to, under the charge of the inspector. In point of fact, the goods remained in the vessel but two days beyond the period allowed for the discharge of the cargo; and for those two days six dollars were charged for the extra services of the inspector and paid. But, in addition to this, a charge of ten dollars for half storage is set up against the merchant, for keeping the goods in his own vessel. I cannot say that the case falls within the principle of Irvin v. Schell [supra], and must hold that the plaintiff is entitled to recover.

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

OGDEN (COFFIN v.). See Case No. 2,950.

Case No. 10,455.

OGDEN v. DAVIES COUNTY.

Circuit Court, W. D. Missouri.

[Nowhere reported; opinion not now accessible. Affirmed by supreme court. 102 U. S. 634. Some of the questions decided therein are stated in Henderson v. Jackson Co., 12 Fed. 676.]

Case No. 10,456.

OGDEN et al. v. GILLINGHAM et al.

[1 Baldw. 38.] [1]

Circuit Court, E. D. Pennsylvania. Dec. 7, 1829.

BILLS AND NOTES — WHAT AMOUNTS TO AN ACCEPTANCE—EFFECT OF BANKRUPTCY OF PRINCIPAL ON POWER OF AGENT.

O. W., residing in New York as the agent of T. N., who had gone to England, put into the hands of the defendants in Philadelphia a quantity of tin to be sold. On the 13th of March the defendants, by letter, informed O. W. that they had sold three hundred boxes, net amount 2,569 dollars 72 cents, "for which you can value on us, payable on the 19th instant." On the 15th of the same month O. W. drew the bill in question. It appeared that before the bill was drawn, T. N. had become bankrupt in England. The defendant gave in evidence certain attachments laid on the property of T. N. in his hands. *Held*, that the above letter did amount to an acceptance of the bill drawn in conformity with it. That the bankruptcy of T. N. did not revoke the power of his agent to draw the bill without notice.

[Cited in Howland v. Carson, 15 Pa. St. 455.]

This action is brought to recover the sum of 2,569 dollars 72 cents, the amount of a bill drawn by Thomas Newbold & Co., of New York, on the defendants [Gillingham, Mitchell & Co.] in favour of the plaintiffs [Ogden, Ferguson & Co.] and duly accepted by the defendants. The pleas of non assumpsit and payment, with leave to give the special matter in evidence, especially certain writs of foreign attachment. After the closing of the evidence on both sides, it was agreed to take a verdict for the plaintiff, subject to the opinion of the court on the following points: (1) Whether there was an acceptance of the bill. (2) Whether the bankruptcy of Thomas Newbold took away the authority of his agent to draw the bill. The bill was drawn by one Oliver D. Ward, residing in New York, the attorney of Thomas Newbold, who had left the United States. Ward, acting as the attorney of Newbold, had put into the hands of the defendants a quantity of tin, with directions to sell it. The defendants afterwards wrote to T. Newbold & Co. at New York, that they had sold three hundred boxes of the tin, net amount 2,569 dollars 72 cents, "for which you can value on us, payable on the 19th instant." This letter was dated 13th March, 1828. On the 15th Ward drew the bill in question, payable on the 19th to the plaintiffs, in conformity with the letter of the defendants. The defendants gave in evidence certain attachments issued from the district court of the county of Philadelphia. Other facts were given in evidence, which will appear in the arguments of the counsel and opinion of the court.

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

Mr. Binney, for plaintiff.

The points reserved are: (1) Whether the letter of the 13th of March, 1828, amounted to an acceptance of the bill. (2) Whether the bankruptcy of Thomas Newbold took away the authority of his agent to draw the bill.

1. The letter states that the bill may be drawn payable on the 19th of March; the sum is precisely mentioned, and the bill conforms to the letter in both particulars. The bill was taken by the plaintiff, as so much cash, for the discharge of a debt actually due to them. Coolidge v. Payson, 2 Wheat. [15 U. S.] 66, decides the case in every particular. Johnson v. Collings, 1 East, 98, is relied upon by the defendants; but in that case the promise to accept was not shown to the person taking the bill, but was a mere promise from a debtor to his creditor. Lord Kenyon goes the whole length of saying, that a promise to accept a non existing bill is not binding; but see Le Blanc's opinion, which limits it and makes it binding under circumstances; and see remarks on that case in [Coolidge v. Payson] 2 Wheat. [15 U. S.] 73. The true principle is the credit given to the promise, this cannot be weaker if the party making the promise has funds. Was there an express promise? The words are, "for which you can value on us." Nothing is said expressly about accepting or honouring the bill; none of the cases contain an express promise in terms to accept. Pierson v. Dunlop, Cowp. 572. That was a negative acceptance, that is, it will not be accepted till the navy bill was paid; "you can value," that is, we authorize you to do it, to draw a good and valuable bill. See Chit. Bills, 215, 227, as to what is an acceptance.

2. Was the attorney authorized to draw the bill at the time he drew it, that is, did the bankruptcy of Thomas Newbold revoke the authority? Ward acted as the attorney of Newbold to the 17th of March, 1828. He dealt with the plaintiffs in that character; made them advances in that character; he had said or reported in New York, that Newbold (then in England) was bankrupt, but he had no official knowledge of it until the 17th of March. Does a bankruptcy in England revoke a power of attorney in the United States, so far as relates to property in the United States, paying debts, &c. without notice? It does not, that is, so as to prevent the attorney from paying debts. The revocation by bankruptcy is by the operation of law, not by the act of the principal. The English bankrupt law has no extra-territorial power, it operates no transfer of property in the United States, to the prejudice of American creditors. Creditors have attached property here after bankruptcy there. Harrison v. Sterry, 5 Cranch [9 U. S.] 302; Milne v.

Moreton, 6 Bin. 353, 360. Can a foreign attaching creditor take the property, notwithstanding the bankruptcy, and yet a creditor here cannot receive it from the attorney with whom he dealt, to whom he made his advances on the credit of the funds in his hands, and that they would be at his disposal? If the power of attorney is revoked by the bankruptcy in England, it must be by transferring the property in the hands of the attorney to the assignees under the commission; the transfer then should also reach the attachments, which can hold the property only as the bankrupt's at the time of the attachment. The objection must be, not that the assignment in England directly affected or revoked the power, but that the property in question no longer belonged to the principal or to his attorney; that he has no power over it, because it was transferred to the assignees. Did it transfer the property? Could not the bankrupt himself have paid debts with this money? Bankruptcy, assignment, &c. are all nothing, as to the acts of the attorney, without notice. Wickersham v. Nicholson, 14 Serg. & R. 118. This case proceeded on a misapprehension of the English law, as it appears in Vernon, which was overruled in Sowerby v. Brooks, 4 Barn. & Ald. 523. Issuing a commission is not of itself notice of an act of bankruptcy. There is but one instance of constructive notice in the English bankrupt law, that is, a publication in the Gazette, with ground to believe that the party had read it; as to death, partnership and revocation by the principal, notice is necessary. Gow, Partn. 53, 54; Paley, Ag. 142, 157; Salte v. Field, 5 Durn. & E. [5 Term R.] 211; —— v. Harrison, 12 Mod. 346; 2 Ves. Jr. 118; Eden, Bankr. 261. What was the notice in this case? The new attorney of the assignees presented himself and his power to the agent here, on the 17th of March. This, the only notice, except a rumour he had heard before. No party bound to respect it, would the agent have been justified if by relying on it, his principal had lost a debt? It was uncertain in its terms. To say that a man is bankrupt does not necessarily mean that it is a bankruptcy, in due course, so as to affect the authority of an agent, or the property in his hands. The statute does not make this notice, it must be knowledge. 16 Vin. 10, pl. 2; 14 Serg. & R. 143. If the principal had sent a revocation to his agent, which was concealed from persons dealing with him as the agent, it would not affect them. A foreign bankruptcy cannot have more effect than an absolute revocation of the power. Morgan v. Stell, 5 Bin. 315.

Mr. Broom, for defendant.

The case in 2 Wheaton [supra] puts at rest many of the doubts on this subject in England. There must be a promise to accept. When I say, you may draw on me for a certain amount, it is an undertaking to accept and pay it? but is such a promise negotiable? can it be transferred to another? Can the person who takes such a draft sue in his own name? Did the letter intend that Newbold should draw in favour of any body, or only that there was that balance to be paid to him if he called for it?

2. As to the effect of the bankruptcy. We do not contend that a bankruptcy in England operates as a legal transfer of property here, but the assignees may sue in the name of the bankrupt for their own use. 6 Bin. 361. See argument of Mr. Binney in that case. Can the power of attorney subsist after all the authority of the principal is gone? He could not have made a contract in relation to this property. How could his attorney? It follows that provided there was notice, the transfer would be void as between the principal and agent. The whole power of the agent over this property was gone by the bankruptcy, the only question, as to third persons not having notice. Houston v. Robertson, 6 Taunt. 449; 16 East, 386; 5 Esp. 158. How far will the want of notice protect third persons? We do not contend that general rumour is notice. This rumour was sufficient to put the attorney on the inquiry. Why protect the plaintiffs more than any other creditors of Newbold? If the draft is destroyed they will stand as they did before it was drawn; they are not injured, or their position changed.

Mr. Binney, in reply.

The law, as established by the supreme court, is, that if an engagement authorizes another to draw, it is negotiable. 16 Vin. 5, pl. 12. The letter is not a promise to pay, but an authority to draw a bill—to make a negotiable instrument. When the question is between the bankrupt and his foreign assignees, the court will assist the latter. The case is different when it is between the foreign assignees and creditors here. The English system of bankruptcy has no effect here by its own force; it is by courtesy, in a case between the bankrupt and his assignees. The injury to the party is not the question, but whether these acts are revocations to persons not having notice of them. [Coolidge v. Payson] 2 Wheat. [15 U. S.] 73.

Mr. Broom cites 4 Camp. 272, as to revocation of power.

HOPKINSON, District Judge. On the 6th of July, 1826, Thomas Newbold, then of the city of New York, but about to depart for England, appointed Oliver D. Ward and George H. Newbold, jointly and severally his attorneys, for him and in his name, or in the name of Thomas Newbold & Co.; authorizing them or either of them, among other things, "to draw such bill or bills of exchange, check or checks, note or notes, and accept, indorse and pay the same, and execute and deliver such instrument or instruments in writing, as they shall consider necessary in

the due course and management of his business." Shortly after the execution of this power, Thomas Newbold left the United States, and Oliver D. Ward took upon himself the powers given him by that instrument. He transacted all the business of Newbold in this country, opened and answered his letters, drew drafts and bills in his name and in his behalf, and generally did his business. In the exercise of this trust and authority, Mr. Ward had put into the hands of the defendants, then residing in Philadelphia, a certain quantity of tin, on Newbold's account, and instructed them to sell it. On the 13th of March, 1828 the defendants addressed a letter to Thomas Newbold & Co., New York, in which they write. "Gentlemen: Herewith you have sales of three hundred boxes tin, which we hope will be satisfactory, net amount 2,569 dollars 72 cents, which you can value on us for, payable on the 19th instant, say twenty-five hundred and sixty-nine dollars and seventy-two cents. Yours, very respectfully, Gillingham, Mitchell & Co." This letter, of course, was received by the agent, Oliver D. Ward, and opened by him. He was known by the defendants to have this authority, as several letters had passed between them on the subject of this tin. At the time Mr. Ward received the above letter, Thomas Newbold was indebted to the plaintiffs, Ogden, Ferguson & Co., and continued so after this suit was brought. Mr. Ward had some money in his hands to pay them on account of their advances to Newbold. After receiving the letter he went to them, showed them the defendants' letter, and offered to give them a draft on the defendants for the amount stated in the letter, which they agreed to receive as cash. There was more than this amount due them by Thomas Newbold. On the 15th of the same March, that is, two days after the date of the defendants' letter, Ward drew a draft on the defendants, for the recovery of which the present action was brought. The draft is as follows: "$2,569.72. New York, March 15, 1828. On the 19th instant, without grace, please to pay to the order of Messrs. Ogden, Ferguson & Co., twenty-five hundred and sixty-nine dollars and seventy-two cents, value received, and charge the same to your obedient servants, Thomas Newbold & Co., per O. D. Ward. To Messrs Gillingham, Mitchell & Co., Philadelphia." It will be observed that this bill is drawn precisely in conformity with the letter of the defendants in every essential particular. It is for the same amount; it is payable on the 19th instant, without the usual grace; it is unquestionable that the letter describes the bill which may be drawn, and the bill actually drawn is according to that description. At the time of these transactions in Philadelphia and New York, as it afterwards appeared, Thomas Newbold had become a bankrupt in England. There was a report of this in New York before the draft was drawn; but Mr. Ward, the agent, was not officially informed of it until the 17th of March, when the attorney under the assignees superseded Mr. Ward in his agency. When this bill was presented to the defendants, which was on the 17th of March, they replied that it could not be paid for want of authority, and it was accordingly protested. This action is brought against the defendants on their acceptance of the bill, according to the usage and custom of merchants, and the question is, are the plaintiffs entitled to recover in this action?

The prominent facts of the case are: (1) A clear authority given by the defendants to draw the bill upon them, which is sufficiently described, and was afterwards drawn in conformity with the authority and description; and a promise or undertaking, that if such a bill were drawn, it would be accepted. It is true they do not say in the terms, if you draw such a bill, we will accept it; but they use a mercantile phrase, perfectly well and universally understood to mean the same thing, that is, "which you can value on us for," or which you can draw on us for; and to say that Newbold may draw, is to promise that they will accept; otherwise a paltry equivocation would be allowed to defeat a clear engagement, and to destroy all commercial faith and confidence. (2) When the defendants gave this authority to draw, and this promise to accept, they had in their hands, and still have, funds of the drawer, more than sufficient to answer the bill. (3) The bill was drawn after the promise was made, and promptly after it was received. There was no unreasonable delay in drawing, which by any possibility could have prejudiced the defendants. (4) The bill was drawn in consequence of the promise contained in the letter of the 13th of March, 1828. That letter was shown to the payees of the bill, as the authority of the drawer; and the bill was taken by the plaintiffs as so much cash, on the faith and credit of that letter. (5) The bill was taken for an antecedent debt, and not for money advanced particularly upon it.

On these facts, a verdict was taken for the plaintiffs, for 2,822 dollars 82 cents, subject to the opinion of the court, on the following points: (1) Whether there was an acceptance of the bill. (2) Whether the bankruptcy of Thomas Newbold took away the authority of his agent to draw the bill.

On the first point, it is not necessary to consult the English cases for information or authority (although I think them very clear), when the law of the subject has been examined and settled by the supreme court of our country. In the case of Coolidge v. Payson, as reported in 2 Wheat. [15 U. S.] 66, the English decisions are examined by the chief justice, who delivered the opinion of the court, beginning with Pillans v. Van Mierop, 3 Burrows, 1663; and it is considered by the chief justice that there is no essential difference between that case and the one be-

fore the supreme court. The chief justice distinctly states the question in Coolidge v. Payson [supra] to be, "does a promise to accept a bill, amount to an acceptance, to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favour of a person who takes it for a pre-existing debt." I am at a loss to conceive how the question in the case before this court, can be stated in more precise and comprehensive terms, in all its essential points. On my construction of the letter, the promise to accept was made, the bill was taken on the credit of the promise; the promise was made before the existence of the bill, and it was drawn in favour of a person who took it for a pre-existing debt. The answer, therefore, which the supreme court gave to this question, in the case of Coolidge v. Payson, must be the answer of this court in this case. That answer is thus given: "It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise." The judgment of the court below was affirmed. On the first point, therefore, I am of opinion that there was a full and binding acceptance by the defendants, of the bill on which this suit is brought.

2. Did the bankruptcy of Thomas Newbold take away the authority of his agent, O. Ward, to draw this bill; for if he had no authority to draw the bill, it cannot affect the funds of Thomas Newbold, on which it was drawn; and the letter of the defendants gave a right only to Thomas Newbold & Co., or one possessing their authority, to draw. The power of attorney given in July, 1826, by Newbold to Ward, was full and explicit for this purpose, and unless afterwards revoked or annulled, it continued when this bill was drawn. The agency of Ward was well known to the plaintiffs; they had dealt with him in that capacity. The bankruptcy of Thomas Newbold, in England, prior to the drawing of this bill in New York, is the only circumstance relied on to support the position that the powers of Mr. Ward, as the agent of Newbold, were determined and annulled at the time he drew the bill for Thomas Newbold & Co. Was such the legal operation and effect of the bankruptcy under the circumstances of this case? In the first place, had Ward, when he drew the bill, or the plaintiffs, when they took it in payment as cash, notice of the bankruptcy? We have no evidence on this point but from Mr. Ward himself, on his cross-examination; nor have the defendants attempted to strengthen what he has said, or to enlarge it, by other testimony in the city of New York or elsewhere. Mr. Ward says, "that he had heard it reported in New York that Thomas Newbold was a bankrupt before he gave the aforesaid draft; but was not officially informed of it until Monday, the 17th of March, 1828, about 11 o'clock, a. m., when Mr. Smith, the attorney for the assignees under the commission of bankruptcy, superseded him in his agency aforesaid." Can Mr. Ward be considered to have any notice of the bankruptcy which he was bound to regard, or would have been justified in regarding, until the 17th of March? He did not consider himself to be superseded in his agency till that time. If he had ceased to act on the mere report of the bankruptcy, and it had afterwards turned out to be unfounded, as many reports in a great commercial city daily prove to be, and his principal had suffered in his property or credit by such precipitancy, it would hardly have protected Mr. Ward from a responsibility for the damages sustained, if he had merely proved the existence of a vague report, vouched by no body, and without any known name or authority. Weak, however, as this report was, as a foundation for belief and adoption as a rule of action, it does not appear that it had reached the ears of the plaintiffs, who had acted in entire good faith in taking this bill.

On this view of this part of the case, we must consider the effect of the bankruptcy upon the power of attorney and the acts of the agent, as if those acts were done without any knowledge or notice of the bankruptcy. If it were desirable or proper to discuss in this place abstract questions, not necessary to the decision of the case in hand, such speculations might be indulged on this occasion. How does the bankruptcy of the principal affect his power of attorney, and the authority of the agent under it? Is it by a direct and immediate operation upon the instrument or letter of attorney; or only indirect and consequential, by divesting both the bankrupt principal and his agent of all property on which the power can act? This question would be tested, by supposing a species of property (and Judge Washington thought there might be such) which does not pass by the assignment of the commissioners. Would the power of the agent over such property be revoked and determined by the bankruptcy; or, in the present case, was the drawing of the bill an unauthorized and void act; a nullity not only in relation to the fund on which it was drawn, but to every intent and purpose to which the bill might be applied? Could the holder prove it as a debt under the commission, or if its date, being subsequent to the bankruptcy, would exclude it, would the bankrupt be liable for it as not being within his certificate and discharge? The principal himself has done nothing to revoke the power; and if it be annulled, it must be so by the legal operation

of the assignment to the commissioners; but that assignment contains no terms to transfer anything but the property, effects and credits of the bankrupt. If the whole operation of the bankruptcy and the assignment is on the property of the bankrupt, and it can reach the agency only by and through the property; it is the unquestionable law of this court, derived both from the supreme court of the United States, and the supreme court of this state, that the bankrupt law of a foreign country is incapable of operating as a legal transfer of property in the United States; that an assignment by law has no legal operation out of the territory of the law maker; and, in the case decided in Pennsylvania, an American creditor attaching in the United States, the property of a bankrupt debtor, who had become bankrupt in England, before the attachment was issued and laid, was preferred to the assignees of the commissioners. On what principle can we say that a debt actually paid in this country by the bankrupt, or, his authorized agent, or which is the same thing, that an appropriation by the agent and the acceptance by the creditor of the bankrupt in the United States, of certain funds of the bankrupt, also in the United States, shall be defeated by the assignment under the commission in England? Why is such a creditor, to whom it may be said the funds have been paid and delivered, at least against the bankrupt and all claiming by and under him, by the delivery and acceptance of the bill, to be in a worse situation than a creditor who has laid his attachment on the same property or funds, which is liable to litigation and dispute in various ways?

The cases cited by the defendants' counsel to show the effect of a bankruptcy upon an agency in England; all the parties residing there; all subject to the law there, and all having notice of the bankruptcy, have no application to a case like the present; nor does the modus operandi by which the agency is destroyed in England by a bankruptcy, appear in any of these cases. The case here is this; the agent held in his possession a full and unquestioned power of attorney, and had acted under it for two years antecedent to this transaction; he was known and recognised and dealt with as the agent of Thomas Newbold, both by the acceptor of the bill and the person in whose favour it was drawn, and to whom it was delivered as so much cash, in payment of a bona fide debt due to him from the principal. The agent who drew the bill, and the payee, were both resident in the city of New York, where the bill was drawn, and the defendants, on whom it was drawn, resided in the city of Philadelphia, having in their hands the funds belonging to the principal on which the draft was made. At the time the bill was drawn by the agent and delivered to the plaintiffs, neither of them had any notice of the bankruptcy of the principal, which took place in England. In such a case, I am clear that the bankruptcy has no effect upon the acts of the agent, whatever its general operation on the agency may be. The fund in the hands of the defendants, to the amount of their acceptance, was appropriated to the use of the plaintiffs, and they are entitled to recover that amount in this action. Let judgment on the verdict be entered for the plaintiffs.

Case No. 10,457.

OGDEN v. HARRINGTON.

[6 McLean, 418.] [1]

Circuit Court, D. Michigan. June Term, 1855.

SALE OF LAND FOR TAXES—PURCHASER'S TITLE—PAYMENT TO COUNTY INSTEAD OF STATE.

1. In a sale of land for taxes, any material act which the law requires, or which may prejudice the rights of the owner, will be fatal to the title of the purchaser.

[Cited in Cahoon v. Coe, 57 N. H. 596.]

2. But mere technicalities which do not come within this rule, and cannot prejudice the interest of the land holder, do not vitiate the sale.

3. A payment of the money received on the sale into the county treasury, instead of the state, or the treasury of the county, instead of the treasury of the township, cannot affect the title.

4. The officer who pays or receives the money wrongfully, is liable to pay it over to the proper treasury.

At law.

Mr. Walker, for plaintiff.

Mr. Lathrop, for defendant.

OPINION OF THE COURT. This is an action of ejectment to recover the possession of the north-east and north-west quarters of section 30 T. B. N., range 16 east, three hundred and twenty acres. The patent was issued to J. W. Edmonds, 15th August, 1837, which covers the land. In 1842 the patentee conveyed the land to plaintiff. The defendant claims under a tax title, and the points raised in the case are in regard to the validity of the procedure in the sale for taxes.

It is objected that the warrant of the supervisors to the township, however, is defective. It is directed merely to the treasurer, &c., whereas, it should have been issued in the name of the people of the state of Michigan. A reference is made to the 6th article of the constitution of Michigan, which relates to the judicial department, and which declares in the 7th section, that "the style of all process shall be 'in the name of the people of the state of Michigan.'" And in the act regulating the commencement of suits (Rev. Laws, 132), it is provided that the style of all process from courts of record in this state, shall be "in the name of the people, &c." These regula-

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

tions, it would seem, were intended to apply only to judicial process; and if the same form had been used, to some extent, in directing certain things to be done, from a superior officer of the state to one who is inferior, it is mere matter of form, and need not be followed. It appears, indeed, where the form of the warrant, as it is called, which authorizes the treasurer to call the tax, is given by the proper authority, the form of judicial process is not followed. In such a case, where the form is not imperative, it can be of no importance. It is only necessary to direct or require the treasurer to collect the tax as stated on the duplicate.

It has again been objected that the land has not been legally assessed. The 2d section of the revised law provides, that "undivided shares or interests in lands shall be assessed to the owners thereof, if such ownership is known to the assessors, and no tract in the same section, originally entered as one parcel, shall be subdivided in assessing, unless the fact of a subdivision having been made by the owner or owners shall be known to the assessors. The entry of the land is proved by the register. The mode of assessing lands owned by more than one person depends upon the personal knowledge of the assessors. Where there is no evidence as to the extent of ownership, to the assessors, the court will presume that the assessment has been correctly made; this presumption always arises in favor of the acts of an officer. It appears in this case there was no possession of the premises at the time it was assessed, so that it does not appear the assessors had any means of ascertaining the interest of such proprietor. The objection, therefore, that the assessment was erroneously made is not sustainable. An accurate description of the land is required, but to the description given by the assessors there is no objection except the one above stated.

It is again objected that the tax is not charged in dollars and cents. The signs of dollars and cents do not appear at the heads of the columns, but the valuation is stated, and the tax or the amount is so plainly stated as not to be mistaken, and in the last column the total amount of the tax is stated. The purposes of the tax are stated in each column, as for township, school, library and other purposes, so that there seems to be no force in this objection. In Sibley v. Smith, 2 Mich. 499, Chief Justice Shaw says: "Our rule is very plain and well settled, that all those measures which are intended for the security of the citizen for ensuring an equality of taxation, and to enable every one to know, with reasonable certainty, for what polls, and for what real and personal estate he is taxed, and for what all who are liable with him are taxed" are essential. The county treasurer, who is collector, is directed to retain in his hands the sum of one hundred and fifty dollars for township purposes, and the further sum of one hundred and nine dollars and fifty cents, for school and library tax, and hold it, subject to the draft of the officers authorized by law to receive the same. And he is authorized, in addition to the aforesaid sums, to retain four per cent. for collection; and he is required, also, to pay over to the treasurer of the county of St. Clair the sum of five hundred and forty-seven dollars and fifty cents, for county purposes; and the further sum of forty dollars and eleven cents, for and on account of state assets; and the further sum of fifty-one dollars and fifty cents, for and on account of the militia; and four hundred and five dollars and forty-four cents, on account of delinquencies in the tax for highways.

It is objected, that the militia tax should have been directed to be paid to the township treasurer, instead of the county treasurer; but this cannot be material. A wrong application of the money cannot vitiate the sale for taxes. But in this case, if the payment be made into the county treasury, instead of the township, the error can be easily corrected by the payment of the sum to the township by the county treasurer. The tax assessed on the roll was, for state, county, township, school and militia purposes.

There is a further objection to pay to state assets. In answer to this, it is only necessary to repeat, that a wrong payment of the tax by the officer who collected it by a sale of property, cannot affect the sale. The officers through whose hands the money passes, and to whom it is paid wrongfully, are liable to pay the sum to the proper treasury.

Upon the whole, we do not see any such error in the proceedings under the tax sales, as affects the validity of the sale.

The jury were instructed accordingly, and they rendered a verdict for the defendant.

OGDEN (HASELDEN v.). See Case No. 6,-190.

Case No. 10,458.

OGDEN et al. v. MAXWELL.

[3 Blatchf. 319.][1]

Circuit Court, S. D. New York. Oct., 1855.

CUSTOMS DUTIES—CONSTRUCTIVE PERMITS TO LAND GOODS—FEES FOR SAME—PROTEST—USAGE—PERSONAL LIABILITY OF COLLECTOR FOR EXACTING ILLEGAL FEES.

1. Under the act of March 3, 1799, § 2 (1 Stat. 706), a collector has no right to charge fees for granting constructive permits to land goods, but only for such permits as he actually issues.

2. Where but one permit to land the baggage of all the passengers on one vessel was issued, and the collector exacted from the owner of the vessel fees for one permit for every five pas-

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

sengers: *Held*, that the fees for more than the one permit were illegal, and could be recovered back, in an action by such owner against the collector.

[Cited in Hedden v. Iselin, 31 Fed. 269; Swift & Courtney & Beecher Co. v. U. S., 111 U. S. 29, 4 Sup. Ct. 247.]

3. No written protest against the exaction of such fees was necessary, as the act of February 26, 1845 (5 Stat. 727), requires such a protest only in regard to duties paid.

[Cited in Moke v. Barney, Case No. 9,698.]

4. No usage in regard to making such charges can legalize them.

[Cited in Swift & Courtney & Beecher Co. v. U. S., 111 U. S. 29, 4 Sup. Ct. 247.]

5. A collector is personally liable for the illegal acts of his deputy, in exacting fees not authorized by law.

[Cited in Cleveland, C., C. & I. R. Co. v. McClung, 119 U. S. 463, 7 Sup. Ct. 267.]

6. And he is so liable, although he believed the exaction to be legal, and although he has paid over the amount of it to the government.

This was an action against the defendant [Hugh Maxwell], as collector of the port of New York, to recover back money paid under the following circumstances: The plaintiffs [David Ogden and others] were owners of the ship Racer. She arrived at New York from Liverpool, in November, 1851, with 769 steerage passengers, and their wearing apparel and other personal baggage and tools of trade. The vessel was duly entered, and the wearing apparel, personal baggage and tools of trade were entered separately from the other goods brought by the vessel. Only one permit for the examination and landing of the baggage of all the passengers, was issued by the collector. But he demanded pay for 154 permits, being one permit for every five passengers, at the rate of twenty cents for each permit, being $30.80 in all. The plaintiffs paid this amount, in order to obtain the one permit. In March, 1852, the same vessel brought 764 passengers to New York from Liverpool, and, under like circumstances, and a like exaction by the collector, the plaintiffs paid $30.60 for 153 permits, although but one permit was issued. In each case, the money was paid without any written protest being made. It appeared, on the trial, that for more than ten years prior to November, 1851, it had been the uniform practice, at New York, for the collector to grant one permit for the baggage of all passengers arriving in any one vessel, and to charge therefor a fee of twenty cents for every five passengers mentioned in the entry, the permits being, in all cases, general, to examine the baggage of all the passengers, and, if nothing was found but personal baggage, to permit the same to be landed, without expressing the number of passengers, but applying to all on board. The jury found a verdict for the plaintiffs, for the amount claimed, with interest, subject to the opinion of the court on a case.

Francis B. Cutting, for plaintiffs.

Benjamin F. Dunning, for defendant.

BETTS, District Judge. An objection is raised by the defendant, preliminarily, to the action, or rather to his personal liability, on the ground that he acted, in the matter in question, as the agent of the government, and had paid into the treasury the moneys demanded, before suit was brought. This objection was not supported by any proof; and, although the court will judicially notice, that by the act of March 3, 1841 (5 Stat. 432, § 5), the defendant is entitled to retain, for his own compensation, from the fees and emoluments received in his office, no more than the sum of $6,000 per annum, and that all sums beyond that are to be accounted for and paid into the treasury, yet we cannot assume, without evidence, either that the total of his receipts from those sources exceeded that limitation in the year 1851 or the year 1852, or that the particular sums paid by the plaintiffs and sued for in this action, did not constitute a part of the emolument retained by the defendant for his individual use. We are, however, inclined to the opinion, for reasons hereafter to be stated, that if those suggestions had been established by the proofs, they would have furnished no adequate defence to the action.

The right of the collector to charge and collect the fees in question, is justified by the defence, both upon an implied authorization by the second section of the act of congress of March 3, 1799 (1 Stat. 706), and also under a long-continued usage and practice in the collector's office of this port, in executing that act in this particular. That section enacts that, "in lieu of the fees and emoluments heretofore established, there shall be allowed and paid for the use of the collectors, naval officers and surveyors appointed and to be appointed in pursuance of law, the fees following, that is to say: "to each collector, * * * for every permit to land goods, twenty cents." Section 46 of another act passed the same day (Id. 661, 662) appoints the manner in which the baggage and mechanical implements imported by passengers shall be entered, and directs that, on compliance with the conditions prescribed, "a permit shall and may be granted for landing the said articles."

The transactions at a collector's office, which are made subject to charges or fees, are enumerated in the statute, and the compensation to be collected for each act done by him is specifically stated. In the levy of these emoluments, he is governed by the limitations, no less than by the express directions of the statute. No equity or usage in respect to these rates of compensation can be appealed to, as a sanction for a departure from the terms of the act. It does not admit of question, that a charge of $61.40 would be illegal and extortionate, if no more than the personal baggage and implements of trade of two passengers were to be entered and landed as such, under two permits given by a collector, whatever might be the num-

ber or value of those articles. This would be so, because congress has required a definite service to be done by the collector, and has granted, for the performance of that service, a specific compensation. The statute gives no reward except for doing the individual act named; and no consideration of convenience to either or both of the parties, or saving of expense, by substituting another practice in place of that directed by law, will authorize a collector, colore officii, to charge and receive compensation for a service differing from that appointed by positive law.

Numerous adjudications in the courts of the United States in this district have declared that, when a rate of fees to an officer of court is established by statute for a particular service, it is illegal in the officer to charge or accept a greater fee for that service.

The rule is equally stringent in the state courts. An action of assumpsit will lie by the party making payment, against the officer, to recover back the overcharge. M'Intyre v. Trumbull, 7 Johns. 35. And, if the act be done corruptly, it is extortion, and subjects the officer to indictment. People v. Whaley, 6 Cow. 661.

The custom or usage alleged to prevail at this port, to make constructive charges for granting permits, whatever may be its notoriety or continuance, is void, both because it contravenes the spirit of the statute, and also because there is no warrant of law, except under the statute, for imposing any charge or fee for that official act. The defendant would, without the aid of the statute, be guilty of extortion, in levying fees of any kind for his official services.

The high character of the collector takes away every color of suspicion that, in these cases, he was actuated by any wrongful motives. He administered the office as he found his predecessors had done, and most probably these special details of duty were performed by his assistants, and his assent thereto, if ever given, was merely formal. The principle, however, is not affected, if these presumptions are admitted as facts. The collector is personally liable for the illegal acts of his deputy, in exacting a compensation not authorized by law. M'Intyre v. Trumbull, 7 Johns. 35. And it is not necessary to the maintenance of a civil action for the recovery of money wrongfully collected, that any turpitude should be proved against the officer. The suit in no way rests on any illegal purpose of the defendant in exacting the payment. It is well sustained, if his official power was exercised in the collection, without warrant of law. Maxwell v. Griswold, 10 How. [51 U. S.] 242. The payment was compulsorily obtained from the plaintiffs in this instance, and they are entitled to charge the collector with the amount, notwithstanding he received it for and paid it to the government. Ripley v. Gelston, 9 Johns. 201. Any charges or costs illegally exacted by an officer colore officii, may be recovered back from him by the common law action of indebitatus assumpsit. Clinton v. Strong, 9 Johns. 370.

We do not consider the objection that the action should be in the names of the individual passengers, and not in that of the ship-owners, as sustainable. In the absence of proof upon this point, the implication would be, that the passage money was all that the ship-owners could claim from passengers for their transportation to and delivery at the port of discharge. This presumption is fortified by the fact, that the owners assumed the satisfaction of these demands, and also that the defendant exacted payment from them. The demands must, therefore, be regarded as charges which the owners were bound to satisfy, as a condition to the unloading of the ship. If the demands were exacted illegally, the owners would have no remedy for them against the passengers, even if the passengers were bound to pay all proper port charges here.

We do not think that the act of February 26, 1845 (5 Stat. 727), applies to exactions of this character. The terms of that act, requiring notice in writing to be given to the collector of objections made to payments exacted by him, are expressly confined to duties paid. In all other respects, the parties stand upon their common law rights and liabilities; and, under those, the action in this case well lies, although the fees collected by the defendant were paid into the treasury before suit was brought. Ripley v. Gelston, ubi supra.

In our opinion, the collector has no authority to charge for any other permits than those actually issued, at twenty cents for each permit. In the present case, he has demanded and received payment for three hundred and seven permits, amounting to $61.40, when by law he was authorized to collect no more than forty cents, being twenty cents each for the two actually granted by him. Judgment must be entered for the plaintiffs, for the above excess, with interest.

Case No. 10,459.

OGDEN v. PARSONS.

[The case reported under above title in 37 Hunt, Mer. Mag. 710, and 38 Hunt, Mer. Mag. 710, is the same as Case No. 10,781.]

OGDEN (PARSONS v.). See Case No. 10,781

OGDEN (PIERSON v.). See Case No. 11,160.

OGDEN (RIDGEWAY v.). See Case No. 11,-814.

Case No. 10,460.

OGDEN v. STRONG.

[2 Paine, 584.] [1]

Circuit Court.[2]

CONSTRUCTION OF STATUTES—LEGISLATIVE INTENTION—THE TITLE—ENGLISH DOCTRINE.

1. The fundamental rule in construing statutes, is to ascertain the intention of the legislature. It is only in statutes of doubtful meaning that courts are authorized to indulge conjectures as to the intention of the legislature, or to look to consequences in the construction of a law. When the meaning is plain, the act must be carried into effect, or courts would be assuming legislative authority.

[Cited in Cory v. Carter, 48 Ind. 337; Buffham v. Racine, 26 Wis. 454; McCaul v. Thayer, 70 Wis. 149, 35 N. W. 353.]

2. In the construction of a statute, every part of it must be viewed in connection with the whole, so as to make all the parts harmonize if practicable, and give a sensible and intelligible effect to each; nor should it be presumed that the legislature meant that any part of the statute should be without meaning, or without force and effect.

[Cited in U. S. v. Reese, 92 U. S. 244.]

[Cited in Atlantic & P. R. Co. v. Mingus (N. M.) 34 Pac. 597; Harrington v. Smith, 28 Wis. 59.]

3. The doctrine held by English writers that the title of an act is no part of it, because added by the clerk, does not apply in the United States, where the legislature makes the title. But even though the title may not, strictly speaking, be a part of the act, yet it may serve in doubtful cases to explain and show the general purport of the act, and the inducement which led to its enactment.

[Cited in Hahn v. Salmon, 20 Fed. 809.]

4. Where, therefore, the title of an act of congress directing moneys to be paid out of the treasury to a widow and her children, was entitled "An act for the relief of the widow and children of B. W. H.," and there was nothing in the act from which a trust could fairly be raised, nor any intimation that the appropriation was intended for any other than their own private benefit, it was *held* that the moneys must be considered as given to the widow and children in their own right, and not as assets to go to the creditors of B. W. H.

[Cited in Rice v. U. S., 122 U. S. 611, 7 Sup. Ct. 1381.]

5. If a statute admit of a construction which will give effect and operation to every part, it ought never to be so construed as to draw after it unnecessary and superfluous provisions.

The complainant [Ogden] filed his bill against the defendant [Strong, administrator of B. W. Hopkins, deceased] to recover moneys paid by him as surety for B. W. Hopkins, upon custom-house bonds, judgments having been obtained against him by the United States on such bonds. The bill was founded upon an appropriation made by congress under an act of congress of February 11, 1830 [6 Stat. 404], by which $13,220 were directed to be paid to the widow and children of B. W. Hopkins; and the great question in the case was, whether this was to be considered as given to them in their own right, or as assets to go to the creditors of B. W. Hopkins.

THOMPSON, Circuit Justice. The complainant filed his bill for the purpose of reimbursing himself out of a specific appropriation by congress, for payments made by him as a surety of Benjamin W. Hopkins upon certain custom-house bonds, which payments were made upon judgments recovered against him upon such bonds. The bill sets out specially the bonds and judgments, and the payments made by the complainant—all which are not denied by the answer. The bill also sets out, at large, the act of congress by which the appropriation is made, and claims that this is a fund belonging to the estate of Benjamin W. Hopkins, and out of which, the complainant alleges, he is entitled to have satisfaction for the advances made by him as surety of B. W. Hopkins; and that, under the laws of the United States, he is a preferred creditor. The answer does not deny any of the material allegations in the bill, except that which relates to the liability of this fund to the payment of any claim against the estate of Benjamin W. Hopkins, but sets up that the appropriation was made for the use and benefit of the widow and children of B. W. Hopkins, and not in trust or for the use and benefit of any other person. In the argument at the bar, several objections have been taken to the mode and manner in which relief has been sought, even if any relief can be obtained. These may, however, be considered as mere formal objections, not involving the substantial merits of the case, and would not, if well founded, put an end to the cause. I shall, therefore, pass them by, and proceed at once to the merits of the case; and this depends entirely upon the construction of the act of congress which is set out at large in the bill. It is entitled "An act for the relief of the widow and children of Benjamin W. Hopkins," and is as follows: "Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that the secretary of the treasury be, and he is hereby authorized and directed to pay out of any moneys in the treasury not otherwise appropriated, to Harriet Strong, widow, Edwin W. Hopkins and Maria A. Hopkins, children of Benjamin W. Hopkins, deceased, the sum of $13,270, being for damages sustained by the said Benjamin W. Hopkins, in consequence of the government failing to furnish an engineer to lay out the fort at Mobile Point, at the time the contract commenced." To which a proviso is added, deducting therefrom $1,762 31, the amount of three judgments recovered against Benjamin W. Hopkins and his sureties upon custom-house bonds. The construction of this act is certainly not free from doubt. The great fundamental rule, in construing statutes, is to ascertain the intention of the

[1] [Reported by Hon. Elijah Paine, District Judge.]

[2] [District and date not given. 2 Paine includes cases from 1827 to 1840.]

legislature. It is only in statutes of doubtful meaning that courts are authorized to indulge conjectures as to the intention of the legislature, or to look to consequences in the construction of a law. Where the meaning is plain, the act must be carried into effect by courts of justice, or they would be assuming legislative authority. It is a general rule of construction, that every part of a statute must be viewed in connection with the whole, so as to make all the parts harmonize, if practicable, and give a sensible and intelligible effect to each. It ought not to be presumed that the legislature intended any part of the statute should be without meaning, or without force and effect. It is observed, by the learned Mr. Dane, in his Abridgement of American Law (volume 6, p. 598, art. 5, § 11), that it is said, in many English books, that the title of a statute is no part of it, because the clerk adds it; but that this reason does not hold in the United States, where the legislature makes the title as much as the preamble or body of the statute. But although the title may not, strictly speaking, be any part of the act, yet it may serve, in doubtful cases, to explain and show the general purport of the act, and the inducement which led to the enactment. It is said, by the supreme court of the United States, in the case of Fisher v. Blight (2 Cranch [6 U. S.] 386), that the title of an act, when taken in connection with other parts, may assist in removing ambiguities where the intent is not plain; for where the mind labors to discover the intention of the legislature, it seizes everything—even the title—from which aid can be derived. The title of the act in this case may afford some aid in judging whether the appropriation was intended for the private benefit of the widow and children of B. W. Hopkins, or to constitute a part of his estate, and to be applied to the payment of his debts. If the former was the object and purpose of the law, it is in harmony with the title; but if the latter was the intention, there could be no propriety in calling it an act for the relief of the widow and children of B. W. Hopkins. Such a title would be at war with the enacting clause; it should have been an act for the relief of the creditors of B. W. Hopkins, and the fund would probably have been placed in the hands of his personal representatives. The bill alleges that B. W. Hopkins died insolvent, and this is not denied in the answer. Whether this fact was known to congress does not appear from the act itself, but the fact is pretty clearly to be inferred from the petition upon which the law was passed; and as it expressly alleged in the bill, it is no more than reasonable to conclude that the law was passed with full knowledge of this fact, and would have been so framed as to meet such a state of things, if it had been intended that it should be considered a part of B. W. Hopkins' estate. The doubt which is thrown upon the construction of this act arises from the statement which it contains as to the consideration upon which the appropriation is made, viz., for damages sustained by Hopkins by reason of the non-fulfilment of the contract between him and the government. Had this been omitted, the act would clearly have admitted of no other construction, than that the appropriation was intended, as indicated by the title, for the relief of the widow and children of B. W. Hopkins; not only the title of the act shows the money was intended for the private benefit of the widow and children, but it is given to them by name, without any words from which a trust can fairly be raised, or the least intimation that it was intended for any other than their own private benefit. The consideration or inducement upon which the act is alleged to have been passed, being the damages sustained by Hopkins, certainly affords some strong equitable grounds for concluding that the money ought to have been applied to the general benefit of Hopkins' estate. But this was a question resting with congress, and will not authorize the court so to consider it, unless such is the construction warranted by the act; and it appears to me that this circumstance is not sufficient to outweigh other parts of the act indicating an intention of a personal benefit to the widow and children. This may well be considered as thrown in for the purpose of showing it was not a mere donation without any consideration, but founded upon a just claim. Suppose there had been no debts due from Hopkins, and he had left other children than those named in the act, if this money constituted a part of Hopkins' estate, such other children, in the case supposed, would come in for their distributive share; but I apprehend the act would not admit of such construction. The petition upon which the law was passed is made a part of the answer; and if we look to the facts there stated, satisfactory reasons appear for limiting the appropriation to the personal benefit of the widow and children. The petition states, that it was required on the part of the United States, in order to enable them to transfer the contract with Hopkins to Hawkins, that she should relinquish her claim to certain property, which she accordingly did; that she was to have received therefor, from Hawkins, for the benefit of herself and children $20,000, no part of which, however, had been paid her; and that she and her children have been left wholly destitute. As this relinquishment was at the instance of the United States, it furnished some equitable considerations for compensating her in part, at least, for the in jury she had sustained. The proviso in the act requiring certain debts due to the United States, to be deducted from the appropriation, goes in some measure to corroborate and strengthen the construction, that the money was intended for the private benefit

of the widow and children; for, if it constituted a part of the estate of Hopkins, and he died insolvent, the United States, by the existing law, would be entitled to priority of satisfaction, and the proviso would be superfluous; and a statute ought never to be so construed as to draw after it such consequences, if it will admit of a construction which gives effect and operation to every part. Such must be presumed to have been the intention of the legislature, and not that any unnecessary and superfluous provision had been made. Upon the whole, although the claim of the complainant is supported by many equitable considerations, we cannot sustain it upon what we think is the fair construction of the act upon which it rests. The bill must, accordingly, be dismissed with costs.

OGDEN (UNITED STATES v.). See Cases Nos. 15,912 and 15,913.

OGDEN (WALKER v.). See Case No. 17,081.

OGDEN (WISNER v.). See Case No. 17,914.

Case No. 10,461.

OGDEN v. WITHERSPOON.

[2 Hayw. (N. C.) 227.]

Circuit Court, D. North Carolina. Dec., 1802.

REPEAL OF STATUTES—RETROACTIVE LAWS—JUDICIAL AND LEGISLATIVE FUNCTIONS—LIMITATION OF ACTION—SUSPENSION DURING WAR.

[1. There are two rules for determining what statutes are repealed by a later one: (1) If the later act be inconsistent with the earlier, it repeals the same. (2) If the later be reconcilable with the earlier, but legislates upon the same subjects and expressly repeals all other laws within its purview, the earlier is repealed.]

[2. The act of North Carolina of 1715 (chapter 48, § 9) requiring claims against the estates of deceased persons to be filed within seven years, was suspended by the act of 1777 (chapter 2, § 101) which disabled British subjects from suing in the state courts; and the disability continued until the treaty of peace was enforced in the state by the act of 1787, which declared the treaty to be a part of the law of the land.]

[3. The act of 1715 was repealed by implication by the act of 1789 which prescribed a shorter period of limitation; and the act of 1799, which declared that the act of 1715 had not been repealed and had continued in force, was ineffectual, as being an invasion of the judicial authority by the legislative power.]

[4. It belongs to the judiciary, and not to the legislative, power to determine the extent and operation of laws after they are made, and an attempt by the legislature to determine retroactively whether one act operated to repeal or suspend a prior one is void.]

[This was an action by Ogden, administrator of Cornell, against Witherspoon, administrator of Nash.]

The defendant pleaded the act of 1715, c. 48, § 9: "Creditors of any person deceased shall make their claim within seven years after the death of such debtor, otherwise such creditor shall be forever barred." Divers other actions were in court pending upon the same pleadings; and the court appointed a day for the argument respecting the validity and effect of the plea. On the day appointed, an argument was had, and the court took time to advise; and some days afterwards delivered their opinions in substance as follows:

Before MARSHALL, Circuit Justice, and POTTER, District Judge.

POTTER, District Judge. The act of 1789 is inconsistent with that of 1715, for it establishes a shorter limitation than the act of 1715, and upon different terms. The act of 1789, c. 23, § 4, enacts "that the creditors of any person or persons deceased, if he or they reside within this state, shall within two years; and if they reside without the limits of this state, shall within three years from the qualification of the executors or administrators, exhibit and make demand of their respective accounts, debts, and claims, of every kind whatever, to such executors or administrators; and if any creditor or creditors shall hereafter fail to demand and bring suit for the recovery of his, her, or their debt as above specified, within the aforesaid time limited, he, she, or they shall forever be barred from the recovery of his, her or their debt, in any court of law or equity, or before any justice of the peace within this state." Section 5 directs "advertisements within two months after qualification," etc. The act of 1715, however, was in force till the act of 1789; but clearly its operation was suspended by Act 1777, c. 2, § 101, commonly called the court law, and by other acts passed after the beginning of the war, disabling British subjects to sue in our courts. The disabilities continued till the treaty of peace was enforced in this state by the act of 1787, which declares it to be a part of the law of the land. The act of 1799, declaring the act of 1715 not to have been repealed, and to have continued in force, has not the effect of making that act to have been in force after it was repealed, till re-enacted.

MARSHALL, Circuit Justice. In the act of 1789 there is this clause: "That all laws and parts of laws, that come within the meaning and purview of this act, are hereby declared void, and of no effect." There are two rules for determining what act shall be deemed to be repealed by a latter one. If the latter be inconsistent with the former, it repeals the former. If it be reconcilable with the former, but legislates upon the same subjects as the former does, and repeals all other laws within its purview, the former is repealed. Then what is the subject of the 9th section of the act of 1715? The estates of all dead men and all creditors upon them, and a limitation of the time for the exhibition of such claims. What is

the subject of the latter act? Precisely the same estates and persons, and a limitation of the time for bringing forward their claims. There is a legislation in both acts upon the same cases. The repealing clause then extends to the section in question. The act of 1715 prescribes a limitation without an exception of persons; the act of 1789 excepts persons under disabilities, such as femes covert and the like. If the act of 1715 be in force, persons under disabilities, will be excepted until the expiration of seven years, and not afterwards; for at that period all persons will be barred by the act of 1715, if it stands with the act of 1789. But why should the legislature design a permission for persons under disabilities to sue after the time prescribed in the act of 1789 for other persons, and until the completion of the seven years fixed by the act of 1715, and not afterwards? The same reason which continued the exception till the expiration of seven years will still operate to continue it longer. If the exceptions are to last, as mentioned by the act of 1789, until the disabilities be removed, then the act of 1715 must be repealed. The act of 1799 declares that the act of 1715 hath continued and shall continue to be in force. I will not say at this time that a retrospective law may not be made; but if its retrospective view be not clearly expressed, construction ought not to aid it. That however is not the objection to this act. The bill of rights of this state, which is declared to be a part of the constitution, says, in the fourth section, "that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other." The separation of these powers has been deemed by the people of almost all the states as essential to liberty. And the question here is, does it belong to the judiciary to decide upon laws when made, and the extent and operation of them; or to the legislature? If it belongs to the judiciary, then the matter decided by this act, namely, whether the act of 1789 be a repeal of the 9th section of 1715, is a judicial matter, and not a legislative one. The determination is made by a branch of government, not authorized by the constitution to make it, and is therefore, in my judgment, void. It seems also to be void for another reason. The 10th section of the first article of the federal constitution prohibits the states to pass any law impairing the obligation of contracts. Now, will it not impair this obligation, if a contract which, at the time of passing the act of 1789, might be recovered on by the creditor, shall by the operation of the act of 1799, be entirely deprived of his remedy?

Upon the point of suspension of the act of 1715, prior to its repeal by the act of 1789, I am of opinion with my brother judge, and for the reasons by him given, that it was suspended and continued so till the act of 1787, declaring the treaty of 1783 to be a part of the law of the land; for it was not settled till the making of the federal constitution, that treaties should ipso facto become a part of the laws of every state, without any act of the state legislature to make them so. It has been argued that, by an act passed in 1791, all acts and parts of acts retained in the compilation of Mr. Iredell, and not by him declared to be repealed or obsolete, or not in force, shall be held to be in force; and that the 9th section of the act of 1715, being retained therein, and having no such declaration attached to it, is therefore in force. The whole of the act of 1789 is also retained, and the repealing clause, as well as the other parts of the act: and if the repealing clause be in force, as no doubt it is, it had the same effect in 1791 as in 1788 and 1789, and continued to keep the 9th section of the act of 1715 repealed, until the passing of the act of 1799.

NOTE. This cause was removed to the supreme court by writ of error, where it was also decided that the act of 1715 had been repealed by the act of 1789.

N. B. The reporter was of the same opinion in 1799 when he published the manual, and placed the act of 1715 as taking effect in the year 1799; but Judge Taylor, and some of the other judges of the court of conference, were of a different opinion, and held the act of 1715 not to have been repealed by that of 1789.

OGDENSBURGH, The (WARD v.). See Case No. 17,158.

Case No. 10,462.

OGLE et al. v. EGE.

[4 Wash. C. C. 584;[1] 1 Robb, Pat. Cas. 516.]

Circuit Court, D. Pennsylvania. April Term, 1826.

PATENTS—ASSIGNMENT—SUIT AT LAW BY ASSIGNEE—INJUNCTION.

1. Quære. Whether an assignee of part of a patent to be made, sold or used within a particular district, can maintain a suit at law? But he may in equity.

[Cited in Jenkins v. Greenwald, Case No. 7,-270.]

2. Cases in which, and terms on which injunctions in cases of alleged infringements of patent rights, are granted.

[Cited in Brooks v. Bicknell, Case No. 1,944; Woodworth v. Hall, Id. 18,017; Orr v. Littlefield, Id. 10,590; Allen v. Blunt, Id. 215; Brown v. Hinkley, Id. 2,012; Miller v. McElroy, Id. 9,581; Hussey v. Whitely, Id. 6,-950; Motte v. Bennett, Id. 9,884; Farmer v. Calvert Lithographing, etc., Co., Id. 4,-651.]

The plaintiffs [Ogle and Withero] filed their bill on the equity side of the court, setting forth that the plaintiff Ogle is the original inventor of a new and useful improvement in the plough, for which he obtained a patent in the year 1818. That in the year 1824, he,

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

by deed, and for a valuable consideration, assigned and conveyed to the other plaintiff all his exclusive right to the said invention, with the liberty of making, constructing, using, and vending the same to others to be used, in and throughout the state of Pennsylvania, with a power of attorney for those purposes. That the defendant has, since the date of the said patent, and also of the said assignment within the state of Pennsylvania, constructed, and used ploughs with the improvement so patented, and is still employed in making and using the same. The bill prays an injunction, which was granted at a former session of this court until answer or further order.

The defendant, without having put in an answer, now moved to dissolve the injunction for the following reasons. 1. Because a patent cannot be partially assigned; so as to enable the assignee to bring an action in his own name. Tyler v. Tuel, 6 Cranch [10 U. S.] 324; Whittemore v. Cutter [Case No. 17,600]. 2. Because the bill does not charge the possession of the invention by the plaintiffs. 1 Madd. Ch. Prac. 137. On the other side were cited, Gods. Pat. 169, 177; 2 Madd. 177; 1 Ves. Sr. 476.

C. J. Ingersoll, for defendant.
Mr. Read, for plaintiffs.

WASHINGTON, Circuit Justice. As to the first ground for dissolving the injunction, I shall content myself with observing, that whether an assignee of part of a patent, circumscribed as to the interest by local limits, can maintain a suit at law in his own name, or united with the patentee or not (a question unnecessary to be decided in this case); there can exist no doubt but that he may support a suit in equity to enjoin third persons from infringing the patent, and for an account.

2. I take the rule to be, in cases of injunctions in patent cases, that where the bill states a clear right to the thing patented, which, together with the alleged infringement, is verified by affidavit; if he has been in possession of it by having used or sold it in part, or in the whole, the court will grant an injunction, and continue it till the hearing or further order, without sending the plaintiff to law to try his right. But if there appear to be a reasonable doubt as to the plaintiff's right, or to the validity of the patent, the court will require the plaintiff to try his title at law; sometimes accompanied with an order to expedite the trial; and will permit him to return for an account in case the trial at law should be in his favour. Hill v. Thompson, 3 Mer. 622, cited in Eden, Inj. 260–262; 14 Ves. 132; 3 Mer. 624, 628; Coop. Eq. Prac. 158; 6 Ves. 707; 1 Madd. Ch. Prac. 113; 14 Ves. 130; Amb. 406; 1 Vern. 120; 2 Madd. 175; 3 Atk. 496; 3 Brown, Ch. 376. Now in this case, the patent was granted in 1818, and is on its face free from all exception. Six years after the issuing of the patent, the patentee, for the consideration of $700 paid to him, sold and assigned to his co-plaintiff his right and title to the same within the state of Pennsylvania. This is therefore a strong case for retaining the injunction until the answer, or until the invalidity of the patent, or the want of title in the plaintiffs, is established at law. Motion overruled, with costs.

OGLETHORPE, The (McKENZIE v.). See Case No. 8,857.

O'GRADY (GEORGIA v.). See Case No. 5,352.

Case No. 10,463.

In re O'HALLORAN.

[8 Ben. 128.][1]

District Court, S. D. New York. June, 1875.

ATTORNEY—JURISDICTION—PRACTICE.

The fact that the attorney for a voluntary bankrupt, who signed the petition as such attorney, had not at that time been admitted to practice in the district court of the United States where the proceedings are pending, is not a ground for dismissing the proceedings, but for an order, on notice to the bankrupt and the alleged attorney, that such alleged attorney will no longer be recognized as attorney in the case.

[In the matter of Dennis W. O'Halloran, a voluntary bankrupt.]

In this case, the attorney for a creditor, who had proved his debt, objected before the register to the proceedings of the bankrupt, on the ground that the attorney for the petitioner, who had signed the petition and other papers as such attorney, was not at the time admitted to practice in the court, of which fact he furnished proof. The register decided that the objection must be made to the court, whereupon the proof was presented to the court.

BLATCHFORD, District Judge. This is no ground for dismissing the proceedings. It is ground for making an order, on notice to the alleged attorney and to the bankrupt, declaring that the alleged attorney will no longer be recognized as attorney.

Case No. 10,464.

Ex parte O'HARA.[2]

Circuit Court, District of Columbia. Nov. 28, 1860.

PATENTS—REJECTION OF APPLICATION—RETURN OF FEE—RENEWAL—APPEAL.

[1. Under the act of 1836, c. 357, § 7 (5 Stat. 119,) the applicant for a patent, on notice of its rejection by the commissioner of patents, has an election either to withdraw his application and receive back his $20 or to appeal, and on his withdrawal of the application the commissioner's decision becomes final.]

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

[2] [Not previously reported.]

[2. An affidavit by an applicant that he signed a power of attorney authorizing his attorney to withdraw his application without knowledge of its contents, and that he had no knowledge of its withdrawal, is not sufficient to allow him to renew his application after 10 years from its rejection by the commissioner and its withdrawal by his attorney.]

[Appeal by John O'Hara from the decision of the commissioner of patents refusing to grant him a patent for his improvement in hats.]

MORSELL, Circuit Judge. The appellant describes his claim thus: "What I claim as new, and for which I desire letters patent, is piercing the whole surface of the hat at short intervals with small holes, thereby decreasing its weight and rendering it pervious to the air. I also claim the forming of the sweat leather in the manner described for the purpose specified. And I also claim the introduction of cork between the sweat leather, and the body of the hat." Upon the refusal of the commissioner to grant letters as prayed, O'Hara filed his reason of appeal: "Because the commissioner of patents has not shown any sufficient reasons in law or in fact for refusing to grant this appellant a patent for his said invention as prayed for in his application for the same." The commissioner, in his report in reply, says: "That on May 18, 1848, appellant filed an application for a patent in this office, for alleged improvements in hats, which was rejected February 15, 1849. On June 30, 1850, this application was withdrawn from the office by his regularly authorized attorney. The specification described a hat pierced with small holes at a little distance apart, all over its surface, to ventilate and make the body light, a peculiar mode of forming the sweat-leather; and a mode of introducing strips of cork between the rows of holes in the sweat-leather and attaching them thereto. On June 20, 1860, the appellant renews this application for a patent, for the same invention, which was refused, on the ground of abandonment. The negligence of the appellant has gone too far. He has slept on his invention for nearly ten years; and is brought by his own acquiescence into the condition of presumed abandonment. His position before the office was clearly defined by his honor, Judge Merrick in the case of Wickersham v. Singer [Case No. 17,610], and the reasoning in that case applies in its full force in this." Patent office letter of July 9, 1860, to O'Hara, amongst other things, states: "Without discussing the pertinency of the references given you in rejecting your application in 1849, you are informed that the office must regard your invention as abandoned," &c.

As a foundation for reinstating the case alluded to in the proceedings of the office just recited, the appellant, with his petition and specification, filed an affidavit dated August 14, 1860, the substance of which is: "That, in the year 1848, he filed an application for a patent upon an invention of a ventilating hat. That he employed an attorney in Washington, J. J. Greenough, who filed said case according to said O'Hara's instructions. But he further says at the time he executed the said application in said Greenough's office in Washington, he signed sundry papers, the true import of which he did not understand; one of which papers seems since to have been a power of attorney or writing empowering him to withdraw his said application, which he did not wish withdrawn under any circumstances, until his resources were exhausted in securing his first rights. That, before making up the case and filing the same, he requested said attorney to go and examine the patent office thoroughly to learn whether his invention was patentable, which examination he did perform, in said O'Hara's presence, and reported to him that he was not anticipated and could secure a patent for his said invention, and there was no risk in paying his money, and he left the case with him to prosecute, and removed with his family to the extreme West, within a few months afterwards. That he paid him for his services, which he holds a receipt for at this time. That he wrote him divers letters, but could not hear from him until more than two years had elapsed, at which time he wrote that said case was rejected for want of novelty. At this time he had met with serious misfortunes in business, and was unable to raise funds to fee an attorney to prosecute his said application, and from that time to this, having had a large family to support by daily labor, he had to delay said prosecution; but believed at all times he could prosecute his case whenever he became enabled; not at any time intending to abandon it. When his attorney, Amos Broadnax, of Washington, D. C., took the case in hand in June last, after his investigation of the same, he reported that his (said O'Hara's) application had been withdrawn by the said Greenough, which was without his (said O'Hara's) knowledge or consent." The aforegoing is the case laid before me, according to due notice previously given, and the appellant hath filed his argument in writing by his attorney, and submitted the case.

The object in this case appears to have been in substance to reinstate a case, for the same claim, and on behalf of the same party, tried and determined by the commissioner on the merits, and rejected by him, in the year, 1849, and by the appellant (or his attorney), under the right given to him by the 7th section of the act of 1836, withdrawn, receiving back $20, as therein provided. The grounds on which the application rests are the circumstances stated in the aforegoing affidavit, and the argument is that O'Hara did not abandon his invention to the public—First, because the mere act of withdrawal does not work an abandonment of the invention to the public by operation of law; second, that the mere

loss of time does not; and, third, that neither John O'Hara or the public have done anything, whereby the public have acquired a right to the invention. The question to be considered is whether this method of recourse is open to him. Whether a withdrawal under some particular circumstances would or would not be evidence of abandonment need not be considered, because the present is not such a case. Act 1836, c. 357, § 7, authorizes and makes it the duty of the commissioner of patents, amongst other things, to examine the inventions and proceedings therein directed for the obtaining of a patent, to determine, under the conditions therein mentioned, who of the applicants is or is not entitled to a patent. The latter part of the clause, which is the part bearing particularly on the question now under consideration, provides that if the commissioner thinks the application ought to be rejected because of a double use, or that description is defective and insufficient, "he shall notify the applicant thereof, giving him briefly such information and references as may be useful in judging of the propriety of renewing his application, or of altering his specification to embrace only that part of the invention or discovery which is new. In every such case, if the applicant shall elect to withdraw his application relinquishing his claim to the model, he shall be entitled to receive back twenty dollars, part of the duty required by this act, on filing a notice in writing of such election in the patent office, a copy of which certified by the commissioner shall be a sufficient warrant to the treasurer for paying back to the said applicant the said sum of twenty dollars. But if the applicant in such case shall persist in his claims for a patent with or without any alteration of his specification, he shall be required to make oath or affirmation anew in manner aforesaid. And if the specification and claim shall not have been so modified, as in the opinion of the commissioner shall entitle the applicant to a patent, he may on appeal, and upon request in writing, have the decision of a board of examiners," &c. (since changed to an appeal to either of the judges of the circuit court of the District of Columbia, by the several acts of congress on the subject by which said appeal is provided), "by giving notice thereof to the commissioner, and filing in the patent office, within such time as the commissioner shall appoint, his reasons of appeal," &c. The notice as required was given by the commissioner, with the references on which his decision was founded, that the appellant's invention had been anticipated in the year 1849. At that time O'Hara had an election, given by the statute, either to give notice to the commissioner of his desire to appeal, or to withdraw his application and receive back $20, relinquishing his claim to the model, as before stated. He did the latter, by his attorney, thereby suffering the decision to become final, and so it was suffered to remain until the filing of the application in this case in the year 1860. With respect to the circumstances alleged by him that he signed the power of attorney authorizing the withdrawal of the application, without knowing what it was, however true this may be, it cannot be considered as sufficient, proceeding as it did from carelessness.

How far the other circumstances mentioned in the affidavit might have weight in another tribunal to which the appellant may resort it is not for me to say. I cannot satisfy myself that it can be given here. I have endeavored duly to appreciate the learned argument on behalf of the appellant, and, so far as its principles relate to the original rights of the inventor in the property of his discoveries, they may be just; but when he resorts to the public for protection in the exclusive enjoyment, they become modified, reciprocal rights arise, a valuable consideration must be given, and the very terms and conditions upon which the grant will be made must be complied with, amongst others, is this very right of appeal. I will conclude by quoting the language of Judge McLean, in delivering the opinion of the supreme court in the case of Shaw v. Cooper [7 Pet. (32 U. S.) 292]: "It is undoubtedly just that every discoverer should realize the benefits resulting from his discovery for the period contemplated by law. But these can only be secured by a substantial compliance with every legal requisite. His exclusive right does not rest alone upon his discovery; but also upon the legal sanctions which have been given to it, and the forms of law with which it has been clothed."

For the foregoing reasons, I think the decision of the commissioner is correct, and it is hereby affirmed.

Case No. 10,465.

In re O'HARA.

[8 Am. Law Reg. (N. S.) 113; 1 Am. Law T. Rep. Bankr. 123; 15 Pittsb. Leg. J. 134; 3 Pittsb. Rep. 111.]

District Court, W. D. Pennsylvania. Dec. 15, 1868.

BANKRUPTCY — COSTS—COMPENSATION OF CREDITORS' COUNSEL — CONTRIBUTION FROM OTHER CREDITORS.

1. Compensation of counsel for petitioning creditors in involuntary bankruptcy is taxable as part of the costs of the proceedings, and payable out of the fund realized.

[Cited in Ex parte Jaffray, Case No. 7,170; Re King, Id. 7,780.]

2. But the principle does not extend to give petitioning creditors a right to contribution from the other creditors in case of failure to realize a sufficient fund to pay expenses and counsel fees.

In bankruptcy. Counsel for the petitioning creditors presented to the register a claim of $1,500 for compensation for their services as counsel, which they asked to have taxed in their favor as costs in the

proceedings, to be paid out of the funds in the hands of the assignees. At the time of presenting said claim, they also made proof that notice of their intention to do so had been served upon the bankrupt and the assignees. The bankrupt neither appeared in person, nor was he represented by counsel. The assignees appeared and filed a written objection to the allowance of said claim, on the ground that no provision therefor is made either in the bankrupt act [of 1867 (14 Stat. 517)] or general orders; admitting, however, the extent of the services rendered, and the reasonableness of the charge threrefor.

By SAMUEL HARPER, Register:

A question similar to this one has been decided in favor of allowing compensation to the petitioning creditors' counsel by Judge Bryan, of the United States district court for South Carolina. In re Williams [Case No. 17,704]. It is true that the decision in that matter rested on an analogy drawn from the practice in the courts of that state, in chancery, in allowing counsel fees on a creditors' bill against the insolvent estates of deceased persons, yet the learned judge gives other equitable and just reasons for the allowance. "There is," said he, "a very cogent reason why any single creditor should feel at liberty to prosecute without the fear of having his claim swallowed up by the expenses of the suit—even when successful. The act contemplates fraud as the ground of prosecution in a great variety of forms. Instant action by one creditor in a precise locality, separated from all other creditors, and without opportunity of counselling with them, is necessary for the efficient administration of the law, and the protection of the whole body of creditors. To wait for time for consultation would, in numerous instances, be to lose the golden moment, and let the fraudulent debtor go free."

In that case it was remarked that, "in contemplation of law, so far as his property is concerned, the bankrupt is dead. He is no longer entitled to control over it, or the distribution of it. It is assets in the possession of the court, to be administered by the agency of an assignee, for the equal benefit of all creditors—not preferred and protected by liens—and such lien-creditors secured in their liens, as in the case of an insolvent deceased's estate." In the present case, this condition of things exists as the result of the proceedings instituted, and (after an unusually severe struggle) successfully prosecuted by the petitioning creditors; and although the bankrupt act and general orders are silent upon the subject, I think it is within the equity of the court to say whether the general creditors shall reap the benefit and share in the burdens, or whether they shall be entirely exempt from the latter, and the expense of preparing the petition and its prosecution to the decree of bankruptcy be thrown upon the petitioning creditors alone. To say the latter, is to say that the involuntary feature of the bankrupt law is a delusion and a fraud. A decision that casts such a pecuniary burden upon the creditor who rescues the property of a fraudulent debtor for the benefit of all his creditors, will virtually amount to the abrogation of the involuntary provisions, for it will deter individual creditors from instituting proceedings against their debtors, which are almost sure to involve them in still greater pecuniary loss. The debt of the petitioning creditors in this matter, as proved before the register, amounts to $1511.80. If the burden of this claim should be thrown on them, and the bankrupt's estate should pay all debts in full, it follows that the petitioning creditors would realize out of the estate eleven dollars and eighty cents, or considerably less than one per cent., while the other creditors would realize one hundred per cent.

It is no answer to this position to say that the creditors of a debtor can consult together before proceedings are instituted, and agree to equally bear the necessary expenses. I have no knowledge of any bankruptcy matter all the creditors in which could be got together in time to prevent the accomplishment of the debtor's purpose. It is difficult to follow the most kinds of property after the possession has passed to others; and the hope of recovering the value of such property from those who may have aided the debtor in his fraudulent transactions, affords but little encouragement for the institution of legal proceedings necessarily expensive. The suggestion that the creditors may or should consult before filing the petition, and agree to bear the expense jointly, is, however, a recognition of the equity of this claim. To allow this claim is merely to say—after the successful prosecution of the petition—what the creditors themselves would almost universally say before the filing of the petition. And there is more reason and justice in saying it now, because by the prompt action of the creditor who first learns of the fraudulent actions of the debtor, much more of his property is rescued for the benefit of the creditors than would be the case if the proceedings were delayed until the creditors could be got together for consultation. The summary processes of the bankrupt law encourage prompt action. Its involuntary provisions were intended to be efficient in the punishment of dishonest debtors, and the distribution of their property among their creditors. That efficiency would be entirely neutralized if the petitioning creditors, instead of acquiring advantages by their proceedings, are to incur heavy pecuniary burdens.

The analogy in the South Carolina case I have cited, does not, however, exist in Pennsylvania, but I do not think it necessary that it should. I base my opinion on the equitable rule that he who shares in a benefit should contribute a like share to the ex-

penses incurred in realizing the benefit. The bankrupt law is intended to be an uniform system. If it be just and equitable in South Carolina to tax the compensation of the counsel for the petitioning creditor as part of the costs, as I believe it is, it is just and equitable to do the like in Pennsylvania.

The case Ex parte Plitt [Case No. 11,228] is somewhat in point. One Mathias Aspden died in London, 1824, leaving an immense personal estate to his "heir at law" or "lawful heir." Litigation followed to determine who was entitled to the estate, and occupied the attention of the federal courts from 1826 to 1852. Several of the most eminent counsel in the country were concerned in it; and the question presented in Ex parte Plitt [supra] in relation to counsel fees was raised by counsel, who, owing to the complex character of the litigation, were instrumental in securing the fund for the successful claimants, though in the end they represented conflicting interests. Judge Kane, in the absence of Judge Grier, delivered the opinion of the circuit court. I quote as follows: "Over and above the fees of office, this fund is subject to three classes of charge: 1st. The necessary expenses of ascertaining it, and reducing it into possession. 2d. A reasonable compensation for its safe keeping, and the supervision of its interests. 3d. The expenses of ascertaining the proper distributees, and making distribution among them." In the first class he included the expenses paid by an unsuccessful claimant for a commission to England, and $1000 as compensation for services in securing a large amount of money to the estate. In the third class he included the claims for counsel fees, and said: "We have no doubt of the power of the court, where a fund is within its control, as in the case before us, to take care of the rights of the solicitors who have claims against it, whether for their costs, technically speaking, or their reasonable counsel fees." Again: "Now, it is the familiar rule of courts of equity, where a suit has been instituted and carried on for the benefit of many, that all who come in to avail themselves of the decree shall bear their just proportion of the charges." The parallel is sufficiently clear to need no application to the present matter.

Of course this decision would not give to the petitioning creditors the right to enforce contribution from the other creditors in case of failure. It is only when success follows his petition, and there are assets to be distributed, that they can be called on to share the expense. The petitioning creditor takes these chances; and should he fail to obtain a decree of bankruptcy, or after decree fail to discover assets, he must bear the burden alone. The only general principle ruled is, that the compensation of the counsel for the petitioning creditor is taxable as costs in cases of involuntary bankruptcy. No general rule can be laid down as to the amount of compensation. That is a subject within the discretion of the court, and cannot be determined by an agreement between the parties. The practice observed in this case is approved, and will be a precedent to govern in all like matters.

McCANDLESS, District Judge. As the solution of this question does not depend upon any statutory provision, and, as a precedent, is of consequence to the profession and the public, before concurring with the register, I have given to the subject mature consideration. I have arrived at the conclusion that his opinion is based on sound principles, and sustained by sufficient authority. The fund is within the control of the court, and it is our province so to administer it as to do exact justice to all the creditors. We have judicial knowledge of the professional services rendered by the able counsel of the petitioning creditors, by whose exertions the fund has been realized; and, as we consider the fee charged reasonable, it is proper that their compensation, as one of the incidental expenses, should be deducted before distribution. The decision of the register is affirmed.

Case No. 10,466.

O'HARA v. HAWES.

[3 App. Com'r Pat. 247.]

Circuit Court, District of Columbia. Dec. 9, 1859.

PATENT OFFICE RULES—TESTIMONY IN CONTESTED CASES—POSTPONEMENT—DISPENSING WITH RULES.

[Certain rules of the patent office made in pursuance of act March 3, 1839, § 12 [5 Stat. 355], giving the commissioner power to make rules respecting the taking of testimony in contested cases, provide that upon the declaration of an interference a day will be fixed for the hearing of the case, previous to which the arguments must be filed; and, if either party wishes a postponement of either "the day for closing the testimony" or the day of hearing, he must within a certain time, by affidavit, show sufficient reasons, etc. *Held*, that such rules are binding upon the parties and the commissioner, and cannot be dispensed with by the latter so as to permit the introduction, against objections, of depositions taken after the day fixed for closing the testimony.]

[Appeal by James O'Hara from the decision of the commissioner of patents in the matter of interference declared between the application of said John L. Hawes and the said James O'Hara for an improvement in retort for distilling coal oil.]

MORSELL, Circuit Judge. The examiner's report of April 19, 1859, adopted by the acting commissioner as his decision, makes the following statement of the case: "On November 27, 1858, James O'Hara filed an application for an improvement in retorts for distilling oil from coal, which consisted in the application of an archimedean screw-stirrer in a vertical

retort or distilling tower where the screw did not occupy the whole cavity of the circular tower, and which left thereby a vacant space between the extremity of the blade of the screw and the internal surface of the wall of the retort. The screw by power is made to revolve and cause the continuous elevation of the central portions of the charge of coal, while at the same time the coal descends through the space between the screw and the wall of the retort. The claim is made for the employment in an upright retort for distilling coal of a revolving screw, of a circumference smaller than the interior of the retort, so applied that while by its revolution it produces a continuous elevation of the central portion of the charge it permits and causes a continuous descent of the surrounding portion by gravitation, and thus produces a positive, continuous, and uninterrupted upward and downward circulation, substantially as and for the purpose herein set forth. The office granted a patent to O'Hara for the above improvement, which was dated December 28, 1858. On March 8, 1859, John L. Hawes filed an application for an improvement in coal-oil retorts, in which the nature of the invention is substantially the same and the claim concludes in the same language with that described in the patent of O'Hara. Hawes filed a caveat in this office, dated November 27, being the same day on which O'Hara filed his application. Interference was declared by the office March 14, and the day of hearing fixed for April 18. No testimony to show priority is adduced by O'Hara, but in his argument stress is laid upon the fact of the contemporaneous filing of his application and of the filing of Hawes' caveat, and as the latter is presumed to relate to an incomplete invention that priority, therefore, rightly belongs to him, O'Hara. He also objects to the reception of any testimony offered by Hawes inasmuch as such was not forwarded to the office, one week before the day of hearing said interference and as the rule of the office points out the time for transmitting testimony, when such is received at a later date, he protests against its admissibility inasmuch as he had no opportunity to take any testimony to rebut any evidence sought to be adduced. Testimony from Hawes was filed in the office on the morning of April 18, without accompanying argument. This testimony has been received and allowed by the examiner because, although not in strict conformity with the office notice, yet it is not contrary to the rules of evidence, copies of which were forwarded to both parties, and because the law does not stringently declare what shall be the latest period for receiving testimony in cases of interference provided it be furnished before the day of bearing. Office rule 97 (Rules and Regulations) appears to contemplate a case such as the present, where a technical objection is raised by one party; and in this case with peculiar force, for O'Hara received notice of the time and place for taking this testimony, the objection to which has been made by him and on the face of the depositions taken and forwarded by the justice. It appears that O'Hara and his attorney were present at the taking of testimony and offered no protest nor did O'Hara, by himself or attorney, forward any protest to the office before the day of hearing and thus give the office an opportunity to allow him to put in rebutting evidence. For the above reasons, therefore, it has been deemed but equitable to Hawes to receive the testimony on his part." The examiner then proceeds to state the substance of Hawes' testimony so received and admitted by the examiner and to overrule the objection made to the admissibility by the counsel of the appellant, which testimony seems to form the only ground on which he decides the point of priority in favor of said Hawes. This report was adopted and confirmed by the acting commissioner April 25, 1859, and priority of invention awarded to Hawes, and a patent ordered to issue to him.

Thirteen reasons were filed by the appellant for appealing from the said decision. Eight of them relate to the inadmissibility of the testimony offered and admitted on behalf of Hawes, the other part relates to the merits of the subject. As the reasons appear sufficiently special and extensive to cover all the objection for consideration it will not be necessary to state them particularly here. The acting commissioner in his reply and report, in the first part thereof, offers his answer as to the subject of the last part of the reasons. The subsequent part, in answer to the subject of the first eight reasons, is as follows: "It is objected that this testimony was taken in opposition to the rules of the office established in such cases; that, being taken after the Monday preceding the day of hearing, it should not have been considered. A copy of these rules made by virtue of section 12 of the act of congress of March 3, 1839, is herewith submitted as attached to the office circular, and an older office circular (with the rules) also in use is also submitted. In this case it happened that the newer office circular fixing the day of closing the testimony on the Monday previous to the day of hearing was sent to O'Hara, while Hawes received the older circular, in which the day of closing testimony is not fixed. It may be remarked that the fixing a day of closing the testimony is not directed in the rules, but is rather an office regulation based upon the rules. Upon the hearing of the interference it was found, on examination of the papers, that Hawes had not received from the office any limitation of the period of taking testimony, provided it was taken before the day of hearing, as an inspection of the above-mentioned older office circular will indicate. Inasmuch, then, as Hawes, by official notice, was not limited, it was not deemed equitable to adhere to the more usual and newer regulation fixing the limit at the Monday previ-

ous; and, as he had really complied with the official notice forwarded to him, the testimony was allowed and taken into consideration, and in so doing it was deemed that no injury could result to O'Hara therefrom, for the record of the testimony shows that O'Hara was notified of the time of taking such testimony, was present at the taking, and did not then object to the reception of said testimony, and it is to this new objection at that time by O'Hara, that the examiner alluded in the report upon the interference made by him to the commissioner. This omission to urge the objection to receiving said testimony would operate to place O'Hara subject to clause 90 of the rules and regulations of this office, and to make his subsequent objection a technical rather than an equitable one," etc.

This is the case, with all the original papers and evidence, etc., as laid before me by the commissioner at the time and place of hearing, when also the parties appeared by their counsel, filed their respective arguments, and submitted the case. The preliminary question raised by the objection to the admissibility of the testimony is rested upon the ground that it was not taken according to the rules and regulations of the patent office on that subject. Those rules were made by the commissioner under the authority of the act of congress of March 3, 1839, § 12, which says, "That the commissioner of patents shall have power to make all such regulations in respect to the taking of evidence to be used in contested cases before him as may be just and reasonable." In a contested case such as this is, the rules and regulations on the subject of taking evidence are binding upon the parties, and each party is entitled to the benefit of them, and, until abrogated, are as binding upon the commissioner himself, as much so as they would be if enacted in so many words in the statute itself. The parties therefore have a legal right to claim that the evidence should be taken according to said rules and regulations; and, in the admission or rejection of the testimony on the trial, the commissioner has no right to vary or adopt any other rule for any special case. The circular in this case sent to the appellant was the one which the commissioner calls the "new one," and it provides, in express terms, that the taking of the testimony must be closed on the Monday next before the day appointed for the trial, which was April 18. The notice given to him by the appellee to attend the taking of the testimony stated the time to be on April 11, a day after the day limited for the closing thereof, and, without giving the names of the witnesses intended to be examined, gave but that short interval to take his rebutting evidence and to file the required argument before the commissioner. This seems to me to be hardly reasonable time, even if there had been no time limited by the rule. To obviate this objection, the commissioner says there were two circulars, which he calls the "old" and the "new," and that there was no time limited in one of them for closing the testimony, and that it was this latter kind that was sent to the appellee. If such was the case, did not the subsequent rule limiting the time modify the old regulation? Otherwise the evil which has happened in this case might constantly occur. The commissioner says that it may be remembered that the fixing a day of closing the testimony is not indicated in the rules, but is rather an office regulation, based upon the rules. In this it would appear that the commissioner is mistaken. The forty-second and forty-third rules are to this effect: "Upon the declaration of an interference a day will be fixed for the hearing of the cause." Previous to this latter day, the arguments of counsel must be filed, if at all. "If either party wishes a postponement of either the day for closing the testimony or the day of hearing, he must, before the day he thus seeks to postpone is past, show by affidavit a sufficient reason for such postponement." These rules seem to me too imperative to permit of the equitable rule which seems to have been on the mind of the commissioner. It is also said that the appellant was present, and did not object. There is no evidence that he consented, but the reverse, as he would not act even to cross-examine the witnesses.

I am entirely satisfied, therefore, that the acting commissioner erred in admitting the testimony in evidence, and that, the said evidence being so inadmissible, the award of priority to the appellee ought not to have been made, and that said decision ought to be reversed, annulled, and set aside, and the same is hereby so done.

Case No. 10,467.

O'HARA et al. v. The MARY.

[1 Bee, 100.] [1]

District Court, D. South Carolina. June 4, 1798.

ADMIRALTY JURISDICTION—AMOUNT INVOLVED—CHANGING SECURITY.

Of three several sums advanced for repairs and outfit of this vessel, one only could attach as a sufficient lien to give jurisdiction to the admiralty; and that security having been changed, the libel was dismissed in toto.

[Cited in Putnam v. The Polly, Case No. 11,-482.]

In admiralty.

BY THE COURT. The libel states three allegations whereon to found a claim against this ship: 1st. For 741 dollars, laid out by Campbell and O'Hara as ship's husband, at Jamaica, for the benefit of the owner and owners of said ship, (and particularly for the benefit of J. G. Glover of New-York, the

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

proprietor of the ship by virtue of a bill of sale or transfer from Richard Hughes, the registered owner) to procure insurance on her intended voyage from Kingston to Charleston. 2d. For 402 dollars, advanced by a Mr. Earle, in Jamaica, to the captain, for necessaries for the ship; for which sum the captain drew a bill on the reputed owner of the ship, expressing that the same was for and on account of the disbursements of the ship. This bill was afterwards indorsed by Daniel O'Hara and son, that Earle might be enabled to negotiate it. This was done at the particular request of the captain, who, in consideration thereof, agreed to deliver, and actually delivered, possession of the ship to these indorsers, as security. They now hold the ship for that purpose; and the bill having been protested and returned, it is insisted that the ship must be considered as duly hypothecated. 3d. For 600 dollars, advanced by said Daniel O'Hara and son in Charleston, to the captain for wages of the crew. For this sum also another bill was drawn by the captain on Glover, the reputed owner, for value received in the disbursements of the ship. This transaction was also, by agreement of the captain, to be considered as an hypothecation of the vessel; and this bill, too, was protested. To reimburse these several sums the libel prays that the ship may be sold, and the balance, if any, paid to said Daniel O'Hara and son, for and in behalf of said Glover, who is legally entitled thereto as purchaser from Richard Hughes, the registered owner, for valuable consideration expressed in the bill of sale.

To this libel a claim has been interposed by Richard Morgan, of New-York, setting forth a bill of sale, for valuable consideration, from Hughes to him, dated 23d February, 1797, by which he became lawful owner of the ship agreeably to the act of congress; the vessel being at that time in parts beyond the seas. Claimant prays that the ship may be adjudged to him, or be sold to satisfy him for money due to him. Richard Hughes, the registered owner, has interposed a plea to the jurisdiction, inasmuch as the several contracts and causes of suit, if any exist, were made on land, within the jurisdiction of the courts of common law, and not of the admiralty. The captain who was, at first, made a party, has been since admitted as a witness, by consent of all parties. Several exhibits have been filed; particularly two letters of J. G. Glover. One of these is to Campbell and O'Hara, at Jamaica, dated 16th December, 1797: the other is to Daniel O'Hara and son, dated 1st May, 1798.

In support of the jurisdiction of the court it is contended: 1st. That the money furnished in Jamaica by Earle, was advanced in a foreign port, and for necessary supplies, and that a lien on the vessel was created, though there was no express hypothecation, nor other written evidence than a bill drawn by the captain on the owner. 2d. That the money paid to procure insurance on the ship was also absolutely necessary, as the vessel could not have proceeded without it. 3d. That the 600 dollars, supplied in Charleston by O'Hara and son, to pay the crew, was not less necessary; and that the parties previously agreed that the ship should be considered as pledged therefor. That Charleston is a foreign port, as relates to New-York, though both are under one government. That if either of these points be sustained, the court must exercise jurisdiction, and direct a sale.

I shall, at present, take notice merely of the plea to the jurisdiction. To constitute a right to hypothecate the ship, there must be urgent necessity, in a foreign port, and a total want of sufficient personal credit. 3 Mod. 244. Apply this rule to the present case. When this ship arrived at Jamaica, she had made 1600 dollars freight. She had met with a gale of wind, and been forced into Curracoa to refit; there she disbursed 825 dollars for that purpose, and had remaining 775 dollars. This was on the 29th November, 1797. While she remained at Jamaica, waiting, but without success, for freight home, Earle supplied 402 dollars. The captain says, Earle objected to the vessel's sailing till he should be paid; but that he afterwards agreed to come here in the ship, which he considered liable to him for the above sum. About this time Glover's letter to Campbell and O'Hara must have arrived; it is dated at New-York on the 16th December, 1797. The whole business was now changed. They, as Glover's agents, seized the vessel, turned out the captain, and put in another; but afterwards reinstated the same, upon an express agreement that he should carry the ship to Charleston, and deliver her to Daniel O'Hara and son. It must have been at that time that the insurance was made, for which the captain drew a bill of 714 dollars on Glover. Is it possible, under these circumstances to say there was a want of personal credit on the part of the supposed owner, Glover? Campbell and O'Hara acted by his directions, with a bill of sale of the ship from Hughes in their possession, and orders to attach her if they could not make good terms with the captain. This clue unravels the subsequent proceedings.

The libel states that the insurance was made by Campbell and O'Hara, as ship's husband. Does this shew a want of personal credit in the captain sufficient to create a necessity for advancing money upon the security of the ship, and to give jurisdiction to a court of admiralty? surely not.

As to Earle's claim for 402 dollars, he had a lien on the ship for that sum in Jamaica, which he relinquished by coming here in her, and receiving payment from O'Hara. Had he libelled for this advance in Jamaica, or upon his arrival in Charleston, his suit must have been sustained. As the transaction now stands, that lien is gone.

As to the 600 dollars paid for wages of the crew, by Daniel O'Hara and son, and for which the captain drew a bill on Glover, this reasoning applies more strongly than to either of the other sums. Without deciding whether this can be deemed, in any sense, a foreign port, as relates to another of the United States, it is clear that every step taken by Campbell and O'Hara, in Jamaica, or by Daniel O'Hara and son here, was taken by them as agents for Glover of New-York, owner of this ship. Glover's letters to them sufficiently evince this; from the last of which it is clear that the admiralty has no jurisdiction of this question. In that, Glover tells them that the bill for 741 dollars for insurance (the first allegation in the libel) will be due on the 15th May last, and that he will take it up.

Upon the whole, it appears that these parties have mistaken their remedy by applying to a court of admiralty. What redress they may have in equity, or at common law, it is not for me now to say. I adjudge and decree that the libel be dismissed, with costs.

O'HARRA (FERGUSON v.). See Case No. 4,740.

Case No. 10,468.

O'HARRA v. HALL.

[4 Dall. 340.]

Circuit Court, D. Pennsylvania. April Term, 1800.

CONTRACTS—EXPLANATION OR ALTERATION BY PAROL.

Case. This was an action brought by the assignee of a bond, against the assignor, upon a written assignment, in general terms. On the trial, Mr. Ingersoll, for the plaintiff, offered parol testimony to show, that the defendant had expressly guaranteed the payment of the bond. W. Tilghman objected, that as the contract of the parties was in writing, no parol testimony could be admitted, on a trial at law, to vary its expressions and import. Mr. Ingersoll replied, that wherever there is an oral misrepresentation at the time of a sale, or transfer, even though the principal bargain is reduced to writing, the misrepresentation may be proved. A court of equity would, in such case, grant relief; and even the courts of law are now accustomed to regard actions on the case, like the present, as bills in equity. Moses v. Macferlan, 2 Burrows, 1005; [Thomson v. White] 1 Dall. [1 U. S.] 428.

Before CHASE, Circuit Justice, and PETERS, District Judge.

CHASE, Circuit Justice. You may explain, but you cannot alter, a written contract, by parol testimony. A case of explanation, implies uncertainty, ambiguity, and doubt, upon the face of the writing. But the proposition now, is a plain case of alteration: that is, an offer to prove by witnesses, that the assignor promised something, beyond the plain words and meaning of his written contract. Such evidence is inadmissible; and has been so adjudged by the supreme court in Clarke v. Russel, 3 Dall. [3 U. S.] 415. As to the authority of Moses v. Macferlan, 2 Burrows, 1005, it has always been suspected, and has lately been over-ruled, on the principle, that the previous decision, there brought into question, was pronounced by a competent court. I grant, that chancery will not confine itself to the strict rule, in cases of fraud, and of trust. But we are sitting as judges at common law; and I can perceive no reason to depart from it.

PETERS, District Judge. If we were sitting as judges in a state court, I should be inclined to admit the testimony, in order to attain the real justice of the cause; as there is no court of equity in Pennsylvania. But there is no such defect in the federal jurisdiction; and, therefore, when the party comes to the common law side of the court, he must be content with the strict common law rule of evidence.

Case No. 10,469.

OH CHOW et al. v. HALLETT.

SHE AT et al. v. HALLETT.

[2 Sawy. 259;[1] 5 Chi. Leg. News, 109.]

Circuit Court, D. Oregon. Nov. 11, 1872.

WRITING—HOW PLEADED—DISTINCT STIPULATIONS—ALLEGATION NOT UNCERTAIN.

1. In actions at law a writing complained upon or pleaded must be set forth in the pleading according to its tenor or legal effect, and if it is merely referred to and annexed as an exhibit, it will be stricken out, on motion, as impertinent and irrelevant.

2. Where a contract contains various substantive and independent stipulations, and there is a breach of more than one of such stipulations, there arises distinct causes of action which should be pleaded separately.

[Cited in Toy William v. Hallett, Case No. 14,123.]

3. An allegation that the defendant failed to furnish transportation to laborers furnished the defendant by plaintiff to his damage so many dollars is not uncertain, but only nominal damage can be recovered under it.

[These were actions at law by Oh Chow and Gin Lee against J. L. Hallett, and She At and Wing Lock against same defendant, to recover balance of wages, and damages for breach of contract.]

Charles B. Bellinger, for plaintiffs.

Joseph N. Dolph, for defendants.

DEADY, District Judge. These actions were commenced October 14, 1872, and the motions to strike out were argued and submitted together on November 9. The first named one is brought to recover the balance

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

of $1,982 46, alleged to be due the plaintiff for laborers furnished the defendant to work upon the North Pacific Railway; and the sum of $365 33 damages for a failure on the part of the defendant to furnish transportation to take said laborers and their freight from said railway to the town of Roseburg. The second is brought to recover a balance of $654 26 and the sum of $142 damages, alleged to be due the plaintiffs and incurred in like manner.

In each case the contract sued upon, instead of being pleaded in the complaint according to its tenor or legal effect, is annexed thereto as an exhibit. In each complaint the allegation in regard to the failure to furnish transportation is numbered six, and commences: "And for a further breach of defendant's said contract plaintiff alleges that defendant failed," etc. No facts are stated except the failure aforesaid to show that the plaintiffs sustained damage by reason thereof.

The motions to strike out are aimed at these allegations as well as the ones making the contracts exhibits, and the contracts themselves. As to the allegations concerning the contracts, the motions must be allowed. In pleadings in actions at law, there are no such things as exhibits. If a party desires to complain upon or plead a writing he must state it in his complaint or plea according to its tenor or legal effect. Such has always been the ruling and practice in this court.

As to the allegations numbered six, they should have been pleaded not as "a further breach" of the contract, but as a separate and further cause of action. The practice of assigning more than one breach in the same count or statement of a cause of action, prior to the Code, was permitted only in covenant upon a deed and by statute in debt upon bond with a condition, or to secure covenants. When an ordinary contract contains various substantive and independent provisions--as in this case, to pay for labor furnished, and to furnish transportation to laborers—if there is a breach or failure to perform more than one of the stipulations, there are distinct causes of action, requiring different proofs, and which may admit of different defenses, and therefore should be stated separately. This cause of action not being pleaded separately is liable to be stricken out on motion. Code, Or. 163. But these allegations are not liable to be stricken out upon the ground assigned in the motion as being "immaterial and irrelevant." True, no special damage could be proven or recovered under them, because no facts showing such damage are stated in them, as that the plaintiffs by reason of such failure were compelled and did furnish such transportation and pay for the same so much. Still the allegations contain an averment of a breach of the respective contracts, for which, if found true, the plaintiffs would be entitled to recover nominal damages. So much of the motions is denied.

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

OHIO (MERCY v.). See Case No. 9,457.

OHIO, The (UNITED STATES v.). See Cases Nos. 15,914 and 15,915.

OHIO, The (WILSON v.). See Case No. 17,-825.

Case No. 10,470.

In re OHIO & M. RY. CO.

Circuit Court, E. D. Missouri. 1876.

[Cited in Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 29 Fed. 624. Nowhere reported. The proper title of this case is Garrett v. Ohio & M. Ry. Co. The bill of complaint was filed November 20, 1876. The court did not file a written opinion.]

OHIO & M. R. CO. (DIMPFEL v.). See Case No. 3,918.

OHIO & M. R. CO. (KING v.). See Cases Nos. 7,800 and 7,801.

Case No. 10,471.

In re OHIO CENT. R. CO.

[Cited in Taylor v. Philadelphia & R. R. Co., 7 Fed. 378. Nowhere reported; opinion not now accessible.]

OHIO LIFE & TRUST CO. (BELL v.). See Case No. 1,260.

OHIO LIFE INS. CO. (BELL v.). See Case No. 1,261.

Case No. 10,472.

OHL v. EAGLE INS. CO.

[4 Mason, 172.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1826.

MARINE INSURANCE—PAROL TITLE TO VESSEL DIFFERENT FROM THAT SHOWN IN PAPERS.

If a policy of insurance is underwritten on a ship, the assured cannot set up a parol title to the whole of the ship, when the ship's papers on the voyage prove a joint ownership in himself and the master. In such case he can recover only for his own moiety in case of loss.

[Cited in U. S. v. Bartlett, Case No. 14,532; Dowling v. The Reliance, Id. 4,042.]

Assumpsit on a policy of insurance of 2500 dollars on the schooner Warren, at and from Philadelphia to Alvarado, valued at 2500 dollars. Loss averred to be total by perils of the seas. (2) Count, on a policy of 1200 dollars on the freight on board of the same vessel, valued at 1200 dollars. Loss averred to be total in like manner. (3) Count, money had and received. Plea, the general issue. At the trial the plaintiff, to establish his ownership of the schooner, produced a bill of sale from Thomas Hendrich and others to himself ([John F.] Ohl) and one Remington, the master of the ship, dated 1st of June, 1824, and a register of the

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

schooner on the 2d of June, 1824, taken out by the plaintiff, at the custom-house, in Philadelphia, in the names of himself and Remington, as owners, and the plaintiff, on that occasion, made oath to the ownership, as stated in the register. The schooner had ever since sailed under this register, Remington being master during the whole period. The plaintiff then offered to prove, by parol evidence, that the purchase had been originally made on his sole account, and that Remington's name was inserted in the bill of sale and registry by mistake. That at all events, if this could be shown, it would operate an implied surrender of the interest of Remington, if any vested in him. The defendants objected to the evidence.

Mr. Loring, for plaintiff.

Webster & Williams, for defendants.

STORY, Circuit Justice. I am of opinion, that the evidence is not admissible. I think that a title to a ship cannot pass by parol, when she is sold, to a purchaser. The general maritime law requires a ship to have some written documents of ownership, at least when sailing on the ocean; and there is nothing in our jurisprudence, which dispenses with such a written instrument of transfer. Lord Stowell has observed (The Sisters, 5 C. Rob. Adm. 155 [438]) that a bill of sale is "the universal instrument of transfers of ships, in the usage of all maritime countries, and in no degree a peculiar title deed or conveyance known only to the law of England. It is what the maritime law expects, what the court of admiralty would, in its ordinary practice, always require." From such an authority one would be little inclined to differ, unless upon some urgent occasion. But here is a bill of sale and a registry of the schooner as an American vessel, at the port of Philadelphia, under and by virtue of that instrument. A bill of sale is indispensable to pass the title to a ship under our registry act of 1792, c. 1, § 14 [1 Stat. 294], so as to preserve her American character.

When the sale was made in this case, the bill of sale was made out and executed by the vendor in the joint names of the plaintiff and Remington. The legal title, therefore, passed to both; and to introduce the parol proof, would be to contradict the direct allegations of the deed. This is not all. The register was taken out in the joint names of both parties, and the ownership was sworn to by the plaintiff to be as stated in the register. The schooner has always sailed under that register, and Remington has continued in possession as master, during the whole period since the purchase. It appears to me, that the plaintiff cannot now be permitted to show that the ship's papers are false, and that the ownership is solely in himself, in opposition to them all. So far as he is concerned, the underwriters have a right to deny that he has more interest than the ship's documents disclose. A different rule would be productive of the grossest frauds. I think, too, that there is always an implied representation on the part of the ship owner, that the ship's documents contain a true statement of the ownership, at least where she sails under a register. The evidence is rejected; and the plaintiff can recover a verdict only for a moiety of the value of the schooner and freight. Verdict accordingly.

[For proceedings on a motion for a new trial, see Case No. 10,473.]

Case No. 10,473.

OHL v. EAGLE INS. CO.

[4 Mason, 390.] [1]

Circuit Court, D. Massachusetts. May Term, 1827.

MARINE INSURANCE—PAROL EVIDENCE OF TITLE—SHIP'S PAPERS—NOTICE OF EQUITABLE OWNERSHIP.

1. A policy of insurance was underwritten on the entirety of a ship; and the ship's papers on the voyage showed a joint ownership of the master and the assured. *Held*, that parol evidence was not admissible to contradict the ship's papers, and prove a sole ownership in the assured, and that the papers were all wrong, and founded in mistake.

[Cited in U. S. v. Bartlett, Case No. 14,532; The Henry, Id. 6,372; Thurber v. The Fannie, Id. 14,014.]

2. Quære, if a title to a ship, engaged in foreign trade, can pass by parol?

[See Dowling v. The Reliance, Case No. 4,042.]

3. In a policy on the ship there is always an implied representation, that the ship's papers disclose the true legal ownership.

4. If the party intends to insure a special or equitable ownership, he must give notice to the underwriter. A common policy on ship covers only the legal ownership.

This cause was tried at the last term, and the facts, as they appeared at the trial, are reported in the former report [Case No. 10,472].

A motion was afterwards made [by John F. Ohl] for a new trial, and was argued at the present term.

Mr. Loring, for plaintiff.

Mr. Webster, for defendants.

STORY, Circuit Justice. The points now made, on the motion for a new trial, do not substantially differ from those made at the former trial, although the form, in which they are presented, gives them a broader aspect than the ruling of the court would warrant. I do not go over the facts, because they are to be found in the report of the trial; and nothing material now turns upon them. The ship sailed on the voyage insured, with every document on board, proving a joint title in Ohl (the plaintiff) and

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

Remington, the master. The bill of sale was in their joint names; the ship's register, and the oath taken by Ohl at the custom-house, all establish the same fact. There was no attempt made to prove, by any writing or otherwise, that the ownership was not in equal moieties in Ohl and Remington, if Remington had any title at all. The object of the testimony was to establish an exclusive title in Ohl, by parol, unwritten, evidence, in opposition to the ship's papers and the bill of sale; to prove that the whole purchase money was paid by Ohl; that the bill of sale was in their joint names by mistake; and that the register was taken out, and the oath taken by Ohl by mistake. That, under such circumstances, there was an exclusive, legal, proprietary interest of the whole ship in Ohl; or that, at all events, there was a constructive trust, as to the moiety in the name of Remington, which, though existing only in personal confidence, and to be established only by parol proof, was yet sufficient to entitle Ohl to recover the value of the whole ship, as an equitable interest. At the trial I thought, and still think, that such proof of interest was wholly inadmissible to establish the plaintiff's title, in opposition to the ship's papers under which she was navigating for the voyage. The legal title must be deemed, so far as underwriters are concerned, to be truly exhibited on the ship's papers; and it appears to me, that it would introduce the most loose and inconvenient practice, to suffer any person to set up a parol title, as a ground of recovery against underwriters, without any prior notice of the nature of the interest intended to be insured.

First, it is said, that a sale of a ship is good by parol contract, without any writing to evidence the transfer; and that it is sufficient if there be a delivery to, and possession by, the vendee. If this be so, it may well be doubted, if it can apply to a case, where there is a bill of sale, and the possession and navigation of the ship is precisely in conformity to the bill of sale; for there the parol contract contradicts and controls the documentary evidence of title. But I am not prepared to admit, that a transfer of a ship is good without a bill of sale, or some written contract of sale, at least as to third persons. It is true, that a ship is personalty, and ordinarily personal property may pass by delivery. But the proposition itself is, or perhaps may not be, universally true, under all circumstances. In respect to ships a different course has, from the earliest times, prevailed. The general practice, I believe, of all civilized nations, has been to evidence the title to them by a bill of sale, or other written document. The nature of the vehicle, the interests of trade and navigation, and the necessity of furnishing, in foreign ports and upon the ocean, some proofs of property beyond mere possession, have probably led to the adoption of this practice. I have not been able to find a single case in English jurisprudence, in which it has been held, that a ship might pass, by mere delivery, without any document in writing of actual ownership. In Rolleston v. Hibbert, 3 Term R. 406, the very point was made by counsel. Lord Kenyon, on that occasion, said: "It was first contended, that it is not necessary that the property in a ship should pass by a written instrument. On that point I give no opinion, because it is not necessary. But certainly, if the parties choose to convey by a written instrument, that shows what the intention and the rights of the parties are; and they shall not afterwards be permitted to refer to any other agreement." The strong application of this language to the facts of the present case, cannot escape observation. Mr. Chief Justice Abbott, in his excellent work on Shipping (part 1, c. 1), says: "This species of property (that is, ships) appears, from very early times, to have been evidenced by written documents, and at present always is so, which other moveable goods rarely are;" and he thus confirms the doctrine of Lord Stowell in The Sisters, 5 C. Rob. Adm. 155. Mr. Jacobsen deduces the same, as the general maritime usage of commercial nations, and adds, that "at all times the property in vessels was only known by such written evidence, as is not required of other moveable property in market overt." Jacobsen, Sea Laws, bk. 1, c. 2, p. 21; see, also, Ex parte Halkett, 19 Ves. 474. I own, therefore, that I am not yet satisfied, that the doctrine that a bill of sale is necessary to pass a title is either new or unfounded in principle. In the case of Lamb v. Durant, 12 Mass. 54, there is indeed a dictum to the contrary; but the case itself turned entirely upon a different point, the right of one partner to convey a good title to a ship owned by the firm. A like dictum is found in Taggard v. Loring, 16 Mass. 336. But there again the question before the court did not turn upon any such consideration; for the only point was, whether barratry could be committed by the master, who had hired the vessel for the voyage. The court very properly decided, that it could not. In Oliver v. Greene, 3 Mass. 133, there was a charter-party, which constituted the part owner the sole owner for the voyage. The same fact existed in Bartlet v. Walter, 13 Mass. 267. If this were a case depending upon the local law of Massachusetts, the doctrine, asserted by the state court, even incidentally, would doubtless be entitled to very great respect. But the present case either turns upon the law of Pennsylvania, or, as may be fairly presumed, upon principles of general, if not universal, jurisprudence.

The New York cases, relied on at the bar, are distinguishable. In Kenny v. Clarkson, 1 Johns. 385, there was a written contract of sale, and the ship's papers were, by the consent of the parties, to remain until all the purchase money was paid. Wendover v. Hogeboom, 7 Johns. 308; Leonard v. Hunt-

ington, 15 Johns. 298; Champlin v. Butler, 18 Johns. 169, are disposed of by the single remark, that the sole question was, whether the party in possession, as owner, ordering repairs, or engaging mariners, was liable for compensation, or the mere registered owner, who had neither expressly nor impliedly made the contract, or authorized the expense. Upon the plainest principles of justice, the former was held exclusively liable. The case of Murgatrod v. Crawford, 3 Dall. [3 U. S.] 491, cannot be deemed an authority, for it was overruled in Duncanson v. McLure, 4 Dall. [4 U. S.] 308. The case of U. S. v. Willing, 4 Cranch [8 U. S.] 48, turned upon the construction of a statute of the United States; and no point was made as to the sufficiency of what is called the parol sale in that case, to transfer the title of part of a ship while at sea. Without a more clear and decisive course of authority to the contrary, I confess myself unwilling to desert the opinion held by Lord Stowell, and recognized at the trial, that a written document is the proper and necessary evidence of the title of transfer of a ship which navigates the ocean. But the present case does not turn upon that point. For here there was a written transfer, and the attempt is to set up a parol title to control the written documents. I think such evidence inadmissible. In Carroll v. Boston Mar. Ins. Co., 8 Mass. 515, the court rejected proof of title of ownership, inconsistent with the ship's papers and bill of sale. The court said, "every document proves an absolute transfer; and these documents must be conclusive in establishing the property of the vessel between the parties." A doctrine somewhat analogous was held by the court in Robinson v. M'Donnell, 2 Barn. & Ald. 134. My own opinion is, that it stands upon a principle commended by the soundest policy and justice.

I agree, that an equitable interest is an insurable interest. Whether it binds the underwriter to answer for any loss, when its peculiar nature is not disclosed, and the terms of the insurance are strictly applicable to legal interests; and whether there would be any difference in such case, if the disclosure were not material to the risk, are questions upon which I give no opinion. I am not unaware of the bearing of some of the cases cited at the bar on these points (13 Mass. 61; Id. 267; 3 Mass. 133; 1 Johns. 385); but I shall be scrupulous in avoiding any decision on them, until they constitute the very point in judgment. Whatever may be the general rule on this subject, in ordinary cases, I am of opinion, that an insurance on a ship is to be deemed, unless a special explanation is given, to be an insurance on the legal interest, and not on a mere equitable interest, as contradistinguished from the legal interest of the ship; and at all events not an insurance upon a mere private, verbal trust, in opposition to the ship's papers and the overt acts of the parties. If such an interest is to be insured, it ought to be disclosed. The nature of such a title must ordinarily be material to the risk: and if by possibility it be not so, still it cannot be fairly presumed to be within the intention of the underwriter upon the common terms of a policy on a ship. In the absence of all explanation I think those terms must be understood to apply to a legal interest, and not to a mere parol trust or equity. I confess myself also to be strongly of opinion, that there is, in every case of this nature, an implied representation, that the ship's papers are according to the real legal ownership. No one has a right to say, that the true character of the ship and the representation of the genuine interest of the parties to the insurance are not, or may not be, material to the underwriter in estimating his risk. No one has a right to suppose, that in case of loss the underwriter is to be responsible, not according to the legal import of the ship's papers, but to verbal engagements and parol trusts, which are susceptible of being shaped according to events. In what manner could the underwriters, in this very case, assert an exclusive ownership upon an abandonment against Remington? The effect of the acts of the master, being a part owner, might be very important in the consideration, not only of questions of peril and revenue, but of the general conduct of the voyage. If the underwriter is not put upon any inquiries of this nature by any disclosure of a special interest or special ownership, he has a right to suppose, that the parties deal with him upon the naked avowal of legal titles.

My judgment accordingly is, that there is no ground for a new trial; that the legal title in the ship is not, and cannot be, varied by any parol evidence; and that the plaintiff must be deemed the owner of a moiety of the ship only, there being no document, contract, or writing, which in any shape controls the ordinary presumption of ownership, arising upon the bill of sale. Motion overruled.

OKELEY (BANK OF COLUMBIA v.). See Case No. 877.

Case No. 10,474.

In re O'KELL.

[2 Ben. 144; 1 N. B. R. 303 (Quarto, 52); 1 Am. Law T. Rep. Bankr. 32; 3 Pittsb. Leg. J. (N. S.) 232.][1]

District Court, S. D. New York. Feb., 1868.

WITNESS' FEES.

A bankrupt is bound to appear and submit to an examination, when ordered, without being paid witness' fees.

[In the matter of William O'Kell, a bankrupt.]

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[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Am. Law T. Rep. Bankr. 32, contains only a partial report.]

By ODLE CLOSE, Register:

[2] [On the 18th day of January, 1868, upon the application of Charles Walke, a creditor of the above named bankrupt, I issued an order for the examination of said bankrupt, returnable at my office at White Plains, New York, on the 5th day of February, 1868, at ten a. m. On the return day of said order, Mr. Conable appeared as attorney for said creditor, and Mr. Taggart as attorney for said bankrupt. Mr. Taggart, in behalf of said bankrupt, insisted that said bankrupt was entitled to his fees as a witness. Mr. Conable, on the other hand, insisted that he was bound to appear and submit to an examination, pursuant to the order, and was not entitled to any fees. The undersigned decided that said bankrupt was bound to appear and submit to such examination pursuant to said order, without fees. Whereupon, at the request of the counsel for said bankrupt that the same should be certified to the judge for his opinion thereon, the question is submitted as to whether said bankrupt, who is required by an order of the court to appear before the register and submit to an examination, is entitled, before being examined, to be paid witness' fees. The undersigned is of opinion that said bankrupt is not entitled to such fees. Section 26 of the bankrupt act [of 1867 (14 Stat. 529)] provides, "that the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath," &c. I find no provision in the act allowing the bankrupt fees as a witness in such cases. He may be required to submit to an examination without the application of a creditor; in such case it is difficult to see from whom he could obtain fees as a witness. The bankrupt applies to the court to be discharged from all his liabilities, and it would seem to the undersigned but reasonable that he should attend at the instance of a creditor whose debt is to be swept away by the discharge, and submit to an examination as to his property. All of which is respectfully submitted.] [2]

BLATCHFORD, District Judge. The register was correct in his decision.

[Subsequently the bankrupt was granted a discharge. See Case No. 10,475.]

Case No. 10,475.

In re O'KELL.

[2 N. B. R. 105 (Quarto, 35).] [1]

District Court, S. D. New York. 1868.

BANKRUPTCY — SPECIFICATIONS IN OPPOSITION TO DISCHARGE—BURDEN OF PROOF.

Where specifications are filed in opposition to the discharge of a bankrupt, the burden of proof is on the creditor, and when he fails to show just cause for refusing a discharge, it must be granted.

[In the matter of William O'Kell, a bankrupt. See Case No. 10,474.]

S. C. Conable, for creditor.
W. H. Taggart, for bankrupt.

BLATCHFORD, District Judge. I have carefully examined the testimony in this case in connection with the eight specifications filed on the part of Charles Walke, a creditor, in opposition to the discharge of the bankrupt, and am not satisfied that any one of the specifications is sustained by the proofs. The burden of proof is on the creditor, and although the character of the evidence is such as to show that the creditor was justified in examining closely into the transactions of the bankrupt, and in opposing his discharge, and there are many things disclosed by the testimony that are quite discreditable to the bankrupt, I cannot say that anything is shown that will warrant the withholding of a discharge. A discharge is therefore granted.

Case No. 10,476.

OKELY v. BOYD.

[2 Cranch, C. C. 176.] [1]

Circuit Court, District of Columbia. June Term, 1819.

EXECUTION WITHOUT JUDGMENT —BANK CHARTER —WHAT MUST BE SHOWN.

An execution issued by order of the president of the Bank of Columbia, without any previous judgment, under the 14th section of the Maryland act of 1793 (chapter 30) entitled "An act to establish a bank in the District of Columbia," must show upon its face all the facts necessary to justify the clerk in issuing it.

This was an action of replevin against the marshal of the District of Columbia, to replevy the plaintiff's goods taken in execution upon two writs of fieri facias issued by the clerk of this court on the 19th of June, 1816 (Nos. 7 and 8 on the judicial docket of December term, 1816), one for $1,000, and the other for $900, upon the order of the president of the Bank of Columbia, in virtue of the authority vested in him by the 14th section of Act Md. 1793, c. 30, entitled "An act to establish a bank in the District of Columbia," by which it was enacted, "that whenever any person or persons are indebted to the said bank for moneys borrowed by them, or for bonds, bills or notes given or indorsed by them, with an express consent in writing that they may be made negotiable at the said bank, and shall refuse or neglect to make payment at the time the same become due, the president shall cause a demand in writing on

[2] [From 1 N. B. R. 303 (Quarto, 52).]
[1] [Reprinted by permission.]

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

the person of the said delinquent or delinquents, having consented as aforesaid, or, if not to be found, have the same left at his last place of abode; and if the money so due shall not be paid within ten days after such demand made, or notice left at his last place of abode as aforesaid, it shall and may be lawful for the president, at his election, to write to the clerk of the general court, or the court of the county in which the said delinquent or delinquents may reside, or did, at the time he or they contracted the debt, reside, and send to the said clerk the bond, bill or note due, with proof of the demand made as aforesaid, and order the said clerk to issue a capias ad satisfaciendum fieri facias, or attachment by way of execution, on which the debt and costs may be levied by selling the property of the defendant for the sum or sums of money mentioned in the said bond, bill, or note; and the clerk of the general court, and the clerks of the several county courts are hereby respectively required to issue such execution or executions, which shall be made returnable to the court, whose clerk shall issue the same, which shall first sit after the issuing thereof, and shall be as valid and as effectual in law to all intents and purposes, as if the same had issued on judgment regularly obtained in the ordinary course of proceeding in the said court; and such execution or executions, shall not be liable to be stayed or delayed by any supersedeas, writ of error, appeal or injunction from the chancellor; provided always, that before any execution shall issue as aforesaid, the president of the bank shall make an oath," "ascertaining whether the whole or what part of the debt due to the bank on the said bond, bill or note, is due; which oath or affirmation shall be filed in the office of the clerk of the court from which the execution shall issue; and if the defendant shall dispute the whole or any part of the said debt, on the return of the execution, the court before whom it is returned shall and may order an issue to be joined and trial to be had at the same court at which the return is made, and shall make such other proceedings that justice may be done in the speediest manner." The execution (No. 7) recited that whereas, in virtue of Act Md. 1793, c. 30, entitled "An act to establish a bank in the District of Columbia," John Mason, Esquire, president of the said Bank of Columbia, hath this day (19th of June, 1816), filed in the circuit court of the district aforesaid, for the county of Washington, a certain note, commonly called a promissory note, drawn by a certain John Okely, and dated at Georgetown, on the 16th day of February, 1816, and thereby, sixty days after the date thereof, the said John Okely promised to pay to a certain Hyatt and Wilson, by the name of Hyatt & Wilson, or order, one thousand dollars, value received; and by the said Hyatt & Wilson indorsed payable to the president, directors and company of the Bank of Columbia for value received; upon which said note, so indorsed, the said president of the said bank hath ordered and directed the clerk of the said circuit court to issue the writ of the United States of fieri facias against the said John Okely in the name of the said president, directors and company of the Bank of Columbia, for the sum of one thousand dollars current money, and also the costs of the said fieri facias. And as it appears by the proofs annexed to, and exhibited with the said note, that the requisites of the said act of assembly have been fully complied with; therefore you are hereby commanded that of the goods and chattels, &c., you cause to be made, &c., returnable on the 4th Monday in December, 1816." On the 9th of October, 1816, at an adjourned session of June term, a rule was obtained by Okely against the bank to show cause on the next Monday why these executions should not be quashed, as being illegal, null, and void. The rule was served but no order thereupon at that session.

On the 19th of November, 1816, Okely replevied the goods; and at June term, 1819 (No. 36, Trials), the cause came on for trial; a jury was sworn, but a juror was withdrawn, by consent, and the motion to quash the executions seems to have been revived, and was argued by

Mr. Jones, for plaintiff Okely.
Mr. Key, for the bank.

For the plaintiff, in replevin, it was said, that the act, being in derogation of common right, must be construed strictly. If the execution were upon a judgment, that judgment must be truly recited and certain. All the facts should appear upon the face of the execution which are necessary to show the right of the bank to have the execution, and the authority of the clerk to issue it. It is not sufficient for the clerk to state that it appears to him that the requisites of the act have been fully complied with. He only states that it appears by the proofs annexed to and exhibited with the note; and although he states that the note was filed in the court, and the proofs being annexed to it may be presumed to be also filed, yet the act does not require the note or proofs to be filed, and the filing them does not make them matter of record so that the court can judicially take notice of them, or the clerk officially refer to them. They might as well be referred to as being in the vaults of the bank.

But if the court could judicially take notice of the note and the proofs, there are several objections to the writ. (1) It contains no averment, nor is there any proof, that the note was not paid "at the time the same became due;" nor is there an averment that the president of the bank caused "a demand in writing on the person of the delinquent;" nor that he was not to be found; nor that the president wrote to the clerk, or sent his

order in writing. (2) There is no averment in the execution, that there was an express consent in writing that the note should be made negotiable at the Bank of Columbia, nor is the note described as "negotiable at the Bank of Columbia," although the note referred to by the clerk has those words in it. The execution (No. 8) for $900 describes the note upon which it was issued, as a note made by Okely, dated at Georgetown on the 7th of March, 1816, by which, sixty days after the date thereof, he promised to pay A. J. Hyatt, or order, $900, value received, "negotiable at the Bank of Columbia." In other respects it was liable to all the objections to which the other execution was liable.

For the bank, it was contended, that the court was not bound by the recital in the execution, but may and ought to look behind it, and see whether the documents furnished by the bank authorized the clerk to issue the execution, whatever its recitals, whatever its omissions might be. It was not necessary that it should recite or state any facts but the order and oath of the president of the bank. The execution, in its recitals, conforms exactly to the precedent in 2 Har. Ent. 637, which refers in the same manner to the note and proofs. It was not necessary that any thing should be filed, but the oath of the president; but the other documents, if required to be sent to the clerk, must be filed by him, and become part of the record upon which the execution issues, and may be examined by the court. The oath of the president, is evidence that the note was not paid when the same became due, and that $1000 were due with interest, and the defendant must have refused or neglected to pay it when due, or it could not have been due with interest. The oath of the president is all that is necessary to justify the execution. If there be any defence, the defendant may avail himself of it on the return of the execution. The clerk could only aver that it appears by the papers filed, that the requisites have been complied with. The defendant, by making the note "negotiable at the Bank of Columbia," has consented to the process.

THE COURT quashed the execution for $1000 (No. 7) nem. con., and the execution for $900 (No. 8). MORSELL, Circuit Judge, dissenting.

NOTE. In the case of Bank of Columbia v. Okely, 4 Wheat. [17 U. S.] 235, the supreme court decided that the 14th section of the charter of that bank was not unconstitutional, and that the clerk of this court was competent to issue the execution upon the order of the president. That section of the charter, however, was repealed by the 8th section of the act of congress of the 2d of March, 1821 (3 Stat. 618), entitled "An act to extend the charters of certain banks in the District of Columbia."

OKIE (UNITED STATES v.). See Case No. 15,916.

Case No. 10,477.

The OLBERS.

[3 Ben. 148.] [1]

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

BILL OF LADING—LEAKAGE OF CASK—BURDEN OF PROOF—PLEADING.

1. Where an answer contained allegations which were inconsistent, but it had not been excepted to, and the case went to trial, *held*, that the court must take that allegation, which operated most strongly against the claimants, to be the one really made.

2. The averment, in a bill of lading, that a cask was "in good order and well conditioned," extends only to its apparent external condition, excluding any implication as to its intrinsic soundness and sufficiency.

[Cited in Vaughan v. Six Hundred and Thirty Casks of Sherry Wine, Case No. 16,900; The T. A. Goddard, 12 Fed. 177.]

3. Where a cask of wine was delivered empty, the wine having leaked out through a hole, which on the evidence, the court found to have been a latent defect in the cask, the bill of lading containing the clause "not accountable for leakage," *held*, that a loss by such defect afforded an excuse for the non-performance of the bill of lading, and the burden was thrown upon the consignee to show that the loss might still have been avoided by the exercise of reasonable skill, diligence, and attention on the part of the carrier.

4. As such evidence was not given, the vessel was not liable for the loss.

This was a libel to recover the sum of $489, as the value of the wine contained in a cask, shipped on the bark Olbers, at Rotterdam, on the 3d of November, 1865, by C. Hemmann & Co., consigned to the libellants, Jacob Wolf and Alexander Wolf, at New York. The shipment was made under a bill of lading signed by the master of the vessel. The bill of lading covered twenty-six casks in all. It contained a statement that the property was shipped "in good order and well conditioned," and contracted for the delivery of it "in the like good order and well conditioned," "all and every dangers and accidents of the seas and navigation, of whatsoever nature or kind, excepted." Upon the face of the bill of lading, (which was a printed blank, in English, filled in with written words,) the following words were separately impressed by a stamp: "Not accountable for leakage, breakage, rust, or corruption." The libel alleged, that the master failed to deliver to the libellants the wine in one of the casks, although no danger, or accident of the seas or navigation, prevented, and that, through the negligence of those in charge of the vessel, while the wine was in such cask, and such cask was in the keeping of the vessel and her master, a hole was pierced in the head of the cask, near the chime thereof, with an instrument unknown to the libellants, and all of the wine was taken out of the cask, and no part of it was ever delivered to the libellants. The answer admitted, that the cask was delivered to the

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

master of the vessel in apparent good order, as to its external condition, and set up that, by the bill of lading, the vessel was not to be accountable for any loss arising from leakage, breakage, rust or corruption; that the cask was delivered to the libellants, at New York, to all external appearance, in the same condition in which it was received by the vessel; that any loss or abstraction of its contents which occurred, happened before it came on board of the vessel or after its delivery therefrom; that, during the voyage, the vessel met with great storms; that, if the contents of the cask were lost, the loss was caused by the perils of the sea, and by reason of the cask being defective and imperfect and not sufficiently strong to withstand the voyage; and that, by usage and custom in regard to such merchandise, the vessel was not accountable for leakage under such circumstances.

C. Goepp, for libellants.
J. K. Hill, for claimants.

BLATCHFORD, District Judge. It is impossible not to remark the wholly and recklessly inconsistent statements in this answer, and which, moreover, are sworn to. There is, first, a statement that the loss or abstraction of the contents of the cask, if any there were, did not take place on board of the vessel; and then a statement that the loss, if any, was caused by the perils of the sea, and the inability of the cask to withstand the voyage, and consequently during the voyage and while the cask was on board of the vessel. It is unnecessary to say that both of these averments cannot be true. The answer not having been excepted to for these inconsistencies, this court must take that allegation which operates most strongly against the claimants, to be the one really made, namely, the allegation that the loss took place while the cask was on board of the vessel, and from an excusable cause.

The proof, in this respect, corresponds with the allegations of both the libel and the answer, and shows that the leakage of the wine from the cask took place while the cask and its contents were on board of the vessel. Such loss being shown, the burden falls upon the claimants to show that it was occasioned by one of the perils or causes from which they were exempted by the bill of lading, or by the general rules of law. Clark v. Barnwell, 12 How. [53 U. S.] 272, 280. There is no satisfactory evidence that the loss of the wine was occasioned by any danger or accident of the seas or of navigation.

The only other exception in the bill of lading, on which the claimants can rely to shield the vessel from responsibility, is the provision, that the vessel shall not be accountable for leakage. In this connection, the answer avers that the cask was defective and imperfect. The averment in the bill of lading, that the property was "in good order and well conditioned," so far as it is applicable to the cask, extends only to the apparent external condition of the cask, excluding any implication as to its intrinsic soundness and sufficiency. Clark v. Barnwell, 12 How. [53 U. S.] 272, 283; The Columbo [Case No. 3,040]. The claimants are at liberty, therefore, notwithstanding the bill of lading, to show the defectiveness of the cask. It is shown, by the evidence, that the cask was in apparent good order when it was put on board and did not then leak. When the cask was brought to light, on breaking out bulk at New York, and before it was taken out of the vessel, it was found to be substantially empty, and marks were found of the wine which had leaked out. The leakage had evidently taken place through a hole which was found in one of the two heads of the cask. The hole was on the line of the joint between two of the pieces of wood which formed the head. There is much conflicting testimony as to what was the size and character of this hole, when it was first seen after the arrival of the vessel at New York. Some of the witnesses for the claimants describe it as a round hole, and as being no larger than the head of a pin, or the point of a pencil, while witnesses for the libellants describe it as a hole whose cross-section was a square, or a parallelogram, and such a hole as would be made by a nail. The theory, on the part of the claimants, is, that the hole was made by the working out of a plug, which had been inserted into what was originally a hole made by a worm in the wood of the cask. The testimony of the master and that of the first mate of the vessel is, that the wine which leaked out escaped through that hole. In view of this fact, and of the character of the hole, in any view that can be taken, I do not think that the exemption of the vessel from responsibility for leakage, under the provision to that effect in the bill of lading, necessarily extends to leakage through a hole of this description; but that, when such a hole is shown to exist, it is incumbent on the vessel to show that the hole was caused by a defect in the cask. This the claimants have undertaken to do, and I think the evidence satisfactorily shows, that a plug had been put into a hole, and that a longitudinal piece of that plug had become broken away from the rest of the plug and worked out, the piece so broken away being coincident, to some extent, in its outer surface, with the inner surface of the original hole. This made an orifice, through which the wine escaped. This plugged hole was a latent defect in the cask. As the evidence leads to the inference that the loss of the wine was caused by this defect in the cask, and that such defect existed before the cask was put on board, and as, according to the general rules of law, a loss by such defect affords an excuse for the non-performance of the contract, the burden is thrown on the libellants to show that the leakage and loss might still have been avoided by the exercise of reasonable skill, diligence and attention on the part of the carrier. It

was, therefore, open to the libellants to show improper stowage of the cask, sufficient to cause the development of the defect, or to show that the ordinary working of the ship and cargo, as an incident of navigation, would not have caused the breaking out of the plug. Clark v. Barnwell, 12 How. [53 U. S.] 280, 283, 284. This they have not shown, and the libel must, therefore, be dismissed, with costs.

Case No. 10,478.

In re OLCOTT.

[2 Ben. 443.] [1]

District Court, S. D. New York. May, 1868.

INJUNCTION—EXECUTION.

Where an execution had been issued on a judgment against a bankrupt, and a levy made under it, and thereupon, on the filing of a petition in bankruptcy by the judgment debtor, an injunction was issued restraining proceedings on the execution, and thereafter a motion was made to dissolve the injunction, on which the bankrupt produced affidavits to show that he had no interest whatever in the property levied on: *held*, that, as the assignee, though notified of the proceedings, had taken no steps to acquire possession of the property, and as it did not appear that the proceedings of the creditor under the execution would affect any one who was entitled to the protection of the court under the bankruptcy act [of 1867 (14 Stat. 517)] the injunction would be dissolved.

In this case the petition of the bankrupt [Cornelius Olcott] was filed in July, 1867, and on an affidavit of the bankrupt, an order was made, enjoining the Ocean Bank from proceeding under an execution issued upon a judgment against the bankrupt, under which execution a levy had been made upon certain personal property as being the property of the bankrupt. The assignee in bankruptcy was appointed in August, 1867. In November, 1867, a motion was made in behalf of the bank, to dissolve the injunction, which was from time to time adjourned. The question whether there was a valid levy upon the property under the execution, was contested.

BENEDICT, District Judge. This is a motion made by the Ocean Bank to dissolve the injunction heretofore granted, restraining the bank from further proceedings upon an execution issued against the bankrupt, by virtue of which the bank claimed to have levied upon certain personal property.

In the aspect which the case now presents, I do not deem it necessary to consider, upon this motion, the question whether the bank had or had not a valid levy upon the property described in the papers; for the bankrupt, as it appears, makes no claim to the ownership or possession of this property, but, on the contrary, expressly declares that it is the property of his wife, and that he has no interest whatever in it; while the assignee in bankruptcy, having been appointed and notified of these proceedings, and having had abundant time and opportunity, does not see fit to take any steps to acquire possession of the property, and asks no relief at the hands of the court in relation thereto.

Inasmuch, therefore, as it does not appear that the proceeding of the bank against the property in question will affect the interests of any party entitled to the protection of this court, under the bankruptcy act, no reason exists why the power of the court should be exercised to stay such proceedings.

The injunction, therefore, is dissolved.

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

Case No. 10,479.

OLCOTT v. FOND DU LAC COUNTY.

[2 Biss. 368; [1] 4 Am. Law T. Rep. U. S. Cts. 47.]

Circuit Court, E. D. Wisconsin. Oct., 1870. [2]

FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES.

1. The established rule is that the federal courts are to administer the laws of the states in cases where they apply; and the uniform practice has been to consider a judicial interpretation placed upon a statute the same as if incorporated within the language of the statute itself.

2. When the highest judicial tribunal of a state has placed a construction upon a statute of a state, that construction will be adopted by this court.

[This was a suit by Horatio J. Olcott against the county board of supervisors of Fond du Lac county.]

The legislature of Wisconsin in 1867 authorized the imposition of a tax upon the property of the county of Fond du Lac, for the purpose of enabling a railroad company to prosecute the construction of a railroad, the money raised by taxation being intended as a donation for that purpose. Under this law certain county orders were issued, bearing date the 15th of December, 1869, which orders constitute the cause of action in the case. When the county authorities were in the act of carrying into effect the provisions of this law, and before, in fact, the county orders in controversy were issued, an application was made to the state circuit court of that county, by one Whitney, for an injunction against the county of Fond du Lac, to restrain them from taking any steps in the execution of the law, on the ground that it was not warranted by the constitution of the state. An injunction was issued. Subsequently a motion was made to dissolve the injunction, and it was accordingly dissolved by the state court, and thereupon the orders in controversy were issued and sold, amounting in the aggregate to the sum of thirty thousand dollars. Whitney, however, took

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

[2] [Reversed in 16 Wall. (83 U. S.) 678.]

an appeal to the supreme court of the state from the order dissolving the injunction, and that court held that the law under which these county orders were issued was unconstitutional, and made the injunction perpetual.

M. H. Carpenter and Finches, Lynde & Miller, for plaintiff.

J. M. Gillett and Sloan & Bennett, for defendants.

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

DRUMMOND, Circuit Judge. The only question in this case is as to the effect of a decision of the supreme court of the state of Wisconsin as a rule of construction for this court in the present controversy. In other words, should this court follow the ruling of the state court on the statute? It has been strongly urged by the counsel for the plaintiff that the supreme court of Wisconsin has made decisions inconsistent in principle with that of Whiting v. Sheboygan & F. Ry. Co., 25 Wis. 167, the case referred to, and that it is the duty of this court to follow what is claimed to be the general scope and spirit of these decisions rather than the decision in this particular case. The principle declared by the supreme court of the United States in the Iowa cases, that where the highest legal authority of a state had settled the law under which instruments bearing the qualities of commercial paper were issued, affirming their validity, and on the faith of such decisions they were taken for value by different persons in the market, and the same authority subsequently decided that they were invalid, that the first ruling would be followed in the courts of the United States, is one which is binding on this court as authority, and the correctness of which cannot be disputed; and if that rule was applicable here it would govern this case. But the only case in which any question has ever arisen before the supreme court of Wisconsin upon the validity of this statute is the case just referred to, where this act of the legislature was declared to be inoperative as being in conflict with the fundamental law of the state.

The rule established by the judiciary act of 1789 [1 Stat. 73] is that the federal courts are to administer the laws of the states in cases where they apply, and the uniform practice has been to consider a judicial interpretation the same as incorporated within the language of the statute itself. And it is obvious that no other rule can be safely observed in our mixed system consistently with the rights of all parties. This court, although a court of the United States, is sitting here to administer the laws of Wisconsin, in cases where they apply, precisely as a court of the state would administer them. It is only in this way that harmony can be preserved between the courts, state and national. Where a state court has adopted more than one construction of a state law it may be competent for the federal court to receive or accept one in preference to the other; but where there is only one construction given by the state court to a law of the state, then it would seem to be disregarding well settled principles for the federal court to decide contrary to the adjudications of the state court. Now, in this case, the plaintiff claims a right under a law of the state of Wisconsin. He has no other standing in court. It is a recent statute. It has become the subject of deliberate examination and adjudication by the supreme court of Wisconsin, and it seems to me, under the circumstances of this case, that this court should follow that decision. If it were a hasty or ill-considered judgment, then there might possibly be some reason for disregarding it. But this opinion was given after a full and able argument, and after an argument upon a motion for a rehearing; an additional opinion was given by the chief justice, and in these opinions that court considered and determined the effect of the previous decisions of the supreme court of the state, which it is claimed were not entirely consistent with this, so that it is the deliberate and well considered judgment of the supreme court of the state not only that this statute was unconstitutional, but that there was nothing in any previous decisions of that court to prevent its so deciding. If there is to be any different rule established by the supreme court of the United States than the one which we think applicable here, that court must take the responsibility. It has certainly never gone so far as the counsel for the plaintiff desire that this court should go in this case. The instruction of the court, therefore, to the jury will be that inasmuch as the supreme court of this state has decided the act under which these county orders were issued to be invalid, that this court must also decide them to be invalid, and that the plaintiff cannot recover.

This case was carried to the supreme court, and reversed by a divided court [16 Wall. (83 U. S.) 678].

NOTE. In the case of Morgan v. Curtenius, 20 How. [61 U. S.] 1, the supreme court ruled that when the circuit court adopted the construction of a state statute which was placed upon it by the supreme court of the state, the fact that that court subsequently overruled its decision, and placed a contrary construction upon the statute, will not authorize the United States supreme court to reverse the judgment of the circuit court as having been erroneously given.

That there may be exceptions to the general rule that the courts of the United States will follow the decisions of the state courts on the construction of state laws, and some such exceptions stated, see Pease v. Peck, 18 How. [59 U. S.] 595. In cases depending upon the statute of a state, especially in those respecting the titles to land, the federal courts will adopt the construction of the state courts, when that construction is settled or can be ascertained. Loring v. Marsh [Case No. 8,514]. The same rule prevails in suits in equity as at law. Id.

The natural import of the words in the judi-

ciary act includes the laws in relation to evidence as well as the laws in relation to property. Loring v. Marsh [Case No. 8,514]. The construction given to a state statute of the description mentioned, by the state court, is regarded as a part of the statute, and is as obligatory on the courts of the United States as the text; and if the state court adopts new views as to the construction of such a statute, the federal courts will follow the latest settled adjudication. Id.

The decisions of the state courts, however, cannot be allowed to retroact upon the judgments of the federal courts. The supreme court will not reverse its own judgment in a case depending upon the local law, if correctly given at the time in accordance with the settled construction given to the law by the state court, even should it appear that the state court subsequently changed its views and adopted a different construction. Loring v. Marsh [Case No. 8,514]. The same is true of the decision of the circuit courts. See, also, Van Bokelen v. Brooklyn City R. Co. [Id. 16,830]; Blossburg & Corning R. Co. v. Tioga R. Co. [Id. 1,563].

On commercial questions the courts of the United States are not bound by the decisions of the state courts. Robinson v. Commonwealth Ins. Co. [Case No. 14,949]; Williams v. Suffolk Ins. Co. [Id. 17,738]. Adopt state statutes of limitation. Martin v. Smith [Id. 9,164]; Brown v. Hiatt [Id. 2,011]. Will follow decisions of state tribunals on all questions dependent upon local laws. Springer v. Foster [Id. 13,266]. Follow state construction of statute. Woolsey v. Dodge [Id. 18,032]; McKeen v. Delancy's Lessee, 5 Cranch [9 U. S.] 22; Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 157; Stapp v. The Swallow [Case No. 13,305]; Coolidge v. Curtis [Id. 3,184]; King v. Wilson [Id. 7,810]; Meade v. Beale [Id. 9,371]. If these conflict, will follow the latest. Smith v. Shriver [Id. 13,108]. Are not bound in interpretation of deeds by local adjudications. Thomas v. Hatch [Id. 13,899]. Will not rest its judgment upon construction of statute by a state court if the construction of the statute was not necessary for the decision of that case. Carroll v. Carroll, 16 How. [57 U. S.] 275. The federal courts ordinarily follow the state laws, and regard the decisions of the highest state tribunal upon a state law as conclusive; but in cases depending upon general usages of commerce or principles of commercial law, they will not be bound by state decisions. Meade v. Beale [supra].

Case No. 10,480.

OLCOTT v. HAWKINS.

[2 Am. Law J. (N. S.) 317.]

District Court, D. Wisconsin. 1849.

PATENTS—INFRINGEMENT—PERPETUAL INJUNCTION.

Perpetual injunction in favor of Woodworth's patent for planing, tonguing, and grooving boards, &c.

[This was a bill in equity by Thomas W. Olcott against William Hawkins, for an injunction to enjoin the infringement of certain letters patent.]

This case was heard upon bill, answer, proofs and exhibits; and was argued by

Finch & James, for plaintiff

A. Smith and Mr. Payne, for defendant.

At a special term held at the city of Milwaukee, on the first Monday of April, 1849, an opinion, of which the following is the substance, was delivered by

MILLER, Judge. The bill represents that letters patent were issued to William Woodworth, in December, 1828; and were renewed to William W. Woodworth, as administrator of said William Woodworth (the patentee) deceased. That by an act of congress, approved February 26th, 1845 [6 Stat. 936], the said patent was extended. This patent is for an improvement in the method of planing, tonguing, grooving and cutting into moulding, &c., either plank or boards, or any other material; and for reducing the same to an equal width or thickness, &c. For the purpose of planing, &c., the plank or boards may be placed on, or against a suitable carriage, resting on a frame or platform, so as to be acted upon by a rotary cutting, or planing and reducing wheel; which may be made to revolve, either horizontally or vertically; and the cutters on this wheel are made to cut upwards from the reduced point of the plank to the said surface. After the board or plank passes the planing cylinder, and as soon, or as fast as the planing cylinder has done its work on any part of the board, or plank, the edges are brought into contact with two revolving cutter wheels, for the purpose of grooving and matching. The carriage, on which the board, or plank, are placed, may be moved forwards by means of a rack and pinion, by an endless chain or band; or by geared friction rollers. Assignments and conveyances from W. W. Woodworth to the plaintiff, through sundry persons, "of all his right, title and interest, which the said W. W. Woodworth then had, in and to the said exclusive privileges within the territory of Wisconsin, to the number of thirty-one, are alleged and proven. Said assignments were recorded more than three months after the date of their execution.

The defendant, in his answer, denied having made and set up a machine; in all its material parts substantially like and upon the plan of the machine described in the bill and letters patent to Woodworth. He further stated that he constructed and put in operation a machine for planing boards, and is still using it; and that it is not a violation of the Woodworth patent; but in conformity to a patent to Robert Luscombe, for an improvement, &c. He admits that he did annex to his machine, machinery for tonguing and grooving, which is covered by the Woodworth patent. The patent to Luscombe consists of a moveable or receding face, which is to act in connexion with a wheel, to which gouges and irons, similar to plane bits, are attached for the purpose of planing.

The patent act of July 4, 1836 (chapter 357, § 11 [5 Stat. 121]), provides "that every patent shall be assignable in law, either as to the whole interest, or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right, under any patent, to make and to grant to others to

make and use, the thing patented, within and throughout any specified part, or portions of the United States, shall be recorded in the patent office within three months from the execution thereof." The deed from Woodworth is a grant and conveyance to the grantee, his executors, administrators and assigns, of the exclusive right, under the patent, to make and use, and to grant to others to make and use the machine within and throughout the territory of Wisconsin, to the number of thirty. It is more than a mere license; it is a full consent, permission and license to him, his executors, administrators and assigns to construct and use thirty machines within Wisconsin; with authority to commence and prosecute to final judgment, any suit, or suits, for the infringement of said patent, within said territory, accompanied with a covenant not to construct, or use, or give a license for such purpose, any machines, within the territory. The case of Woodworth & Bunn v. Wilson, 4 How. [45 U. S.] 712, is in point. The deed from Woodworth to Bunn is the same as this one, except that Bunn was authorized to commence and prosecute suits in the name of Woodworth, or in his own name. The supreme court decided that Bunn was an assignee of the exclusive right, within the territorial limits, described in his deed. That part of the act, requiring deeds, or assignments, to be recorded within three months is merely directory; and except, as to intermediate bona fide purchasers without notice, any subsequent recording of such papers is sufficient to pass the title to the assignee. Brooks v. Byam [Case No. 1,948]; Boyd v. McAlpin [Id. 1,748]. The defendant does not come within this exception. He does not pretend to be a bona fide purchaser without notice.

There is no doubt of the validity of the Woodworth patent. It has been sustained in several circuit courts of the United States, against, probably, every other machine constructed, in almost every variety of shape and form. The supreme court has sustained it; and congress, by a special act has extended it. It is considered a highly meritorious and important patent right. The patent to Luscombe, for his improvement, cannot affect the plaintiff, if the defendant's machine is an infringement of the Woodworth patent. Woodworth claims, "as his invention, the improvement and application of cutter, or planing wheels, to planing boards," &c. He describes how the several operations may be so combined as to plane, tongue and groove at the same time. The application of the planing cutters to planing boards, &c. together with the action of the other cutters constitute the invention. This invention consists of a combination of known mechanical powers, by which certain results are produced. This patent, by its terms, being for a new combination of existing machinery, or machines; and not claiming any improvement or invention, except the combination, unless that combination is substantially violated, the patentee is not entitled to any remedy for the use of parts of the machinery. The enquiry is not whether any part of the combination has been used since the patent, but whether the whole combination has been substantially violated. Prouty v. Ruggles, 16 Pet. [41 U. S.] 336; Barrett v. Hall [Case No. 1,047]; Moody v. Fiske [Id. 9,745]; Evans v. Eaton, 3 Wheat. [16 U. S.] 454; Howe v. Abbot [Case No. 6,766]. The principle of two machines may be the same, and their form or proportions different. Their external mechanism may be apparently different, and they may substantially employ the same power in the same way. The word "principle" means the operative cause, by which a certain effect is produced; the combination of certain mechanical powers; the mode of operation. Upon the question of principle we may arrive at a correct conclusion, by ascertaining what is the result which the invention is designed to produce. Whatever is essential to produce the appropriate result of a machine, independently of its mere form, is a matter of principle. By this combination, the board is planed upon its surface, tongued on one edge, and grooved on the other, by one operation. Now, where this is produced by a combination of the same mechanical powers, though the machines may be somewhat different in their structures, in principle they are the same. The frame rollers and matchers of these two machines are the same in principle. The only question is, whether the planing part of the defendant's machine is an infringement of the Woodworth patent. This is a point of some difficulty. It involves, like almost every one arising in patent cases, not so much general principles, as the minute and subtle distinctions which occasionally arise in the application of those principles.

The patent act contemplates two classes of persons as peculiarly appropriate witnesses in patent cases, viz: 1st, practical mechanics, to determine the sufficiency of the specification, as to the mode of constructing, compounding and using the patent; 2d, scientific and theoretic mechanics to determine whether the patented thing is substantially new in its structure and mode of operation, or a mere change of equivalents. The second is by far the higher and more important of the two. Allen v. Blunt [Case No. 216]. The court has been favored with the testimony of operatives and mechanics of intelligence; but not sufficiently with that of experts, or men of science, which is generally necessary to a proper understanding of the principle involved. The witnesses speak generally of the planing wheels and of certain principles connected therewith: but do not enter into, either an analysis of those wheels from actual measurement; or a mathematical demonstration of those prin-

ciples, sufficiently to satisfy a mind enquiring after truth. The machine, as described by the witnesses, to have been constructed, according to the specifications accompanying the Woodworth patent, the axis of the cylinder is horizontal, and the knives are used in various forms; and as the board passes under, and the cylinder revolves, the knives operate upon the principle of the adze. Upon the defendant's machine, the planing is performed by a wheel which turns upon an upright shaft with knives and gouges set in and on the edge of the wheel. The gouges on the edge of the wheel take off the superabundant stuff, and the knives finish the work. The board passes to, and under the planing wheel, by the same means as the Woodworth patent. The witnesses generally described the principle of cutting away the surface of the board upon the Woodworth patent to be that of an adze; and the principle of the defendant's machine, to be that of a common plane traversing across the board, moving in lines parallel to the surface, which it finishes. They generally state that the two machines are different in principle. They speak in general terms of the dissimilarity of the machines, in reference to the cylinder and the wheel; and the adze and the plane cut. Some of the witnesses state, that the bed plate in the Woodworth machine is intended to be a perfect level; and in the defendant's, is the fullest at the line the cutters travel over while performing their work, and in form is circular. Also, that the board is depressed after being planed, to avoid the back cut or lash. That at the point where the cutters strike, in the defendant's machine, the board is parallelled with the face of the wheel; and that it was necessary to incline the board to the face of the wheel; and that the part of the board planed is depressed. They have not given the court to understand whether the cylinder upon the Woodworth machine is a perfect cylinder, or not. If it is not, then the cut would not be strictly that of an adze. But be that as it may; if the disc of the defendant's wheel should not be exactly plane, but in the least dished, the appropriate motion of the adze is introduced. The same principle may be occasioned by adjusting the board to the face of the wheel, as described by the witnesses. And as the bed plate of defendant's machine is not level, but highest where the cutters act upon the board, although they may enter as planes, yet they assume the adze cut in leaving the board. The principle is the same, whether the knives cut upwards on a level board, or run level over a curved board highest at the point of action. When the board is straightened the shape of the cut is the same—not level, but grooved. In my opinion, at the effective moment, it is not the plane, but the adze cut that finishes the work. Upon the same principle is it, when the board is inclined to avoid the back lash, or cut. Nor does the action of the wheel necessarily determine the principle, or character of the cut.

I cannot see any essential difference, in principle, between defendant's machine, and those patented to McGregor and Ira Gay. Nor is there any essential difference, in principle, between defendant's wheel and a machine having knives extending from a perpendicular axis, and constructed so as to avoid the back lash. All machines, constructed upon these principles, have been enjoined in different circuit courts. I am, therefore, of opinion, that the defendant's machine is, in principle, similar to the Woodworth patent; and that the whole combination, embraced by the Woodworth patent, has been substantially violated.

Decree, that the injunction be, and remain perpetual.

[For other cases involving this patent, see cases Nos. 17,214, 18,013, 18,014, 18,016, 18,018, 18,019, and 18,021.]

Case No. 10,481.

OLCOTT v. WING.

[4 McLean, 15.] [1]

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

PARTNERSHIP—TRADING IN LAND—APPORTIONMENT OF LOSS.

1. A partnership in purchasing and selling lands, is governed by the same principles as ordinary partnerships.

[Cited in brief in Chester v. Dickerson, 54 N. Y. 7; Rovelsky v. Brown, 92 Ala. 522, 9 South. 184.]

2. The complainant and defendant entered into a partnership to buy and sell lands, the complainant to furnish the capital, the defendant to buy; and after the close of the business, the money paid by complainant, and the interest thereon, to be first paid out of the proceeds, and the residue to be divided as profits. If a loss should be incurred, they were to bear it equally. Under this contract a large tract of land was purchased. The land deteriorated in value; it was conveyed to the complainant, but on a bill, the court ordered the land to be sold, the loss to be borne equally by the parties.

[Distinguished in Ellsworth v. Pomeroy, 26 Ind. 164. Cited in Young v. Thrasher, 115 Mo. 231, 21 S. W. 1104.]

[This was a bill in equity by Thomas W. Olcott against Austin E. Wing.]

Mr. Backus, for complainant.
Jay & Porter, for defendant.

OPINION OF THE COURT. It appears from the facts in this case, that the complainant and defendant entered into an agreement to purchase real estate, the complainant to advance the money, and each to share equally

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

in the profits, after deducting the price paid, and interest. In the month of March, 1836, the defendant purchased a tract of land, described in the bill, for $4,250, the title for which was taken in the name of the defendant, although he drew a draft on the complainant for that sum, which was paid by him. This purchase was made in pursuance of the agreement. The partnership was limited to five years, at the expiration of which time the business was to be closed. And it was fairly within the terms of the contract, that the sales of real estate purchased should be made when a good profit could be realized, or other circumstances rendered a sale proper. The above tract, however, remained on hand, and greatly deteriorated in value, with the general fall in the value of real property in the country at the time. The complainant alleges that he repeatedly urged the sale of the premises. At length, in April, 1839, the defendant conveyed the premises to the complainant; and the question is, whether such a conveyance shall discharge him from the obligations of his partnership. Under the circumstances, we think it was proper to ask the aid of a court of chancery to adjust this matter. With the consent of both parties, the premises might have been sold, and the amount of the sale being compared with the purchase money and interest, would show the profit or loss. But without such consent, the only regular and safe course for the complainant to take, was to file a bill, and ask for a sale of the land, under the direction of a court of chancery. No difficulty is perceived in giving a construction to this contract of partnership. The complainant was to furnish the capital, and the defendant was to perform the labor; and they were to participate equally in the profits. But little labor was required from the defendant in making the purchases contemplated. Where persons agree to enter into a partnership in selling goods which require continual labor and responsibility, the capital to be advanced by one, and the labor to be performed by the other, the use of the capital is generally considered as an offset to the labor. But this principle does not apply to the case under consideration, where very little labor is necessary. In the estimation of the defendant, at least, a large profit from the operation was anticipated; and that appears to have induced the complainant to advance his money. The court will decree a sale of the premises, the master giving notice, etc., and time, as specified in the decree. And if the sale shall fall below the money, with interest, advanced by the complainant, the difference constitutes the loss, which shall be equally divided between them. Any actual expense incurred by the defendant in purchasing the land, to be allowed to him. If the land shall sell for more than the purchase money and interest, and the actual expense of the defendant, on the sale, the excess shall be equally divided between the parties, as profit.

Case No. 10,482.

The OLD CONCORD.

[1 Brown, Adm. 270; 2 Abb. U. S. 20, note.][1]

District Court, E. D. Michigan. April, 1870.

PRACTICE—RIGHT OF MORTGAGEE TO INTERVENE—REARREST OF VESSEL.

1. A mortgagee of a vessel has a right to intervene in an admiralty suit for the protection of his interest.

[Cited in The Grand Republic, 10 Fed. 400; The Two Marys, 10 Fed. 925.]

2. A vessel, discharged from arrest upon giving bond or stipulation, returns to her owner forever discharged from the lien which was the foundation of the proceedings against her, and the court has no power to order her rearrest.

[Distinguished in The Favorite, Case No. 4,698. Cited in The William F. M'Rae, 23 Fed. 558.]

3. It seems where the sureties become insolvent, the court may require the claimant to furnish new sureties, on penalty of contempt, or of being denied the right to appear further and contest the suit.

Motion to vacate order remanding vessel to the custody of the marshal. In this case the propeller was arrested November 10, 1868, and bonded on the same day by John Hutchings, claimant, with two sureties. December 18, 1868, Hutchings mortgaged the propeller to Eber B. Ward, who intervened pendente lite, setting up his mortgage as the basis of his right to intervene. July 5, 1869, an order was entered, remanding the propeller to the custody of the marshal, on the ex parte application of libellants, on the ground that the sureties had become insolvent since the bond was given. Ward now moved to vacate the order so remanding the propeller, on the ground that the court had no jurisdiction over the vessel after she was so bonded, and therefore had no power to make the order.

H. B. Brown, for motion.

W. A. Moore, contra.

LONGYEAR, District Judge. It is contended, on behalf of libellants, that Ward has no standing in court, he being a mortgagee merely, and not the owner or an agent, consignee or bailee for the owner, as required by rule twenty-six. Rule twenty-six has been considerably altered and enlarged, if not entirely superseded by the act of March 3, 1847 (9 Stat. 181). But the rule and the act relate exclusively to the conditions to be complied with to entitle a claimant to avoid an arrest of the property, or to obtain its discharge after it shall have been arrested, and not to conditions necessary to entitle a party to intervene pendente lite, to participate in the distribution of proceeds, or to protect any interest he may have in the subject-matter of the litigation. The right of a party to intervene for these purposes

[1] [Reported by Hon. Henry B. Brown, District Judge, and by Benjamin Vaughan Abbott, Esq., and here compiled and reprinted by permission.]

has been recognized, both in England and in this country, as extending to judgment creditors who have acquired a lien, and also to attaching creditors. See 1 Conk. Adm. 55, 66-70, citing The Flora, 1 Hagg. Adm. 298, 303; The Rebecca [Case No. 11,619]; The Mary Anne [Id. 9,195]. This being so, what reason can there be why a mortgagee should not be admitted to intervene for protection of his own interest, and contest a forfeiture so far as his right or interest would be prejudiced by the decree? I can see none. I am therefore clearly of the opinion that Ward is properly admitted to intervene as mortgagee, and consequently that he has a right to make this motion, and to be heard upon it.

The next and remaining question is as to the validity of the order remanding the vessel. I shall hot stop to argue the question. It seems to be too well settled, both in this country and in England, to need further elucidation, that the vessel, on being discharged from arrest upon the giving of the bond or stipulation, returns into the hands of her owner, discharged from the lien or incumbrance which constituted the foundation of the proceedings against her, forever and for all purposes whatsoever, the surety taken being a substitute for the vessel, and the court has no power or jurisdiction over her thereafter in the same suit or for the same cause. The Union [Case No. 14,346]; The White Squall [Id. 17,570]; The Kalamazoo, 9 Eng. Law & Eq. 557, 560; 15 Law Rep. 563.

No question of fraud, mistake or improvidence in entering into the bond, or discharging the vessel, arises in the case, and therefore need not be considered. The only remedy that seems to be provided in a case where the sureties shall become insolvent is an application to the court for an order requiring new sureties to be given. Disobedience to such order would put the party in contempt, and he could be proceeded against accordingly, and be denied the right further to appear and contest the suit until he complied with the order, or otherwise purged his contempt. Adm. rule 6; Ben. Adm. § 492; 2 Conk. Adm. 112.

I am therefore of opinion that the court had no power to make the order remanding the vessel into the custody of the marshal. Motion granted.

Case No. 10,483.

The OLD DOMINION.

[8 Ben. 221.] [1]

District Court, E. D. New York. July, 1875.

COLLISION IN HAMPTON ROADS—STEAMER AND SCHOONER—DANGEROUS MANŒUVRE.

Three schooners were running into Hampton Roads in the night, all heading west north west for the Thimble light. A steamship bound out from the Roads passed the two first schooners on her port side, but came in collision with the third, which was about a quarter of a mile astern, and which struck her on her starboard bow nearly at right angles and was sunk by the collision. The schooner alleged that she kept her course and that the steamer, which was on her port hand, starboarded her wheel and ran across her bows. The steamer alleged that the schooner was on her starboard hand; that she starboarded to give her more room, and that the schooner changed her course by porting her helm and endeavored to cross the steamer's bows and thus caused the collision: *Held*, that the attempt to pass between the two schooners was a dangerous manœuvre, which caused the collision, and for which the steamer was liable, whether the attempt arose from an error of judgment on the part of her officers or from their failure to observe the third schooner, with which she collided.

On the evening of the 11th of November, 1874, the schooner Louise Crockett, which had put to sea from Hampton Roads, meeting threatening weather, put back to Hampton Roads, and when within a mile or two of the Thimble light was sunk by a collision with the steamship Old Dominion, which was bound out from Norfolk to New York. The owners of the schooner and of the cargo on board her filed separate libels to recover their damages. On behalf of the schooner it was alleged that the schooner had the regulation lights set and was sailing on her port tack for the Thimble light, heading west north west with the wind north east; that the head light of the steamer was seen about two miles off, bearing one or two points on the schooner's port bow; that the schooner kept her course, and the steamer approached, showing first her green light and then the green and red lights; that the steamer then changed her course and ran across the schooner's bows, showing her green light only, and the vessels struck, the schooner striking the starboard bow of the steamer nearly at right angles. On behalf of the steamer it was alleged that shortly after passing the Thimble light, while heading east by south on her course down the bay, the red and green lights of the schooner were seen about a point and a half or two points on the starboard bow; that shortly thereafter the schooner's red light shut in and the steamer's helm was at once put to starboard to pass the schooner starboard to starboard, and then the schooner ported her helm and changed her course to cross the steamer's bows and ran into the steamer, whose engines were not stopped till after the collision. It appeared in the evidence that there were two other schooners, the Maggie and Lucy and the Greene, which were running into Hampton Roads ahead of the Crockett, all three running on about the same line for the Thimble light, and that the steamer passed them on her port side. The Greene was about a quarter of a mile ahead of the Crockett.

W. W. Goodrich, for libellants.
Owen & Gray, for claimants.

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

BENEDICT, District Judge. I have examined the evidence in these cases in the light of the arguments presented by the respective advocates, and am satisfied that the collision in question arose from an attempt on the part of the steamship to pass between the schooner Crockett and the schooner Greene, thus crossing the bows of the Crockett, when she should have gone under her stern. As the schooners were sailing, it was not safe to attempt to pass between the schooners, nor was there any reason for making the attempt.

It may be that the attempt arose simply from an error in judgment on the part of those navigating the steamship, although my mind inclines strongly to the belief that it arose from the fact that the attention of those on the steamship was devoted to the two schooners ahead of the Crockett, and that the last vessel was not seen till the steamer was just upon her. The positive evidence of those on the steamship may perhaps be explained by their supposing that there were but two instead of three schooners following each other. However this may be, the liability of the steamship is the same whether her course arose from error of judgment or the failure to see that the Crockett was following behind the Greene.

Let decrees be entered in favor of the libellants, with an order of reference to ascertain the amount of the loss.

OLD DOMINION INS. CO. (MURPHREY v.). See Case No. 9,945.

OLDHAM (HOLMES v.). See Case No. 6,643.

OLD NATIONAL BANK OF PROVIDENCE (KNIGHT v.). See Case No. 7,885.

Case No. 10,484.

In re OLDS et al.

[4 N. B. R. 146; (Quarto 37).] [1]

District Court, W. D. Michigan. Aug. 31, 1870.

BANKRUPTCY—COSTS—PAYMENT BY ASSIGNEE.

Where bankrupts (involuntary) complied with all the requirements of the bankrupt law [of 1867 (14 Stat. 517)], filed a petition for their discharge, there being funds in the hands of the assignee, and the final dividend not having been declared, the following question arose: "Whether the costs incurred upon the petition of bankrupts for their discharge, the hearing on said petition, publication of notice of hearing, etc., shall be paid out of the funds in the assignee's hands belonging to the estate of said bankrupts, or by the bankrupts themselves,"—*held*, the assignee, when he has funds, should pay the costs.

[Cited in Re Elmendorf, 9 Fed. 546.]

[In the matter of M. Olds, W. Olds, and L. Olds, involuntary bankrupts.]

At Kalamazoo, in said district, on the 31st day of August, A. D. 1870.

Before J. DAVIDSON BURNS, Register in Bankruptcy:

I, the above-named register, do hereby certify that, in the course of the proceedings in said cause before me, the said bankrupts [M. Olds, W. Olds, and L. Olds] have filed a petition for their discharge; a hearing has been had thereon, no opposition has been made by any creditor to the granting of discharge; two of the bankrupts have taken the oath required by section 29 of the bankrupt act, and I have made certificate of conformity, and report in favor of their discharge. This is an involuntary case, and there are funds in the hands of the assignee, the final dividend not having been declared. The following question pertinent to the proceedings has arisen, and I have been requested to certify the same to the district judge, for his opinion thereon, to wit: "Whether the costs incurred upon petition of bankrupts for their discharge, the hearing on said petition, publication of notice of hearing, etc., shall be paid by the assignee out of funds in his hands belonging to the estate of said bankrupts, or by the bankrupts themselves." In my opinion the assignee, when he has funds, should pay such costs. The bankrupts having, by force of law, surrendered all their property to be disposed of for the benefit of their creditors, it seems just and right that the avails of such property shall, so far as necessary, be used to give the bankrupts that relief which, upon conformity to the requirements of the law, they are entitled to claim, viz., a discharge from their debts. The case would be different if creditors successfully opposed the granting of a discharge, but when no opposition is made, and the bankrupts in all things conform to their duty under the act, they should not be deprived of the discharge which (unless the costs thereof shall be paid by the assignee out of the estate funds) they may not have the pecuniary ability to obtain. Section 28 of the bankrupt act provides that in the order for a dividend, the following claims shall be entitled to priority and to be first paid in full: First, the fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act. The proceedings on petition for discharge are certainly "proceedings in bankruptcy."

WITHEY, District Judge. The decision of the register, J. Davidson Burns, Esq., certified above, is approved.

Case No. 10,485.

The OLER.

[2 Hughes, 12; [1] 14 Am. Law Reg. (N. S.) 300.]

Circuit Court, E. D. Virginia. July 14, 1874.

ADMIRALTY JURISDICTION—COLLISION ON SHIP CANAL.

1. The admiralty jurisdiction of the United States courts extends to a tort committed by

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

collision on an artificial ship canal connecting navigable waters which are within that jurisdiction.

[Cited in The B. & C., 18 Fed. 544.]

[See The Avon, Case No. 680.]

2. Where, by collision, one vessel is left helpless in the track of navigation, and on the following day is injured by a passing vessel, the vessel in fault in the original collision is liable for the cost of repairing the injuries received by the disabled vessel in the second collision.

This is an appeal into this court from a decree of the district court, rendered on the 21st November, 1873. [Case unreported.] The leading facts are as follows: On the 21st November, 1872, the schooner Annie Cole, John Q. Hozier (the libellant), master, being in North river, North Carolina, near the mouth, laden with fresh fish for Norfolk, fell in with the steamer W. G. Oler, John E. Wyatt, master, also bound for Norfolk, and signalled the steamer for a tow. The Oler slacked her speed, threw her line, which was caught by the schooner, and the two vessels proceeded up the North river, and into the "Virginia Cut" of the Chesapeake and Albemarle Canal, until they got within two miles of the northern terminus. This was late in the day, and the steamer grounded, some say on the starboard (east), some on the port (west) side of the canal. When the steamer grounded they were moving at less than two miles an hour. The tow-rope was some two hundred feet long. As soon as the steamer grounded, the master of the Annie Cole turned her bow to the starboard bank of the canal, and ran it aground within twenty-five yards of the place where the steamer struck. The steamer soon reversed her wheel, thereby loosed herself, and commenced moving back towards the schooner. The master of the latter and his mate shouted vehemently to the steamer to stop backing, lest she should strike and sink the schooner. Three men in the schooner took poles and set them against the steamer to prevent collision, but they broke. For some reason the steamer continued to back. On nearing the schooner the action of her screw wheel had caused a "suck," which loosed the schooner from the bank. The schooner was then drawn under the steamer, where the wheel of the latter soon struck her, knocking a hole in her below the water-line so large that the schooner soon sank. The value of the cargo would have been at Norfolk from $950 to $1300. Energetic efforts were made to save it, but without success, and it proved a total loss. The steamer went on to Norfolk; the schooner remained sunk on the side of the canal in a careened position. The next day another vessel in passing struck the mast and other parts of the schooner, still further damaging her. The cost of repairs to the schooner and of raising her was $531. The libel is for damages to the vessel and the cargo, both exceeding $1500. The respondents resist the claim on several grounds, viz.: (1) They claim that the towing was gratuitous, and not for hire, and that there was no implied contract on the part of the master of the tug to sustain the risk of such an accident as happened. (2) They deny that the accident was the result of negligence on the steamer's part, but insist that it happened by the want of judgment and skill in the master of the schooner. (3) They claim that even if the steamer were responsible for the collision and direct damages, she is not responsible for the damages inflicted upon the schooner on the next day by another vessel. (4) They object that the libel is in form for breach of contract, and in fact for tort, and therefore demurrable. (5) They deny that tort committed on a canal is cognizable in an admiralty court.

Ellis and Welborn, for steamer.

Goode and Chaplain, for libellants.

HUGHES, District Judge. As to the first two objections, I think they are clearly untenable, from the evidence. The tug had towed the schooner on a former occasion for hire; and there was, independently of that fact, enough in this transaction to imply a contract for hire. It cannot be questioned that the backing of the tug for the distance of twenty yards upon the schooner, which caused the collision, was by the fault of those upon the tug. Her master was bound to the observance of care and diligence, and the facts proved upon him carelessness and positive blame.

The third objection cannot be sustained. The collision left the schooner helpless in the canal, liable to continual injury from passing vessels and otherwise. For such injuries as she was liable to sustain while in that condition, the tug was responsible. She is therefore liable for the cost of repairs for the injury which the schooner did actually sustain on the day after the collision. This is a much stronger case than that of The Narragansett [Case No. 10,017], where the court gave costs resulting from damage happening in consequence of the collision, from the injured vessel upsetting before she was got into port.

The fourth objection merely goes to the form of the libel, and not to the substance. The objection is such as can be cured by amendment at any time before the decree, and leave is given to make the amendment. This libel is in fact for tort, and the only informality consists in its using the phrase "in a cause of contract" when it ought to have said "in a cause of collision," in its opening statement of the cause of action. A like objection was overruled in the case of The Quickstep, 9 Wall. [76 U. S.] 665, where it was decided that the recital of a contract for towage in a libel for collision does not necssarily convert the libel into a proceeding on the contract. In truth, there was cause of action, both for breach of contract or bailment, and for collision; and both

causes of action might have been joined in the libel.

Coming, therefore to the fifth objection, and that on which counsel for defence laid chief stress, I am called upon to decide whether the jurisdiction of the admiralty courts of the United States extends to a tort committed on a canal, connecting two navigable rivers affected by the tides. The "Virginia Cut" of the Albemarle and Chesapeake Canal has capacity to pass a vessel of a thousand tons; and for an aggregate tonnage of fifty millions a year. An annual commerce of 400,000 tons passes through it. The number of vessels, masted and otherwise, traversing it per annum is now about 6000. It has but one lock, which is 220 feet long and 40 feet broad, and this is a tidewater lock. It connects the waters of the Elizabeth and North rivers, of Hampton Roads and Albemarle Sound, and is part of an inside chain of navigation parallel to the coast, extending from New York to Florida. It is a part of the great system of navigable waters of the Atlantic seaboard of the United States; and the magnitude and character of its commerce are such as undoubtedly place it within the admiralty jurisdiction, if it is not withdrawn therefrom by the fact that it is an artificially constructed work, open to the public, but owned by a private corporation.

Judicial opinion, as to the admiralty jurisdiction, has been quite progressive in this country. At first, the narrow view of the old English common law judges obtained in our courts; and it was held that the admiralty jurisdiction with us extended only to tidewaters, and to rivers navigable from the sea as far as they were affected by the tides. Such was the tenor of the decision of the United States supreme court in the case of The Thomas Jefferson, rendered in 1825, see 10 Wheat. [23 U. S.] 428. The position thus taken was held for twenty-six years by the court. The vast commerce of the Mississippi river and its tributaries, as well as of the Great Lakes and their connecting waters, was thus deprived of the benefit of the system of admiralty jurisdiction which had grown with the growth and accommodated itself to the wants of the commerce of the world for centuries. Some relief from this decision was found necessary. The position taken by the supreme court in The Thomas Jefferson [supra], compelled a resort to some legislative provision for the commerce of the Great Lakes and rivers; and, accordingly, congress, by the act of February 26, 1845 [5 Stat. 726], gave jurisdiction in the nature of admiralty jurisdiction to the district courts of the United States "in all matters of contract and tort," upon vessels of twenty tons, etc., etc., arising upon the Lakes and the waters connecting them. Under this act, the courts of the United States took cognizance of the class of causes it names arising in those waters, for some six years. In such causes they did not act as admiralty courts; they did not administer an admiralty jurisdiction; they acted under statutory authority as quasi admiralty courts, and administered a statutory jurisdiction in the nature of the admiralty and maritime jurisdiction. By 1851 the supreme court had arrived at a different opinion of the proper jurisdiction for the admiralty courts of the United States from that which it had held in the case of The Thomas Jefferson in 1825. Commencing in that year with the case of The Genesee Chief [12 How. (53 U. S.) 443], a case of collision occurring on Lake Ontario, in a chain of decisions reaching down to The Eagle [8 Wall. (75 U. S.) 15], decided in 1868, it has assumed positions more and more advanced on this subject, until it has come to hold that the act of 1845 conferred no powers upon the district courts of the United States which they did not already have as admiralty courts; and that their jurisdiction as admiralty courts not only extends over the ocean and its bays and harbors, its gulfs and waters, but to the inland lakes and their connecting waters, and to the interior rivers of the country to the extent of their navigable capacity, holding that the navigability of waters, open and public, brings them within the admiralty jurisdiction, and not the circumstance of their being affected by the tides or of their emptying into or opening from tidewaters. I have examined these decisions carefully, and I nowhere find that the supreme court, in defining the waters over which the admiralty jurisdiction of the district courts extends, uses any discrimination between natural public waters and artificial public waters. Chief Justice Taney, in The Genesee Chief [supra], employed language which has been substantially adopted in all recent decisions of that tribunal. He said: "There can be no reason for admiralty power over a public tidewater which does not apply with equal force to any other public waters used for commercial purposes and foreign trade," using the word public in the sense of open to the public.

I know of but one case that has come before our courts in which this question, whether the admiralty jurisdiction extends to a canal has occurred. That was the case of Scott v. The Young America [Case No. 12,549], in which there was a collision on the Welland Canal, which is on British territory. Judge Wilkins held that the court had jurisdiction there, even under the act of 1845; which must be confessed to be a far weaker source of authority in admiralty causes arising in a foreign country, than the admiralty and maritime law itself, and the jurisdiction confers.

Another canal case was that of The Diana, decided in England and reported in [1 Lush. 539], which was quoted approvingly by our supreme court in The Eagle, 8 Wall. [75 U. S. 15]. I have not been able to consult the reporter of that case, but it was one of collision on the Great Holland Canal in 1862. The objection there raised to the jurisdiction

of the admiralty court was not that the water on which the collision occurred was an artificial canal, but was the old English objection that the canal was not a tidal water. The objection was overruled by Dr. Lushington, and the jurisdiction of the English admiralty over an inland canal in a foreign country was maintained. Acting in the spirit of the United States supreme court in all its decisions, from that of The Genesee Chief down to the present time, and upon the two precedents of canal cases which I have cited on this side of the Atlantic and Lushington on the other, I have no hesitation in deciding that causes of contract and tort arising in the Virginia part of the Albemarle and Chesapeake Canal, otherwise cognizable in admiralty, are within the admiralty jurisdiction of the court.

A decree may be taken for the libellants for $531.95, the cost of repairs to the vessel, and for $1050, the amount of loss sustained on the fish, and costs.

Case No. 10,486.

OLIPHANT v. SALEM FLOURING MILLS CO.

[3 Ban. & A. 256;[1] 5 Sawy. 128; 10 Chi. Leg. News. 276.]

District Court, D. Oregon. March 29, 1878.

PATENTS — FALSELY STAMPING AN ARTICLE "PATENTED"—PENALTY—PATENTABILITY OF THE ARTICLE—PARTIES TO ACTION FOR THE PENALTY.

1. The question, whether it is a violation of the statute, to mark with the word "patent" articles which are not patentable, discussed.

2. The action was brought to recover a penalty under section 4,901 of the Revised Statutes, for marking certain sacks of unpatented flour with the word "patent." The defendants demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action: *Held*, that the allegation in the complaint "that all of said flour and sacks were the property of the defendant and patentable under the laws of the United States," was a sufficient allegation that the flour marked was patentable, and that it was not a sham allegation, as flour may be a patentable article.

[3. Cited in Winne v. Snow, 19 Fed. 508, to the point that in an action brought by an informer for his own benefit and that of the United States under section 4901, Rev. St., for falsely stamping the word "Patented" on an unpatented article, the plaintiff may properly describe himself as bringing the action for the benefit of himself and of the United States; that in such cases the United States is not regarded as a party to the action; and that a demurrer for misjoinder will not be sustained.]

[Action by W. S. Oliphant against the Salem Flouring Mills Company, to recover penalties for the violation of section 4901 of the Revised Statutes.][2] Heard on demurrer.

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and L. S. B. Sawyer, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 3 Ban. & A. 256, and the statement is from 5 Sawy. 128.]

[2] [From 5 Sawy. 128.]

Addison C. Gibbs and J. Quinn Thornton, for plaintiff.

William H. Effinger and J. J. Shaw, for defendant.

DEADY, District Judge. This action is brought by the plaintiff, who sues as well for himself as the United States, under the third clause of section 4,901 of the Revised Statutes, to recover of the defendant penalties for marking one thousand sacks of unpatented flour with the word "patent," "for the purpose of deceiving the public, and having it understood and believed by the public that the flour put into each of said sacks was patented."

The defendant demurs to the complaint, and for cause of demurrer alleges that it does not state facts sufficient to constitute a cause of action. Upon the argument of the demurrer, the only point made in support of it was that the article upon which the word "patent" is used must be a patentable one, entitled to be patented, and this must be sufficiently alleged.

The section of the Revised Statutes in question provides substantially that whoever (1) "marks upon anything made, used or sold by him, for which he has not obtained a patent, the name or any imitation" thereof of the patentee of such thing without his consent; or (2) "marks upon or affixes to any such patented article the word 'patent,' or 'patentee,' or the words 'letters patent,' or any word of like import, with intent to imitate or counterfeit the mark or device of the patentee," without his consent; or (3) "marks upon or affixes to any unpatented article the word 'patent,' or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable, for every such offence, to a penalty of not less than one hundred dollars, with costs," to any person who shall sue for the same, one half to go to himself, and the other to the United States.

The first two clauses of this section are evidently intended to protect the patentee of a patented article against the fraudulent use of his name or device upon a spurious article, and it is equally manifest that the third clause is intended to protect the public against the fraudulent use of the word patent. What art, machine, composition, process, or result may be patented is largely a question of fact, which in most cases lies beyond the knowledge or observation of the mass of mankind, the public. To say whether an article is both novel and useful, and has "a sufficiency of invention" to entitle it to be patented, is often a difficult question, and one which in most cases requires the skill and research of experts to determine. It may be useful but not new, or the reverse, and in neither case is it patentable. But the word "patent" upon an article is prima facie an assertion that it has some peculiar value or merit sufficient to induce the government,

upon a thorough examination of the subject, to give the inventor the exclusive right to make and vend the same. The impression which the fact ordinarily makes upon the mind is, that the article marked "patent" is in some respects more useful or desirable than articles of the same general kind or use which are not so marked. If, then, a person marks an unpatented article with the word "patent," the public are thereby liable to be deceived as to the character and value of the article. The act is a species of counterfeiting. This being so, the presumption is, until the contrary appears, that the mark was placed on the article with the intention to deceive. The falsehood is a badge of fraud.

To my mind it is clear, both upon the reason of the thing, and the plain words of the statute, that the penalty is incurred by marking an unpatented article with the word "patent," whether the same is patentable or not. The statute is made for the protection of the public, and is intended to prevent unscrupulous persons from imposing upon the community by the unauthorized and false use of the word "patent." But it must also appear that the article was so falsely marked with intent to deceive the public. Cases may arise in which it is apparent that the marking was done on unpatented articles in jest or ridicule, or as a mere fancy or caprice, under such circumstances that it is not possible that any one could be misled or deceived by it. A person might mark his dog or horse with the word "patent," but hardly with the intention to make the public believe that either was of any more use or value than any other like animal. And in such an extreme case the court might be able to say on demurrer to the complaint that there could not by any possibility have been any intention to deceive.

But in all ordinary cases, or cases in which there can be any doubt about it, the question of fraudulent intent or purpose to deceive is one for the jury. In passing upon it, the probability or improbability of the public being deceived by the alleged false marking will be taken into consideration by them. In this case, the court is unable to say, judicially or otherwise, that flour has never been patented, and cannot be; and more, that that is a fact of such general notoriety the public could not be deceived in regard to it. So far from this being the case, it is easy to conceive, in the light of the numberless patents for special preparations of farinaceous food, of flour being so prepared, either by means of peculiar machinery or some mixture with the grain of some chemical ingredient, as to be patentable. It is fair to presume that this flour was marked "patent" for some purpose. The demurrer admits that this purpose was to deceive the public, unless, as has been suggested, the court can say that such a result is impossible.

In U. S. v. Morris [Case No. 15,814], Mr. Justice Leavitt expressed the opinion that this statute did not apply to non-patentable articles. But this was mere obiter and without the argument. This opinion stands alone, and I am unable to concur with its reasoning or conclusions.

In Nichols v. Newell [Id. 10,245], as stated in Brightly's Dig. p. 637, it was decided that the object of this section "is to guard the public right to use unpatented articles; and to prevent deception, by assertions, that articles not entitled to that privilege, have been patented." The full report of the case is not obtainable here, but the reputation of the author of the digest is a sufficient guarantee that the effect of the decision is correctly given therein. From this it appears that the law applies to all unpatented articles, whether patentable or not, for the plain reason that the public should not be prevented from exercising their undoubted right to use unpatented articles by the false, and may be corrupt, assertion of any one, that they are patented.

In the case of Stephens v. Caldwell [Case No. 13,367], cited from the manuscript of Mr. Justice Sprague (1860), the digest says the penalty provided in this section "for affixing the word 'patent' to an unpatented article, is incurred as to all articles made and having such word affixed with a guilty purpose." It is probable from the context that the article involved in the case was a patentable one, but the language is clear and unqualified, and indicates plainly that no such limitation upon the ordinary signification of the word "unpatented" was thought of.

In Walker v. Hawxhurst [Id. 17,071], there was a verdict for the defendant and a motion for a new trial, on account of alleged error in the charge. In overruling the motion Mr. Justice Nelson said that the simple act of marking an article was not sufficient. "The marking must not only give the public to understand the fact of a patent, but the act must be done malo animo, with an intent to deceive; and this ingredient of the offence, which is essential to make it complete, must be left to, and be found by, the jury." It does not appear from the report what was the nature of the article marked, but there is no suggestion that it was at all material whether it was patentable or not.

This demurrer was taken and argued upon the assumption that the complaint did not sufficiently allege that the flour was a patentable article; and that if it did, it was a sham allegation, being manifestly false because it is impossible for flour to be patented. But upon examination of the complaint I am inclined to think that the allegation upon that subject is sufficient. It is "that all of said flour and sacks were the property of the defendant and patentable articles under the laws of the United States." This is not, as was contended, an allegation that the

flour and sacks taken conjunctively, together, constituted one patentable article, but rather that all the flour and sacks, as such, that is, both sacks and flour, are patentable. But, however this may be, I regard the allegation as immaterial, and the complaint is sufficient without it. The demurrer is overruled.

Case No. 10,487.

The OLIVE.

[Blatchf. Pr. Cas. 185.] [1]

District Court, S. D. New York. June 20, 1862.

PRIZE—ENEMY PROPERTY.

Vessel and cargo condemned as enemy property.

In admiralty.

BETTS, District Judge. The above vessel and cargo were captured by the United States ship-of-war New London, in November, 1862, in Mississippi Sound, off Biloxi. The schooner was loaded with lumber, and was directing her course towards the Mississippi passes. It appears, from the papers found on board of her, that she was enrolled and licensed at the port of Pensacola under the authority of the Confederate States, as owner by residents on Florida, thus being enemy property. On her arrest she was, under the directions of the United States naval officer in command, taken to Ship Island, and the vessel and cargo were there appraised,—the vessel at $700, and the cargo of lumber, being 42,000 feet, at $25 per thousand feet, and the vessel and cargo were, at that valuation, appropriated to the military use of the United States. On the libel filed May 19, 1862, in this court, and the return of service and notice of the attachment and monition issued therein, and on public proclamation on such return made, no appearance being entered for the vessel or the cargo, judgment by default is rendered on motion of the United States attorney, condemning the vessel and cargo to be forfeited, and that the sums so appraised as the value thereof be paid into the registry of the court in satisfaction of said decree and forfeiture.

Case No. 10,488.

OLIVE et al. v. MANDEVILLE.

[1 Cranch, C. C. 38.] [2]

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

PRACTICE—MOTION TO APPEAR WITHOUT BAIL BEFORE APPEARANCE DAY.

A motion, made before the appearance day, to appear without bail, will not be heard if the defendant be not in actual custody.

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

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

[This is an action by Olive, Colcott & Co. against Mandeville.]

The writ was returnable to this term. The appearance day of this term is the day after the rising of the court.

Motion by Mr. Jones to appear for the defendant without bail, grounded on the defendant's discharge under the bankrupt law of England.

The plaintiff's counsel, R. J. Taylor, made affidavit that the defendant's motion was made the last evening; that he is informed and believes that John Sutton will prove that the discharge was obtained by fraud; that he has called twice at the house of Sutton, and was informed that he was so ill that he could not be seen; and thereupon moved that the defendant's motion might be continued till next term. The defendant had given appearance-bail.

THE COURT would not now, in this case, the defendant not being in actual custody, hear the motion to appear without bail before the appearance day.

Case No. 10,489.

The OLIVE BAKER.

[4 Ben. 173.] [1]

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

COLLISION IN NEW YORK HARBOR—TUG AND TOW—INEVITABLE ACCIDENT.

1. A barge, while under tow, lashed to the side of a tug, was injured by a collision with a vessel lying at a dock. On the part of the tug, it was claimed, that the collision was caused by the slackening of the bow line between the barge and the tug, by some one in charge of the barge, against the will of the master of the tug, whereby the tug had not full control of the barge; that another tug, passing close by the tow, raised a swell, which, with the tide, gave the barge a sheer towards the dock, which the tug was not able to check, owing to the slackening of the bow line; and that the collision was caused by inevitable accident: *Held*, that, as the tug had acquiesced in the slackening of the bow line, she became responsible for whatever consequences resulted from that arrangement.

[Cited in The Sweepstakes, Case No. 13,687.]

2. That the tide was known and ought to have been calculated for, and the effect of the passing of the other tug ought to have been guarded against.

[Cited in The Merrimac, Case No. 9,478.]

3. That the circumstances, therefore, did not make out a case of inevitable accident.

In admiralty.

Beebe, Donohue & Cooke, for libellants.
Scudder & Carter, for claimants.

BLATCHFORD, District Judge. The libellants, as owners of the barge Halleck, sue the steam propeller Olive Baker, to recover the sum of $1,200, as the damages sustained by them in consequence of injuries caused to the barge, while she was being towed by the

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

Olive Baker, on the 17th of August, 1868, from the foot of Bridge street, in Brooklyn, to the Wallabout Bay, around the upper end of the Cob dock. The barge, while under tow, and lashed to the starboard side of the Olive Baker, was carried across the entrance to the bay, and to the side opposite the Cob dock, and her bow struck against the side of a heavy ice boat lying at a dock at Williamsburg, so as to inflict considerable damage upon the barge. The libel alleges, that the injury was caused solely by the fault of the Olive Baker. The answer alleges, that, after the Olive Baker and the barge had started on their trip, some one having charge of the barge slackened her bow line, against the will of the master of the Olive Baker, whereby the Olive Baker had less control of the movements of the barge than she otherwise would have had; that, when the Olive Baker, with the barge in tow, reached the entrance to Wallabout Bay, the tide was running out and against the Olive Baker; that the channel was narrow, and, as the Olive Baker was attempting to enter the bay, a tug passed rapidly by her; that the water from the wheel of such tug came against the starboard bow of the barge; that the force of the tide and of such tug on the Olive Baker was so great that, without any fault on the part of those navigating the Olive Baker, she took a sudden sheer across the narrow channel, towards an ice boat lying at or near the shore; that, in order to prevent the Olive Baker and the barge from colliding with the ice boat, the Olive Baker was at once backed, but, as she had not complete control of the barge, after the slackening of the bow line, the barge continued to go forward until the bow line was straightened, and, when it was so straightened, it parted and allowed the barge to collide with the ice boat; and that such collision was caused by inevitable accident.

This defence resolves itself into two matters —the slackening of the bow line of the barge against the will of the master of the Olive Baker; and the action of the tide and the tug, causing the Olive Baker to sheer and necessitating her backing, and causing the slackened bow line to part, and thereby bringing about the collision, through inevitable accident.

In regard to the slackening of the bow line, to whatever extent it was slackened, if it was slackened at all, the captain of the Olive Baker testifies, that he slowed his boat down while the captain of the barge was slackening the line, during the trip, and before the entrance off the upper end of the Cob dock was reached, and that, after the line had been slackened and again fastened, the Olive Baker went ahead again. The Olive Baker, in undertaking to tow the barge, made herself responsible for any arrangement of the towing lines that was known to and acquiesced in by her. Whatever slackening of the line took place in this case, was acquiesced in by the Olive Baker. There were three lines—a bow line, a tow line midships, and a stern line, the tow line belonging to the Olive Baker and the other two lines to the barge. The evidence is satisfactory, and comes from those on the Olive Baker, that, when the Olive Baker was backing, before the collision, and in order to prevent it, although the bow and stern lines parted by the backing, the Olive Baker afterwards brought up on the tow line and backed on that, and the collision occurred after that. The parting of the bow line alone is set up in the answer, and the parting of that is attributed to its having been slackened. The evidence shows that it was a new and strong line. The headway of the Olive Baker and the barge were very great when the Olive Baker started to back, and the line undoubtedly snapped from the sudden strain upon it, the barge going ahead and the Olive Baker backing. As the tow line did not break and the Olive Baker brought up on it, and the other two lines parted before the tow line was brought up on, it would seem, that the tow line must have been more slack than either of the other two lines, after the backing commenced. But, for the condition of slackness of all the lines, the Olive Baker was, on the evidence, responsible, and, in so far as the collision was promoted by the parting of the bow line through its slackness, the Olive Baker, being responsible for such slackness, is responsible for the parting and its consequences.

As to the joint action of the tide and the tug in producing the accident, the evidence shows, that the tug, being light and not having anything in tow, was coming up from behind the Olive Baker. The tide was ebb and the Olive Baker was running against it. The barge was down by the stern and towed hard. The pilot of the Olive Baker saw the tug coming up on the starboard side of the barge, the barge being on the starboard side of the Olive Baker. The stem of the barge projected from ten to fifteen feet ahead of the stem of the Olive Baker, and the stern of the barge extended some ten feet in the rear of the stern of the Olive Baker. The bows of the two boats were pressed in together, so that their sterns lay out from each other. As the tug was coming up, the captain of the Olive Baker, who was her pilot, and was at her wheel in her pilot house, blew a signal of two blasts of his steam whistle, indicating that he desired the tug to go to his port side. The tug made no reply, but went on. When the tug had got alongside of the barge, and was passing between it and the face of the Cob dock, so close to the barge that she scraped the barge as she passed, and so close to the dock that there was, as the captain of the Olive Baker says, only two and a half feet distance betwen the tug and the dock, the captain of the Olive Baker ported his helm, so as to crowd the tug still more, and tend to throw the head of the barge and of the Olive Baker to the right, into the bay, and in the direction in which the Olive

Baker and the barge were bound, to reach their destination. The captain of the Olive Baker says, that, the water being shoal, the suction caused by the tug, as she passed, caught the stern of the barge and drew it towards the corner of the dock, and thus threw the head of the barge away from the entrance to the bay. The theory is, that this force and that of the tide running out of the bay, against the starboard bow of the barge, counteracted the effect of the porting by the Olive Baker, and caused her to shoot across the entrance and against the ice boat on the other side. As soon as the captain of the Olive Baker saw that the head of the barge was being thrown away from the entrance to the bay, he stopped and backed his engine, it having before been slowed, under one bell. I can see nothing, in all this, of inevitable accident. It is in proof, that the captain of the barge, when he saw the tug trying to run on the inside of him, called the attention of the captain of the Olive Baker to the fact that he ought to be careful lest the barge should be damaged, and that the captain of the Olive Baker replied that he knew his own business. I think there was, in the evidence, a strife between the Olive Baker and the tug as to which should have the inside and, therefore, the shorter line into the bay. The Olive Baker should have gone further out when she saw that the tug had refused to go outside. There was room enough for the Olive Baker to have done so by starboarding her helm. She could have stopped and reversed sooner. The tide was known and should have been calculated for, and the effect of the rapid passing by of the tug in such close proximity ought to have been known and guarded against. The barge was wholly at the mercy of the Olive Baker, and the latter is, I think, chargeable with the consequences of the collision.

There must be a decree for the libellant, with costs, with a reference as to the damages.

Case No. 10,490.

The OLIVE BRANCH.

[1 Lowell, 286.] [1]

District Court, D. Massachusetts. Nov., 1868.

SALVAGE—WHEN CREW CAN BE SALVORS—ABANDONMENT BY MASTER—LOCAL USAGE REQUIRING MEN TO ASSIST IN UNLOADING FISHING VESSEL.

1. The crew can be salvors of their own vessel when their contract has been put an end to, either voluntarily by the master, or as the effect of a vis major.

[See The Antelope, Case No. 484.]

2. But where the crew were abandoned by the master, near the home port, and the vessel was soon afterwards stranded, and there was no mate, and the men got the ship off the shore and saved her with considerable difficulty and danger, *held*, they were not salvors.

3. A local usage to require the men to stay by a fishing vessel till she is unloaded and cleaned, in her turn, will not authorize the owners to claim a deduction from the wages of the men who have not assisted in this work, if they were not asked to stay for this purpose, and the custom was merely made use of to cheapen their demand for wages.

4. Quære, if a usage to wait for an indefinite time until the owners are ready to discharge the vessel is valid?

Five seamen of this schooner proceeded for their wages and for salvage. Their contract was to carry on the bank and other cod fishery from Plymouth during the season, and to make two trips, if the owners should wish to make so many, for round sums of money for the season. The schooner was a large one, and her first trip lasted until the early part of September. The master on his return anchored the vessel near Yarmouth, some twenty miles from Plymouth, and left the vessel towards night, taking with him the two sharesmen; and it was admitted that he did so without right, and in pursuance of a purpose to defraud the owners, some of whose property he had embezzled. A storm was even then rising, and in the course of the night the vessel was stranded. The libellants stayed by the schooner, and on the next day, with much labor and danger, and some privation, succeeded in getting her afloat, and pumped out in Yarmouth harbor. They were without officers, for no mate had been connected with the schooner. They telegraphed to the owners at Plymouth, and a man was sent who took command, and the vessel was taken safely to Plymouth and anchored near the claimants' wharf on Sunday. The libellants asked for their wages more than once; and on Wednesday or Thursday the owners offered to pay them if they would deduct ten dollars each, which they refused. Some of them afterwards offered to take off five dollars, but this offer was not accepted. The owners testified to a custom at Plymouth, for all seamen of fishing vessels who do not expressly stipulate to the contrary, to stay by the vessel until the fish are washed and the vessel fully discharged and cleaned, and that if the same owners have other vessels which are being discharged, the regular turn must be taken for the vessel in question. That in this case there were one or more vessels of theirs which had priority, and that some time would elapse before the Olive Branch could be unloaded. By way of set-off for this remaining duty the owners asked for this reduction. The libellants demanded not only full wages but salvage.

C. G. Thomas, for libellants.

W. D. A. Whitman, for claimants.

LOWELL, District Judge. Seamen may be salvors of their own ship when their contract has been dissolved, either voluntarily by the master or by the effect of a vis major. Mason v. The Blaireau, 2 Cranch [6 U. S.] 240; The Triumph [Case No. 14,183]; The Flor-

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

ence, 16 Jur. 572; The Warrior, Lush. 476. That this point may be one of some nicety, will be seen by comparing the case of The Triumph, ubi supra, with that of The John Perkins [Case No. 7,360]. In this case I am obliged to say that the conduct of the libellants, courageous and meritorious as it was, does not bring them within the law of salvage, because their voyage was not ended, nor their contract in any way annulled or dissolved. The master had left them, and it happened, from the nature of the voyage, that they had no mate; but the desertion had no reference to the approaching storm, and I regret to say that I cannot distinguish the case from one in which the master should have lawfully gone on shore, leaving these men in charge, or should have been lost overboard. I do not, of course, mean to be understood that where a ship at sea is deprived of her officers, and the men, or some of them, are competent to navigate the ship, and do supply the place of officers, they would not be entitled to extra compensation, but it would probably not be a salvage reward, and the evidence here does not enable me to ascertain any such service. Whether the action of the owners has been either generous or even gracious, I have no jurisdiction to determine.

Upon the question of wages, it appears that the owners did not desire to make a second trip, though perhaps the season was not so far advanced that they might not have required the men to go again under their contract; the dispute is upon the alleged usage. The libellants were shipped at Boston, and some of them had sailed but seldom from Plymouth or its neighborhood. They deny knowledge of the custom set up, and say that so far as they know, the usage is to wash the fish only when that service is expressly mentioned in the articles. The claimants are likely to be better informed on this subject, and the preponderance of the evidence is that such a usage exists. It is analogous to the general rule applicable to other voyages, unless when varied by contract or usage, that the seamen are to stay by the vessel until the cargo is unladen.

But it is clear that, in this case, it was for the interest of both parties that the men should be discharged when they were discharged. The vessel would not be unloaded and cleaned for an indefinite period, has not in fact been cleaned yet, some six weeks after her arrival; the board of the men would have come to much more than their services would be worth. One of the owners said very frankly that he considered it for the benefit of both parties that the men should be discharged on the Thursday, but that it was usual for them to make a discount when that was done, and this voyage having turned out ill, the saving was of some importance to the owners. It does not appear that the owners asked the men to stay; but, on the contrary, they were quite ready to have them go, upon terms. They told them why they asked the discount, but beyond that made no claim, but rather encouraged the belief that they would settle with the men. I cannot regard this conduct as quite ingenuous. The men may have been deceived by it, and have understood, as the fair result of the interviews, that there was no question at all of their staying, but only upon what terms they would go. I so understand the matter myself as developed by the evidence. Under these circumstances equity requires me to regard the contract as ended by the consent of both parties; and as the owners have made no loss by its termination, I shall make no deduction from the wages. It is well understood that after a voyage is ended no statute desertion can take place; but a refusal of duty even then may lead to a diminution of wages by way of penalty; but the facts do not authorize the imposition of a penalty here.

It may be doubted whether a usage to detain the crew for an indefinite time, in the discretion of the owners, would be valid. Decree for full wages.

Case No. 10,491.

The OLIVE CHAMBERLAIN.

[1 Spr. 9.] [1]

District Court, D. Massachusetts. Oct., 1841.

SEAMEN'S WAGES—FORFEITURE FOR VIOLENCE UPON MASTER—CONDONATION—IMPRISONMENT.

1. Forfeiture of wages by the first mate for personal violence upon the master.

[See The Almatia, Case No. 254.]

2. His being permitted to continue in his office for a few days, until the master can reach a place more convenient for the exercise of his authority, is not a condonation, especially if the mate continue to be contumacious.

3. The owners having suffered no damage, the forfeiture is decreed only as a penalty for the offence.

4. If the mate has been sufficiently punished by imprisonment, he ought not to be subjected to a further infliction.

In admiralty.

E. Smith, Jr., for libellant.

F. Dexter and G. W. Phillips, for claimants.

SPRAGUE, District Judge. This is a libel in rem for wages. The defence is forfeiture by misconduct. Merry, the libellant, was mate of the brig Olive Chamberlain. While at Cardenas, he, without justifiable cause, assaulted the master, striking him one or more blows, and committing other violence on his person. He at other times manifested a spirit of insubordination, and spoke of the master, in presence of the crew, in language of contempt. The libellant continued in his

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

office of mate, and performed its duties, for four or five days after the assault, and until the arrival of the brig at Havana; and it was there agreed between him and the master, that he should exchange places with the second mate, but upon being required to give up the log-book, he refused. The master, thereupon, after consulting the American consul, caused the libellant to be taken from the vessel, and committed to jail, where he remained four days, when he was released, and immediately returned to Boston. He was there arrested on a criminal complaint for the assault at Cardenas, and now stands bound over to take his trial, at the next circuit court.

It is contended by the libellant's proctor, that the offences are not set forth with sufficient distinctness in the answer. But this does not apply to the assault at Cardenas, which is set forth with precision. That outrage was of itself sufficient to work a forfeiture of wages.

It is contended that the misconduct was forgiven by permitting the libellant to continue in his office, and perform its duties, until the brig arrived at Havana. But the master merely waited a few days, until he reached a more convenient place for exercising his authority. It is not so strong a case as that of The Mentor [Case No. 9,427], which was held to be no remission. Beside this, the libellant refused at Havana to give up the log-book, and persisted in this refusal, until he was taken out of the vessel and committed to prison. His disobedience and contumacy were thus continued to the last.

It is further insisted, that the libellant has already been punished by the imprisonment at Havana and the criminal proceedings here, and that to enforce a forfeiture of wages would be to punish him twice. In this case the owners suffered no damage, and they can withhold the wages of the libellant only as a penalty for his misconduct. The punishment is to be proportioned to the offence, and if sufficient has already been suffered, the court will not permit a further infliction. The offence is not of a trivial character. Actual violence upon the person of the master, on board of his own vessel, by one bound to submit to his authority, is not to be passed over lightly. The criminality of the libellant is heightened by the office which he held. To the first mate, above all others, has the master a right to look, not only for an example of obedience, but for active and efficient assistance in repressing insubordination, and upholding his lawful authority. His misconduct at other times, though not relied on as substantive ground of forfeiture, must at least deprive him of that favorable regard to which he might have been entitled, had he at all other times been exemplary in the discharge of his duties.

The forfeiture of his wages earned prior to the assault at Cardenas, in addition to what has been already suffered, will not, in my judgment, exceed the just measure of punishment. For the five days which he continued to serve after the offence, he is entitled to recover wages. No costs will be allowed.

Case No. 10,492.

In re OLIVER et al.

[19 N. B. R. (1879) 291.][1]

District Court, E. D. Michigan.

CHATTEL MORTGAGES—DEBTS CONTRACTED AFTER EXECUTION AND BEFORE RECORDING—FOLLOWING STATE PRACTICE.

Where the supreme court of a state has decided that, under its chattel mortgage law, mortgages are void as to all creditors who become such between the giving and recording of the mortgage, the district court will adopt such construction, and hold such mortgages void as against the assignee in bankruptcy of the mortgagor, where debts were contracted after the execution of the mortgage. Sawyer v. Turpin, 91 U. S. 114, distinguished.

On the petition of Isaac Young that the assignee be required to pay over to him the proceeds of certain mortgaged property. The petition alleged that petitioner held a mortgage of personal property, executed by the bankrupts to him August 12, 1877, but not recorded until November 29th of the same year. The mortgage covered certain goods, from the sale of which the assignee received the money now in his hands. Bankruptcy proceedings were instituted December 12th. The answer of the assignee admitted the giving and recording of the mortgage at the dates named, his appointment as assignee, and the fact that he had in his hands nearly one thousand dollars, the proceeds of the sale of the mortgaged property; but denied that he should pay that amount to the petitioner, for the reason that, practically, all of the debts proven against the bankrupts' estate were contracted before such mortgage was recorded; and claimed that, under the statutes of this state, the mortgage was absolutely void as against such creditors, and, consequently, against himself, as representing them.

Shepard & Lyon, for petitioner.

Mr. Cooley, for assignee.

BROWN, District Judge. There is no question that the mortgage was given for a valuable consideration, passing at the date of its execution. It is claimed, however, that the debts of the bankrupt were mainly contracted after the giving of the mortgage, and before its filing; that it was not filed until fourteen days before the commencement of bankruptcy proceedings, and that it is, therefore, invalid as against the assignee. Section 4706 of the compiled laws of this state provides: "That every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels not accompanied

[1] [Reprinted by permission.]

by immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage shall be filed," etc. The act does not define who are creditors within the meaning of this section, and it is left for the courts to determine whether it applies to those who have levied upon the stock by virtue of an attachment or execution before the mortgage is filed, or to all those who became creditors between the execution and filing of the mortgage. A similar statute in Massachusetts, declaring that no such mortgage should be valid "against any other persons than the parties thereto, unless recorded, was considered by the supreme court of that state in Mitchell v. Black, 6 Gray, 100. In that case it was held that one who had taken bills of sale of merchandise from his debtor, as security for money advanced, and who had allowed the debtor to sell portions of the merchandise, in the usual course of his business, as if he were the owner thereof, might take possession of it at any time, in order to secure his debt, and that such taking of possession, though at a time when the debtor was known by himself and the creditors to be insolvent, was effectual, notwithstanding the state insolvent law, which contained provisions very like those of the bankrupt act [of 1867 (14 Stat. 517)]. In speaking of the registration of mortgages, the court observed: "The time when the record shall be made is not specifically prescribed by the statute, though it must undoubtedly precede the possession by others subsequently acquiring an interest in the mortgaged property. To prevent it from passing to them, it will be sufficient that the record is made at any time before such possession is taken, though it be long after the execution of the mortgage." A somewhat similar case came before the supreme court of the United States, on appeal from the circuit court for the district of Massachusetts, in Sawyer v. Turpin, 91 U. S. 114. In this case a bill of sale of personal property was executed on the 15th of May, 1869, but the conveyance was not recorded, nor was possession had thereunder. On the 31st of July this bill of sale was surrendered, and a chattel mortgage upon the same property executed in exchange therefor, but this mortgage was not recorded until the 17th of September. Proceedings in bankruptcy having been commenced within a little more than a month thereafter, the assignees filed their bill in the district court to set aside this mortgage as a fraudulent preference. In passing upon the question, the supreme court adverted to the case of Mitchell v. Black, above cited, and adopted the construction given therein to the chattel mortgage law of Massachusetts, and held that, as the mortgage was recorded before the rights of the assignee in bankruptcy accrued, it could not be impeached by the complainant, and the court added that, even if the failure to put it on record enabled the debtor to maintain a credit he ought not to have enjoyed, it could make no difference, as the bankrupt act was not intended to prevent false credits. Other cases to the same effect are: In re Wynne [Case No. 18,117]; Miller v. Jones [Id. 9,576]; Ex parte Dalby [Id. 3,540]; Cragin v. Carmichael [Id. 3,319]; Seaver v. Spink [65 Ill. 441]; Player v. Lippincott [Case No. 11,224]; National Bank of Fredericksburg v. Conway [Id. 10,037]. The same question came before this court in the case of In re Barman [Id. 999], in which the mortgage was made on the 9th of August, but was not filed until the 8th of December, nor possession taken until January. It was conceded that the mortgage was given for a present consideration, and would have been valid, if filed when executed, as against bankruptcy proceedings; but that, as it was not filed until December, it should be regarded, as against the assignee of the bankrupt, as taking effect from that date. As the supreme court of this state had not then settled the construction to be given to the word "creditors" in the chattel mortgage act, I felt constrained to follow the case of Sawyer v. Turpin [supra], as giving a construction to a similar statute of another state, although I was aware at the time that such construction was putting it in the power of debtors to defeat the purposes of the bankrupt act, by giving chattel mortgages upon their stocks in trade, and persuading the mortgagee to keep them off the record, to the prejudice of creditors, who might have trusted them upon the faith of their apparent ownership of the property. But, at the last term of the supreme court of this state, a construction was given to this statute in the case of Feary v. Cummings, 1 N. W. 946, different from that given by the supreme court of Massachusetts to the statute of that state. In this case the mortgagees, who had purchased the mortgaged property upon foreclosure, were sought to be held as garnishees of the principal debtor. It appeared the mortgage was made October 8, 1877, but was not filed until May 28, 1878. Plaintiffs became creditors of the mortgagor, the principal defendant, between the giving and the filing of the mortgage, although they did not obtain judgment until September, 1878, after the seizure and sale of the property to the mortgagee. The court held that, if the mortgage was not put on file prior to the plaintiffs becoming creditors, it was invalid as against them, "the law being that those who become creditors while the mortgage is not filed are protected, and not merely those who obtain judgments or levy attachments before the filing;" and that, although no creditor could impeach the mortgage before taking proceedings against the property, yet, if

such proceedings were taken, he would be considered as a creditor within the meaning of the section, if his debt accrued between the giving and filing of the mortgage; citing in this connection Thompson v. Van Vechten, 27 N. Y. 568, where a similar construction was given to the statute of that state. See, also, Bostwick v. Foster [Case No. 1,682]; Harris v. Exchange Nat. Bank [Id. 6,119]; Moore v. Young [Id. 9,782]; Allen v. Massey [Id. 231]; Harvey v. Crane [Id. 6,178]. The construction thus given to this statute is obligatory upon this court, and I must therefore hold in this case that the petitioner can take nothing by his mortgage. The petition is therefore dismissed.

Since this opinion was prepared, the case of Platt v. Preston [Id. 11,219], decided by Judge Choate, has appeared in the Bankruptcy Register. In that case the same conclusion was reached, for the same reasons here given. The mortgage is not rendered invalid by the bankrupt law or because the filing constitutes a preference, but it may be set aside by the assignee, because, by the law of the state, it is void as against the creditors whom he represents.

OLIVER (COOK v.). See Case No. 3,164.

Case No. 10,493.

OLIVER v. CUNNINGHAM et al.

[See 6 Fed. 60.]

Case No. 10,494.

OLIVER v. DECATUR.

[4 Cranch, C. C. 458.] [1]

Circuit Court, District of Columbia. March Term, 1834.

MORTGAGES — FORECLOSURE BY BILL IN EQUITY— RECEIVER—RENTS AND PROFITS BEFORE ANSWER.

1. In a suit in equity to foreclose a legal mortgage, the court will not, before answer, grant an injunction to prevent the mortgagor in possession from receiving the rents and profits; nor will they appoint a receiver, the defendant being in no default for not answering.

2. The defendant may, at any time, before the bill is taken for confessed, plead, demur, or answer; and the plaintiff is to pursue the same course as if the plea, demurrer, or answer had been filed before the expiration of the three months limited, for answer, by the rules of the court.

Bill [by Robert Oliver against Susan Decatur] to foreclose a legal mortgage, and for an injunction to prevent the defendant from receiving the rents, and praying that a receiver may be appointed; on the suggestion that the property is insufficient security for the debt. The defendant was in no default for not answering.

Mr. Key and Mr. Dunlop, for plaintiff, moved the court to appoint a receiver, and cited 2 Madd. 231, 233, 235; Wills v. Pugh, 10 Ves. 403; Middleton v. Dodswell, 13 Ves. 266; Lloyd v. Passingham, 16 Ves. 59, and the cases cited in 2 Madd. 231, and Duckworth v. Trafford, 18 Ves. 283; Berney v. Sewell, 1 Jac. & W. 647.

Mr. Marbury, for defendant, cited 2 Madd. 231; Coop. Ch. 42, 107; Berney v. Sewell, 1 Jac. & W. 647,—to show that it is not usual to appoint a receiver before answer; nor in a case of legal mortgage.

THE COURT (nem. con.) refused to grant an injunction and to appoint a receiver.

In November, 1833, the defendant pleaded the pendency of another suit for the same cause in Norfolk, (Virginia,) but afterwards, and before the plea was set down for argument, namely, on the 29th of March, 1834, withdrew the plea and filed an answer, which the plaintiff's counsel contended was wholly insufficient and ought not to be received, and must be considered as a nullity, and again moved the court to appoint a receiver.

Mr. Dunlop, for plaintiff, cited Dillon v. Alvares, 4 Ves. 357, that the pendency of a suit in Ireland is no bar to an injunction; Avery v. Petten, 7 Johns. Ch. 211; Verplank v. Caines, 1 Johns. Ch. 57,—as to power to appoint a receiver.

Mr. Marbury, contra, cited Berney v. Sewell, 1 Jac. & W. 647. The defendant has a right to answer at any time before the bill is taken for confessed; which is not yet done. If the answer is not sufficient in some respects, the plaintiff must except to it. It cannot be treated as a nullity.

CRANCH, Chief Judge. (MORSELL, Circuit Judge, absent). This is a bill to foreclose a mortgage in fee, and for the appointment of a receiver; and for an injunction to prevent the mortgagor in possession from receiving the rents, and the tenants from paying them to her. The bill was filed on the 22d of March, 1833. On the 28th of November, 1833, the bill not having been taken for confessed, the defendant filed a plea of a prior suit for the same cause still depending in a court of equity in Norfolk, in Virginia. On the 29th of March, 1834, the plea not having been set down for argument, the defendant withdrew it, and filed her answer. On the 1st of April, 1834, the plaintiff again moved for a receiver and injunction on the ground of the insufficiency of the answer, which he avers the defendant had no right to file, unless by leave of the court; and contends that the court should consider a bad answer as no answer; and should now take the bill for confessed, and proceed to decree. By the 6th rule of practice prescribed by the supreme court of the United States, the defendant has three months, after the appearance day, to answer; and, by the 10th rule, if he does not answer by that time, the plaintiff may take the bill for confessed, or have a

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

general commission or attachment to answer interrogatories; but the court may permit an answer. By the 18th rule, the defendant may, before the bill taken for confessed, demur, or plead to the whole bill or to part of it, and answer to the residue; and, by the 20th rule, if the plea or demurrer be overruled, the defendant has two months to answer; and, if his answer be insufficient, the plaintiff, by the 13th rule, may, in two months, except; and, by the 14th rule, the defendant has two months to file a better answer, or to insist on the sufficiency of that which is already filed. If he insists, the plaintiff may set down the exceptions for argument at the next term. If the answer be adjudged insufficient, the defendant must put in a better, &c. Thus, it seems, that, at any time before the bill is taken for confessed, the defendant may plead, demur, or answer, as he may think fit, and the plaintiff is to pursue the same course as if the plea, demurrer, or answer had been filed before the expiration of the three months limited for answer. So that it does not yet appear that the defendant is in default. But, if she were, the plaintiff could only get a decree nisi, according to the 6th rule; and that decree could not be for a receiver or an injunction. No case has been shown in which a receiver has been appointed in favor of a legal mortgagee, against the mortgagor in possession; and the case of Berney v. Sewell, in 1 Jac. & W. 647, seems decisive that it cannot be done consistently with the rules of a court of equity in England; and it is upon the English cases, and the cases in this country, which have been decided upon English cases, that the appointment of a receiver is now claimed.

The plaintiff, in this case, has not used due legal diligence. The mortgage became absolute, or, by proper demand, might have become absolute, on the 14th of June, 1829. The bill was not filed until the 22d of March, 1833; and the plaintiff has brought no action of ejectment to obtain possession, and cannot recover, at law or in equity, the rents received by the mortgagor in possession. The court has already decided that the facts stated in the bill do not entitle the plaintiff to have a receiver or an injunction; and nothing has occurred since, to give him a right to claim either. We think, therefore, that the motion must be overruled.

This cause came on again, to be argued upon the exceptions to the answer, on the 26th of November, 1834, and was argued by Messrs. Key and Dunlop, for plaintiff, and Mr. Marbury, for defendant.

The plaintiff's counsel still insisted that the answer was so imperfect that the court must consider it a nullity, and should take the bill for confessed, and appoint a receiver.

CRANCH, Chief Judge, after reciting the thirteen exceptions taken by the plaintiff, to the defendant's answer, said: Upon a careful reading of the bill and answer, I think the answer is exceptionable in every particular in regard to which it is excepted to; but still I cannot consider it as a nullity. It answers some of the material allegations of the bill, and insists, by way of plea and demurrer, that the complainant is not entitled to relief or discovery, as to some of the other grounds of complaint. But it is certainly an insufficient answer.

The question then occurs, what is the order to which the complainant is now entitled, according to the rules of practice in a court of equity? By the 14th rule prescribed by the supreme court of the United States, for the circuit courts, the defendant, having insisted on the sufficiency of his answer, and the exceptions having been set for argument, and argued, the court cannot receive any further or other answer, "but on payment of costs." By the 15th rule, the costs thus to be paid are to be "such costs as shall be allowed by the court." By the 16th rule, upon a second answer being adjudged insufficient, costs shall be doubled, and the defendant may be examined upon interrogatories, &c., or the plaintiff may move the court to take so much of the bill as is not answered, for confessed, and proceed for the residue, in the ordinary mode, by replication, commission, and hearing. The order of the court is, that the plaintiff's bill shall be taken for confessed, unless the defendant, on or before the 15th day of this month of December, 1834, answer fully as to all the particulars in regard to which her former answer was excepted to by the plaintiff, and pay to the plaintiff the full legal costs by him expended in this suit, up to that day. (See 2 Madd. Ch. Prac. 343; Tomkin v. Lethbridge, 9 Ves. 178, 463; and Smith v. Serle, 14 Ves. 415, as to what answer will be deemed illusive and a nullity.

[NOTE. The plaintiff died, and to the bill of revivor filed by his executors it was held that the defendant was not entitled to the three months' time within which to plead, answer, or demur. Case No. 10,496.]

Case No. 10,495.

OLIVER v. DECATUR.

[4 Cranch, C. C. 461.][1]

Circuit Court, District of Columbia. March Term, 1834.

USURY—INTEREST PAYABLE ANNUALLY—ADDITION TO PRINCIPAL AT END OF YEAR.

If the interest is, by the agreement, payable annually, it is not usury to add it to the principal, at the end of the year, and take a new note for the whole, bearing interest.

Assumpsit against the maker of a promissory note.

Mr. Marbury and R. S. Coxe, for defendant [Susan Decatur], prayed the court to instruct the jury, in effect, that if they should

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

be satisfied, by the evidence, that the plaintiff [Robert Oliver] loaned to the defendant, on the 3d of November, 1820, the sum of $3,000, and on the 22d of December, 1820, the further sum of $12,000, and on the 26th of June, 1822, the further sum of $8,000, and that at the times of the loans, respectively, it was agreed between the said parties, that the interest thereon should be paid annually, according to the respective dates of the said loans; and that afterwards the plaintiff calculated the interest of the said loan of $3,000 from the 3d of November, 1820, to the 31st of December, 1821, and on the said loan of $12,000, from the 22d of December, 1820, to the 31st of December, 1821, and afterwards calculated interest upon the said interest from the 31st of December, 1821, to the 31st of December, 1822, and that the promissory note of the defendant upon which this suit is brought was given for and included the interest upon the interest so calculated; and also the interest upon the said loan of $8,000 so calculated as aforesaid, then the said note is usurious, and the plaintiff cannot recover thereupon in this action.

Mr. Marbury cited Comyn, Usury, 82, §§ 7-14; Noy, 71; 3 Bos. & P. 154; 9 Ves. 223; 6 Johns. Ch. 313.

But THE COURT (THRUSTON, Circuit Judge, contra) refused to give the instruction.

Mr. Key cited Peter v. Brackenridge [unreported] in this court, May, 1830; Bank of Washington v. Eliot [Case No. 949]; Anstr. 495; and 1 Johns. Ch. 14.

See Comyn, Usury, 87, 147; 1 Bulst. 17; 2 Salk. 449; 1 Ch. Cas. 258; Brown v. Barkham, 1 P. Wms. 652; Thornhill v. Evans, 2 Atk. 330; Morgan v. Mather, 2 Ves. Jr. 15; Waring v. Cunliffe, 1 Ves. Jr. 99.

Verdict for plaintiff, $7,558.

Case No. 10,496.

OLIVER v. DECATUR.

[4 Cranch, C. C. 592.][1]

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

BILL OF REVIVOR—APPEARANCE.

A defendant who appears to a bill of revivor is not entitled to the benefit of the sixth and tenth rules of practice established by the supreme court of the United States for the circuit courts, but the court will order the suit to stand revived unless cause be shown to the contrary in 10 days.

[This was a bill in equity by Robert Oliver against Susan Decatur.]

The complainant, Robert Oliver, died, and his executors filed a bill of revivor, and issued a subpœna which was returned served at the October rules, 1835, so that the appearance day was the first Monday in November. [See Case No. 10,494.]

Key & Dunlop, the complainant's solicitors, moved the court now to order the suit to stand revived.

Mr. Marbury, the defendant's solicitor, now entered his appearance for the defendant and claimed time (three months) to plead, answer, or demur, according to the rules of this court as prescribed by the supreme court of the United States in cases of original bills. See Rules 6 and 10. In the English practice the same time is given to answer or plead to bills of revivor as to original bills, and the rules prescribed by the supreme court make no difference. 2 Madd. Ch. Prac. 260, 534.

THE COURT (Cranch, Chief Judge, contra) ordered the suit to stand revived, unless cause to the contrary should be shown in 10 days.

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

OLIVER (HUNT v.). See Case No. 6,894.

Case No. 10,496a.

OLIVER v. KAUFMAN.

[See Case No. 10,497.]

Case No. 10,497.

OLIVER et al. v. KAUFFMAN et al.

[Scr. Bk. 170; 1 Am. Law Reg. 142; 9 Leg. Int. 152.][1]

Circuit Court, E. D. Pennsylvania. Oct., 1850.

SLAVERY — HARBORING FUGITIVES — "NOTICE" — WHAT MUST BE SHOWN IN ACTION FOR DAMAGES.

[1. The word "notice," as used in Act Cong. Feb. 12, 1793, § 4 (1 Stat. 305), making it an offense to harbor or conceal a person "after notice that he is a fugitive from labor," means "knowledge."]

[2. The harboring of a fugitive from labor made criminal by such act is the lending of encouragement to the fugitive in his desertion of his master, to further his escape, and to impede and frustrate his reclamation, not mere acts of kindness and charity.]

[3. In an action on the case for harboring and concealing plaintiff's fugitive slaves, plaintiff must show that the slaves were lost to him by defendant's illegal interference, or that some other loss, injury, or damage was suffered by him in consequence thereof.]

This was an action on the case by Cecilia Oliver and others, by their next friend, Eli Stake, against Daniel Kauffman, Stephen Weakley, and Philip Breckbill, for damages caused by their illegal harboring and secreting of plaintiffs' fugitive slaves.

H. M. Watts, C. B. Penrose, and W. B. Reed, for plaintiffs.

Thaddeus Stevens, for defendants.

GRIER, Circuit Justice (charging jury). The plaintiffs in this action are Cecilia Oli-

[1] [Published from Scrap Book in the custody of the clerk of the circuit court for the Eastern district of Pennsylvania. 1 Am. Law Reg. 142, and 9 Leg. Int. 152, contain only partial reports.]

ver, Ellen R. Oliver, and Catharine Oliver. They are the minor children of Shadrach S. Oliver, and sue by their next friend, Eli Stake. Shadrach S. Oliver, their father. had formerly resided in Maryland, and removed to the state of Arkansas, where he died in February, 1846. He was owner of certain slaves. His estate was settled up, and the property amicably divided between his widow and children. Twelve slaves, consisting of two husbands and their wives and their children, were allotted to the plaintiffs. In May, 1847, the mother returned to Williamsport, Maryland, taking with her the plaintiffs, her children, and their slaves. On their way they passed through Pennsylvania, on the National road between Wheeling and Cumberland. In October, 1847 (from 10th to 15th), these slaves fled to Pennsylvania, and were pursued by the agent and friend of the plaintiff for the purpose of recapturing them and taking them back. In this attempt they were unsuccessful. The fugitives were traced through Chambersburg into Cumberland county. This action has been brought in the name of these infant children against the defendants, Stephen Weakley, Daniel Kauffman, and Philip Breckbill, citizens of Cumberland county. It is an action on the case. The declaration sets forth: 1. That plaintiffs are citizens of the state of Maryland, and were owners of twelve certain negroes, who, by the law of Maryland, were held to labor and service by the plaintiffs. That in October, 1847, the said twelve negroes made their escape from the plaintiffs, and came into Cumberland county, Pa., where the plaintiffs, by the constitution and laws of the United States, had a right to pursue and arrest and take said fugitives, and cause them to return to their owners, in Washington county, Maryland. But the defendants, well knowing the premises, and contriving and fraudulently intending to deprive the plaintiffs of the labor and services due to them by said fugitives, did tortiously and illegally harbor and conceal the said twelve negroes, knowing them to be fugitives from labor, and enticed, persuaded, and assisted them to escape from and leave the labor and service of the plaintiffs, and obstructed and hindered them from seizing, arresting, and recovering said slaves, whereby they were wholly lost to the plaintiffs. 2. The second count of the declaration charges the defendants with illegally enticing, persuading, procuring, aiding, and assisting said twelve negroes to absent themselves from and wholly to leave and escape the service and labor of plaintiffs. 3. The third count, after stating the ownership and escape of the slaves, substantially as in the first, and the right of plaintiffs to pursue and reclaim them, charges that the defendants, well knowing the premises, illegally and fraudulently harbored and concealed them, whereby they escaped from the labor, etc. Damages laid at $20,000.

To these charges the defendants have pleaded that they are not guilty. And whether they are guilty, or not, of the conduct so charged, is the question which it is your duty to decide, under the instructions of the court as to the law. (The judge here read from his charge to the jury in a late case tried at Pittsburgh. Van Metre v. Mitchell [Case No. 16,864].) To men of your intelligence, it is perhaps unnecessary to remark that in order to discharge the duty you have sworn to perform, of rendering a true verdict on the issues presented to you, the law of the land, as stated to you by the court, and applied by you to the facts of the case, constitute the only elements of such a verdict. No theories or opinions which you or we may entertain with regard to liberty or human rights, or the policy or justice of a system of domestic slavery, can have a place on the bench or in the jury box. We dare not substitute our convictions or opinions, however honestly entertained, for the law of the land.

[2] [In the performance of your duty on this subject, it will be proper that you suffer no prejudice to affect your minds, either for or against either of the parties to this suit. The odium attached to the name of "Abolitionist" (whether justly or unjustly, it matters not), should not be suffered to supply any want of proof of the guilty participation of the defendants in the offence charged, even if the testimony in the case should satisfy you that the defendants entertained the sentiments avowed by the class of persons designated by that name. The defendants are on trial for their acts, not for their opinions. Beware, also, that the occasional insolence and violent denunciation of the South be not permitted to prejudice your minds against the just rights guaranteed to them by the constitution and laws of the Union. An unfortunate occurrence has taken place since the former trial of this case, which, as it is a matter of public history, and as such has been introduced into the argument of this case, it becomes the unpleasant duty of the court to notice in connection with this portion of our remarks. A worthy citizen of Maryland, in attempting to recapture a fugitive, was basely murdered by a mob of negroes on the southern borders of our state. That such an occurrence should have excited a deep feeling of resentment in the people of that state, was no more than might have justly been expected. That this outrage was the legitimate result of the seditious and treasonable doctrines diligently taught by a few vagrant and insane fanatics, may be admitted. But by the great body of the people of Pennsylvania, the occurrence was sincerely regretted, and an anxious desire was entertained that the perpetrators of this murder should be brought to condign punishment. Measures were tak-

[2] [From 1 Am. Law Reg. 142.]

en, even at the expense of sending a large constabulary and military force into the neighborhood, to arrest every person, black and white, on whom rested the least suspicion of participation in the offence. A large number of bills of indictment were found against the persons arrested for high treason, and one of them was tried in this court. The trial was conducted by the attorney general of the state of Maryland; and although it was abundantly evident that a riot and murder had been committed, by some persons, the prosecution wholly failed in proving the defendant, on trial, guilty of the crime of treason with which he was charged. But, however much it was to be regretted that the perpetrators of this gross offence could not be brought to punishment, the court and jury could not condemn, without proof, any individual, to appease the justly offended feelings of the people of Maryland. Unfortunately, a different opinion with regard to our duty in this matter, seems to have been entertained by persons holding high official stations in that state; and certain official statements have been published, reflecting injuriously upon the people of Pennsylvania and this court, which have tended to excite feelings of resentment, and to keep up a border feud, which, if suffered to have effect in our courts, or in the jury-box, may tend to prejudice the just rights of the people of Maryland, and of the plaintiffs in this case. These offensive documents, I have reason to believe, are neither a correct exhibition of the good sense and feelings of the people of that state, nor of the legal knowledge and capacity of its learned and eminent bar. It would do them great wrong to suppose them incapable of understanding the legal proceedings, which have been made the subject of so much reprehension, or capable of misrepresenting them. It is your duty to treat with utter disregard ignorant and malicious vituperation of fanatics and demagogues, whether it come from North or South, and give to the respective parties such protection of their respective rights as the constitution and the laws of our country secure to them. I have urged these considerations on your attention more at length, because they have been the subject of much comment by counsel. The foundation of the legal rights now asserted on behalf of the plaintiffs, is found in the constitution of the United States.] [2]

The extradition of criminals or slaves escaping from one country to another has generally been considered a matter of comity and not of right; and the common law and law of nations which refuse to deliver up persons guilty of mere political offences most probably have borrowed this principle from the Jewish code (Deut. c. 23, v. 15): "Thou shalt not deliver unto his master the servant which has escaped from his master unto thee," etc. The institutions of the Jews, while they tolerated slavery, and would not permit the harboring or concealing of the slave of one Jew by another, nevertheless forbade their extradition when they escaped into Judea from a gentile or foreign nation. And therein our own laws are assimilated to theirs. While we would not deliver up slaves escaping from foreign nations, the people of these United States, as one people, united under a common government, have bound themselves, by the great charter of their Union, to deliver up slaves escaping from one state into another. "Whatever may be our private opinions (says Chief Justice Tilghman) on the subject of slavery, it is well known that our Southern brethren would not have consented to become parties to a constitution under which the United States have enjoyed so much prosperity unless their property in slaves had been secured." This constitution has been adopted by the free consent of the people of Pennsylvania, and it is the duty of every man to give it a fair and candid construction, and carry it into full force and effect.

The provision of the constitution (article 4, § 3) is as follows: "No person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation thereof, be discharged from such labor or service, but shall be delivered up on claim of the party to whom such service or labor may be due." It declares, also (article 6, § 2), "that this constitution and the laws of the United States, made in pursuance thereof, shall be the supreme law of the land, and the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." By virtue of this clause of the constitution the master might have pursued and arrested his fugitive slave in another state, he might use as much force as was necessary for his reclamation, he might find and secure him so as to prevent a second escape. But as the exercise of such a power, without some evidence of legal authority, might lead to oppression and outrage, and the master, in the exercise of his legal rights, might be obstructed and hindered, it became necessary for congress to establish some mode by which the master might have the form and support of legal process, and persons guilty of improper interference with his rights might be punished. For this purpose the act of congress of 12th February, 1793, was passed. By the third section of this act, the master or his agent is empowered to seize and arrest the fugitive, and take him before a judge or magistrate, and, having proof of his ownership, obtain a certificate, which should serve as a legal warrant for removing the fugitive. The fourth section describes four different offences: 1st, knowingly and willfully obstructing the claimant in seizing or arresting the fugitive;

[2] [From 1 Am. Law Reg. 142.]

2nd, rescuing the fugitive when so arrested; 3d, harboring; 4th, concealing such person after notice that he is a fugitive from labor. Jones v. Van Zandt [Case No. 7,501]. Under this statute you will observe that a penalty of five hundred dollars is incurred for harboring or concealing a fugitive, which the party injured may recover, but the present action is not for this penalty. In this suit, the plaintiff is only entitled to recover the damages he has actually sustained by the acts of the defendants. You will first determine whether the proof, under the principles here laid down, entitles the plaintiff to recover. And, if they be so entitled, you will then have to consider the amount of damages.

In order to entitle the plaintiffs to your verdict, they must have proved to your satisfaction: 1. That the slaves, or persons held to labor, mentioneu in the declaration, or some of them, were by the laws of Maryland the property of the plaintiffs, or, as the statute expresses it, that their labor and services were due to the plaintiffs for life, or a term of years. 2. That these persons so held to labor escaped to the state of Pennsylvania. 3. That the defendants, or some of them, aware of these facts (having notice or knowledge that the persons harbored or concealed were fugitives from labor), did harbor or conceal them contrary to the true intent and meaning of the statute. 4. And, if you find these facts in favor of plaintiff, the amount of the damage, injury, or loss sustained by the plaintiff in consequence of such harboring or concealing.

On the first two points, there is no contradictory testimony. But while the escape of the twelve negroes has not been disputed, the defendants' counsel contend that the facts, as proved, do not show that the fugitives were slaves, or the property of the plaintiffs, but, on the contrary, that they were free. That the fugitives were the property of Shadrach S. Oliver at the time of his death, and that the plaintiffs, his children, became their owners by succession, has not been controverted; but it is contended that the negroes had become free by the act of the plaintiffs: 1st. By taking them into the state of Maryland contrary to a law of that state. 2d. By voluntarily bringing them into the state of Pennsylvania. But as the proof of this subject rests entirely on the evidence given by plaintiffs, and has not been contradicted, the counsel have consented, at the suggestion of the court, that the questions of law arising thereon shall be reserved for future consideration if necessary. You will therefore proceed to consider this case as if the court had instructed you that these objections do not affect the plaintiffs' title, and find your verdict on the other point—and if on that you find for the plaintiffs we will endeavor to put the case in the shape of a special verdict, so that the case may be reviewed if necessary.

[2] [It has been contended that these slaves became free by the act of the plaintiffs in voluntarily bringing them into the state of Pennsylvania. This question depends on the law of Maryland, and not of Pennsylvania. This court cannot go behind the status of these people where they escaped. We know of no law or decision of the courts of Maryland, which treats a slave as liberated, who has been conducted by his master along the National road through the state of Pennsylvania. On this subject, Lord Mansfield has said some very pretty things (in the Case of Somerset), which are often quoted as principles of the common law. But they will perhaps be found, by examination of later cases, to be classed with rhetorical flourishes rather than legal dogmas. Since the former trial of this case, the point has been decided in the supreme court, as I think. But, however that may be, the point is ruled in favor of the plaintiffs, for the purposes of the present case, as we desire to have your verdict on the facts of the case, which are so much contested. Whether the plaintiffs could have sustained an action on the case on the mere guarantee of their rights as contained in the constitution, we need not inquire. The action has been instituted with reference to the terms used in the act of congress of 1793. The fine inflicted by that act can be no longer recovered, because the act of 1850 [9 Stat. 462], having changed the penalty, has thereby repealed the act of 1793 to the extent to which it has been thus supplied. But the statute, so far as it gave an action on the case for harboring and concealing, has not been supplied or repealed.] [2]

The question to which your attention will be chiefly directed is whether the defendants, or either of them, have harbored or concealed the fugitives contrary to the true meaning of the act of congress. For this action is upon the statute, and could not be sustained at common law. The statute gives, not only an action for a penalty of $500 against the person offending against it but also an action on the case for the special injury which may have accrued to the master or owner. But in this action the plaintiffs must show, not only that the defendants have acted contrary to the statute, but that loss, damage, or injury has been caused to the plaintiffs by such illegal interference. The act of congress contemplates pursuit and recapture, and the conduct prohibited is such as tends and is intended to hinder, obstruct, or prevent such reclamation. In case of a rescue of a captured fugitive, or of an illegal interference to hinder such recapture, when the master had it in his power to effect it, the defendant would be liable, not only to the penalty, but also to pay the full value of the slave thus rescued, and even punitive or exemplary damages, as in other actions for a tort. But, where the offence alleged is harboring or

[2] [From 1 Am. Law Reg. 142.]

concealing, the plaintiff, if he would recover more than nominal damages, must show that the slave was lost to him in consequence of such illegal harboring or concealing. In the case of the harboring of an apprentice who had left his master, the common law gave an action on the case to the master, because it considered it a wrong or injury to the master that his neighbor should encourage or protect his absconding apprentice, instead of sending him back to his master. But the principles of natural or national law, drawn probably from the Jewish code, did not require that a slave who had escaped from bondage, or one charged with merely political offences, should be delivered up. Hence, if these states had continued to be independent governments, foreign to each other, or without any political connexion or union, the state of Pennsylvania would not have been bound to deliver up a fugitive slave, nor could an action have been maintained by a citizen of a foreign state against a citizen of this state for harboring or concealing the fugitive. But one of the great objects of this union, and the constitution, which we are bound to support, and which is the supreme law of the land, is to make us in many respects one people or nation. And it is well known that the Southern states would not have become parties to this Union, but for the solemn compact of the other states to protect their rights in this species of property. This constitution, and these laws enforcing it, are binding on the conscience of every good citizen and honest man, so long as he continues to be a citizen of the United States or of Pennsylvania, while Pennsylvania continues to be a member of this Union. Those who are unwilling to acknowledge the obligations which the law of the land imposes upon them should migrate to Canada, or some country whose institutions they prefer, and whose institutions do not infringe upon their tender consciences. But while they claim the benefits of the Union they cannot repudiate its obligations. The people of Pennsylvania are opposed to the institutions of slavery, and have abolished it within their borders. But they acknowledge the right of other states to make their own institutions, and the obligation imposed upon us to regard the solemn compact which we have made with the sister states. And, however it may suit the taste of a few individuals to denounce the compromises of this Union as "odious," Pennsylvanians both see and feel the impolicy and folly of making their territory a city of refuge for the refuse population of other states. We resent the conduct of foreign nations who cause their white paupers and criminals to be transported into our cities, and have in some instances compelled them to be returned to their own governments; and our compact with our sister states does not compel us to submit to such a grievance from them. It would seem, therefore, to be as inconsistent with our true policy, as it is with our solemn obligations to our fellow citizens of the Southern states of the Union, to encourage the immigration of fugitives, or interfere with their covenanted right of reclamation.

Much has been said during the discussion of this case, by learned counsel, on this unfortunate subject of slavery, as one which has perverted the moral sentiments of many of our citizens, both North and South, and originated peculiar notions, hostile to the stability of this Union. But if such be the case, as I hope it is not, I think it due to the good citizens of Pennsylvania to state my belief that the moral disease engendered by this morbid epidemic has infected but a small number. Conventions for plotting disunion (which would be certainly followed by civil war and bloodshed), for defiling the graves and maligning the memories of the patriots of the Revolution, for reviling and denouncing the officers of our government, and all those who support and uphold our institutions, have hitherto met with little encouragement from any persons who profess a regard for religion, morality, or the law of the land. It is, perhaps, too true, that some attempts have been made to excite violent and armed opposition to the execution of the laws, and to murder its officers; but we are happy in believing that such incendiary doctrines find no lodgment in the minds of our citizens, and the apostles who madly propagate them will meet with but little success here. The good citizens of Pennsylvania are opposed to slavery, but they revere the constitution and laws of their country. Since the days of Franklin, associations have existed among the philanthropists, and true friends of humanity, to protect the colored man from the oppressive grasp of the kidnapper, and elevate his character; but these friends of religion and humanity have no connection with those unhappy agitators who infest other portions of the Union, and, with mad zeal, are plotting its ruin. The time has not yet come when the jury box will be contaminated by men whose moral perceptions are so perverted by a strange hallucination that they will not render a true verdict according to their oaths and the law of the land.

I have been led to make these remarks, because the subject has been brought to your attention in the course of the argument, and by the reports of meetings and conventions which must have met your eyes in every newspaper since the commencement of this trial. But I desire that you will not suffer any prejudice to arise in your minds to affect either of the parties in this case. With what may be the "peculiar opinions" of the defendants, you have no concern. They are free to entertain any opinions they may choose to adopt, and are on trial only for their acts. They are charged with having done acts contrary to law, and are entitled to your verdict, unless the plaintiffs have given satisfactory evidence to show that they have transgressed the law to the injury of the plaintiffs. The

right of the plaintiffs to support this action, as I have already stated, depends on the act of wrongness, and not on the principle of the common law. And, although the declaration does not say the offence was committed against the statute, we must look to it for the definition of the offence with which the defendants are charged. In assisting you in this investigation, I shall only state the general principles of the law applicable to the case, without any application of them to the facts of this case. For the testimony is so contradictory that the court cannot assume anything as proved, without trespassing on your peculiar province of deciding contested facts, and passing on the credibility of conflicting witnesses.

As to the nature of the harboring and concealing, which is the substance of the complaint in this case, and which would subject the defendants to liability in this form of action, I shall repeat the observations made on a former occasion: First, what is meant by "notice"; and second, what constitutes "harboring."

On the first point, the court has been relieved from much difficulty by a late case tried before Mr. Justice McLean in Ohio, and which has been affirmed in the supreme court of the United States. See Jones v. Van Zandt [Case No. 7,501]; s. c., 5 How. [46 U. S.] 216. In that case it was decided that the word "notice," as used in this act, means "knowledge"; that it is not necessary that a specific, written, printed, or verbal notice from the owner be brought home to the defendant, but that it is sufficient if the evidence show that he knew the person he harbored or concealed was a fugitive from labor.

The word "harbor" is defined by lexicographers by the words, "to entertain," "to shelter," "to secure," "to secrete." It evidently has various shades of meaning, not exactly expressed by any synonym. It has been defined in Bouvier's Law Dictionary, "to receive clandestinely, and without lawful authority, a person for the purpose of concealing him, so that another, having the right to the lawful custody of such person, shall be deprived of the same." This definition is quoted in the opinion of the court, as delivered by Mr. Justice Woodbury, in Jones v. Van Zandt, 5 How. [46 U. S.] 227, but without the intention of affirming either the authority of the book, or the correctness of the definition. For, although the word may be used in the complex meaning there given to it, it does not follow that all these conditions are necessary elements in its definition. Receiving and entertaining a person clandestinely, and for the purpose of concealment, may well be called "harboring," as the word is sometimes used. Yet one may harbor without concealing. He may afford entertainment, lodging, and shelter to vagabonds, gamblers, and thieves, without the purpose or attempt at concealment, and it may be correctly affirmed of him that he harbors them.

The act of congress, by using the terms "harbour or conceal," evidently assumed that the terms were not synonymous, and that there might be a harboring without concealment. The act seems to be drawn with great care and accuracy, and bears no marks of that slovenly diction which sometimes characterizes acts of assembly, where numerous synonyms are heaped together, and words are multiplied only to increase confusion and obscurity. But neither in legal use or in common parlance is the word "harbor" precisely defined by the words "entertain" or "shelter." It implies impropriety in the conduct of the person giving the entertainment or shelter, in consequence of some imputation on the character of the person who receives it. An inn-keeper is said "to entertain" travelers and strangers, not to "harbor" them, but may be accused of harboring vagabonds, deserters, fugitives, or thieves,—persons whom he ought not to entertain. It is too plain for argument that this act does not intend to make common charity a crime, or treat that man as guilty of an offense against his neighbor who merely furnishes food, lodging, or raiment to the hungry, weary, or naked wanderer, though he be an apprentice or a slave. On the contrary, it contemplates, not only an escape of the slave, but the intention of the master to reclaim him. It points out the mode in which this reclamation is to be made, and it is for an unlawful interference or hinderance of this right of reclamation, secured to the master by the constitution and laws, that this penalty is imposed. The harboring made criminal by this act, then, requires some other ingredient besides a mere kindness or charity rendered to the fugitive. The intention or purpose which accompanies the act must be to encourage the fugitive in his desertion of his master; to further his escape and impede and frustrate his reclamation. "The act must evince an intention to elude the vigilance of the master, and be calculated to obtain the object." Jones v. Van Zandt [supra]. This mala mens or fraudulent intent required by the act to constitute illegal harboring is not to be measured by the religious or political notions of the accused, or the correctness or perversion of his moral perceptions. Some men may conceive it a religious duty to break the law, but the law will not receive that as an excuse. If the defendant was connected with any society or association for the purpose of assisting fugitives from other states to escape from their masters, and, in pursuance of such a scheme, afforded this shelter and protection to the fugitive in question, he would be legally liable to the penalty of this act, however much his conscience, or that of his associates, might approve his conduct.

The difference between the action for the penalty and the action on the case is this: The defendants might be liable for the penalty if they illegally harbored and concealed the fugitives, even though the master may

have afterwards reclaimed them. But in an action on the case, for damages, the plaintiff must show that the slaves were lost to him through the illegal interference of the defendants, or that some other appreciable loss, injury, or damage was suffered by him in consequence thereof. In the first case he would recover the whole value of the slaves, as damages; in the latter, only to the amount of loss or actual damage which he shows he has suffered.

[2] [If the owner of the fugitive does not think fit to pursue, in order to reclaim them, he cannot complain that those who have merely harbored them after their escape have injured him, unless he can connect such persons with the original escape of the slaves, and show that they seduced the slaves, and helped them to escape from the possession of their master. If the master had entirely abandoned the pursuit of his slaves and given up all attempts to reclaim them, before interference of the defendants, the whole value of the slaves could hardly be claimed as the measure of his damages, as their loss could not be then imputed to their harboring. But if the owner or his agent, pursuing the fugitives for the purpose of reclamation, should trace them to the premises of a certain individual and could trace them no farther, because they had been harbored and concealed, and carried away secretly by night, and delivered to another, who continued the same process, and the pursuit of the claimant was thus baffled, no one of those individuals thus interfering could be suffered to allege that his interference did not cause the loss of the fugitives, or that their value was not a proper measure of damages in an action for such harboring. If a number of persons combine together to commit a trespass or wrong, they are liable to damages to the extent of the whole injury. The injured party may recover judgment for the whole damage against each, and elect de melioribus damnis, as he can have but one compensation. And where a number of persons are sued for a joint trespass or tort, and the plaintiff can prove any one of them to be guilty, the jury may find the others not guilty, and assess the whole damages against that one, even though many others, known or unknown, may have combined with that one to do the act, and have not been sued. Although the plaintiff can recover but one satisfaction, the damages are indivisible, and each joint trespasser is liable for the whole.

[It will be for you, gentlemen of the jury, to apply these principles to the facts of the case before you. The evidence is very contradictory. In some cases, testimony apparently conflicting may be reconciled without imputing corrupt perjury to either side. It would be difficult, perhaps, for the most enlarged charity to do so in this case. The whole case has been argued before you with very great ability by the learned counsel, and as you are the sole judges of the facts, the court do not think it necessary to make any remarks upon them. If in your judgment, the hypothesis of the defendants' counsel is supported by the evidence; if Mr. Breckbill was merely a spectator, without counsel, interference or assistance; if Mr. Weakley did not participate in the transaction at all, you should find them not guilty. If you believe, also, that Kauffman did not assist in harboring, secreting or deporting the slaves, but merely fed them out of charity, and suffered them to rest for a few hours in his barn; that they were brought there without his knowledge, consent, or approbation, and taken away without his assistance, or any act of his, to enable them to elude the pursuit of their owners, or to further their escape, your verdict should be in his favor also. If, on the contrary, you find the hypothesis of the plaintiffs' counsel to be a true one; if, from the facts in evidence, you believe that certain persons in the region of country where the defendants reside, and including them, or any of them, were known as persons willing to assist fugitives to escape; that for this reason they were brought to the premises of Kauffman, by some person, known or unknown, who was assisting the slaves to escape; if they were received by him, harbored and secreted in his barn, then taken away by him, or by his agents or servants, after night, in order to assist them to escape, and to elude pursuit; if the slaves were thus transferred by him, with the countenance, counsel and assistance of Breckbill, to the barn of Stephen Weakley; if Weakley kept them secreted in his barn, and removed them on the following night to places unknown, and the pursuit of the owners of these slaves was thus baffled, you should find for the plaintiffs the full value of the slaves in damages, as against all the defendants, or such of them as you believe from the evidence to have had an active participation in the offence.] [2]

In answer to a point put by defendants' counsel, as follows: "That if the jury shall believe that, before the negroes came or were brought by George Cole to Kauffman's barn, they had eluded the pursuit of the owner and his agent, the plaintiffs are not entitled to recover,"—the judge remarked that, in the abstract, this point was true, but it did not become the defendants to say, if it be proved that they harbored or concealed the slaves, or carried them off in their wagon, that they did not thus assist the slaves in eluding the pursuit of their owners, and frustrate their efforts to reclaim them; as much so as if a person carried off another's horse, and, when he reached a certain stage, delivered him to a comrade, who in turn delivered him to another, by which the property became entirely

[2] [From 1 Am. Law Reg. 142.]

[2] [From 1 Am. Law Reg. 142.]

lost to the owner. No one would doubt their responsibility.

Have you evidence to satisfy your minds that the defendants, or any of them, harbored or concealed the fugitives mentioned in the declaration? Did they do this, knowing them to be fugitives from labor, and to further promote their escape from the pursuit or reclamation of their masters? Did they, by such harboring and concealing, cause the escape of the fugitives, or hinder their recapture? If you find these facts to be true, your verdict should be for the plaintiffs for the value of the slaves, say $3,000, and interest, if you see fit to add it. But the burthen of proof is on the plaintiff, and unless he has made out his case by satisfactory evidence, you should find for defendants, or for such of them as have not been proved to be guilty. You should suffer no prejudice to operate on your minds against either party on account of any "peculiar notions" either you or they may entertain on the subject of slavery. In this court the same equal and exact justice should be meted out both to master and servant,—to slaveholder and Abolitionist. With these remarks, the case is committed to you.

The jury, failing to agree, were discharged, standing ten for the plaintiffs, and two for the defendants.

OLIVER (KING OF SPAIN v.). See Cases Nos. 7,812–7,814.

Case No. 10,498.

OLIVER v. MUTUAL COMMERCIAL MARINE INS. CO.

[2 Curt. 277.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.

MARINE INSURANCE — AGREEMENT FOR POLICY — REFORMATION IN EQUITY — POLICY TO AGENT "FOR WHOM IT CONCERNS"—MISTAKE — FRAUDULENT DESIGN.

1. If a policy, when drawn and received, does not correctly express a previously concluded agreement for insurance, which it was designed by both parties to execute, equity will reform it.

[Cited in Dean v. Equitable Fire Ins. Co., Case No. 3,705; Hearn v. Equitable Safety Ins. Co., Id. 6,300; Ivinson v. Hutton, 98 U. S. 83; Kountze v. Omaha, Case No. 7,928.]

[Cited in Glass v. Hulbert, 102 Mass. 34; Parkhurst v. Gloucester Ins. Co., 100 Mass. 303.]

2. If underwriters conclude an agreement for insurance with one known to them to be merely an agent, and nothing is said as to whose account the insurance is to be made, the agent has a right to a policy insuring him as agent, or for whom it concerns.

[Cited in Hill v. Millville M. M. & F. Ins. Co., 39 N. J. Eq. 75.]

3. If the agent makes a mistake in declaring the interest, equity requires it to be corrected, and the policy reformed.

4. There is a distinction between the correction of a mistake in a written contract, and in the execution of a power; in the latter case, courts interpose more willingly.

[Cited in Dinwiddie v. Self, 145 Ill. 306, 33 N. E. 895. Cited in brief in Walker v. Metropolitan Ins. Co., 56 Me. 374.]

5. But if the agent did not declare the interest in the wrong person by mistake, but through a fraudulent design, equity will not relieve the principal.

6. If a party fails, through mistake, to obtain such a policy as he is entitled to, by an existing valid contract, equity will relieve, though the mistake arose from ignorance of law.

[Cited in Sias v. Roger Williams Ins. Co., 8 Fed. 186; Bailey v. American Cent. Ins. Co., 13 Fed. 253.]

[Cited in Clayton v. Freet, 10 Ohio St. 545; Canedy v. Marcy, 79 Mass. [13 Gray] 377. Quoted in Palmer v. Hartford Fire Ins. Co., 54 Conn. 502, 9 Atl. 250.]

This bill was filed by Edward Oliver, an alien, against the Commercial Mutual Marine Insurance Company, a corporation created by a law of the state of Massachusetts, and established and doing business in that state, to have an alleged mistake corrected in a policy of insurance. The case being somewhat complicated in point of fact, the opinion of the court will be better understood by giving the substance of the bill and of the answer. The correspondence, and such of the evidence as was deemed material, are set forth in the opinion of the court.

The substance of the statements in the bill was as follows: "And thereupon, your orator complains and says, that, on the seventh day of November, eighteen hundred and fifty-one, he was the sole owner of a ship or vessel of the value of twenty thousand dollars, called the Liscard, then lying at Quebec, in the province of Lower Canada, and bound on a voyage from said Quebec to a port of discharge in said United Kingdom, on board which said ship there had been, and was then laden, a cargo of merchandise, the property of various persons other than your orator, and which said merchandise your orator had agreed should be conveyed in said ship from said Quebec, to said port of discharge, for a certain amount of hire or freight to be paid him by said parties respectively therefor, amounting in the whole, to the sum of nine thousand dollars. And your orator being desirous to procure said vessel and said freight to be insured for said voyage, at and from said Quebec to said port of discharge, namely, the said ship for the sum of ten thousand dollars, valued at twenty thousand dollars, and said freight for the sum of five thousand dollars, valued at nine thousand dollars, against the perils of the seas and other risks usually contained in marine policies of insurance on property of such description, did, in writing by letter, bearing date November seventh, eighteen hundred and fifty-one, request his agent, one James E. Oliver, of said Quebec,

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

to procure the same to be insured on account of your orator, and to have the policies of insurance thereon in the name of your orator, a copy of which letter, marked 'A,' your orator hereto annexes and prays that the same may be taken as part of this, his bill of complaint. And your orator further showeth unto your honors, that said James E. Oliver, afterwards on the —— day of the same November, in compliance with the request of your orator, did, through one Henry McKay, of Montreal, broker, request one A. McLimont, of the city and state of New York, insurance broker, to procure said insurance upon said ship and said freight to be made and effected at some proper and solvent insurance company in said New York, or in Boston in said state of Massachusetts, and did cause to be transmitted to said A. McLimont, insurance broker as aforesaid, a copy of your orator's said letter, bearing date the said seventh day of November; and thereupon the said McLimont being unable to procure said insurance to be made and effected for a reasonable premium in said New York, did, in writing, authorize, and request one David R. McKay, of said Boston, commission merchant, to cause said insurance to be made and effected by some proper insurance company in said Boston, which said written request and authority so given by said McLimont to said McKay, was and is contained in two certain letters written by the said McLimont to the said McKay, one of which letters bears date the twenty-eighth day of this same November, and the other of said letters bears date the twenty-ninth day of the same November; and your orator hereto annexes copies of both said letters marked 'B' and 'C', and prays that the same may be taken as part of this, his bill of complaint. And your orator further shows, that in said letter of said McLimont, bearing date the twenty-eighth day of said November, by accident and mistake, the said McKay was directed to cause said ship to be insured for the sum of eight thousand dollars, to be valued at the sum of sixteen thousand dollars, and said freight to be insured for the sum of four thousand dollars, and to be valued at the sum of seven thousand two hundred dollars; and in and by said letter of said McLimont to said McKay, bearing date the said twenty-ninth day of November, said mistake was in part corrected, and said McKay was directed to insure said ship for the sum of ten thousand dollars and to insure said freight for the sum of five thousand dollars; but by accident and mistake the sum for which said ship and said freight were to be valued thereon was wholly omitted. And your orator further shows unto your honors, that the said McKay, after receiving said letters on the twenty-ninth day of said November, did apply to the said Commercial Mutual Marine Insurance Company to make insurance upon said ship and freight for your orators, according to the order and request of said McLimont, and did then and there exhibit both said letters of said McLimont to said insurance company, with the intent to inform said insurance company as well of the relation of said McLimont as agent of the owners of said ship, as to enable them to determine the character of the risk to be insured; and said insurance company did thereafterwards read and examine said letters, and on the same day agree with said McKay, acting as the agent of your orator, to insure the said ship on the voyage aforesaid, at and from said Quebec, for the sum of ten thousand dollars, to be valued at the sum of twenty thousand dollars, and to insure the said freight of said ship on said voyage for the sum of five thousand dollars, to be valued at the sum of seven thousand two hundred dollars, and to receive as a premium therefor, the sum of eight hundred and twenty-five dollars. And your orator further shows unto your honors, that, thereafterwards, on the first day of December of the same year, the said insurance company, with the intent and design to carry into effect said agreement, did cause to be made a writing or policy of insurance, signed by the president and secretary, bearing date the said first day of December, a copy of which is hereto annexed, marked 'D', which your orator prays may be taken as part of this his bill of complaint, and did deliver said policy to said McKay, the agent of your orator, as aforesaid, and did receive from said McKay, the agent of your orator, said premium of eight hundred and twenty-five dollars, which sum was thereafterwards by your orator repaid to said McKay. And your orator further shows unto your honors, that, although when said insurance company had so agreed to insure said ship and freight for the amounts aforesaid, it was well known to said insurance company that said A. McLimont was merely the agent of the owner of said ship and of the person entitled to, and solely interested in said freight; and that he, said McLimont, had no insurable or other interest whatever in either said ship or said freight, and that said McLimont was, by profession and pursuit a mere insurance broker, and that he was acting as the agent of the person who owned said ship and who was solely interested in said freight, and yet by accident and mistake said insurance on said ship and said freight was, by the terms of said policy, declared to be on account of said A. McLimont, and without adding thereto the word agent or any other term indicating that he, the said McLimont, was insured as said agent of the party owning said ship and interested in said freight, and without the usual clause commonly inserted in such policies, that said insurance was effected for whom it might concern. And your orator further shows unto your honors, that said insurance company knew, and was distinctly informed by said McKay by said letter of said McLimont to said McKay, bearing date the said twenty-eighth day of November, and submitted to and read

by them as aforesaid, that said McLimont was the mere agent of, and broker for the owner of said ship, and had no interest whatever in said ship or freight except so far as he would be entitled to the usual commission of a broker for procuring said insurance; and that said insurance company did agree, consent, and understand at the time said agreement to insure said ship and freight was made with said McKay, and before said policy so made to carry said agreement into effect was written and signed, that said insurance was to be made for the benefit and on the account of the owner of said ship; and that said McLimont was not the owner of said ship nor interested therein or in said freight, and that by mere inadvertence, accident, and mistake in writing said policy of insurance, it was omitted to be inserted in said policy that said insurance was made on account of said McLimont as agent and for whom it might concern. And your orator further shows unto your honors, that said policy was received by said McKay and transmitted to the said James E. Oliver, the agent of your orator, and by him kept and retained in ignorance, that by the terms and legal effect thereof no other interest was insured thereby save that of the said McLimont, and in the full understanding as well by said McLimont, said McKay, and said Oliver, that the interest of your orator in said ship and freight to the extent of the sums named in said policy, was thereby insured and protected, in accordance with your orator's directions contained in his said letter to said James E. Oliver, bearing date the said seventh day of November. And your orator further shows unto your honors, that said ship Liscard, laden with goods to be carried on freight as aforesaid, sailed on the voyage described in said policy of insurance, on or about the nineteenth day of said November, and was in all respects at the inception of the risk described in said policy, tight, staunch, strong, and sea-worthy; and thereafterwards, while pursuing the voyage described in said policy, was, by the perils of the sea, on or about the third day of December, wholly broken, destroyed, sunk, and lost, and the whole of the cargo, so laden on board said ship, was by the same perils and at the same time, destroyed, sunk, and lost, by means of which the said freight so insured, as well as said ship, became and were wholly lost to your orator. And your orator submits to your honors, that, by reason of the premises, he is justly and equitably entitled to have said mistake so made in drawing said policy of insurance corrected, and said policy reformed by inserting therein that said insurance was made on account of A. McLimont as agent, or for whom it may concern; and that the sums so insured by said company on said ship and said freight, be paid to him accordingly. And your orator further shows unto your honors, that previously to this suit being commenced, on the tenth day of February last past, and since, he applied to, and requested, and caused applications to be made to said insurance company to act toward your orator in such a way as is equitable and just, and to reform said policy as aforesaid, and to adjust and pay to him the sums so insured by them on said ship and said freight, and so lost to your orator as aforesaid by reason of the perils insured against in said policy, and exhibited to said insurance company the usual and proper proofs of said agency of said McLimont and of said loss and of his sole ownership of said ship and sole interest in said freight at the time of said agreement so made with the agent of your orator by said insurance company to insure the same as aforesaid, and your orator well hoped that said insurance company would have yielded to his said applications and paid to him the sums so insured by them and lost by him as aforesaid."

The substance of the answer was as follows: "That on or about the twenty-ninth day of November, in the year eighteen hundred and fifty-one, one David R. McKay applied at the office of this defendant in said Boston, for insurance on a certain vessel called the Liscard and her freight for the account of A. McLimont, and in pursuance of such application insurance was agreed to be made thereon, upon the terms and conditions set forth in a certain written policy of insurance, issued by this defendant and bearing date the first day of December, in the said last-mentioned year, a true copy of which policy except the indorsements thereon it is believed is annexed to said bill of complaint, but for greater certainty this defendant prays leave to refer to the original. This defendant denies that at or before the time when such application was made or when the agreement to insure was made, and when the said policy was issued, any communication was made to it or to its officers by the said David R. McKay or any other person, to the effect that the said McLimont was not the owner of said vessel or that the said insurance was effected by him as agent or for the account of any other person, but this defendant and its officers in receiving such application, making said agreement, and issuing said policy, acted under the full impression and belief that said McLimont was the owner of said vessel and of her freight, and that the said insurance was effected and intended to be for his sole account and benefit. This defendant denies that when the said application and agreement were made, and said policy was issued, the letters mentioned in the said bill of complaint or any or either of them were exhibited to this defendant or to any of its officers or were seen or read by them or any of them, or that the facts therein stated were disclosed to the defendant or any of its officers or the existence of any such letters known or suspected until after the said vessel was, as is alleged, lost. This defend-

ant denies, that when the said application and agreement were made and said policy issued, it was known to it or to any of its officers, that the said McLimont was an insurance broker by pursuit or occupation, or that any communication to that effect was made to it or them, or that there was any understanding to that effect; on the contrary this defendant and its officers did believe from the manner and form in which said application and agreement were made, that said McLimont was engaged in navigation, and was the owner of said vessel and her freight. This defendant saith, that in making the said policy, it did intend to fulfil the agreement for insurance made with said David R. McKay, and that the policy does contain the whole of the agreement made with him and conforms thereto in letter and in spirit. This defendant denies it to be true, that the president thereof has at any time declared, that at the time of making the said contract he knew that said McLimont was an agent or broker and not the owner of said vessel, or made any statement or declaration to that effect; or that when application was made to this defendant for payment of a loss claimed under the said policy, it ever promised to pay the same within the period of sixty days, as is alleged in said bill of complaint. This defendant saith, that up to the time when a claim was made for payment upon said policy, by reason of the alleged loss of said ship, this defendant and its officers had no knowledge, information, or belief, that any person other than said McLimont was an owner of or interested in the said vessel, or her freight, or the insurance thereon; that after such claim was made, it appeared on certain papers exhibited in part as proofs of said alleged loss, that the said McLimont was not an owner of or interested therein, that the said vessel and freight or some parts thereof were insured elsewhere by previous policies, which fact was not disclosed to this defendant or its officers, when the agreement for insurance was made, and further that the statements made, as to the alleged loss of said vessel, were not satisfactory to show that this defendant was legally or equitably bound to pay the same, if the said McLimont had been the owner thereof. This defendant denies that there is any error or mistake in said policy and insists that it does conform to the intentions of the parties between whom it was made, that the defendant was informed, if not in terms, yet by the manner and form in which application was made and the language used and believed, that the said McLimont was the owner of the said vessel and freight, that the said policy was made with intent to cover his interest as such, and not the interest of any other person, and was delivered to and accepted by said McKay as conforming to said application and agreement."

S. Bartlett and Mr. Thaxter, for complainants.

F. C. Loring, contra.

CURTIS, Circuit Justice. This is a suit in equity, the object of which is to correct an alleged mistake in a policy of insurance. On the 7th of November, 1851, the complainant, who is a merchant in Liverpool, being the owner of a vessel called the Liscard, ordered James E. Oliver, his agent at Quebec, to insure, in New York, at the best terms, two thousand pounds on the vessel, and one thousand pounds on her freight, by policies in the complainant's name. Other insurance on other vessels was ordered at the same time. James E. Oliver, through Henry McKay of Montreal, requested Andrew McLimont, an insurance agent in New York, to procure this and the other insurances. On the 28th of November, 1851, McLimont wrote by mail to D. R. McKay at Boston, as follows:

"New York, 28th November, 1851. D. R. McKay, Boston: My Dear Sir,—I am duly favored with yours of the 26th instant. Contents duly noted, also telegraph of this day's date; and I have advised you by same conveyance to insure in Coasters Mutual Company. I also transmit you the following order to insure:—

On ship Liscard....	$ 8,000	valued at	$16,000
On freight money..	4,000	" "	7,200
On ship Wakefield.	2,000	" "	11,200
On freight money..	2,000	" "	6,000
	$16,000 in all.		

"The Liscard is a fine new ship three years old; her destination is Liverpool, and she sailed from Quebec on the 18th instant. The Wakefield is also a fine ship, eight years old; her destination is Greenock, Scotland. She sailed on the 17th instant. I trust you will get these risks done on moderate terms, but you are not limited to a rate. Do the best you can and lose no time. You will please take out special policies for these risks, and inclose them to me, paying cash for the premium, and drawing on me at one day's sight for the amount. You should get a discount of five per cent. on these premiums. I get it from the offices here, and I am told money is tight in Boston. In fact, you must do your very best to get that discount, as I allow it myself when rendering accounts. Now, as to the commission, all I charge is one fourth per cent. upon amount insured, which has to be divided between your brother and myself; but we always calculate on a handsome scrip dividend for these policies, therefore we shall divide commissions and scrip. I am likely to do a very large business with you, in this way, next year, (if we are both spared,) amounting, perhaps, to twenty thousand dollars of premiums, so that the scrip should be a handsome thing for both of us. I am in hopes of seeing you next month

on this subject. I have been thinking, that if you saw any safe chance of extending your business with the lower ports, we might make some mutual arrangements for our mutual benefit. I write this hurriedly, and conclude. Yours truly, A. McLimont."

Finding that mistakes had been made in the sums mentioned in this letter, Mr. McLimont sent by telegraph, a despatch mentioning the order for insurance, and correcting the mistakes therein. This despatch first arrived; and D. R. McKay went with it to the office of the defendants, and after some conversation with the president of the company, concluded to wait for the arrival of the letter. When that arrived, McKay again went to the office, saw the president, and concluded with him an agreement to effect the insurance ordered on the Liscard. The president wrote in a book of the company the following memorandum:

"December 1, 1851. Ship 'Liscard.' Quebec, Canada, to Liverpool, England. $10,000 on vessel valued at $20,000, and $5,000 on freight money valued at $7,200. 5½."

Before McKay left the office, he wrote and handed to the president or secretary, the following memorandum:

"A.

"Insure as follows:—

$10,000 on ship Liscard, valued at	$20,000.
5,000 on freight of do. " "	7,200.

"Sailed from Quebec, Canada, for Liverpool, England, on the 18th November.

"Also, $2,500 on ship Wakefield, valued at	$14,000.
2,500 on freight of do. " "	6,000.

"Sailed from Quebec, for Greenock, Scotland, on the 17th November. D. R. McKay. Boston, December 1, 1851."

During the same forenoon a messenger from the office aplied to him to know the names of parties to be inserted in the policies, and thereupon he wrote and sent the following:

"B.

"Policies for D. R. McKay, on Liscard and Wakefield, to be made out on account of A. McLimont, and payable to him or order."

The policy in question was made and sent to McKay, purporting to "cause D. R. McKay, (a member of said company, pursuant to said act and by-laws,) on account of A. McLimont; loss payable to A. McLimont, Esq., him, or his order, to be insured, &c." It is alleged the vessel and freight were afterwards totally lost by a peril within the policy, the complainant being the sole owner thereof. The scope of the bill is, to reform the policy, so as to have it attach on the interest of the complainant, and to have a decree for the amount due. The complainant, through D. R. McKay, and the respondents through their president, made an agreement for insurance, which preceded, in point of time, the writing of this policy; and which the policy was intended to imbody. If the policy, when drawn, did not correctly express a concluded agreement which had previously been made, which agreement, the policy was designed by both parties to carry into execution, equity will reform it.

In this case the most material inquiries are, at what point of time a concluded agreement was made, what it was, and what were the rights of the parties under it when the policy was made out. To a certain extent there is no conflict in the evidence upon these subjects. The president of the company, in his deposition, testifies that he made an agreement, and that he entered the substance of it on the books of the company, in the memorandum already given. In answer to the fifth and sixth cross-interrogatories, he says: "There was a written application made, before it was decided to write the risk, and I made a memorandum embracing the substance of the application, after it was decided to write the risk. I have given the memorandum I made, in the words in which it stands on the book of the company." Though it is disputed whether a written application was made, it is clear, beyond all doubt, that an application, either oral or written, was made, that it was assented to, and its substance recorded at the time by the president of the company in the memorandum already given. This memorandum ascertains the name of the vessel, the sum to be insured thereon, her valuation, the valuation of the freight, and the sum to be insured thereon, the voyage, and the premium. Here is every particular necessary to be fixed, in order to make a concluded agreement for a policy in the form and with the clauses usual at that office. The promisor was, of course, to be the insurance company; the promisee, D. R. McKay, with whom the contract had been made. So we must conclude both parties understood it; not only because when the policy was made out, McKay's name was inserted in the policy as the person insured, but also because, in the absence of any stipulation to the contrary, he who makes a proposal for insurance, or any thing else, which is accepted, is by implication, at least, taken to be the person contracted with, unless the contrary is made to appear.

Here, then, was a concluded agreement which embraced every essential stipulation to make a binding contract for a policy; and it covered every point necessary to be noticed, except two; the first being, a declaration of the interest, or account, upon which the insurance, when effected, was to attach, and the second, the person to whom the amount of any loss should be made payable. In respect to the last, in the absence of any direction to pay to another, the amount of any loss would be payable to the person who was insured. A failure to make

any agreement, or rather, I should say, the omission of the assured to give any direction on this subject, would not prevent the issuing of the policy. And it remains only to inquire, whether any thing was at that time agreed on, respecting the interest or account for which the insurance was made; and, if not, what were the rights of the parties in reference thereto. I am entirely satisfied that nothing was agreed on, or declared, on this subject, at the time the agreement for insurance was made. This results from the testimony both of D. R. McKay and the president, who are the only persons having knowledge of the subject, and also from the written memorandum made by both of them. The president testifies that he embraced in the written memorandum made by him in the books of the company, the substance of the proposal. That says nothing as to any interest or account. McKay says he wrote the paper A before he left the office. That is silent on this point. I am aware of the argument concerning the inference to be drawn from McLimont's letter and other circumstances. But the point at which I have now arrived, is this. When McKay left the office, an agreement for a policy had been concluded, and there was no declaration by him of the interest or account for which the insurance was effected. Had he, at that time, and before any thing more was done, a complete right to a policy, containing the elements which appear in the memorandum, wherein he should stand insured, as agent, or for whom it might concern? I am of opinion he had this right. Parties who contract for policies of insurance are not expected to insert in the contract every particular, needful to be inserted in the policy. The underwriters, on their part, agree to effect insurance; the numerous limitations of their liability as insurers, which appear in the different memorandums and other special printed clauses in the policy are not mentioned. Their obligation is understood to be, to make out a policy in the usual form, and containing the usual clauses, adapted to the case, made by the agreement of the parties. So if one applies for insurance, makes known that he is an agent only, and the company agrees to effect the insurance, or as the president of this company expresses it, to write the risk, it is a necessary implication that such words shall be inserted in the policy, as are usually inserted in such cases, and as are necessary to make a binding contract. It is to be presumed, that the underwriters intend to earn their premium, and therefore that they expect and desire that the insurance should attach upon some interest, and understand and agree, if a known agent applies for insurance, that the formula, usually inserted when an agent obtains insurance, and which is necessary to the assumption of the risk, shall be in the policy, when it is drawn. I think it may safely be laid down, that when a contract is made for a policy, whatever clause is usually inserted in policies, by reason of a given state of facts, and which it is necessary to insert to adapt the policy to that state of facts, both parties will be understood as agreeing to have inserted, if they are both apprised of that state of facts, and contract in reference to it. That it is usual, and necessary, to insert in policies of insurance effected by agents in their own names, a declaration that they are insured as agents, or for whom it may concern, or some equivalent words, or to declare specially on whose account the insurance is made, will hardly be controverted. That it was known to both McKay and the president of the company, that he was acting as an agent merely, that he himself had no interest upon which the insurance could attach, and that when the company agreed to write the risk, they contracted to insure property which belonged to some principal of McKay, is admitted on all hands.

The result seems to me to be, that before McKay had sent his second memorandum (paper B) he had a complete right to a policy insuring him as agent, or for whom it might concern, or declaring specially his principal. In other words, I consider the right of McKay under this contract, to have been a right to a policy upon the Liscard and freight, on a voyage from Quebec to Liverpool, for the sums, and under the valuations, and at the rate of premium mentioned in the memorandum on the books of the company. And that as no declaration was made by McKay at the time the contract was made, respecting the interest upon which the insurance was to attach, he had the power, either to leave that point open in the policy, by having it made for whom it might concern, or to declare the interest, and have it inserted, in terms, in the policy. It was at this point, and in the exercise of this power, that the mistake was made. I do not consider it a broad question, whether a mistake was made in reducing to writing an oral contract for insurances, as it has been treated at the bar; but a much narrower question, whether a mistake was made, in the execution of a power belonging to one of the parties, to declare the interest upon which the insurance should attach. Such a mistake, when occurring in the execution of a similar power reserved in a policy, has been allowed to be corrected even at law. In Robinson v. Touray insurance was made on the 17th of July, at and from Archangel to Great Britain, on goods to be thereafter valued and declared. On the 16th of October, the brokers declared in writing, that the interest attached on goods on board two vessels named in the memorandum, and the underwriters put their initials to it. Subsequently, it was acertained by the brokers, that their principals had no goods on board those vessels; and they called on the defendant to correct the mistake, and declared the insurance attached on goods on board the America. The defend-

ant refused to assent. Lord Ellenborough was of opinion that the declaration of interest did not require an assent on the part of the underwriter; that the contract was complete when the policy was signed; that the declaration of interest was merely the exercise of a power reserved to the assured; and if a blunder was made, it could be corrected. Of this opinion was the court of king's bench, when a rule to show cause was applied for. 3 Camp. 157; 1 Maule & S. 217.

To state fully and precisely the grounds upon which I think this case rests, I should say that when a complete contract for a policy, is made by a known agent, and nothing is said respecting any declaration of interest, the contract, is to insure the property of his principal, and in order that this contract may take effect, power is impliedly reserved to the agent specially to declare the interest upon which the insurance is to attach, and to have such declaration inserted in the policy, when drawn, or to have the policy drawn so as to insure him as agent, leaving the declaration of interest to be made afterwards, in case of loss. Either is within the known usage of agents and underwriters; and the conduct of the respondents in sending to McKay to obtain this declaration, and of McKay in making it, show, if any proof were needed, that it was understood by both, he possessed this power. And when a mistake was made in declaring the interest, it was, as Lord Ellenborough said, a mistake in executing a power reserved to the agent by a complete and binding contract, in which power the underwriter has no interest, save that it should be rightly executed, so that he may obtain the premium, and have a valid title to retain it, and over which he can, justly, exercise no control.

It will thus be perceived that the grounds on which I rest the decree in this case, are free from all doubt in point of fact. It is a point much contested, whether McKay showed to the president the letter of McLimont, and made him acquainted with its contents, so as to apprise him that McLimont was merely an agent. But however this may be, there is no doubt whatever, that the president knew, that McKay was acting as an agent, that the interest to be covered was not his, and that no agreement was made, when the contract for the policy was completed, and McKay left the office, to confine the insurance to the interest of any particular person, or in any way to restrain the power which belonged to the agent, rightly and truly to declare the interest, so as to make the insurance effectual, in behalf of his superior, whoever he might be. When the messenger of the defendants came to McKay afterwards, he was then, for the first time, called on to execute this power. That he knew McLimont was not the owner, and did not intend to cover his interest, but the interest of McLimont's principal, I cannot doubt. He made a blunder in declaring the insurance to be for McLimont's account; and in my opinion, equity and good conscience require it to be corrected, and the policy reformed. That courts of equity possess the authority to correct mistakes in policies of insurance, even to the extent of changing the most material clauses therein, which are the subjects of special agreement in each case, has not been controverted, and is too well settled to admit of doubt. Motteux v. London Assur. Co., 1 Atk. 545; Collett v. Morrison, 12 Eng. Law & Eq. 171; Phoenix Fire Ins. Co. v. Gurnee, 1 Paige, 278. It is to be done only with great caution, and upon such proof as is entirely satisfactory. But there is a considerable difference between the reformation of a written contract and the correction of mistakes in the execution of powers. In the latter class of cases, courts interfere much more readily, and upon the footing of presumed intention. 1 Story, Eq. Jur. §§ 169–179; 2 Sugd. Powers, 94; Ashhurst v. Mill, 7 Hare, 502. But I do not think it necessary in this case to press the power of the court at all beyond the narrowest limits which have been assigned for the correction of mistakes; because I proceed wholly upon evidence in which there is no conflict, and upon those rights and duties which are the legal results of the admitted relations of the parties, and of the contract evidenced by the written memoranda which preceded the policy.

It has been argued that McLimont was not authorized to procure insurance in Boston; nor in any name but that of the complainant; and that he and McKay intentionally departed from their instruction in this last particular, and had the policy made out insuring McKay on account of McLimont, so that they might share the scrip dividends made by this mutual insurance company, in fraud of the complainant. This requires examination. Not that I think it, of itself, important, that the agent deviated from his instructions, in the particulars mentioned; because a subsequent ratification by his principal, even after a loss, would remove the difficulty; Routh v. Thompson, 13 East, 274; Hagedorn v. Oliverson, 2 Maule & S. 485; and this bill of complaint itself affords the necessary evidence of ratification. Finney v. Fairhaven Ins. Co., 5 Metc. [Mass.] 192; Finney v. Bedford Commercial Ins. Co., 8 Metc. [Mass.] 350. Nor have these respondents anything to do with a fraud, practised, or attempted, by an agent of the complainant on him; that being, as to them, res inter alios. But the effect of these circumstances on the case, if any, arises from their bearing on the intent of McKay; and in this point of view, and upon the facts which clearly appear, the argument must be this: McLimont intended to obtain insurance for account of Oliver, the complainant; McKay intended to obtain it for McLimont's principal, not knowing who he was; but they desired to place them-

selves in a position in which they would have the benefit of the scrip dividends; and therefore, when McKay came to execute the power to declare the interest, he purposely, and not by any mistake, declared it in McLimont. If this were so, a court of equity could not treat an attempted fraud as an innocent mistake; and though the principal, in such a case, would be in no fault, it could not relieve him, but must leave him to his remedy against his agent. But this is a charge of meditated fraud; and it is incumbent on the respondents to make it out in proof. Primâ facie this is a case of mistake by McKay. For he was apprised, by McLimont's letter, that the insurance was not to be for his account. Indeed, the very ground taken by the respondents assumes this; for they say; he and McLimont, designed to get the scrip dividends to their own use, or that McKay designed to assist McLimont to do so, in fraud of his principal. If McKay knew McLimont had a principal, and that the insurance was meant to attach on the principal's property, and obtained a policy in such a form that it would not attach on the property of McLimont's principal, this departure, from the sole object of his agency, must either have been intentional, or unintentional; if the latter, it was a mistake; if the former, a fraud; and this is not to be presumed, but must be proved by the respondents who allege it.

Without going over the evidence in detail, it is sufficient to say, that I am not satisfied the insertion of McLimont's name, as the person for whose account the insurance was made, or the omission to add the words, as agent, or for whom it may concern, was intentionally done, for the purpose alleged by the respondents. In the first place, the only communication between McLimont and McKay, which could have led to this asserted fraudulent concert, is the letter of McLimont above copied; certainly this shows, clearly, an intention to take, to his own account, or to share with McKay, the scrip dividends, as part of the profits of the agency of obtaining insurance. Speaking in reference to one of these mutual insurance companies, I understand the scrip dividends to be, the evidences of that share of the profits of the company, during a fixed period, to which each person, obtaining insurance during that period, is entitled, under the charter and by-laws, in proportion to the amount of premium which he has contributed to the funds of the company. And if this be the correct view of it, I have no hesitation in saying that the principal who orders the insurance, and whose money pays the premium, on account of which the dividend of profits is made, is the party equitably entitled to those profits; and I should hesitate long before I sanctioned any usage, or allowed effect to any supposed consent of the principals, to permit the agents to take such profits to their own use. I do not say that it would be impossible to make out such a usage, or to show a practice which would induce a legal conviction that the principal had consented to part with what justly belongs to him; I cannot express an opinion on that question till it is before me, with all the lights which belong to it. But in this case, and upon the facts now before me, there is no pretence for saying that these profits belonged to the agents; and any attempt on their part, secretly to appropriate them to their own use, would be a fraud on their principal. But though it does appear that McLimont probably intended to take the expected scrip dividend, if any, on account of this policy to his own use, or to share it with McKay, it does not appear that he intended to do it secretly, or otherwise than with the consent of his principal. Indeed it is difficult to perceive how he could have done so; for the policy was to go into the hands of the principal, and that must show him that the insurance was made by a mutual company, and how it was effected. Besides, there is no connection between the power over the scrip dividends, or the right to them, and the declaration that the insurance was for the account of McLimont. As appears from the testimony of the secretary of the company, McKay, who was insured, and thereby became a member of the company, was the person to whom the company would account for any such dividends, whether he declared the interest in McLimont, or the complainant.

It is further urged by the defendant's counsel, that McKay gave a direction in writing to have the policy made for account of McLimont; that the defendants assented, and made it so; that it is, therefore, in point of fact, just what the parties intended it should be; and if they, or one of them was mistaken in the legal effect of what they purposely did, equity will not relieve. It is true, as settled by the supreme court in Hunt v. Rousmanier, 1 Pet. [26 U. S.] 1, that the inquiry in all these cases must be, not how the parties intended, or expected, an instrument to operate, but what they intended it to be. But there is a wide distinction between a case where an instrument is, what the parties agreed it should be, but its legal effect is unexpected, and a case where an instrument was designed to carry into effect an existing binding agreement, but by mistake fails to do so. In the former case the party never had a right to anything more than he has got. He may be disappointed in finding that what he acquired was less valuable than he expected, but he acquired all he bargained for, and there is no ground upon which a court of equity can give him anything more. On the contrary, in the latter case, the party had a complete right, by an existing contract, to something which, by mistake, he has failed to get. And this contract, and the right under it, still subsists, in point of equity;

because, though the parties attempted to execute the contract, by mistake they failed to execute it; and therefore a court of equity interposes, and upon the footing of an existing contract, unexecuted, proceeds to put the party in that condition, to which his contract entitles him. And in this class of cases I apprehend it is wholly immaterial whether the party has failed to obtain that to which he was entiled through a mistake of fact or of law.

Suppose a contract in writing, for a valuable consideration, to convey a tract of land; and through mutual mistake of the law, some legal formality is omitted, which renders the deed inoperative. Inasmuch as a court of equity would have decreed specific performance of that contract if no deed at all had been given, so it will give effect to the contract by reforming an invalid deed. Findlay v. Hynde, 1 Pet. [26 U. S.] 241. In Hunt v. Rousmanier [supra], a position is laid down which precisely covers this point. "Where an instrument is drawn and executed, which professes, or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either of fact or law, does not fulfil, or violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement." Now here was a previous agreement to insure property of McKay's principal. The president of the company says he supposed McLimont to be that principal. If so, he was mistaken in point of fact; but his mistake is not important, because it was respecting a matter which was not a subject of stipulation between the parties, but only of the exercise of a power by one of them. McKay, either intended to have the secretary insert, after the words "for account of McLimont," the words "as agent," or "for whom it may concern," or he was ignorant that those words were necessary to make the policy an effectual execution of the contract to insure the property of his principal; in the last event it was a mistake of law by McKay, whereby he failed to obtain effectual insurance on the property of his principal, to which he was entitled, under his contract with the company; in the former event it was an omission, by the secretary, in consequence of ignorance of the fact that McLimont was an agent merely, which omission, McKay did not perceive, or have corrected at the time, and so the policy, as drawn, failed to execute the agreement.

My opinion is, that the complainant is entitled to a decree to reform the policy; but as the defendants contest their liability under the policy, when reformed, an issue must be put to the jury to find whether the defendants are liable for anything, and if so, for how much, under the policy as reformed.

Case No. 10,499.

OLIVER v. OMAHA.

[3 Dill. 368;[1] 1 N. Y. Wkly. Dig. 385; 2 Cent. Law J. 772.]

Circuit Court, D. Nebraska. May Term, 1875.

INJUNCTION TO RESTRAIN ILLEGAL TAXES — AUTHORITATIVE FORCE OF STATE ADJUDICATIONS—FEDERAL JURISDICTION.

1. On a question of restraining the collection of city taxes, upon lands within the city limits, used exclusively for agricultural purposes, this court is bound by the decision of the supreme court of the state.

2. A citizen of another state, in the case of an illegal tax upon his real property, levied under state authority, may proceed originally in this court, notwithstanding a provision of the state statutes, requiring a previous decree in the state chancery court, before any sale for taxes can be made.

This was an action brought [by George T. Oliver] to restrain the collection of taxes by the city of Omaha on the plaintiff's lands lying within the corporate boundaries of said city, but used exclusively for agricultural purposes. No suit for the taxes had been commenced in the state court when this suit was brought. Submitted upon the pleadings and agreed state of facts. The 15th proposition in Mr. Thurston's brief, referred to below, is as follows: "(15) The relief sought is to restrain the sale of the land for the taxes, which sale, if made, would cast a cloud upon plaintiff's title. By general statutes in force at the commencement of this suit (see Gen. St. p. 940), after the first day of December, 1873, no sales of land could be made by treasurers for taxes levied thereon prior to the year 1872. The only manner in which sale for such taxes could be made after said date, was by a decree in chancery granted by the district court of the state, after judicial proceedings had therefor in the manner pointed out by the aforesaid statute, in which proceedings every party interested would have an opportunity to be heard upon the merits and equities, and which proceedings to obtain such a decree have been duly instituted and are now pending. The effect of a decree herein, then, would be to enjoin the action of a court of competent jurisdiction from rendering a decree of sale, or hearing the rights of the respective parties therein."

J. M. Woolworth, for plaintiff.
J. M. Thurston, for defendant.

MILLER, Circuit Justice. I am satisfied that the case comes within the principle of Bradshaw v. Omaha, 1 Neb. 16, and this court is bound by it. The only doubt I have had is raised by the 15th proposition of Mr. Thurston's printed argument; but, as the present plaintiff is entitled to come into the

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

federal court, I see no good reason why he should wait until he is sued in a state court with many others, who may have no such defence as he has, and then ask to remove his case into the federal court. Therefore, let a decree be entered for the plaintiff, for a perpetual injunction against the collection of the tax. Decree accordingly.

[NOTE. Subsequently the supreme court of Nebraska overruled the case of Bradshaw v. Omaha. Turner v. Althaus, 6 Neb. 64. The circuit court, in Kountze v. Omaha, Case No. 7,928, follows this last decision of the Nebraska supreme court.]

Case No. 10,500.

OLIVER v. PARISH.

[2 Wash. C. C. 462.] [1]

Circuit Court, D. Pennsylvania. April Term, 1810.

DISCHARGE ON COMMON BAIL—AFFIDAVIT TO HOLD TO BAIL—EXAMINATION OF AFFIANT.

The court are not precluded from obtaining further satisfaction, as to the debt sworn to in an affidavit to hold to bail, because the affidavit is positive; but the necessity to examine the party making the same, must be presented on the face of the affidavit.

Rule to show cause of action, and why the defendant should not be discharged on common bail. The plaintiff produced a positive affidavit of the debt, made by Sarmiento, the real plaintiff. The defendant suggested that the promise of the defendant mentioned in the affidavit, was in fact conditional, and prayed that under the rule of the court, which states that the court will, in its discretion, interrogate the party making the affidavit, in order to satisfy its conscience as to the cause of action, and quantum of bail, that Sarmiento might be examined.

BY THE COURT. If where the affidavit is positive, as in this case, the defendant, by a suggestion of circumstances to invalidate it, may examine the plaintiff upon interrogatories, there is an end of discretion, and the inquiry must be gone into, in every instance. The meaning of the rule is, that if, from the face of the affidavit itself, further satisfaction be deemed necessary, the court is not precluded from obtaining it, by examining the person who made the affidavit, merely because the debt is positively sworn to. This may be particularly proper, where the affidavit is made by some other person than the plaintiff himself. Rule discharged.

OLIVER (PIATT v.). See Cases Nos. 11,114–11,116.

OLIVER (UNITED STATES v.). See Case No. 15,917.

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

Case No. 10,501.

OLIVER et al. v. VERNON.

[4 Mason, 275.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1826.

CONTRACTS—SERVICE AS TREASURER OF SOCIETY—COMPENSATION—WITNESS FOR EXECUTOR—RELEASE OF CLAIM ON ESTATE.

1. A release by a party to make him a competent witness in favor of an executor is sufficient, if it releases all claim to the estate of the deceased, although by mistake the executor's name is omitted in the release.

2. Where an allowance is made to a party, as a compensation, up to a certain period, for his services as treasurer of a society, which is accepted by him without objection, it is conclusive as an adjustment for such services, especially if the party making the allowance was authorized to fix that compensation.

3. If subsequent services of a like nature are rendered, the party is entitled to a compensation, unless it is clearly established, that he meant them to be voluntary.

Bill in equity [by Ebenezer Oliver and others against William Vernon, executor]. The bill states, that in the year 1796, the New England Mississippi Land Company purchased a tract of land in the Mississippi territory, containing eleven millions three hundred and eighty thousand acres. That they conveyed all their right and interest in that tract to Leonard Jarvis, Henry Newman and William Hull, their heirs and assigns, and the survivor of them in trust, to be appropriated according to articles of agreement then entered into by the said company. That the directors of the company, together with Hull, the surviving trustee, conveyed and released the said lands to the United States, in conformity to an act of congress of the 31st March, 1814 [3 Stat. 116]. That certain commissioners, appointed by virtue of that and other acts of congress, adjudged the sum of one million seventy-eight thousand three hundred and thirteen dollars, to be paid to the directors of the company, or to Benjamin Joy and Samuel Dexter, Esquires, as agents of the said directors. That Joy and Dexter received that sum, in Mississippi stock, from the treasury of the United States, and in July, 1815, by order of the directors, deposited and paid the same to Samuel Brown, as treasurer of the association. That it appears, by the articles of agreement before referred to, that the sum, so to be received, should be paid into the treasury of the company, subject to the orders and disposal of the directors.

It was admitted by the bill, that Mr. Brown paid out of the said sum, for the first and second dividends, $130,800 to Joy, acting for himself and other stockholders; $30,000 to Mary Gilman; and that $685,300 were paid to other stockholders. That $68,346.62 were paid to Joy and Dexter (by agreement of the company), as agents, for their services and expenses; and $7,000 were paid to

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

the directors for their services, and other sums not recollected. That by the death of Mr. Brown, all the effects, books, and accounts, which he possessed as treasurer, have come into the hands of Vernon, the defendant. That the plaintiffs always understood and believed, that a considerable balance remained in Mr. Brown's hands, as treasurer, at the time of his death; that the defendant, denying this, retains the books, papers, &c. concerning the affairs of that company, and demands the sum of $16,174.-69, as a commission on the deposit, as due to Mr. Brown's estate. It is then alleged in the bill, that, according to the original plan, all services, both as treasurer and director, performed by Mr. Brown, were gratuitous, but that after the deposit, the stockholders, from courtesy, allowed the directors $7,000, and to Brown, as treasurer, $2,000, in full of all services. The bill then concludes by a prayer, that Vernon may be held to account, &c. and to deliver over the books, papers, and accounts to the directors, and to answer certain interrogatories, viz. whether Mr. Brown was treasurer; whether Joy and Dexter paid the deposit to Brown; whether the books and papers have come to his hands; whether there is any charge in Mr. Brown's books, made by him, for the commission on the deposit, or other services; and whether Vernon, the defendant, has not charged the commission, since the death of Mr. Brown.

It was stated, in the answer, as follows: Vernon, the defendant, admits, that he is executor of Brown; that Brown was the treasurer of the association; that certain books and papers, relating to the concerns of the company, came into his hands as executor, but whether all, or not, he is ignorant; that Mr. Brown charged himself with the sum of $1,078,313 stock, as stated in the bill, but not at the time, nor under the circumstances, therein stated. The answer then goes on to state, that no articles of agreement were referred to in the books and papers in his possession, concerning the transactions with the company. That every thing was transacted by special votes, and the committees of the company; and he denies, that there was any such agreement as is set forth in the bill. The answer further states, that a committee was appointed, July 19, 1815, to liquidate the claims against the company, for the purpose of laying the same before the commissioners under the act of congress; which committee reported, on the 3d November, 1815, that it was expedient to allow for services rendered, as per their report, marked A, and annexed to the answer; that this report, after repeated adjournments, was accepted November 9, 1815. That, on the 21st February, 1816, the company appointed seven directors, and unanimously re-elected Mr. Brown their treasurer. That another meeting was held June 6, 1816, to receive from Mr. Joy such stock or money as he might receive for the company, and to pay it over to the treasurer. It is denied, in the answer, that the deposit of $1,078,313 was made before the allowance of $2,000 was made to Mr. Brown, or that this allowance was intended to be in full for all services, past and future, rendered and to be rendered, by Mr. Brown; which services were not limited to those connected with the office of treasurer, Mr. Brown being the most active agent, and all the most important transactions of the company being conducted under his advice and direction, and the final success of its claims being mainly attributable to his persevering energy and industry. It is then admitted, that Mr. Brown received the $2,000, but denied, that it was paid by courtesy, or received in full satisfaction for his services; that it was received, November 9, 1815, and afterwards confirmed by the commissioners under the act of congress.

It is further stated, that, at the meeting of May 7, 1817, the vote, passed to pay the services therein stated, was not intended to refer to services to be subsequently rendered, that is, rendered after the deposit was received; that, although Mr. Brown acquiesced in this allowance for services previously rendered, that is, previous to July, 1815, it is denied, that he ever gave any acknowledgment for the same, or declared himself satisfied therewith. It is further stated, that the vote of the 7th May, 1817, is only confirmatory of the doings of the committee, appointed July, 1815; that the stock paid to persons therein mentioned, on account of the expenses of the company, was not intended to be in full of said expenses, nor to liquidate any other claims than those actually existing against the company; that, subsequent to passing the vote appointing the committee to liquidate the claims then existing, said Brown rendered various other important services, for which he received no compensation; that he expected to receive such compensation, and did not intend to perform said services gratuitously. Having become the repository of stock to a large amount, and of large sums of money, for which he was responsible; having distributed said stock among the proprietors, conducted a very difficult and extensive correspondence, and several suits at law and equity, providing accommodations, wine, &c. for 600 meetings of the company and directors, at his own house, for several years. That Mr. Joy was allowed $2,800 for wine. That Mr. Brown paid and charged the company and members, in stock and money, the whole amount received; and defendant has paid Stow the sum of $40 for stating the accounts. The answer then admits, that there is no charge in Mr. Brown's books for a commission on the deposit, or for other services, but avers, that no general account was ever stated with the company, and that his books were not "written up" at the time of his death; that defendant paid the third dividend a few months previous to the death of

Mr. Brown; that the severe illness of Mr. Brown, previous to his death, prevented his attention to the subject of his accounts with the company. The answer further admits, that the defendant has charged the commission, which is the main subject of the present suit since the death of Mr. Brown, which he considers as reasonable, on account of the responsibility, hazard, &c. in paying such large sums, and in the management of the company's business; that he is ready to dispose of the books and papers, as the court shall order, the plaintiffs paying him the balance of his account.

The case was submitted to a master, and, in his report, after giving an abstract of the bill and answer as above, he made the following statement of the evidence adduced by the parties:

"It is stated and admitted, that Mr. Brown never received more than $2,000 for his services as treasurer, and for all other services rendered the company, except the $1,000 as director, and that no other sums were voted for said services. The following is the vote of the company of July 19, 1815, appointed to liquidate the claims against the company. 'Voted, that a committee of three be appointed to liquidate the accounts of the company, and examine and determine all claims existing against the company, in order that the amount of its expenses may be ascertained and transmitted to the commissioners at Washington. R. G. Amory, Joseph Sewall, and M. Watson, appointed.' The committee, thus appointed, made their report on the 15th of November, 1815, which report is in the following words, to wit: 'The subscribers, having been appointed, by the New England Mississippi Land Company, by vote of the 19th of July last, being members thereof, to liquidate its accounts, do hereby certify, that the several debits of the within accounts exhibited by the treasurer of the company, showing the total amount of Mississippi stock due from the company, being one hundred and fifty-three thousand and thirty dollars ninety cents, are conformable to the votes of the company, or in virtue of contracts made by the directors, under the authority vested in them by the company; and we further certify, that the said sum is now justly due in Mississippi stock from the said company, according to the within account. Boston, Nov. 15, 1815.' The account, liquidated by this committee, states, among other things, all the sums that had been granted and allowed by the company to the directors, treasurer, and agents of the company, for their services and expenses; and if necessary to be referred to in the examination of the question, now in controversy between the parties, is marked A, and annexed to the answer to the bill. It is further stated and admitted, that Mr. Brown, as treasurer of the company, received the amount stated in the bill and answer, to wit, $1,078,313, which stock was deposited in his hands to be paid out to the stockholders; and that he did distribute and pay it out to ninety-five stockholders in three dividends.

"It is stated by the defendant, that on the 6th day of June, 1816, Messrs. Brown, Winthrop, Amory, and Watson, were appointed a committee 'to receive from Mr. Joy such stock and money as he shall have received of the commissioners, and pay the same to the treasurer,' and that therefore the deposit of this stock must have been made to Mr. Brown subsequently to the vote before mentioned granting him $2,000, and therefore not in full for future as well as past services. That Mr. Brown was much engaged in the service and business of the company; that he incurred great responsibility from the difficulty of the service and the liabilities incident thereto. That it appears by Mr. Brown's books, that he did actually sustain loss, by advancing or overpaying the stockholders; particularly $1,000 to Gen. Boyd, and $613.05 to William Stackpole. The evidence, as to the advance to Boyd, is stated in the defendant's account, and proved by Mr. Brown's books. The evidence, as to the mistake or over-advance to Stackpole, is to be found in Mr. Brown's book of receipts, letter S, which is referred to. The defendant further states, that from June, 1815, when the indemnity granted by congress was paid to Messrs. Joy and Dexter, the meetings of the company and of the directors were at his house, and that the members were accommodated at his expense. The fact of the meetings being at Mr. Brown's house, is proved by the books of the company, which state the meetings to be there held. The expense incurred by his accommodation is not specifically proved, and therefore no accurate statement can be made of the amount. That the sums paid to Mr. Joy, Mr. Dexter, Mr. Morton, and others, were for services rendered the company, the amount of which is stated in the account marked A, before referred to. That the services of Mr. Brown, and his official liabilities, were greatly enhanced, after the deposit was made, and after the grant of $2,000 was voted. That many of the original stockholders died during his agency, and the dividends were paid to their representatives and assigns; that many powers of attorney were lodged with him; that he necessarily incurred the increased risk and additional trouble of paying over the stock to these representatives and assigns of the original stockholders. That Mr. Brown was sick, and thereby disabled from doing business, the last year of his life. That no general account, for that reason, was ever made out or settled between him and the company; and that at the time of his death his accounts with the company were not balanced. That Mr. Brown's services were not limited to those connected with the office of treasurer, but that he conducted an ex-

tensive correspondence for the company, and had the general care and superintendence of all its concerns and pecuniary interests. The defendant's counsel also furnished the deposition of Thomas English, the purport of which is to prove the extensive and laborious services of Mr. Brown for the company, his dissatisfaction at the compensation he had received, and his intention to be further remunerated for his services. A copy of this deposition is hereto annexed and referred to as a part of this report.

"Against the charge, by the defendants, for a commission on the deposit, it is stated by the plaintiff, that, under the circumstances referred to in the bill and answer, the sole question is, whether the said Brown, or his estate, is entitled, by way of compensation or commission, to any sum for his services, beyond that already allowed him, and paid according to the report of the committee. The plaintiffs allege, that the services of Mr. Brown, both as treasurer and director, in common with the other directors, were gratuitous, according to the intention and meaning of the articles of association agreed upon by the company, as stated in a printed copy thereof, filed in the case, unless by special grant it were otherwise ordered; and the following extracts from the printed articles are relied upon, as proof of this statement: 'The directors shall pay over to the respective proprietors, their proportions of the moneys received from any and every sale, as soon after the receipt thereof as may be, and shall annually settle their accounts with the company. It is agreed that a treasurer shall be chosen at the annual meeting in February, whose duty it shall be to have the custody of all moneys, and to receive all moneys due for taxes, and any that shall be received for sales, or any other moneys belonging to the company, and shall have the custody of all such established records and papers of consequence, as the directors or trustees shall see fit to commit to his care for safe keeping; and such treasurer shall pay over all moneys of the company agreeably to a warrant or order of the directors; and the treasurer shall give bond to the directors, in such sum as shall be from them from time to time required, for the faithful discharge of the duties of his office; and shall receive such compensation as the directors shall think just. That the directors of the said company, at any legal meeting, or a majority of them, not less than five, shall be, and they are hereby fully authorized and empowered to agree to release or assign to the United States, the whole title and claim of the said company to all the lands they claim under the act of the legislature of the state of Georgia, and empowered to direct and require the trustees of said company, for the time being, to deliver sufficient deeds for carrying the same into effect, which being done, the trustees shall be forever exonerated from all claims of what nature soever, and any certificates, or other consideration therefor, which may be given by the United States, shall be received and holden by the treasurer of said company, to be disposed of by order of the directors, for the use of the claimants, according to their respective interests, as soon as may be, after all the just claims and demands upon the said company shall have been discharged.'

"The plaintiffs further state, that Mr. Brown, more than twenty years previous to his death, was treasurer of said company; that it does not appear, that he gave any bond, or that any was required by the directors; or that he, at any time, demanded compensation from the directors; or that they, at any time, made to him any compensation, except as voted by the company, in manner before stated; or that Mr. Brown, in his books, or any entry, charged the company for compensation. As further evidence upon this question, the plaintiffs refer the court to the depositions of John Peck, Perez Morton, and John P. Boyd, which are hereto annexed and made a part of this report. The defendant objects to the admission of the deposition of P. Morton, Esq., on the ground of his interest in the event of this suit. On the 30th of June, 1825, the defendant gave said Morton an obligation of which the following is a copy: 'I hereby bind myself and my heirs to pay the Hon. Perez Morton one half of all dividends, that may hereafter be made, on one hundred thousand acres of the original scrip of New England Mississippi Land Company. Witness my hand, Wm. Vernon.'

"The defendant objects, that the tendency of the evidence of Mr. Morton was, to defeat the claim of said Vernon for an allowance of commissions, and if said claim of commissions were disallowed, it would increase the amount to be received by said Morton, under the obligation of said Vernon. Releases have been executed and delivered, by the plaintiffs, to Mr. Morton and Gen. Boyd, to qualify them as witnesses, which are filed in the case and made a part of this report, but whether competent to remove these objections, in point of law, the court will decide."

Mr. Blake, Dist. Atty., for plaintiffs.
Prescott & Minot, for defendant.

STORY, Circuit Justice. The master's report contains so full an exposition of the facts and circumstances of this case, that it is unnecessary to do more than refer to it for the points in controversy. I shall confine my observations to the objections and arguments brought forward by the parties.

1. In respect to Mr. Morton's deposition, if anything in my view of the case, turned conclusively upon that, I should rather incline to think his testimony admissible. The release in the case was intended to release

every claim of the witness against Mr. Brown's estate, so far as this controversy is concerned. It is but by a formal slip that Mr. Vernon's name is not introduced as one of the releasees; but there is an express release, in terms, of all claims upon Mr. Brown's estate as to this matter, reserving all other rights to the witness. I rather incline to think, that at least in a court of equity, this would be held a sufficient release to bar the witness; and at all events if it became material, I should recommit the report, and direct a more formal release to be given, in order to qualify the witness. My own view of the case is not materially affected by the fact, whether the testimony of Mr. Morton be in or out.

2. The allowance to Mr. Brown of $2,000, as a compensation for his services as treasurer, is, in my judgment, conclusive, as to all claims for services up to the time when that compensation was made, by the acceptance of the report of the committee appointed to ascertain existing claims. I carry it forward to November, 1815, because I think it fair to infer, that it was the intention and object of all parties to liquidate all demands up to the period of the acceptance of the report. The ascertainment of the full demand was important for a final settlement at Washington; and this was indeed its avowed object. I think this allowance conclusive for the antecedent services, because it must be deemed to have been acquiesced in by Mr. Brown, as a final adjustment, and because, by the regulations of the company, the treasurer's compensation was to be in the discretion of the directors. If Mr. Brown was dissatisfied with the allowance, he ought to have appealed to the directors. He did not; and his executor cannot disturb the full effect of his acts. Indeed, from the whole evidence in the case, I am strongly inclined to think, that whatever was Mr. Brown's legal right of compensation, even this allowance was not sought for or claimed by him.

3. As to subsequent services, in point of law and equity, Mr. Brown was entitled to compensation, if he chose to claim it. He performed valuable services, and especially in the receipt of the stock, in large and small sums, and the payment of the dividends of it, among ninety-five stockholders. In common reason no man ought to be expected to do such a duty without some compensation, for it must always be attended with considerable labour, and some hazard. In point of fact Mr. Brown has, by an error in payment, overpaid to the amount of more than $1,600 in stock, and probably this error is, from other circumstances, now irreparable. The presumption of law, then, being, that for the performance of valuable services a compensation is due, what is there in this case to rebut that presumption? It is said, that it was originally understood and agreed by all parties, that Mr. Brown, as treasurer, was to receive no compensation. Now there is no such original agreement proved in the case. On the contrary, it is shown by the articles, that it was originally in contemplation of the company, that the treasurer should receive compensation, for an authority is given to the directors to make it. And the company, in the final allowance to Mr. Brown, must be deemed to have admitted his equitable claim to that sum, at least, for the services rendered. The testimony of the witnesses establishes, to my satisfaction, that Mr. Brown was strongly inclined against making any claim for his services; but he also thought, that every other director ought also to give his services gratuitously. They, however, did not; and there is no reason why his wishes or intentions should, under such circumstances, bar his own rights, and let in those of all others. Indeed, it is obvious from the tenor of the conversations related by the witnesses, that they applied to services rendered antecedently to November, 1815.

But there is a material difference between cases where a man, from generosity of spirit and liberal feelings, waives any compensation for services he has performed as a matter of bounty, and cases where he originally stipulates to perform those services gratuitously. In point of law, Mr. Brown, on accepting the treasurership annually, must be deemed to have undertaken the duties under the express stipulation of the articles, that the treasurer should be entitled to such compensation as the directors should think just. If he chose not to insist on any compensation, he was certainly at liberty so to do. But if he had insisted on compensation, it is plain, that the directors were bound to allow him, for his services, a just and reasonable sum. The legal right of Mr. Brown, under the articles, is one thing; his private intention not to enforce it is quite another thing. It is matter of his private discretion, and cannot be pleaded as a release or extinguishment of his claim. It is conceded, on all sides, that the character of Mr. Brown was that of liberality; a disposition not to claim money for services, but to act without thought or care for compensation. Still, he had a right to compensation in all cases where he did not expressly or impliedly waive it after the performance of them.

Has he so waived compensation for the services performed in superintending the dividends of the stock? I think there is no sufficient proof that he has. The directors had a right to fix his compensation, and to limit the amount; or to have told him, in February, 1816, when he was re-chosen as treasurer, that they would allow him no compensation. This was not done; and he therefore entered upon the office, confiding in the fair discretion of the directors under the articles. I think, too, that Mr. Brown could not have claimed any fixed amount of compensation; and unless the directors

fraudulently or unreasonably denied him a proper compensation, his only remedy was an appeal to the justice of the directors. The case, however, is not presented under this aspect; for the directors never acted on the subject. And the calamitous illness of Mr. Brown, for several years before his death, disabled him from any final decision, whether he would waive his legal claim or not.

4. As to the extent of compensation, I cannot accede to the notion, that it ought to be any thing approaching the sum contended for by the executor. Mr. Brown has shown, by paying over all the proceeds in his hands, excepting about four or five thousand dollars, that he either waived any compensation at all, or else confined his claim to a far smaller amount. He probably has incurred a loss of $1,600 in the service of the company; and if his services were gratuitous, to this extent, at least, in good faith and equity, the company ought to indemnify him. It would be hard to visit on his estate a loss honestly arising by mistake, in very difficult duties, performed gratuitously in the company's service. My opinion, however, being, that Mr. Brown did not contract for gratuitous services, but intended to hold his rights, and leave the company to his own liberality in the event, his estate is now entitled to a reasonable compensation for them. His liberality of intention was never consummated by any definitive act; and his executor does not choose now to yield up a legal claim upon any undefined intentions. I think a gross allowance of 2,000 dollars is an adequate compensation; but if the plaintiffs wish, I will decree a small sum more to enable them to take the opinion of the supreme court.

There must be a decree for the delivery up of the company's books and papers, and a payment of the balance in the hands of the executor; but each party must bear his own costs. Decree accordingly.

Case No. 10,502.

OLIVER v. WEAKLEY et al.

[2 Wall. Jr. 324.] [1]

Circuit Court, Third Circuit. Oct. Term, 1853.[2]

FUGITIVE SLAVES—ESCAPE—HARBORING AND CONCEALING—ACTION FOR DAMAGES.

[In an action for damages, under the 4th section of the act of February 12, 1793 (1 Stat. 302), to recover the value of escaped slaves, it is not sufficient to show merely that the defendant harbored or concealed the fugitives, but it must further be shown that such harboring and concealing caused their escape or hindered their recapture.]

This was a suit brought under the act of congress of February 12, 1793 [1 Stat. 302]. Oliver, of Maryland, was the owner of certain slaves, who ran away from him, and came like the others into Pennsylvania. He traced his negroes to the defendant's barn, and endeavoured by particular and general evidence to show that this person had harboured and concealed them. But, admitting this fact, it rather appeared that before they got there, the plaintiff had lost the track of them; that they had already eluded his pursuit, and that although the defendant had harboured or concealed them, this was not the cause of the plaintiff's loss of them.

This suit was not, like Van Metre v. Mitchell [Case No. 16,865], for the $500 penalty, but an action on the case for damages under the last part of section 4 of the act cited above; and the declaration contained counts setting forth:

The first. That the defendant well knowing, &c., and contriving and fraudulently intending to deprive the plaintiff of the labour and services due to him by said fugitives, did tortiously and illegally harbour and conceal the said negroes knowing them to be fugitives from labour, and enticed, persuaded and assisted them to escape from, and leave the labour and service of the plaintiff, and obstructed and hindered him from seizing, arresting and recovering said slaves, whereby they were wholly lost to the plaintiff.

The second. That the defendant illegally enticed, persuaded, procured, aided and assisted said negroes to absent themselves from, and wholly to leave and escape the service and labour of plaintiff.

The third. After stating the ownership and escape of the slaves substantially as in the first, and the right of the plaintiff to pursue and reclaim them, charged that the defendants well knowing the premises, illegally and fraudulently harboured and concealed them whereby they escaped from the labour, &c.

Plea, not guilty.

[The statute upon which this action was based provides that when a person held to labor in one of the United States shall escape into another of them, the person to whom such labor is due, or his agent, may seize or arrest the fugitive. It then prescribes the mode in which the reclamation is to be made, and the fugitive returned to the state from which he had fled. Section 4 of the act reads as follows: "And be it further enacted, that any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney when so arrested pursuant to the authority herein given or declared; or shall harbor or conceal such person after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any court proper to try the same; saving moreover to the person claiming such labor or

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

[2] [District not given.]

service, his right of action for or on account of the said injuries or either of them."]

For the defendants. In this case, and under a declaration such as this is, on the case for damages, we may admit for the sake of argument, and to the fullest extent, the harbouring and concealment made penal by the act of congress. If the action were for the penalty, the cause of action would be complete when "harbouring" or "concealing" was shown, whatever might be the result of it. But here the gist of the action is in a "loss" or "escape," the result of the harbouring or concealment; and the plaintiff recovers nothing unless he shows what his declaration alleges: st. as in the first count, that the defendant "assisted the negroes to escape" "whereby they were wholly lost;" or as in the second count, that the defendant "aided and assisted" "the negroes wholly to leave and escape the service," &c.; or as in the third, that he "harboured and concealed them whereby they escaped," &c. The loss or escape must be shown to have been caused by the harbouring and concealing; that is, must be shown to be the effect of it.

GRIER, Circuit Justice, laid down to the jury the meaning of the words "harbour" and "notice" as already given, and then continued: This being an action, not of debt, for the penalty of $500, but on the case, and on account of injuries for which the act saves a right of action, the plaintiff, on whom lies the burthen of proof, must show that the slaves were lost to him through the illegal interference of the defendants, or that some other appreciable loss, injury or damage was suffered by him in consequence thereof. The difference between the present action on the case for damages, and the one of Van Metre v. Mitchell [Case No. 16,865], tried before me some time since, is that the latter, being debt for a penalty given by the statute, for the mere act of harbouring or concealing, the defendant would be liable on proof of such harbouring or concealment, irrespective of its effects; while, in the present suit, he can recover only to the amount or actual loss, which he shows he has suffered.

Have you then evidence to satisfy your minds, that the defendant harboured or concealed the fugitives mentioned in the declaration?

Did he do this, knowing them to be fugitives from labour, and to further promote their escape from the pursuit or reclamation of their masters?

Did he, by such harbouring and concealing, cause the escape of the fugitives, or hinder their recapture? If you find these facts to be true, your verdict should be for the plaintiff for the value of the slaves and interest, if you see fit to add it.

The jury, failing to agree on the first trial, were discharged, standing (as was said) ten for the plaintiff, and two for the defendants. On the second they found a verdict of guilty as to one of the defendants and damages of $2800 against him. The other defendants they found not guilty.

Case No. 10,503.

The OLIVER JORDAN.

[2 Curt. 414.] [1]

Circuit Court, D. Maine. Sept. Term, 1855.

ADMIRALTY—ARREST OF PROPERTY HELD BY STATE UNDER ATTACHMENT.

Property in the custody of the law of a state, under an attachment, cannot be arrested by a warrant from a district court, sitting in the admiralty, in a proceeding to enforce the lien of a material-man; consequently the district court cannot proceed in rem, and if it do so, its decree is erroneous.

[Cited in Lewis v. The Orpheus, Case No. 8,-330; Johnson v. Bishop, Id. 7,373; Taylor v. Carryl, 20 How. (61 U. S.) 600; The J. W. French, 13 Fed. 920; The E. L. Cain, 45 Fed. 370; Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1026.]

[Cited in Howe v. Freeman, 80 Mass. (14 Gray) 568. Cited in brief in Leighton v. Harwood, 111 Mass. 69.]

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

This was an appeal from a decree of the district court sitting in admiralty. The appellants were the sheriff of the county of Cumberland, in the state of Maine, and the plaintiff in an action at law commenced in the supreme court of that state. Upon the original writ by which the action was commenced, the sheriff had attached the Oliver Jordan, and had the vessel in his custody under the attachment, when the libel was filed in the district court, and the warrant of arrest issued. The libel asserted under the local law of Maine, a lien for materials. The suit in the supreme court of the state was also to enforce a similar lien. The plaintiff in that suit, and the sheriff appeared in the district court, and took an exception to the jurisdiction, founded on the above facts. The exception was overruled, and a decree made in favor of the libellants [case unreported] from which this appeal was taken.

Deblois & Gould, for appellants.

Mr. Rand, contra.

CURTIS, Circuit Justice. This vessel being in the custody of the law of the state, the marshal could not lawfully execute the warrant of arrest. Under our system of government, there is no mode of preventing a conflict of jurisdiction, but to consider persons and property which are in the custody of the law of a state, to be withdrawn from the process of the courts of the United States, except in those cases where congress has specially provided for an exercise of the supremacy of the laws of the United States (see Act March 2, 1833; 4 Stat. 634, § 7); and, e contra, that persons

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

and property in the custody of the law of the United States as not being subject to any state process. This rule has been frequently laid down and applied.

In Harris v. Dennie, 3 Pet. [28 U. S.] 299, it was held, that goods imported from a foreign country, and not yet entered, being in the custody of the laws of the United States, could not be attached by state process.

In Hagan v. Lucas, 10 Pet. [35 U. S.] 400, it was decided, that the first levy of an execution upon property, whether made under the jurisdiction of the United States, or of a state, withdraws the property from the reach of process from the other jurisdiction. This was reaffirmed in Brown v. Clarke, 4 How. [45 U. S.] 4, and was again applied in Pulliam v. Osborne, 17 How. [58 U. S.] 471. See, also, Taylor v. The Royal Saxon [Case No. 13,803].

In the case of The Robert Fulton [Id. 11,890], Mr. Justice Thompson had before him, a case not distinguishable from the case at bar. He held that the warrant of arrest could not be lawfully executed, and consequently the district court could not lawfully proceed in rem. I concur with him in that opinion, and the decree of the district court must be reversed. But I shall not now order the libel to be dismissed. The state process may be so terminated as to render it practicable to proceed in the admiralty against the vessel. I shall retain the libel, if the libellant desires it, to allow him an opportunity to learn whether he can make use of the jurisdiction; and he may hereafter submit such motion as he may be advised is proper.

Case No. 10,503a.

OLMSTEAD v. The ACTIVE.

[5 Cranch (9 U. S.) 124–126.]

District Court, D. Pennsylvania. Jan. 4, 1803.

ADMIRALTY JURISDICTION—FEDERAL COURTS.

[The United States district court for the district of Pennsylvania has authority to enforce the decrees of the court of appeals in prize cases, established under the articles of confederation, against the proceeds of a prize condemned in that court, in whatever form such proceeds may appear as fully as it could against the original thing from which they were produced.]

[This was a libel by Gideon Olmstead and others against the executors of David Rittenhouse, to enforce a decree rendered December 15, 1778, of the court of appeals in prize cases of the United States, reversing a decree of the court of admiralty of Pennsylvania in relation to the disposition of the proceeds of the sloop Active, which had been condemned as a prize in the latter court.]

Gideon Olmstead, Artimus White, Aquilla Rumsdale, and David Clark, citizens and inhabitants of the state of Connecticut, were, during the Revolutionary war, captured by the British and carried to Jamaica, where they were put on board the sloop Active to assist as mariners in navigating the sloop to New York, then in possession of the British, with a cargo of supplies for the fleets and armies of Great Britain. During which voyage, about the 6th of September, 1778, they rose upon the master and crew of the sloop, confined them to the cabin, took command of the vessel and steered for Egg harbor, in the state of New Jersey. On the 8th of September, when in sight of that harbor, they were pursued, and forcibly taken possession of by Captain Thomas Houston, commander of the armed brig Convention, belonging to the state of Pennsylvania, and on the 15th of September, brought into the port of Philadelphia; when Houston libeled the vessel as prize to the Convention. A claim was interposed by Captain James Josiah, master of the American privateer Le Gerard, who claimed a share of the capture as having been in sight and by agreement cruising in concert with the Convention. A claim was also interposed by Olmstead and others for the whole vessel and cargo, as being their exclusive prize. The state court of admiralty, however, adjudged them only one-fourth part, and decreed the residue to be divided between the state and the owners of the privateer, and the officers and crews of the Convention and the Le Gerard. From this sentence Olmstead and others appealed to the court of commissioners of appeals in prize causes for the United States of America, where, on the 15th of December, 1778, the sentence of the state court was reversed, and it was ordered and adjudged that the vessel and cargo should be condemned as lawful prize for the use of the appellants, Olmstead and others, and that the marshal should sell the same, and pay the net proceeds to them or their agent or attorney. Upon receipt of a copy of this sentence, the court of admiralty made the following order:

"In the Court of Admiralty for the State of Pennsylvania. Thomas Houston, Esq., et al. appellees, ads. Gideon Olmstead, Artimus White, Aquilla Rumsdale, and David Clark, appellants, claimants of the sloop Active and her cargo.

"The court, taking into consideration the decree of the court of appeals in this cause, reversing the judgment or sentence of this court in the same cause, and further decreeing a condemnation of the sloop Active, her tackle, apparel, furniture and cargo, as prize, &c., and the process of this court should issue for the sale of the said sloop, her cargo, &c., and for the distribution of the moneys arising from the said sale after deducting costs to the claimants above named, their agent or attorney; after mature consideration are of opinion, that although the court of appeals have full authority to alter or set aside the decree of a judge of this court, yet that the finding of the jury in the cause does establish the facts in the cause without reexamination or appeal. And therefore the verdict of the jury still standing, and being in full force, this court cannot issue any process, or pro-

ceed in any matter whatsoever contradictory to the finding of the said jury. And therefore doth now decree, order and adjudge, that the marshal of this court be commanded to sell at public vendue at the highest price that can be gotten for the same, the said sloop or vessel called the Active, her tackle, apparel and furniture, and the goods, wares and merchandises laden and found on board her at the time of her capture, &c., and after deducting the costs and charges of the trial, condemnation and sale thereof, out of the moneys arising from the said sale, that he bring the residue thereof into court, there to remain ready to abide the further order of this court therein. George Ross. December 28th, 1878."

The finding of the jury, alluded to in the above order, was in these words:

"In the cause wherein Thomas Houston is libelant, and Olmstead and others first claimants, and James Josiah second claimant, we find as follows: One-fourth of the net proceeds of the sloop Active and her cargo to the first claimants; three-fourths of the net proceeds of said sloop and her cargo to the libelant and to the second claimants, as per agreement between them. Nov. 4th, 1778."

The warrant which Judge Ross directed to be issued to the marshal to make sale of the vessel and cargo, in pursuance of the above order, and which was accordingly issued on the 28th of December, 1778, after reciting the proceedings in this court, and in the court of appeals, proceeds as follows:

"This court, therefore, taking into consideration the premises, and being of opinion that consistent with the laws of this state it cannot carry into execution the whole of the said sentence of the honorable the court of appeals aforesaid; yet willing, so far as the said sentence appears legal, to carry it into effect, and to prevent, as far as possible, any injuries or losses which the parties to this cause, or either of them, may be liable to by the vessel or cargo continuing in their present situation, do therefore hereby command you forthwith to sell," &c., "and, after deducting the costs and charges, to bring the residue of the said moneys into court ready to abide the further order of this court." This warrant was made returnable at a court of admiralty, to be holden at the judge's chambers on the 7th of January, 1779.

Copies of the above order and warrant being produced, on the same 28th of December, 1778, before the court of appeals, it was moved, on the part of the appellants, Olmstead and others, that process might issue to the marshal of the admiralty of Pennsylvania, commanding him to execute the decree of the court of appeals; and after argument the case was postponed for further argument until Monday, 4th of January, 1779, at 5 o'clock p. m. On which day, at 8 o'clock a. m., the court of appeals being again convened at the pressing instance and request of the claimants Olmstead and others, it was moved and suggested by their advocates that, notwithstanding the decree of the court of appeals, which had been transmitted to the court of admiralty, the judge of that court had appointed the hour of nine on that morning for the marshal to pay into court the money arising from the sale of the sloop Active and cargo, which suggestion was supported by the oath of the registrar of the admiralty; whereupon it was prayed that an injunction might issue from the court of appeals directed to the marshal of the court of admiralty, commanding him to keep the money in his hands until the further order of the court of appeals; which injunction was accordingly granted, reciting the sentence of the court of admiralty and its reversal, and the decree by the court of appeals; the refusal of the judge of the court of admiralty to cause that decree to be executed; and the motion to the court of appeals for a writ to the marshal commanding him to execute the same; the continuance of the motion to the 4th of January, 1779, at 5 o'clock p. m. and the appointment of the hour of 9 o'clock a. m. of the same day, by the special order of the judge of the court of admiralty, for the marshal to pay money into that court, whereby the effect of the writ prayed for, if the court should grant it, would be eluded. This injunction was served upon the marshal before he paid the money into the court of admiralty; but he disregarded it, and paid the money over to the judge, who gave a receipt for it. "Whereupon the court (of appeals) declared and ordered to be entered on record, that as the judge and marshal of the court of admiralty of the state of Pennsylvania had absolutely and respectively refused obedience to the decree and writ regularly made in and issued from this court, to which they and each of them were and was bound to pay obedience, this court being unwilling to enter upon any proceedings for contempt, lest consequences might ensue at this juncture dangerous to the public peace of the United States, will not proceed further in this affair, nor hear any appeal, until the authority of this court be so settled as to give full efficacy to their decrees and process. Ordered that the register do prepare a state of the proceedings had upon the decree of this court, in the case of the sloop Active, in order that the commissioners may lay the same before congress." Upon the writ issued by the judge commanding the marshal to sell the vessel and cargo, and bring the proceeds into court to abide its further order, the marshal, on the 4th of January, 1779, returned, that in obedience to that writ he had deposited in the court of admiralty £47,981. 2s. 5d., Pennsylvania currency, on account of the cargo of the prize sloop Active; but that the sloop remained yet unsold.

The money was loaned to the United States, and the loan-office certificates brought into court and deposited in the hands of the judge, who, on the 1st of May, 1779, delivered to David Rittenhouse, treasurer of the state of Pennsylvania, fifty of the certificates,

amounting to £11,496. 9s. 9d., "being the share or dividend of the state in right of the brig Convention in and out of the prize sloop Active, according to the verdict of the jury on the trial of the said sloop Active in the admiralty court of the state;" at the same time taking a bond of indemnity from Mr. Rittenhouse, by the name of "David Rittenhouse, of the city of Philadelphia, Gent.," the condition of which was that: "Whereas the said George Ross hath this day paid to the said David Rittenhouse, treasurer of the state of Pennsylvania, for the use of the said state, the sum," &c., now, "if he, the said David Rittenhouse, shall make repayment and restitution of the said sum of £11,496. 9s. 9d. unto the said George Ross, his executors or administrators, in case he, the said George Ross, shall hereafter by due course of law, be compelled to pay the same according to the decree of the court of appeals in the case of the said sloop Active; and if he, the said David Rittenhouse, shall and do in all things well and truly save harmless and indemnified at all times hereafter the said George Ross, his heirs, executors and administrators, and his and their lands and tenements, goods and chattels of and from all damages, actions and demands which may arise or happen, for or on account of his having paid the money aforesaid, then the above obligation to be void, or else to be and remain in full force and virtue." The certificates were afterwards funded in the name of David Rittenhouse, and among his papers was found a list of the old loan-office certificates, and of the new funded stock, at the foot of which was written, in the handwriting of Mr. Rittenhouse, the following memorandum: "Note.—The above certificate will be the property of the state of Pennsylvania, when the state releases me from the bond I gave in 1778, to indemnify George Ross, Esq., judge of the admiralty, for paying the fifty original certificates into the state treasury as the state's share of the prize." In the year 1801, the legislature of Pennsylvania passed an act [4 Dall. Laws Pa. 700] requiring the treasurer to call upon the executrixes of Mr. Rittenhouse for the certificates of stock, and to give them a bond of indemnity, but they refused to deliver them up, being advised that they would not be safe in so doing.

PETERS, District Judge. This is the long-depending case of the sloop Active and cargo. It comes before me by libel filed against the executors of the late Mr. Rittenhouse, who received from George Ross, Esq., then judge of the state court of admiralty, the sums mentioned in the libel, which were invested in the certificates of stock as stated therein. Mr. Rittenhouse, on receiving these certificates, which were proceeds of the sales of the said sloop and cargo, gave a bond of indemnity to Mr. Ross, which is now offered, when payment of these proceeds is made, to be delivered up. The suit is instituted for the purpose of carrying into effect a decree of the court of appeals established under the old confederation, a copy whereof appears among the exhibits. In the answer it is alleged that the moneys were received for the state of Pennsylvania. In the replication this is denied. In a memorandum made by Mr. Rittenhouse, at the foot of the account exhibited, it appears that he intended to pay over these proceeds to the state when indemnified. No such payment ever has been made, and the certificates and moneys are yet in the hands of the respondents. It appears to me that Mr. Rittenhouse considered himself, as I conceive he was, a stake-holder, liable to pay over the deposit to those lawfully entitled thereto. His executors conceive themselves in the same predicament, and have declined paying over the certificates and interest. No counsel have appeared, and requested to be heard on the part of the respondents, and I am left to judge from the libel, answer, replication, and exhibits, which contain the state of the facts. If I should be thought mistaken in the opinion I form on the subject, there is time and opportunity to appeal to a superior tribunal. I throw out of the case all circumstances not immediately within my present view of the duty I have to perform. I have nothing to do with the original question. That has been decided by the court of appeals; nor does it appear to me essential for me to determine with what intentions Mr. Rittenhouse received the certificates. The fact of the certificates and interest being now in the hands of the respondents is granted by them in their answer. It has been determined by the supreme court of the United States that this court has power to effectuate the decrees of the late court of appeals in prize causes, and this court has, on several occasions, practiced agreeably to that decision. There is no doubt in my mind (the authorities in the books being clear on this point) that the process and jurisdiction of this court will reach and extend over the proceeds of all ships, goods and articles taken as lawful prize, found within the district, and legally proceeded against therein. These proceeds are under the same legal disposition, and subject to the same responsibility, under whatever shape they may appear, as the original thing from which they were produced. It is conceded that the certificates and moneys in question are proceeds of the sloop and cargo in the libel mentioned. These were decreed to the libellants by the judgment of the late court of appeals. I am, therefore, of opinion, and accordingly decree, and finally adjudge and determine, that the certificates be transferred and delivered, and the interest moneys paid over by the respondents to the libellants, in execution of the judgment and decree of the court of appeals, as stated in the proceedings in this cause, with costs. I make it, however, a condition that the bond of indemnity be cancelled or delivered to the

respondents, on their compliance with this decree.

[NOTE. The respondents refused to obey this decree, and an application was made to the court for an attachment. This was refused. Whereupon the complainants moved in the supreme court for a mandamus against Judge Peters. Upon the hearing on the return a peremptory mandamus was awarded commanding him to issue the attachment. U. S. v. Peters, 5 Cranch (9 U. S.) 115.]

OLMSTEAD v. RITTENHOUSE. See Case No. 10,503a.

Case No. 10,504.

OLMSTEAD v. The SANDUSKY.

[8 Betts, D. C. 53.]

District Court, S. D. New York. Oct. 15, 1846.

COLLISION—VESSEL AT ANCHOR WITHOUT LOOKOUT.

[A schooner lying at anchor in the North river at night, about 100 yards from the dock at Thirteenth street, New York, was injured by the tow of a steamboat which was endeavoring to land one of her tows at the dock. There was no lookout on the schooner, and the man who took the helm on a hail from the steamboat forced the vessels in collision by sheering the schooner in the wrong direction. *Held*, that the schooner was alone in fault in anchoring in such place without keeping a lookout, but that no costs should be allowed claimants, as the maneuver of the steamboat was slightly hazardous.]

[This was a libel in rem by John B. Olmstead against the steamboat Sandusky for collision.]

BETTS, District Judge. This was a collision in the harbor of New York. The schooner Ann M. had just anchored off Thirteenth street. One of the libellant's witnesses concurs with the statement of the libel that she was one-quarter or one-third across the river from the east shore; but the decided preponderance of testimony is that she lay far within that distance, and she was probably not over 100 yards from the docks. The steamboat Sandusky, with a heavy tow of barges, was endeavoring to make in so as to land one of her barges at Thirteenth street, and, in passing to the east of the schooner, a barge in tow and the schooner came together, inflicting damages to both, but only very trifling to the tow, and between $70 and $80 of injury to the schooner.

To enable the libellant to recover for those damages, it must be clearly established that he was guilty of no fault or neglect on his part conducing to the accident, and that there was negligence on the part of the steamboat. Abb. Shipp. 300, 301. The doctrine has been carried so far as to hold that the libellant must not only clear himself of all neglect, but the burthen is furthermore on him to prove the accident would have equally happened if he had performed his duty. Grattan v. Appleton [Case No. 5,707].

The collision occurred at 8 or 9 o'clock in the evening, in November. The tide was running strong ebb. No person was on the watch on board the schooner until the steamboat was in dangerous proximity to her, nor until she had been hailed from the steamboat to sheer off or to slip her cable. Then two men came on deck from the cabin and cabin gangway. One of them swears that he sheered the schooner all he could, but the other says nothing was done at her helm, for there was no time to do anything before she was struck. The latter witness was probably confused by the incidents and mistaken in what he asserts. The other is more likely to be correct, as he speaks of his own actions. The want of a proper lookout on deck was an inexcusable omission. In anchoring directly in the path of vessels coming down the river and making the different piers in that vicinity, it was a cardinal duty of the schooner to place and keep a competent watch on deck for her own security, as well as to aid in the protection of others. This was no idle service. It is fully proved by both classes of witnesses that the schooner, by aid of the tide under her, could be steered by the strain of her cable so as to veer 20 to 50 feet from her position. She had, half an hour before this collision, avoided one with the sloop Highlander by that maneuver. Owing, doubtless, to alarm and the imminency of the danger, the helm, when taken, was not borne off in the right direction.

The decided weight of evidence is that the schooner was given a rank sheer to the eastward, and that her movement that way caused the collision. A boat secured alongside of the steamer hit her on the starboard bow, and both glanced by. There is the discordance of testimony usual to this class of cases as to almost every feature of the case. The witnesses for the libellant assert that the steamer was steering eastwardly across the bows of the schooner when they struck. Those for the claimant insist the steamer at the time was in a line directly east of the schooner, and straightened her course, heading down the river along the docks. More witnesses on the steamer and the towboats, noticing this fact, testify to it, than are produced to contradict them; and who were placed in equally favorable circumstances to determine the position and bearing of the two vessels. The witnesses on board the schooner insist she was lying fore and aft on the tide at the time; and this is corroborated by others on board the sloops R. Wilkie and Highlander. Those vessels, however, were such distance off and so out of the line of the schooner as that persons on board them could not, in the night, give opinions upon the matter with equal opportunity for accuracy with those placed upon the particular vessels coming in contact. The captain, two pilots of the steamer, and two captains of the boats in tow testify that

the schooner came on them quarterly, sheering rank in eastward, and that the steamer had ample room to pass her safely with the tows, if she had aided by sheering west, or had even kept her position fore and aft on the tide.

On this state of the evidence, it must be pronounced that the libellant has not supported his allegations, and the decree must be for the claimants. But I am not disposed to give them costs. The steamer undertook to make her passage through a place merely sufficient for her to do it if the two vessels she went between had both been conducted with extreme prudence and good judgment. But her close approach in the night, with towboats spreading out wide, was calculated to produce perturbation and confusion with those on board the schooner, and a sudden exertion to get clear of the impending danger might lead them to fall upon the mistake which insured it. Such I have no doubt was the fact here; and, although the circumstances are not so far blamable as to impose on the steamer the consequences of the collision which ensued, I think they should equitably operate to take away her claim to costs. Decree accordingly.

Case No. 10,505.

In re OLMSTED.

[4 N. B. R. 240 (Quarto, 71).] [1]

District Court, E. D. New York. 1870.

BANKRUPTCY—ABANDONMENT OF PETITION BY CREDITOR.

On the 2d day of December, 1870, A filed a petition against the bankrupt. An order to show cause was granted, returnable December 10th. The case was adjourned till May 31, 1870, when, no one appearing, the proceedings were dropped. Subsequently B, another creditor, filed a petition alleging the bankrupt's indebtedness to him, and after alleging the filing and abandonment of A's petition, prayed that bankrupt might be adjudicated upon A's petition. *Held*, B's application must be dismissed, on the ground that it should have been made on the return or adjourned day.

[Cited in Re Lacey, Case No. 7,965. Distinguished in Re Buchanan, Id. 2,073.]

On the 2d of December, 1869, Fordyce, a creditor of Olmsted, filed a petition in bankruptcy against him. The usual order to show cause was granted, returnable December 10th. On the return day the debtor did not appear, and on the motion of the petitioning creditor the case was adjourned, and on subsequent days it was further adjourned till May 3, 1870, and no one appearing on that day the proceedings were dropped. On the 13th of September following, another creditor, Filkins, filed a petition alleging in the usual form the indebtedness to him, and after alleging the filing of the Fordyce petition, and its abandonment, as stated above, prayed that Olmsted might be adjudicated upon Fordyce's petition—his own petition not alleging any act of bankruptcy as committed within the six months prior to September 13, 1870. The court granted an order that Olmsted show cause why adjudication should not be granted and provided for service upon Fordyce and his attorney. On the return of this order execution was taken on Filkins' petition.

Mr. Gorham, for debtor, argued that the petition of Filkins did not state facts sufficient upon which to make adjudication, and that under the last paragraph of section 42 of the bankrupt act [of 1867 (14 Stat. 537)] the adjudication must be made upon his petition and not upon the petition of Fordyce, because the act provides that the court may, upon the petition of any other creditor, proceed to adjudicate upon such petition, and that the word "such" can only refer to the petition of the new creditor. Further, that Filkins not having presented his petition upon the return or adjourned day of the Fordyce petition, he is too late, and cannot avail himself of the provisions of the act; and cited in support of this point In re Camden Rolling Mill Co. [Case No. 2,338].

Mr. Hughitt, for Filkins, argued that the new creditor was entitled to come in at any time, and was not limited to the return or adjourned day; and that the adjudication must be had upon the petition of Fordyce, and that Filkins' petition was only supplemental to Fordyce's.

HALL, District Judge, wrote no opinion, but after considering the case dismissed the application, and held the exceptions of the debtor well taken on the ground that the application of Filkins should have been made on the return or adjourned day, and said, that the reason of this rule was that the debtor was then in court, advised of the charges against him, and that it was then competent for the second creditor to take up and enforce the proceedings abandoned by the first creditor; but if he allowed that time to pass he could no longer rely upon that petition as his basis of action, but must begin anew and bring the debtor into court upon his own motion and proceeding.

OLNEY (CHAPPELLE v.). See Case No. 2,613.

OLNEY (DESPAN v.). See Case No. 3,822.

Case No. 10,506.

OLNEY v. TANNER et al.

[19 N. B. R. 178.] [1]

District Court, S. D. New York. Feb. 20, 1879.

BANKRUPTCY—JURISDICTION OF DISTRICT COURT—SUIT BY OR AGAINST ASSIGNEE—PROCEEDINGS IN STATE COURT—RECEIVER.

1. District courts have jurisdiction, under section 4979, of a suit by or against an assignee

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whenever he is a necessary and proper party, although other persons may be joined.

2. About six months prior to the commencement of the proceedings in bankruptcy, the bankrupt made a voluntary assignment. Plaintiff was afterwards, and before the filing of the petition, appointed receiver of the bankrupt in certain proceedings supplementary to execution in the state court. In a suit brought against the bankrupt, the voluntary assignee and the assignee in bankruptcy to set aside the voluntary assignment, as void under the state law for noncompliance with the statutory requirements, and as void as to creditors on the ground that it was void in fact, *held*, that the district court had jurisdiction; that the receiver was a person claiming an adverse interest within the meaning of the statute; that the assignment, being one void in fact or by force of express statute, was not within the limitation of three months, and the property covered thereby and in which such interest was claimed was "property transferable to or vested in the assignee"; and that all persons having an interest therein to be affected by the decree were properly joined as defendants.

[This was a bill in equity by James B. Olney, receiver, etc., against Wilson P. Tanner and others. Heard on demurrer.]

Norwood & Coggeshall, for complainant.
J. L. & F. Werner, for defendants.

CHOATE, District Judge. This is a demurrer to a bill in equity. The complainant is the receiver, appointed August 15, 1877, in supplementary proceedings upon an execution issued under a judgment recovered by one Seaman against the defendant Swartwout. A petition in bankruptcy was filed against Swartwout, September 11, 1877, on which there has since been an adjudication, and the defendant Sayre has been appointed his assignee in bankruptcy. March 28, 1877, Swartwout made a voluntary assignment to the defendant Tanner of personal and real property, nominally for the benefit of his creditors, which assignment the bill alleges to be actually void, under the laws of New York, for noncompliance with certain requirements of statute, and also void as against creditors, on the ground that it was void in fact.

The bill is brought against the bankrupt, his assignee in bankruptcy, and the voluntary assignee, and seeks to have the voluntary assignment declared void, and to have the property applied to the satisfaction of the judgment under which the complainant was appointed receiver. The bill now demurred to is an amended bill. The original bill was demurred to, and the point especially relied upon by the defendants was that, under section 4979, this court has jurisdiction of a suit by or against an assignee only where the assignee is sole plaintiff or sole defendant; and the demurrer was overruled on the ground that such was not the true construction of the statute, but that the jurisdiction was granted whenever the assignee was a necessary or proper party to such a suit and was a party, although other persons might be joined. While there are some dicta of the courts possibly sustaining the view of the statute contended for by the defendant's counsel in this respect, the evident purpose of the grant of jurisdiction, as well as the language used, clearly requires the other construction. The evident purpose of the enactment was to secure to assignees the right to have controversies between themselves, as assignees, and parties claiming adversely to them, determined in the federal courts. And this is equally an important right or privilege, if, from the nature of the controversy, there happens to be some other person who, as well as the assignee, is a necessary or proper party to the full determination of the same controversy. Nor is there, as it seems to me, the same reason for a restrictive construction of this act in this respect as existed with reference to the statutes giving jurisdiction to the federal courts on the ground of the citizenship of the parties.

The point chiefly urged in support of the present demurrer is that this is not a suit by a party claiming an adverse interest touching property or rights transferable to or vested in the assignee; that it is, in fact, a suit by a creditor claiming a lien on the property of the bankrupt to enforce that lien, and that no such suit will lie, because, pending the question of the discharge, no creditor can sue the bankrupt, and because no person but the assignee can sue to recover property fraudulently assigned by the bankrupt; and defendants' counsel cites and relies on the case of Glenny v. Langdon [94 U. S. 604] decided in the supreme court of the United States at the present term That case is conclusive that no creditor can, after the appointment of the assignee, maintain a suit to set aside a fraudulent assignment, even though the assignee refuses to proceed to recover the assigned property, vested in the assignee by force of the bankrupt law [14 Stat. 517] as the property assigned in fraud of creditors; that the creditors' remedy is in the bankrupt court, to sue or to procure his removal for misconduct. A creditor, even though he has a lien acquired before the bankruptcy, is not—it may be well conceded—a person claiming an adverse interest within the meaning of this section of the statute, and the rights of creditors in respect to such liens are otherwise carefully provided for in the statute; and certainly a suit against the bankrupt and his assignee, without leave of the bankrupt court, is not the remedy appointed for him by the statute. This, however, is not the case of a creditor suing to enforce a lien, although the ultimate result of the suit may be the satisfaction of a lien which the creditor has acquired. Upon the appointment of a receiver by authority of a court of competent jurisdiction, the title to the property of which he is appointed receiver vests in him in trust. Porter v. Williams, 9 N. Y. 142. While further proceedings may be necessary to actual manual possession of it, he has instantly something more than a lien; he has the title. See Sedgwick v.

Menck [Case No. 12,616]. This was, on the averments of the bill, the state of facts at the commencement of the bankruptcy proceedings, and it seems to me that the receiver is a person claiming an adverse interest within the meaning of the statute. It remains to consider whether the property in which he claims this interest is "property transferable to or vested in the assignee." The bill states a case of an assignment void for fraud in fact, or void by force of express statute; it is, therefore, not within the limitation of three months, which applies to the right of the assignee to avoid a transfer merely void as against the bankrupt law. But for the appointment of the receiver, therefore, the title to the property would have vested in the assignee in bankruptcy; and as the receiver's title is in trust for the satisfaction of a particular debt, and, as to any surplus, first for the creditors generally, and then for the debtors, there seems to be an equitable interest in the property which passed under the bankrupt law to the assignee. As the trust under which the receiver holds the property cannot be performed except by a sale of the property under decree of the court, all parties having an "interest therein to be affected by such decree," among whom is the assignee, are properly joined as defendants in the suit.

Demurrer overruled, with leave to answer on payment of costs.

[NOTE. The case was subsequently heard upon bill, answer, and proofs, and the bill was dismissed. 10 Fed. 101. An appeal was then taken to the circuit court, where the decree of the district court dismissing the bill was affirmed. 18 Fed. 636.]

OLNEY (UNITED STATES v.). See Case No. 15,918.

OLNEY (WHITNEY v.). See Case No. 17,-595.

Case No. 10,507.

OLSHAUSEN v. LEWIS.

[1 Biss. 419.][1]

Circuit Court, N. D. Illinois. Jan., 1864.

WHEN HOLDER OF DRAFT BOUND TO USE DILIGENCE—BILL OF EXCHANGE—EFFECT OF HOLDING.

1. If the maker of a draft had a well founded expectation that if presented within a reasonable time it would be honored, the holder must, in order to recover against him, use due diligence in presenting it, and give him notice of its dishonor.

2. The following instrument: "St. Louis, May 10, 1861. At sight pay to the order of Stilwell, Powell & Co., four thousand dollars, value received, and charge the same to the account of Lewis, Page & Co. To the Marine Bank of Chicago, Ill.,"—is a bill of exchange, and not a check.

3. It is payable in the current coin of the country, and not in depreciated bank notes.

4. Oral testimony is not competent to change its legal effect.

5. The holder having retained it at Chicago more than a month without presentation, and not having protested it until three weeks after that time, is guilty of such negligence that he cannot recover of the drawer.

The instrument upon which the action was brought was as follows: "St. Louis, Mo., May 10, 1861. At sight pay to the order of Stilwell, Powell & Co., four thousand dollars, value received, and charge the same to the account of Lewis, Page & Co. To the Marine Bank of Chicago, Ill."

On the same day on which the draft was drawn it passed into the hands of the plaintiffs by indorsement, and by them it was forwarded to Munn & Scott, of Chicago, with instructions to collect or convert into New York exchange, and remit proceeds. Munn & Scott did not present the draft at all, but kept it until June 13th, and then returned it to the plaintiffs. On the 19th of June it was sent by the plaintiffs to the Merchants' Savings Loan and Trust Company of Chicago, with instructions to present for payment. On the 24th, it was presented, and the Marine Bank tendered depreciated Illinois bank bills in satisfaction, which were refused, whereupon the draft was returned to St. Louis without protest. In the meantime, on or about May 18th, these Illinois bank bills had gone out of circulation. It was again sent to the loan and trust company for presentation, with instructions that, if payment in coin or current money were refused, the draft should be protested. It was presented the second time on the 6th of July. The bank refusing to pay in such funds, the draft was protested, and notice given to the defendants of its dishonor. The defendants claimed to be discharged from liability on the draft, on the ground "that due diligence was not used by the holders in presenting it to the bank for payment," and that "the draft was not protested, and notice given to the defendants of its first dishonor." The defendants, up to the time of the drawing this draft and its dishonor, were large depositors at the Marine Bank, and it appeared from the evidence, that their deposit account varied from $3,000 to $12,000; that they were men of undoubted responsibility, and that at the time this draft was drawn their credit was of the highest character, and such that a draft of this amount would have been paid by the bank, no matter what was the precise state of their account at the time. It appeared from the evidence, that at this time, the business in Chicago, and generally throughout this part of the country, was transacted in Illinois bank notes, a depreciated currency, and that there was a great deal of excitement upon the subject of the currency, and that the general tendency of its value was downwards; that the Marine Bank kept the accounts of their customers in the same way precisely that they would have kept them if

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

the currency had been sound and equivalent to gold and silver. They were in the habit of receiving special deposits, and where the currency of the country was left with them, it was placed to the credit of the depositor, and, unless special instructions were given, as a credit in so many dollars and cents. They kept the account, however, in such a way as to show the nature and character of the money that was deposited; and where gold was deposited, or Eastern bank notes, or bank notes of much greater value than Illinois bank notes, the bank held itself responsible to pay the depositor the equivalent. These defendants kept their account with the Marine Bank in the same way that all the rest of the accounts were kept; they deposited these Illinois bank notes, and were credited in the usual way, and the bank held itself responsible to the defendants for the payment of moneys similar, or bank notes similar in character to those which were deposited. It also was in evidence that if the defendants had drawn a draft or check upon the Marine Bank, payable in gold or in New York exchange, and so specified, if the bank had had the gold or New York exchange, it would have been paid. The evidence also showed that by a sort of understanding among the bankers and the business community, in order to make a check or draft payable in gold, it should be so specified upon its face, otherwise it was treated as payable in the currency of the community, Illinois bank notes. A suit was accordingly brought against the drawers by the holders to recover the amount of money specified in the draft.

Cornell & Norton, for plaintiffs.
Kales & Williams, for defendants.

DRUMMOND, District Judge (charging jury). The instrument upon which this suit is brought is, in its form, a bill of exchange, and is to be governed by the rules applying to such bills.

Its legal effect is that it is payable in money, in the current coin of the country, and the holder had the right to call upon the Marine Bank, not for depreciated bank notes, but for money, and, on its refusal, to hold the drawers. It is not competent to introduce any oral evidence to change the legal effect of this instrument.

The question then arises, whether these defendants had the right to draw upon the Marine Bank for this sum of money. If they had, secondly, whether due diligence has been used by the holders of the bill, in its presentment to the drawee.

It is contended on the part of the plaintiffs, that the defendants had no right to draw this draft, for the reason that it is a draft for the payment of $4,000 in good money, and that they had not at that time, or at the time when, in due course of business, it might be presented for payment, this sum in good money on deposit in the bank. I think the true rule on that subject is stated in Parsons on Bills of Exchange, that the drawer should have a reasonable expectation at the time he draws a draft that when it is presented for payment, proper diligence being used in relation to its presentment, it will be duly honored.

It is contended on the part of the defendants, that, under the conceded facts of this case, it is a question of law whether the defendants had a reasonable expectation that this draft would be paid, if presented within a proper time. If they had, then it was incumbent on the holders to present it within a reasonable time, using proper diligence, and, upon its non-payment upon presentation, to give notice to the drawers. Now the testimony upon which it is contended, on the part of the plaintiffs, that they had no reason to expect that this draft would be paid, is substantially, that the kind of money which was deposited was depreciated bank notes, and that, in the absence of any special statement upon the face of the draft, it would not, in point of fact, have been paid by the drawee, at any time after it was drawn. Independent of the usual mode of doing business, which has been detailed by the witnesses, it is also contended that there was an agreement between these defendants and the Marine Bank, that they should receive, on checks which they drew, the same kind of bills that they placed on deposit. There is no direct or positive evidence as to the signing of this agreement by the defendants. There is the evidence of two witnesses, that instructions were given by the officers of the bank, that all the customers of the bank should enter into such an agreement, and that no business should be done with them unless they did, and a notice was pasted in the bank-book of each customer to that effect, which notice has been introduced in evidence; and it is considered, on the part of the plaintiffs, that the bank-book of the defendants had a similar notice in it, because, from the testimony which has been adduced, that was the course of business, and notice has been given to the defendants to produce that bank-book. They have not done so, and the plaintiffs claim that the presumption in consequence of the non-production of this bank-book, and the other testimony in the case, is that this book had a similar notice pasted in it. I shall leave it as a question of fact to be found by the jury, whether there was this agreement between the Marine Bank and the defendants.

A sufficient consideration for such agreement would be the fact that the Marine Bank agreed to receive these notes on deposit.

It is contended by the defendants, however, that this agreement was done away with by mutual consent before this bill or draft was presented. This would not, how-

ever, avoid the effect of the evidence, as to what existed in the minds of the defendants at the time they drew this draft. The question is as to the expectation there was in the minds of the defendants at the time they drew this draft, as to its being paid on presentation. If they had no reasonable expectation, at the time they drew this draft, that it would be paid, if presented within a reasonable time, then they are not entitled to a demand and notice of non-payment; because in such cases it is in the nature of a fraud upon the party with whom the draft was negotiated; but if you shall believe from the evidence, that they had reasonable ground to believe or to suppose that this draft would be paid, then they are entitled to the exercise of due diligence on the part of the holder, and if due diligence has not been used, then the plaintiffs cannot recover from the defendants.

The holders of this draft, Munn & Scott, had no right, upon a supposition existing in their own mind, to decline to present it. There can be no absolute rule laid down with reference to the time in which a bill of exchange shall be presented to the drawee; that depends upon the circumstances of the case. But where the facts are undisputed, as in this case, it becomes a question of law. This draft might have been sent to any part of the world; it might have been sent to New York or California, or it might have been sent to the East Indies; it might not have reached the Marine Bank for a year, or eighteen months or more, and still it might be it would have been, as against the drawer, presented in reasonable time. All that the law requires is reasonable diligence under the circumstances of the case; but here the draft was sent immediately to the place where it was payable, and where the drawee was; it was retained here a whole month, returned to St. Louis, returned again to Chicago, and presented to the Marine Bank for payment, no notice being given to the defendants of non-payment; and not actually protested and notice given to the defendants till the 6th of July. Under the circumstances of the case, I feel constrained to say that due diligence was not used by the holders in the presentation of the draft; and, if the other fact existed, to which I have already so often called your attention, that there was a reasonable expectation that the draft would be paid, then, there not being due diligence used by the holders, the defendants cannot be held responsible on the draft.

The jury found for the defendants.

For rules as to presentment and notice, consult 3 Kent, Comm. 104 et seq.; 1 Pars. Cont. 268; Story, Bills, § 324.

OLUF, The (WESTHOFF v.). See Case No. 17,449.

OMAHA (KOUNTZE v.). See Case No. 7,928.

OMAHA (OLIVER v.). See Case No. 10,499

OMAHA (SERROT v.). See Case No. 12,673

Case No. 10,507a.

In re O'MALLEY et al.[1]

District Court, S. D. New York. Dec. 7, 1879.

BANKRUPTCY — FORECLOSURE OF MORTGAGES IN STATE COURT—INJUNCTION—JURISDICTION—CONTEMPT.

[1. Where a suit to foreclose a mortgage on property belonging to the bankrupt's estate has been instituted in a state court after the commencement of the bankruptcy proceedings, and has subsequently been stayed by order of the bankruptcy court, such stay will be dissolved on its being made to appear that the mortgaged property is clearly of no value beyond the admitted incumbrances thereon.]

[2. It is at least doubtful whether a state court has not concurrent jurisdiction with the federal bankruptcy court of suits to foreclose mortgages on property belonging to the bankrupt's estate, and this doubt is sufficient to dispose of any suggestion of contempt in instituting such a suit in a state court after the commencement of the bankruptcy proceedings.]

[In the matter of William O'Malley and others, bankrupts.]

Hall, Brown & Westcott, for motion.

W. G. Palmer, for assignees.

CHOATE, District Judge. This is a motion by a mortgagee of leasehold property belonging to the bankrupt's estate to dissolve a stay of proceedings in a suit commenced in a state court to foreclose the mortgage since the commencement of the bankruptcy proceedings. There is a second mortgage on the property subsequent to this mortgage and there are also arrears of taxes and rent due to the bankrupt's lessor, who threatens dispossession proceedings. The moving papers show that the bankrupt's estate has no valuable interest in the property, the admitted liens being equal to its value, and this is not denied by the assignees. The assignees, however, claim that the motion should be denied, solely on the ground that no state court had jurisdiction to foreclose a mortgage on any property, the title to which has vested in the assignee by a suit commenced after the filing of the petition in bankruptcy; that the commencement of such a suit without the permission of the bankrupt court is a contempt of the bankrupt court; and he further claims that the appointment of a receiver of the rents and profits pending the suit, which is part of the relief sought for in the state court, is inconsistent with the possession of the property by the assignee as the officer of this court; and that such receivership should at any rate be enjoined as an improper interference with property in the custody of this court.

The case, as presented on the affidavits, clearly makes it just and right that the

[1] [Not previously reported.]

mortgagee should be allowed to enforce his mortgage. While this court ordinarily stays the foreclosure of mortgages temporarily, and until the assignee can have a reasonable time to exercise the power given to him by the bankrupt law to make a sale subject to the incumbrances there, or, if it can be sold for a sum exceeding those incumbrances, to enable him to sell it free from the incumbrances, yet, where the property is clearly of no value beyond the admitted incumbrances, or the assignee declines to exercise these powers, or after a reasonable time is unable to effect a sale, there is no reason for refusing permission to mortgagees to enforce their claims on the property, under conditions which will protect the other creditors from excessive and unreasonable claims for deficiencies against the bankrupt's estate. To deny them this right by enjoining their proceedings to that end would be an improper interference with their rights without any benefit to the bankrupt's estate, and cannot be justified under any of the powers given to this court by the bankrupt law.

While the view has certainly been entertained that the jurisdiction given by the bankrupt law to the circuit and district courts of the United States under section 4979, of suits in equity brought by an assignee in bankruptcy against any person claiming an adverse interest or owing any debt to such bankrupt, or by any such person against an assignee touching any property or rights of the bankrupt, transferable to or vested in such assignee, is exclusive (In re Brinkman [Case No. 1,884]; Phelps v. Sellick [Id. 11,079], and cases cited), yet the point must be considered at least doubtful, in view of a recent opinion of the supreme court, although the case before the court was one where the jurisdiction of the state court had attached before the bankruptcy. Eyster v. Gaff [91 U. S.] 521. Justice Miller in his opinion (page 525) says, referring apparently to this very section: "The debtor of a bankrupt or the man who contests the right to real and personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee on the circuit and district courts of the United States, it is concurrent with and does not divest that of the state courts." And while the bankrupt court has exercised the right of staying suits of foreclosure in the state court, so far as is necessary to secure to the assignee the exercise of his powers to sell the property as allowed by the bankruptcy law, yet it has also assumed the right to permit such foreclosures to go on if the bankrupt's estate has no real interest in the property by reason of its being encumbered beyond its value. Phelps v. Sellick [Case No. 11,079].

As to whether the mortgagee ought to sue in the state court or the federal court, that is a matter for him to determine for himself. If he is willing to take the risk of the objection that the state court's judgment may be challenged for want of jurisdiction, I do not perceive any reason why he should not be allowed to sue there if he prefers. The removal of the injunction, or even the express consent of this court to his commencing or continuing a suit of foreclosure, may not remove the difficulty, if it exists, but it will do away with the suggestion that his proceedings are in contempt of this court.

As to the proposed appointment of a receiver, it is evident that the rents of the property should be applied to paying taxes and ground rent, and for the security of the mortgagees if, as seems to be the case, their security is inadequate. If the sale of the property were to be further restrained by this court, the mortgagees could have the same relief in this court by having the rents kept as a distinct fund for their security or applied to payment of paramount liens pending the sale. As the course which the assignees have taken is virtually the abandonment of any purpose or intention to attempt to obtain anything from this property for the benefit of the estate, I see no reason why the mortgagees should be prevented from applying to the state court for the appointment of a receiver.

Stay vacated except as to prosecuting the suit to a personal judgment against the bankrupt.

OMALLY (BARNS v.). See Case No. 1,035.

Case No. 10,508.

OMALY v. SWAN.

[3 Mason, 474.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1824.

FORECLOSURE OF MORTGAGE—PROCEEDINGS FOR DEFICIENCY.

After a foreclosure by a mortgagee he is still entitled to recover the balance of the debt due him beyond the value of the mortgaged premises at the time of the foreclosure.

[Cited in brief in Bliss v. Weil, 14 Wis. 39. Cited in Hunt v. Stiles, 10 N. H. 469; Porter v. Pillsbury, 36 Me. 284.]

Assumpsit [by Michael Omaly against James Swan] to recover the amount of a simple contract debt, due to the plaintiff, for which a mortgage had been given as collateral security. The plaintiff had foreclosed the mortgage and taken possession of the mortgaged premises; and now sought to recover the balance of the debt, deducting

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

the value of the mortgaged premises at the time of the foreclosure.

W. Sullivan, for defendant, admitted that the only question in the cause was, whether the plaintiff was entitled by law to recover such balance.

F. C. Gray, for plaintiff, stated, that the point had been repeatedly decided in favour of the right of the plaintiff.

STORY, Circuit Justice. This question has been long since settled by the local law. In Amory v. Fairbanks, 3 Mass. 562, the supreme court of this state affirmed the right; and this court afterwards, in Hatch v. White [Case No. 6,209], recognised the same doctrine. It is too late now to controvert it. Judgment for the plaintiff.

Case No. 10,509.

In re O'MARA.

[4 Biss. 506.] [1]

District Court, N. D. Illinois. Oct., 1868.

ARREST OF BANKRUPT UNDER PROCESS FROM STATE COURT.

Where a bankrupt is under arrest under process from a state court, he should make application to that court, before coming into the court of bankruptcy to obtain his release. This practice is less likely to produce conflict of jurisdiction.

In bankruptcy. Motion to discharge the bankrupt [Michael O'Mara] from arrest on ca. sa. issued from the circuit court of Cook county.

DRUMMOND, District Judge. I do not at present feel inclined to make an order in the case. I wish, in all cases, to avoid a conflict of jurisdiction. Where a man is arrested under the authority of a state court, the application should in the first instance be made in the state court for his discharge, not only on grounds that the state law will warrant, but on the ground that the bankrupt law authorizes his discharge. It is not necessary that the party should apply here. I suppose that the bankrupt law applies to all courts. I do not like to have any conflict of jurisdiction. I was obliged in one instance, where an application was made to a state court and refused, to grant an order; but that was done by consent when the court intimated an opinion upon the subject. In re Wiggers [Case No. 17,623].

The question is suspended, so that the counsel may renew upon notice.

OMEARA (UNITED STATES v.). See Case No. 15,919.

OMEGA, The (The CAMBRIDGE v.). See Case No. 2,336.

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

Case No. 10,510.

The OMER.

[2 Hughes (1877) 96.] [1]

District Court, E. D. Virginia.

MARITIME LIENS—MATERIAL-MEN—PRIORITY.

An order is taken by material-men, on a consignee, for the freights which a vessel is to earn on a voyage. The order is given to satisfy them for a balance due. The vessel was disabled at sea from pursuing her voyage, put into Norfolk, and there other material-men refitted her. *Held*, that the order for freights to be earned only suspended the lien of the first material-men, which is good for the balance due them, but that the lien of the second material-men, who contributed "most immediately" to the completion of the voyage, must first be paid.

[Cited in The Frank G. Fowler, 8 Fed. 333; The Rapid Transit, 11 Fed. 335.]

In admiralty. The vessel is libelled by Staples, Peed & Co., of Norfolk, for supplies, etc., disbursed to her to the amount of $4,012.80, to enable her to complete her voyage from Baltimore to Demerara, after putting in at Norfolk. The house of Loud, Claridge & Co., of Baltimore, come in by petition, claiming to be paid $1,128.09; the balance of an account due them for disbursements in Baltimore, in part for fitting her out for said voyage. Both the libellants and the petitioners claim as material-men; the petitioners for disbursements in Baltimore, the libellants for disbursements in Norfolk, in fitting out the vessel for the same voyage; the latter after she had put in in distress. The Omer sailed in ballast from Baltimore to Norfolk, where she received from Peters & Reed a cargo for Demerara. In the charter-party executed here, an order was given by the master on the consignees to pay the freight which was to be earned to the order of Loud, Claridge & Co., who took this assignment of freight, as they now allege, as collateral security for their disbursements in Baltimore on which the $1,128.09 was due. After taking on her cargo here, the brig set sail for her destination. But she encountered bad weather when several days out from the Virginia capes, fell into distress, and was obliged to put back into Norfolk. She here was obliged to discharge her cargo, and the libellants, Staples, Peed & Co., were employed by her master, with knowledge of her owners and of Loud, Claridge & Co., to repair and refit and supply her for the renewal and completion of her voyage. The libellants took possession of her for that purpose, which they held until the libel was brought. The cost of the repairs and disbursements made by Staples, Peed & Co., under the eye and approval of the master, was $4,012.80, and is conceded to be just. It was found necessary to resort to a bottomry loan to meet these expenses, and advertisement was made in the Norfolk newspapers for this loan, which was to be upon the faith of the

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

vessel, freight, etc. Hearing of this proposed resort to a bottomry loan, Loud, Claridge & Co., through their agents here, Peters & Reed, notified Staples, Peed & Co. not to allow the freight to be included in the bottomry pledge. There is also evidence that a member of the house of Loud, Claridge & Co. stated on two or more occasions that he relied upon the assignment of freight which his house had received as above mentioned for the payment of his debt, and did not rely upon a lien upon the vessel, and regretted that he did not have such a lien. The master failed to obtain a bottomry loan, and the voyage of the brig to Demerara was not renewed, and was broken up in consequence. The owners in New Brunswick being unable to satisfy the claim of Staples, Peed & Co., this house libelled the vessel in this court, and the house of Loud, Claridge & Co. brought their petition here.

HUGHES, District Judge. No objection is made by either libellants or petitioners against the payment of some small seamen's claims and costs which have been satisfied by special decrees. It may also be stated that the vessel has, by consent, been sold by the marshal at auction for $3,100, Loud, Claridge & Co., being the purchasers. The vessel is alleged by the libellants to have brought only two-thirds of its value, but no exception has been taken to the sale. The petitioners claim to share as material-men pro rata in the fund to be distributed, with Staples, Peed & Co. I am to decide whether they are entitled to do so, or whether the whole fund shall go to Staples, Peed & Co.

It is insisted on the part of the latter that the petitioners in taking a particular lien for their claim by the assignment of the freight, waived and lost their general lien upon the vessel. I do not think so. The acceptance of an order for the freight suspended their right to resort to their general lien until the freight was paid or was lost. Their general lien remained and is still good. It is further insisted by the libellants that their claim is superior to that of Loud, Claridge & Co., because they contributed "most immediately" to the completion of the voyage. It cannot be questioned that, as a general rule, this latter principle is a good one. It is certainly good in this case. They had possession of the vessel on which they had disbursed the amount for which they libel her. By right of that possession and of the primary lien which they had for the disbursement, they could have enforced the payment to themselves of their claim, before she could have been released under the bottomry bond for which advertisement was made. They brought their libel to enforce the lien which they held by virtue of their possession, and by virtue of having contributed last to fitting the vessel for the voyage. Even if Loud, Claridge & Co. had taken a bottomry bond for their claim when the vessel was in Baltimore, yet Staples, Peed & Co.'s lien for their subsequent disbursements would have been good against such a bond. See The Jerusalem [Case No. 7,294]. The case of The Paragon [Id. 10,708], is to the same effect, Judge Ware expressly holding that among materialmen, the one contributing "most immediately," that is to say, at the latest stage of the voyage, to enable the vessel to complete it, has preference over those who contributed at an earlier stage of the voyage.

Staples, Peed & Co. may have a decree for the whole fund left after satisfying costs and seamen's wages.

Case No. 10,510a.

ONDERDONK v. FANNING et al.

[5 Ban. & A. 562.][1]

Circuit Court, E. D. New York. July, 1880.

PATENTS—PRELIMINARY INJUNCTION.

It appearing that the alleged infringing machine had been patented to the defendant since a former suit in which a preliminary injunction had been granted against him, but that the machine now made by him was not identical with the machine alleged to infringe in the former suit; and it further appearing that the complainant's patent had never been upheld on final hearing,—a motion for a preliminary injunction was denied.

[This was a bill in equity by Robert Onderdonk against John Fanning and others for damages for violation of rights under patent No. 217,519, for lemon squeezers. The patent in this case was originally issued to the defendant John Fanning, and by him assigned to his wife, Josephine Fanning, and to one Isaac Williams, a one-half interest to each. These assignees assigned the whole patent to the plaintiff. In a former action between the same parties as in this suit, a preliminary injunction was granted to the plaintiff. 4 Fed. 148. Subsequently he moved for an attachment to punish an alleged contempt of this injunction. This motion was denied, on the ground that the machine then manufactured by the defendant was not the same which had been adjudged an infringement of the plaintiff's patent, and was not clearly an infringement, so as to make the defendant liable for a contempt. 2 Fed. 568. In the meanwhile the defendant had procured a patent on his new manufacture. This suit is now brought by the plaintiff to restrain the manufacture of this last machine by the defendant. It is heard upon motion for a preliminary injunction for this purpose.]

Foster, Wentworth & Foster, for complainant.

Edwin H. Brown, for defendants.

BENEDICT, District Judge. This application for a preliminary injunction presents a different state of facts from that shown up-

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

on the similar motion made by the plaintiff in a former suit against this defendant. The machine here complained of is not identical with that involved in the former suit, and for the machine in question here the defendant has been granted a patent since the motion in the former suit. Under these circumstances, and in view of the fact that the validity of the plaintiff's patent has never been upheld at final hearing, I do not consider the case to be one calling for the issue of a preliminary injunction.

Motion denied.

[NOTE. At the final hearing the bill was dismissed on the ground that the defendants' squeezer was not an infringement of the plaintiff's patent. 9 Fed. 106.]

O'NEALE (BANK OF THE UNITED STATES v.). See Case No. 932.

Case No. 10,511.

O'NEAL v. BROWN.

[1 Cranch, C. C. 69.][1]

Circuit Court, District of Columbia. March Term, 1802.

EJECTMENT—DISTRICT OF COLUMBIA—CESSION BY MARYLAND—DEED OF TRUST OF ORIGINAL PROPRIETOR—RIGHT OF CESTUI QUE TRUST.

1. In ejectment for a lot in Washington, it is not necessary to show a grant from the state of Maryland. The act of cession by Maryland to the United States transferred to the United States all the right of the state of Maryland to the ungranted land in this part of the District of Columbia.

2. The deed of trust of the original proprietor cannot be set up against the cestui que trust.

3. By Acts Md. 1791, c. 45, § 2, and 1793, c. 58, the legal title vests in the cestui que use.

4. The commissioners were authorized to sell the public lots in Washington in April, 1797.

Ejectment for lot No. 10, in the square No. 78, in the city of Washington. The plaintiff [O'Neal's lessee] proved that in the year 1784, and from that time to the 20th of June, 1791, Benjamin Stoddert and James M. Lingan were and continued in peaceable and undisturbed possession of the land comprehended in the square No. 78, in their own right and claiming to be proprietors thereof in fee-simple. That on the said 20th of June, 1791, they being so in possession, conveyed the said land by deed duly executed to Thomas Beall of Georgetown, and John Mackall Gantt, in trust, among other things, to be laid out with other lands for a federal city, with such streets, squares, parcels, and lots as the president of the United States for the time being should approve; and that the said trustees should convey to the commissioners, for the time being, appointed by virtue of the act of congress [of March 3, 1791 (1 Stat. 214)], for establishing the temporary and permanent seat of the government of the United States, and their successors for the use of the United States, all the said streets and such of the said squares, parcels, and lots as the president should deem proper for the use of the United States. And as to the residue of the said lots, that a fair and equal division of them should be made, and that such as should be divided or allotted to the said proprietors, should be by the said trustees conveyed to the said proprietors; and that the said other lots should and might be sold at such times, in such manner, and on such terms as the president of the United States for the time being should direct; and that the said trustees should, on the order of the president, convey the lots so sold to the respective purchasers. The plaintiff also produced the order from the president of the United States to the commissioners, dated September 16, 1793, authorizing them to sell any of the last mentioned lots, at such times, in such manner, and on such terms as they should deem proper. The plaintiff also produced the acts of assembly of Maryland, 1791, c. 45, and 1793, c. 58, and the act of congress of the 6th of May, 1796 (1 Stat. 461). He also produced the record of the division of the square No. 78, between the said Stoddert and Lingan, and one Uriah Forrest, as original proprietors on one part, and the commissioners on the other, in which division the lot No. 10 was assigned or allotted to the public, and declared liable to be sold agreeably to the deed of trust. And lastly, he produced the certificate of the commissioners duly recorded, dated April 7th, 1797, in which they certify that the plaintiff's lessor had purchased the lot No. 10, for two hundred dollars, and acknowledged the payment of the whole purchase-money. Upon this title the plaintiff relies.

The defendant [Joel Brown] prayed the court to instruct the jury that the plaintiff has not made out a sufficient title to enable him by law to recover, and relies on two objections: 1st. That the plaintiff has not shown any grant from the lord proprietor, nor from the state of Maryland, nor from the United States. 2d. That the commissioner had no power to sell lots on the 7th of April, 1797; 1st, because the words in the deed of trust, "president of the United States, for the time being," mean the president of the United States at the time of the sale. But at the time of sale, Mr. Adams was president, and the orders produced were given by General Washington, when he was president. And 2d, because whatever powers of sale the commissioners might have had by virtue of those orders, were taken from them by the act of congress of May 6, 1796 (1 Stat. 461), respecting the loan, by which all the public unsold lots were rendered liable to indemnify the United States against their guaranty of that loan.

Mr. Mason, for plaintiff.

Mr. Gantt, for defendant.

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

THE COURT refused to give the instruction prayed by the defendant, and gave their reasons at length, the purport of which was—That if the land had not been granted by the lord proprietor, nor by the state of Maryland before the act of cession by the state of Maryland and the acceptance by congress, the right of the state passed to the United States by the cession and acceptance. And the sale made under the act of congress of 1796 was the first grant, and therefore good. That if Stoddert, Lingan and Forrest were lawfully seized, in 1784, and conveyed the land in trust, the deed of trust cannot be set up to defeat the title of cestui que trust. That the legislature of Maryland, in 1791 and 1793, had a right to legislate respecting private rights to the property, and were competent to enact in what mode the use of the property, the legal title to which was vested in the trustees, should be declared, and should pass. That when the right of cestui que use accrued the legal title, by virtue of the act of 1793, vested, and followed the use, in a manner analogous to the operation of the English statute of uses. That the question respecting the words "president for the time being," did not arise in the case, because the sale was made under the act of congress, of 1796. The plaintiff was not bound to show the authority given by the president to the commissioners to sell under that act, because it was not to be presumed to be in his power, and was not a matter of record.

These reasons are given from memory, which at this time (Oct. 27, 1805) may not be perfectly accurate.—W. C.

Case No. 10,512.

In re O'NEALE.

[6 N. B. R. (1873) 425.][1]

District Court, E. D. Virginia.

BANKRUPTCY—AMOUNT DUE BY BANKRUPT AS TRUSTEE.

A was residuary legatee of B, and took the real estate subject to the payment of a certain sum to C in trust for the benefit of three of B's children, to be paid at the expiration of three years from B's death. A enjoyed the possession of this real estate some thirty years, became insolvent, was adjudicated a bankrupt in January, eighteen hundred and seventy-one, and the estate in question was sold by his assignee. C did not receive the sum which was to have been paid to him by A according to the terms of the will. On the question of distribution the court held, that A was not an express or direct trustee, and that the statutory bar was a complete defence to any claim for the amount to have been paid to C as trustee.

In bankruptcy.

UNDERWOOD, District Judge. Thomas L. O'Neale, the ancestor of Albert G. O'Neale, died in eighteen hundred and thirty-five, leaving a last will and testament, by which he devised a large estate to his widow and children, giving to the former a life estate in certain real and personal property, including slaves. To the children, four in number, he gave, under various conditions, property of different kinds. After these bequests and by another clause of his will, he declared: "I give to Albert G. O'Neale the whole balance of my estate, embracing Lindsey Hall—subject to the payment of three thousand dollars to D. W. Pitt and B. D. Pitt, in trust for the support of my son Robert Johnson O'Neale and of my daughters Mary Lindsey Andrews and Sarah J. Jones, and their children, to be paid to the said trustees at the expiration of three years from my death." The will was duly probated in the proper county. On the death of the ancestor, Albert G. O'Neale went into possession of "Lindsey Hall" under the devise to him, and has continued to occupy it to the present time, a period of more than thirty years. Sarah J. Jones, now Sarah J. Dobyns, and Albert G. O'Neale have lived in the same neighborhood during all the period. O'Neale was a man of large wealth and undoubted responsibility until the close of the war, when he became insolvent and was adjudicated a bankrupt in June, eighteen hundred and seventy-one. His estate, Lindsey Hall, was sold by his assignee, and this controversy arises on the question as to how the proceeds of that sale should be distributed.

Sarah J. Dobyns claims a prior lien for part of the money bequest of three thousand dollars, which was to have been paid to the Pitts, for the use of herself and her children. One Baylor claims priority under a judgment recovered in April, eighteen hundred and seventy, for about two thousand three hundred dollars. Smith, as guardian, claims priority under a trust deed executed March twelfth, eighteen hundred and seventy, but not recorded until May tenth, eighteen hundred and seventy, for about two thousand three hundred dollars.

It is admitted that the bequest of three thousand dollars, if treated as a right of action in suit before a court of law, is barred, more than the longest period for bringing civil actions having elapsed since the debt became due. It is also admitted the courts of equity apply the analogies of common law limitations, and will not enforce stale demands, and that no new promise has been made nor any act done to take this case out of the statute of limitations, but the claimant, Dobyns, insists that this is a trust, and that trusts are not within the statute of limitations. This general proposition is also conceded, but Smith and Baylor reply that the rule "that the statute of limitations does not apply between trustee and cestui que trust" extends only to direct or express trustees, and does not apply as between a cestui que trust and an implied trustee. There is some conflict of testimony as to whether the charge of three thousand dollars on Lindsey Hall has not been paid, but it is not necessary to consider that question now, nor to determine whether the whole or every part of the be-

[1] [Reprinted by permission.]

quest, principal or interest, has been paid in fact to Mrs. Dobyns, or to her children, all of whom have been of age for many years, for in the view taken by the court the statutory bar is complete. It is manifest that O'Neale was not made a trustee for Mrs. Dobyns by the terms of his father's will. Pitts and Pitts were the persons in whom the trust was reposed. They were the direct trustees, made so by the act and choice of the devisor. If Albert G. O'Neale took the character of a trustee at all, it was that of an implied or resultant trustee. That character was imposed upon him either by operation of law or by matters of evidence. He was changed into a trustee, if he ever became one, by matters of evidence or construction of law. When did that relation first attach? Certainly not when he entered into possession of the property under the will, for he took the estate in his own right, nor could it attach for three years thereafter, because the charge did not become due until the expiration of that period. The answer to the question must be, that if he ever became trustee it was because Pitts and Pitts failed to act as trustees, and Mrs. Dobyns and himself dealt with the estate and with each other as though he was the trustee, but it is not material when or how he became trustee, if he took the character, not by the appointment of the will, but afterwards by matter of evidence or construction of law.

The distinction between direct and implied trustees is important, and not to be overlooked. The former enters, takes and holds the estate not in his own right, but in the right and for the benefit of another. It would be against conscience for such an one to claim, as against his cestui que trust, any title adverse to him, until by open and notorious act of disavowal the trust estate had been terminated. As between such a trustee and his cestui que trust no time runs, and the statute would not be a bar. But as between the implied trustee, he who has entered into possession of the property in his own right, and who holds for his own benefit, but whose title is subsequently by matter of evidence or construction of law, turned into that of a trustee for the use and benefit, in whole or in part, of another, time does run, and the statute of limitations does apply, and that, in the opinion of the court, is the precise relation in which Albert G. O'Neale and Mrs. Dobyns stand, if in fact he ever became her trustee at all. This distinction as to the rights of express or implied trustees under the statute of limitations, is not new in this country nor in England. It is laid down by Story (2 Story, Eq. Jur. § 1520b); Lewin, Trusts, § 774; Perry, Trusts, 778; Ellendorf v. Taylor, 10 Wheat. [23 U. S.] 168, 177; [Beaubien v. Beaubien] 23 How. [64 U. S.] 207; Decouche v. Savetier, 3 Johns. Ch. 190; Walker v. Walker, 16 Serg. & R. 379; Ang. Lim. §§ 471, 167, 178; Sheppard v. Turpin, 3 Grat. 394; Beaubien v. Beaubien, 23 How. [64 U. S.] 207; Kane v. Bloodgood, 7 Johns. Ch. 91, and very many other authorities.

The court is, therefore, of opinion that Albert G. O'Neale was not an express or direct trustee. That the statute of limitations does apply between Sarah J. Dobyns and Baylor and Smith, that this is, in fact, only a controversy between Dobyns, Baylor and Smith, rival lien holders and claimants to priority, and that both Baylor and Smith are entitled to priority over the claimant Dobyns. No opinion is, however, expressed at this time on the question of the relative rights of Baylor and Smith to priority of payment, but that question is left for future consideration.

Case No. 10,513.

ONEALE v. BEALL.

[2 Cranch, C. C. 569.][1]

Circuit Court, District of Columbia. May Term, 1825.

ACTION ON NOTE—STRIKING OUT NAMES OF INDORSERS.

In an action by the payee of a promissory note, the plaintiff has a right, at the trial, before offering the note in evidence, to strike out the names of the indorsers.

Assumpsit, by the payee against the maker of a promissory note. The note, when produced, had the name of the plaintiff and T. Cookendaffer indorsed in blank. The plaintiff, after the jury was sworn, struck out those names, before he offered the note in evidence.

Mr. Frost, for defendant, objected that the indorsements were evidence that the note had been negotiated and passed away, and that the plaintiff must show that he had taken it up and had paid it, and that his right of action was redintegrated; and cited Welsh v. Lindo, 7 Cranch [11 U. S.] 159.

Mr. Ashton, contra. 2 Phil. Ev. 11, note c, and the cases there cited, viz. Dugan v. U. S., 3 Wheat. [16 U. S.] 172; Clark v. Pigot, Salk. 126, pl. 4.

Verdict for the plaintiff, subject to the opinion of the court as to this objection.

THE COURT (nem. con.), after consideration, was of opinion that the plaintiff had a right to strike out the names of the indorsers, and overruled the objection.

Judgment for the plaintiff.

Case No. 10,514.

O'NEALE v. BROWN.

[1 Cranch, C. C. 79.][1]

Circuit Court, District of Columbia. March Term, 1802.

TRESPASS — DAMAGES FOR OBSTRUCTING VIEW BY FENCE—EVIDENCE OF POSSESSION.

1. In trespass the plaintiff cannot recover damages for erecting a fence and obstructing

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

his windows unless he was in possession at the time of erecting the fence.

2. A certificate in fee from the commissioners of Washington is not evidence of possession.

Trespass. The declaration stated that on the 25th of February, 1800, the plaintiff being in possession of part of lot No. 10, in square 78, in the city of Washington, the defendant entered with force and arms, &c., and having so entered, afterwards, to wit, on the 22d of August, 1801, erected a wooden fence thereon so as to obstruct the plaintiff's windows on lot No. 9, and other enormities, &c.

Mr. Gantt, for defendant, prayed the court to instruct the jury that the plaintiff ought not in this action to recover damages for erecting the fence and obstructing his windows, unless the plaintiff proves possession in himself at the time of the defendant's erecting the fence.

THE COURT gave the instruction as prayed. Because the plaintiff in the declaration has stated a disseisin by the defendant nineteen months before the erecting of the fence, and it is not laid with a continuando. The erecting of the fence therefore cannot be connected with the entry laid; and the plaintiff must prove a reëntry, or possession in himself after the first disseisin and before the erection of the fence.

Mr. Gantt then moved the court to instruct the jury that they could not give damages for the forcible entry laid in the declaration.

But THE COURT refused.

Mr. Woodward, for the plaintiff, then moved the court to instruct the jury, that they may give damages for erecting the fence, under the general allegation of other enormities, which the court also refused.

Mr. Woodward then moved the court to instruct the jury that the certificate in fee from the commissioners of the city to the plaintiff (which by the Act Md. 1793, c. 58, is equivalent to a deed of bargain and sale,) was evidence of the plaintiff's possession.

But THE COURT refused to give such instruction.

Case No. 10,515.

ONEALE v. CALDWELL et al.

[3 Cranch, C. C. 312.][1]

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

STATUTE OF FRAUDS — BY WHOM PLEADED — REDEMPTION FROM TAX SALE—"LEGAL REPRESENTATIVE" — POSSESSION GIVEN BY WRIT OF INJUNCTION.

1. The statute of frauds, which requires that a declaration of trust of lands should be in writing, can be pleaded only by him who has the legal estate, and is sought to be charged with the trust.

2. A purchaser, under a decree for the sale of the real estate for deficiency of personal estate, will be authorized by the court to redeem the property from a tax-sale, and will be allowed to deduct from the purchase-money, the amount paid for such redemption.

3. The purchaser under a decree of the court is the "legal representative" of the proprietor, who was chargeable with the tax, and is entitled, within two years after the tax-sale, to redeem the property under the first provision of the 10th section of the city charter of 1820, upon payment of the taxes and expenses of sale paid by the purchaser, with 10 per cent. per annum as interest thereon; and is not bound to pay for any improvements, nor for interest on taxes paid after the tax-sale.

[Cited in Smith v. Taylor, 2 Wash. St. 422, 27 Pac. 813.]

4. The word "reinstate" must be construed to apply as well to the "legal representative" of the proprietor charged with the tax, as to the proprietor himself.

5. A court of equity which decrees a sale of real estate has authority, in Washington county, to cause the purchaser under its decree to be put in possession by a writ of injunction, and if that be disobeyed by a writ of habere facias possessionem.

In this case, the court, as a court of equity, having issued an injunction commanding the defendants to deliver possession of the land to the purchaser, under its decree, &c., the following statement of the case, and reasons for the decision of the court, were drawn up, and communicated to the counsel of the parties, at their request, by CRANCH, Chief Judge.

This was a bill in chancery, filed 11th June, 1822, by William Oneale, in behalf of himself and other creditors of the estate of Alexander McCormick, deceased, praying for a sale of the real estate for defect of personal assets; and charging that certain deeds, made by the said Alexander McCormick to the defendant Timothy Caldwell, were without consideration, and that Caldwell only held as trustee for McCormick and his heirs; that some of the defendants are infants, and that Caldwell resides out of this district. All the defendants appeared by Mr. Swann, their solicitor, and, as to so much of the bill as seeks to subject the property, upon the ground that it was conveyed by McCormick to Caldwell in trust for the use of McCormick and his heirs, pleaded the statute of frauds in bar, namely, that no action shall be brought whereby to charge any person upon any contract for the sale of lands, &c., or any interest in the same, unless the agreement be in writing; (29, c. 2, cl. 3, §§ 3 and 4,) and they charged that neither the said Alexander McCormick, nor any person for him, ever made any contract or agreement in writing, for the making, or declaring, or executing any such trust as is alleged in the bill. That plea was filed 20th June, 1823, and not accompanied by any answer to the residue of the bill.

THE COURT overruled the plea, thinking that the declaration of trust required by the

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

statute, was a declaration to be made by Caldwell, and not a declaration by McCormick. Caldwell is the person sought to be charged by the trust, and the statute is a defence to him only. An averment that McCormick made no declaration of trust is an immaterial averment.

The plea being overruled, and the residue of the bill, (that is, the part not covered by the plea,) being taken for confessed, (2 Madd. Ch. Prac. 295,) THE COURT, on the 5th of December, 1826, decreed a sale of the property, which was made on the 14th of March, 1827. Robert Leckie purchased lots twenty-six, twenty-seven, and twenty-eight in square seven hundred and twenty-nine, and D. D. Arden purchased lots three, five, and six, in square eight hundred and thirty-six, which sales were confirmed by the court on the 14th of June, 1827.

On the 16th of June, 1827, Robert Leckie filed his petition, setting forth his purchase, and his compliance with the terms of sale, and that the defendants, the heirs of McCormick, refused to give him possession, and praying for the interposition of the court to put him in possession. Whereupon THE COURT, on the same day, ordered them to show cause on the last Monday of October, why Mr. Leckie should not be put into possession, provided a copy of the order should be served on them, one month before that day. This rule was enlarged to the 2d of November, and further to the 12th of May, 1828.

On the 15th of May, 1827, Mr. Leckie had filed another petition stating that before the sale made under the decree of this court, the property had been sold for taxes, and bought in by W. J. McCormick, one of the defendants; that the time for redemption had not expired, and praying that he might redeem and be allowed the amount out of his notes given for the purchase-money. That the defendant W. J. McCormick, administrator of the intestate, had assets, out of which he ought to have paid the taxes, but he suffered the lots to be sold, and bought them in, himself.

Upon this petition, THE COURT, on the 15th of May, 1827, ordered that upon Mr. Leckie's paying all the amount of taxes, and all costs and charges thereon, and filing a receipt for the same with the clerk of this court, and with the trustee, he should have a credit therefor on his first note.

On the 6th of June, 1828, the rule to show cause why Mr. Leckie should not be put into possession, came on to be heard, and was argued by Mr. Wallach and Mr. Barrell for Mr. Leckie, and by Mr. Swann for the defendants.

For the defendants it was alleged, that the decree was only for sale and conveyance, not for possession; that the court had no jurisdiction to order the marshal to give possession. That W. J. McCormick claims under the tax-sale, and that Mr. Leckie had only paid up the taxes and costs, with ten per cent. on the taxes due at the time of the tax-sale, and the taxes which had since accrued, and which had been paid by W. J. McCormick, but had not paid the ten per cent. interest upon $23.84 which was the amount of the taxes so paid by W. J. McCormick since the tax-sale; nor had Mr. Leckie paid him $120.41, expended by him for improvements made since the tax-sale and within the two years allowed for redemption. The sale for taxes was made on the 14th of June, 1825. The taxes and expenses, with ten per cent. per annum thereon, were paid by Leckie to the register of the city on the 13th of June, 1827. The defendant McCormick claims the property in his own right, and avers that he has a right to receive a deed from the mayor of the city, under the tax-sale, because Mr. Leckie had not paid the interest on the $23.84, and the $120.41 for improvements. The right of Mr. W. J. McCormick is placed by his counsel, upon the construction of the tenth section of the city charter of 1820, by which it is provided, "that if, within two years from the day of any such sale" &c. "the proprietor or proprietors of any property which shall have been so sold" (for taxes) "his, her, or their heirs, agents, or legal representatives, shall repay to such purchaser the moneys paid for the taxes and expenses as aforesaid, together with ten per cent. per annum, as interest thereon, or make a tender thereof, or shall deposit the same in the hands of the mayor of the city or other officer of the corporation appointed to receive the same, for the use of such purchaser," &c., "he, she, or they, shall be reinstated in his, her, or their original right and title as if no such sale had been made." And provided also, "that minors, mortgagees, and others having equitable interests in real property which shall be sold for taxes as aforesaid, shall be allowed one year after such minor's coming to, or being of, full age; or after such mortgagees, or others having equitable interests, obtaining possession of, or a decree for the sale of, such property, to redeem the property so sold, from the purchaser or purchasers, his, her, or their assigns, on paying the amount of purchase-money so paid therefor, with ten per cent. interest thereon as aforesaid, and all the taxes which have been paid thereon by the purchaser or his assignees, between the day of sale and the period of such redemption with ten per cent. interest on the amount of such taxes; and also the full value of the improvements which may have been made or erected on such property by the purchaser or his assigns while the same was in his or her possession." It is contended that Mr. Leckie could not redeem under the first of those provisos because he was not the proprietor at the time of the tax-sale, nor the "legal representative" of such proprietor; and that the only effect of redemption is to reinstate the proprietor, his

heir or legal representative in his original right and title as if no such sale had been made; and therefore if Mr. Leckie can redeem at all, it must be under the second proviso in favor of minors, mortgagees, and others having equitable interests; and before he can redeem under that clause, he must pay the interest upon the $23.84 paid by Mr. McCormick for taxes accruing since the tax-sale; and the $120.41 for improvements made while the property was in his possession.

It seemed, however, to the court, that the second proviso is cumulative, not exclusive. That it was meant to give to minors, &c., an additional privilege, not to prevent them from redeeming under the first proviso. It was intended that if, by reason of their minority, or by being mortgagees not in possession, or by having equitable interests only, they should be prevented from redeeming within the two years under the first proviso, they might redeem after the expiration of the two years, as soon as their disability should be removed. The second proviso does not prevent a minor, or mortgagee, &c., from redeeming under the first. If Mr. Leckie can redeem at all, it must be under the first proviso; for he is not a minor, nor a mortgagee, nor a person having an equitable interest. By the decree of the court the legal title was sold. Mr. Leckie became the purchaser, and might maintain his action of ejectment. He was the "legal representative" of the proprietor within the meaning of the first proviso. The tax-sale does not deprive the proprietor of his legal estate. The freehold or seisin in fact and in law, remain in him until the expiration of the two years allowed for redemption. Until that time, the purchaser has no title at law or in equity. It is only an inchoate estate; a contingent interest; an incumbrance to the extent of the taxes, and expenses of sale. If the proprietor, within the two years, sell the property, the vendee is either as the proprietor, or as the legal representative of the proprietor, entitled to redeem. It cannot be intended, by the act, that upon repayment to the purchaser at the tax-sale, of the taxes, interest, and expenses by the vendee of the original proprietor, the vendor, (the original proprietor,) should be reinstated in his original title, so as to defeat his intermediate sale; for the law authorizes the "legal representative" of the original proprietor to redeem, and declares that he (the legal representative) shall be reinstated in his original right and title, "as if no such" (tax) "sale had been made." It is evident that the intention of the law was that the right acquired by the purchaser at the tax-sale by paying into the city treasury the taxes and expenses of sale, should become void by the repayment, within the two years, of the taxes, interest, and expenses, by any person claiming title to the lot sold; so that the title should remain just as it would have been, if no sale had been made. The word "reinstate," it is true, does not, with strict accuracy apply to a person who has purchased the right of the original proprietor after the tax-sale; yet, as the law says that the legal representative of the proprietor shall be reinstated in his original right, it is clear that the legislature meant to vest in the legal representative, all the right which would have been reinvested in the proprietor, if the redemption-money had been paid by him, instead of his legal representative; and that they did not intend to restrict the word "reinstated" to its literal meaning; for if they did, the legal representative could, in no case be benefited under the act, by the redemption. The literal meaning of the word "reinstate" would confine the redemption to him in whom the title was at the time of the tax-sale, although the redemption-money were paid by his vendee. The legal representative is to have the same right and title, after the redemption, as he would have had if no such tax-sale had been made. This is the clear meaning of the act; and the word "reinstated" must be construed consistently with, and cannot control that meaning.

The court of chancery had authority to decree a sale of the lots. It had as full power to order the sale as Caldwell, the trustee, and McCormick, the cestui que trust, if he had been alive, would have had. A sale under the decree transferred the legal estate as completely, as if it had been conveyed by them. Like the title under a sheriff's sale, by fieri facias, the title under the decree passes by the sale, without any deed of conveyance. The sale conveyed all the title of all the parties to the suit. Mr. Leckie, the purchaser at that sale, was then the legal representative of the proprietor, within the meaning of the first proviso in the tenth section of the charter, and had (especially by the leave and order of the court,) a right to redeem. If he had a right to redeem, the redemption enured to his benefit by the express words of the proviso. I have said that the privileges allowed to minors, mortgagees, &c., by the second proviso of that section, are cumulative to those allowed by the first proviso. This, I think, is apparent from the reason of the case, and from the words of the proviso. It is not reasonable to suppose that the legislature meant to put infants in a worse situation than adults. Such a supposition would be contrary to the spirit of the common law, and the whole tenor of legislation; and no reason can be given why they should not be allowed to redeem within the two years, as well as adults. If they should redeem within the two years, they would not be obliged to pay for any improvements; not only because the law expressly authorizes redemption upon the repayment of the taxes and expenses and ten per cent. interest only, but because the purchaser under such tax-sale is not presumed nor permitted, by virtue of the sale, to take possession of the property, nor had he any legal title thereto; so that if,

before the expiration of the two years, he should by any means obtain possession and make improvements, he would make them at his own peril. But if no redemption be made within the two years, and the purchaser at the tax-sale pay up the balance of the purchase-money and obtain a deed, and make improvements, then it is reasonable that any person, who is by law permitted to redeem after the two years, should pay for any improvements which the purchaser should have made after the expiration of the two years, and after his title had become complete at law; or, in the words of the second proviso, "while the same was in his possession;" the legislature not having contemplated that he could obtain the possession until the two years should have expired. By the words of this proviso, the minor coming to redeem must not only pay the taxes and expenses, and ten per cent. interest thereon, but must pay the amount of purchase-money so paid for, with ten per cent. interest thereon, and all the taxes that have been paid thereon by the purchaser, or his assigns, between the day of sale and the period of redemption, with ten per cent. interest on the amount of such taxes, and also the full value of the improvements which may have been made or erected on such property by the purchaser, or his assigns, while the same was in his or their possession. The person, who redeems under the second proviso, must pay the purchase-money so paid therefor. Until the expiration of the two years, nothing is to be paid by the purchaser but the taxes and expenses of sale. The purchase-money, as such, is not to be paid until the two years have elapsed. "The purchase-money so paid therefor" must, therefore, include not only the taxes and expenses of sale, paid at the time of the sale, but the residue of the purchase-money paid after the two years. This shows that the second proviso only applies to such as come to redeem after the expiration of the two years. A proprietor who seeks to redeem within the two years, therefore, cannot be at all affected by the second proviso, and consequently cannot, under that proviso, be obliged to pay for any improvements, nor for the interest upon the taxes paid by the purchaser after the sale. The non-payment by Mr. Leckie for those improvements and that interest, therefore, is no reason why he should not be put into possession of the property which he has purchased.

But it is said that the decree of the court is for the sale and conveyance of the property only, not for the possession; and that the defendants cannot be in contempt for not delivering up the possession.

THE COURT, however, was of opinion that its power to decree a sale of the property included a power to compel all the parties to submit to such decree, and to carry it into effect; and on the 6th of June, 1828, an injunction was issued by the court, commanding the defendants and all other persons to deliver the possession to Mr. Leckie. This injunction having been served and disobeyed, and it having been suggested that Mrs. McCormick, the widow of the intestate, was entitled to dower, a commission was issued, by order of the court and consent of parties, on the 14th of June, 1828, to assign her dower, which was returned executed; and the report of the commissioners assigning her dower was, on the 21st of June, 1828, confirmed by the court; and, upon the authority of the case of Garretson v. Cole, 1 Har. & J. 389, a writ of habere facias possessionem was ordered, agreeably to the form adopted by the chancellor in that case; which is not exactly the form of the common-law writ, but was framed by the chancellor to suit the occasion. See Act Md. 1785, c. 72, § 27.

ONEALE (LONG v.). See Case No. 8,481.

ONEALE (SEMMES v.). See Case No. 12,654.

O'NEALE (THORNTON v.). See Case No. 13,999.

O'NEALE (UNITED STATES v.). See Case No. 15,920.

Case No. 10,516.

O'NEALE v. WILLIS.

[2 Cranch, C. C. 108.] [1]

Circuit Court, District of Columbia. July Term, 1809.

WITNESS—FREEDMAN—COMPETENCY.

Quære, whether a free colored man is a competent witness in a cause between white persons.

Assault and battery, by beating the plaintiff's slave. A free colored man was offered by the plaintiff as a witness.

THE COURT was divided as to his admission.

CRANCH, Chief Judge, was in favor of admitting him, upon the authority of U. S. v. Mullany [Case No. 15,832], in this court, at July term, 1809.

THRUSTON, Circuit Judge, contra. The witness was not sworn. A juror was withdrawn by consent.

Case No. 10,517.

ONE ANCHOR AND CHAIN.

[2 Lowell, 549; [2] 11 Am. Law Rev. 615.]

District Court, D. Massachusetts. Feb., 1877.

SALVAGE.

A steamship lost her anchor, at night, in a roadstead within the limits of the harbor of Boston, and a wrecker, knowing the ownership of the vessel, and that the owners were ready to contract for the recovery of the an-

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

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

chor, went in search of it, and succeeded in finding but was unable to raise it, when another wrecker, employed by the owners, came to the spot, and offered him twenty-five dollars for what he had done; and, when that offer was rejected, offered the use of a steam winch for raising the anchor. The first wrecker expended money and time in recovering the anchor, and refused a tender of fifty dollars. *Held*, that he should have twenty-five dollars, without costs.

The steamship Palestine, in coming to anchor inside of Boston light, at night, on Saturday, Jan. 6, 1876, lost an anchor and chain. On the following Monday, Francis H. Caverly, one of the libellants, master of the wrecking schooner Plover, who now joins his crew with him in this proceeding, applied to the pilot who had brought in the steamship to give him the range of the place where the anchor and chain were lost. The pilot replied that he supposed that the agents of the ship, Warren & Co., of Boston, were negotiating for the recovery of the property, and if Captain Caverly would bring an order from them, he would give him the information. Without seeing the agents, Captain Caverly went down with his vessel to the place he supposed to be that of the loss, and succeeded in finding the end of the cable. While he was trying to raise the anchor, which was very heavy and was fast in the clay, a wrecker came down who had been engaged by the agents of the ship, upon the terms that he should have twenty-five dollars if unsuccessful, and fifty dollars if he brought up the anchor and chain. This wrecker had a steam winch, and offered the libellant, Caverly, who was not provided with such an apparatus, to let him have the use of it; he also offered to buy out the libellants. Both offers were rejected, and this wrecker went back to Boston. Caverly found that he could not raise the anchor, and went to town and hired a wrecker who had the necessary means, and who had been an unsuccessful bidder for the contract, to come and raise the anchor, for forty dollars, which he did. The claimants tendered the libellant fifty dollars, which he refused.

J. B. Richardson, for libellants.

M. Storey, for claimants.

LOWELL, District Judge. There seems to be an unwritten law in the harbor of Boston, that whoever first obtains possession of a lost anchor holds it against all the world until his salvage is paid. Such a usage cannot stand the examination of the courts. This anchor and chain were not derelict in any proper sense. Their owners were known to the master of the Plover, and it was known that they had the hope and reasonable expectation of recovering it. This libellant might have been a bidder for the contract, but he has no right to make his bid with one end of the cable in his possession. When the contractor came down and was prepared to offer him twenty-five dollars, which represented the full amount of trouble which the libellants had saved him, they should have accepted the offer.

They were likewise bound to accept the offer of his steam winch, their own appliances being inadequate, by which they would have saved a day and a large expense. The net result of these exertions is that the true and known owners of the property have met with delay, trouble, and the expenses of a lawsuit, all growing out of a mistaken notion that possession of another man's property gives the possessor a right to deal with it as he pleases.

The cases of ships or goods picked up at sea, in which there can be no reasonable ground to believe that the owner would ever have seen them again if the salvor had not happened to find them, have no application to an anchor and chain lost in a known spot within the limits of the port where the vessel is lying.

Considering that this is the first case of the kind, I shall allow the libellants the twenty-five dollars, without costs; though, in the next case of the kind, salvage will probably be refused. Decree accordingly.

ONE BARREL OF WHISKEY (UNITED STATES v.). See Case No. 15,921.

ONE CASE (UNITED STATES v.). See Case No. 15,922.

Case No. 10,518.

ONE CASE CASHMERE SHAWLS v. UNITED STATES.

[See Case No. 15,923.]

ONE CASE OF CASHMERE SHAWLS (UNITED STATES v.). See Case No. 15,-923.

ONE CASE OF HAIR PENCILS (UNITED STATES v.). See Case No. 15,924.

ONE CASE OF SILK (UNITED STATES v.). See Case No. 15,925.

ONE CASE OF SPARKLING WINE (UNITED STATES v.). See Case No. 14,614.

ONE CASE OF STEREOSCOPIC SLIDES (UNITED STATES v.). See Case No. 15,-927.

ONE CASK OIL (LEARS v.). See Case No. 8,161a.

ONE COPPER STILL (UNITED STATES v.). See Case No. 15,928.

ONE DISTILLERY (UNITED STATES v.). See Cases Nos. 15,929 and 15,930.

ONE HALF BARREL BRANDY (UNITED STATES v.). See Case No. 15,931.

ONE HORSE (UNITED STATES v.). See Case No. 15,932.

Case No. 10,519.

ONE HUNDRED AND EIGHTEEN STICKS OF TIMBER.

[10 Ben. 86.] [1]

District Court, E. D. New York. Aug., 1878.

CHARTER — FREIGHT AND DEMURRAGE — LIEN — CHANGE OF ACTION IN REM TO ACTION IN PERSONAM.

1. The master of a vessel filed a libel against the cargo, to recover freight and demurrage claimed under a charter and bill of lading. The consignee of the cargo, who had sold the cargo and had no interest in it, intervened and gave bonds for the cargo when it was seized under the process. The cargo had been delivered to the purchaser without notice of any claim of lien for freight and after the consignee had signed an agreement agreeing to pay $150 demurrage, and the consignee in his answer admitted that he was liable for the amount of freight due, but disputed the amount claimed by the vessel. The charter provided that freight was to be paid on the cargo, which consisted of lumber and timber, at so much "per M. inch board measure:" *Held*, that the lien of the vessel on the cargo had been lost.

2. As the consignee, who was the only party respondent before the court, was the party really liable to pay what was due, the court would turn the proceeding into an action in personam, and give a decree against him for the amount of the freight due, according to the charter, and the $150 demurrage, which he had agreed to pay, but without interest or costs.

[Distinguished in The Monte A., 12 Fed. 333.]

3. The meaning of the charter was, that all the timber carried was to pay freight, except only the butts of sticks where the ends were not square.

A cargo of lumber and timber was brought from Port Royal, S. C., to New York, under a charter party, and a bill of lading which specified 118 sticks of timber, amounting to 171,206 feet, besides plank and resawed lumber, at $7.50 per M. freight for the timber and $7.00 per M. freight for the plank and lumber. On arrival the master informed the consignee that there was a claim of $150 for demurrage at Port Royal, and requested an advance on the freight. The consignee advanced $500, and also signed the following agreement:

"New York, Oct. 9, 1876. I hereby agree to become responsible to the captain and owners of Schr. A. G. Ireland, to the amount of $150, and to retain all the balance in my hands rec'd from sale of said schr's cargo after freight, com's., &c., are paid, subject to an attachment for demurrage."

And a further advance of $150 was also made, and the cargo was discharged. The inspector who measured the 118 sticks of timber reported 160,212 feet measurement; and the consignee offered to pay freight at the rate of $7.50 for that amount, and for the rest of the cargo at the rate and measure in the bill of lading, less the $650 advanced, but refused to pay demurrage. The cargo has been sold by the consignee and was taken away by the buyer as fast as discharged. The master libelled the cargo on the charter party for his freight and demurrage, and the consignee appeared as claimant of the cargo, and gave a stipulation for its value.

D. & T. McMahon, for libellant.
John E. Risley, for claimant.

BENEDICT, District Judge. This action is brought to enforce a lien against a cargo of timber, for freight and demurrage, due upon a charter party. The existence of the lien is denied by the claimants. The evidence shows that after the cargo arrived at the port of delivery, it was sold by the person to whom it had been consigned and who is the claimant in this action. After this sale had been effected, the timber was discharged from the vessel, and as fast as landed it was taken by the buyer and removed to his premises, where, in point of fact, a part of it had already been sawed when the libel herein was filed.

It further appears that the master and a part owner of the vessel were informed before the cargo was landed of the consignee's intention to sell the timber, and promised not to give the buyer notice of any claim upon it, lest thereby the sale should be broken up.

It still further appears that an agreement was come to between the master and owner of the vessel and the consignee of the cargo as to the amount of the demurrage due, in which agreement not only was there no mention of an intention to claim a lien upon the cargo, but a sale of the cargo and a receipt of the proceeds by the consignee was plainly contemplated.

These significant facts are inconsistent with the idea that it was intended to look to the cargo after its landing for either freight or demurrage. The only evidence pointing to an opposite conclusion is that respecting the remark made at the close of the interview at which the agreement as to the demurrage was made. This conversation is denied by the consignee, but if it occurred as claimed by the libellant, it is not inconsistent with the fact, clearly proved, that the intention of the master and owner was to permit the consignee to sell the cargo and receive the proceeds and to withhold from the buyer the fact that the freight and demurrage had not been paid. A delivery of cargo by the vessel to a third party who has purchased the same and agreed to pay the consignee therefor, with the knowledge of the shipmaster, who has intentionally withheld from the buyer information of any intention to hold the cargo for the freight, in case the freight should not be paid by the consignee, amounts to a waiver of the lien for freight.

I am therefore of the opinion that the libellant has now no lien for freight upon

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

the cargo proceeded against. But in this case, it appears from the record, that the party before the court, as claimant of the cargo, is not the person who purchased the timber, and to whom it was delivered from the vessel, but the consignee—who, as now appears, had no interest in the cargo at the time it was seized, but who has here intervened without objection taken by the libellants, and has filed his own stipulation for value—so that any decree rendered in this cause must, of necessity, be made against the consignee. The party thus before the court was knowing to all the facts attending the carriage and delivery of the cargo, and in his answer admits himself to be liable for the freight due upon the charter party. The question, then, is presented whether it is not permissible in a court of admiralty to treat this action as an action in personam against the person whose stipulation is in court, and give a decree accordingly. There is no possibility of any injustice being done by such a course.

The issue raised by the pleadings presented every question that can be raised in respect to the liability of the claimant, and one additional question, viz.: that of a lien. The fact that the claimant was the consignee of the cargo, who received and sold the same, and now has of the proceeds an amount equal to the freight and demurrage, appears by the testimony of the consignee himself; and in addition to the admission of liability in the answer, the evidence tendered in support of the libel proves every fact upon which the liability of the claimant depends, nor is there any pretence that any other or different state of facts can be shown.

Inasmuch, therefore, as the pleadings involve the question of the claimant's liability and as a decree in favor of the libellant in this action will be, in substance, a decree against the claimant, for a liability admitted by his answer, it would seem to be not only just, but in harmony with the principles upon which proceedings in admiralty are conducted, to disregard the form of the proceeding, and instead of remitting these parties to an action in personam, where precisely the same facts would appear, to determine in this action the question which the pleadings present, viz.: the amount of freight due the libellant, and give a decree for that amount, against the consignee, who has volunteered to intervene in this action, and has obtained the release of the cargo by giving his own stipulation for its value. It is not supposed that such a course could be pursued if the owner of the timber was before the court as claimant. Nor could it be adopted as against this claimant if the result would necessarily be to charge him with the costs, for it would be unjust to saddle the costs of the action upon the party who succeeds upon a question decisive of the right of the libellant to institute the action in the form adopted. But in admiralty, costs are in the discretion of the court, and, as a matter of course, no costs will be given to the libellant. I should even give costs to the claimant, were it not for the fact that his appearance as claimant, contesting the libellant's demand, was wholly gratuitous, as at the time of filing the libel he had no interest whatever in the property proceeded against.

I am not aware of any adjudged case in which a course similar to the one above indicated has been pursued; but cases will, I think, be found tending to support such action on the part of the court. See Sheppard v. Taylor, 5 Pet. [30 U. S.] 701, for a case where an action in personam was turned into an action in rem.

I proceed, therefore, to determine the amount of freight owing by the claimant to the libellant, upon the facts proved. It may be first observed that the position of the claimant is not that of one who has advanced money upon a clean bill of lading, for, as clearly appears, when the claimant made his advance he knew that the cargo was being transported under a charter party and had made himself acquainted with the terms of that instrument. No doubt can therefore be entertained as to his liability to pay the freight due, according to the charter party. Indeed, he admits his liability in the answer he has filed.

But a single question has been raised as to the amount of freight due. The consignee disputes the method by which the timber was measured by the libellant, for the purpose of calculating the freight.

The provision of the charter is that the freight shall be $7 and $7.50 "per M., inch board measure." The consignee has contended that the meaning of this provision is that the freight is to be calculated upon a sale-inspection measurement, in which all broken, unsound and unmarketable parts are excluded from the measurement. To this view I cannot accede. The meaning of the charter is that all the timber carried is to pay freight, excepting only the butts of sticks whose ends are not square. So the timber was measured by the witness Armstrong, as I understand his testimony, and a decree will therefore be entered for freight, calculating it at the rates named in the charter party, upon the quantity given by the witness referred to, unless the claimant desires to institute a more particular inquiry as to the quantity when measured in the manner indicated. There is a possibility that the witness may have been misunderstood, and permission is therefore given to the claimant to institute such inquiry if he so desires.

Thus far I have confined my attention to the question of freight alone. The libel also claims demurrage at the rate named in the charter party for detention of the vessel while loading.

Upon this question the claimant has set

up in his answer and proved an agreement on his part to be personally responsible for demurrage to the amount of $150. I entertain no doubt of the personal liability of the consignee for this amount upon the agreement which he entered into, and having himself set up and proved the agreement, no injustice will be done by rendering a decree against him in this action for that amount of demurrage as well as the freight, less the payments made on account. I allow no interest and, for the reasons above stated, no costs to either party.

Let a decree be entered in accordance with this opinion.

Case No. 10,520.

ONE HUNDRED AND FIFTY-ONE TONS OF COAL.

[4 Blatchf. 368; 15 Int. Rev. Rec. 34; 6 Am. Law Rev. 759.] [1]

Circuit Court, S. D. New York. Sept. 30, 1859.[2]

CARRIERS—LIEN FOR FREIGHT—DELIVERY—EFFECT.

1. The mere manual delivery of an article by a carrier to the consignee, does not, of itself, operate necessarily to discharge the carrier's lien for the freight; but the delivery must be made with the intent of parting with the lien.

[Cited in The Santee, Case No. 12,328; Six Hundred Tons of Iron Ore, 9 Fed. 597. Distinguished in Costello v. 734,700 Laths, 44 Fed. 108.]

2. A delivery made under the expectation that the freight will be paid at the time, is not such a delivery as parts with the lien, and the carrier may afterwards libel the article in rem, in admiralty, for the freight.

[Distinguished in Egan v. A Cargo of Spruce Lath.]

[3. Cited in The Mary K. Campbell, 40 Fed. 907, to the point that the application by the court of payments to items not liens is unobjectionable, if there has been no special application by the parties.]

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

This was a libel in rem, filed [by John Gaughran] in the district court, to recover freight for the transportation of one hundred and fifty-one tons of coal. After a decree by that court in favor of the libellant [Case No. 5,273], the claimant appealed to this court.

Charles L. Benedict and Burr & Benedict, for libellant.

John E. Burrill, Jr., and Davidson & Burrill, for claimant.

NELSON, Circuit Justice. According to the bill of lading in this case, the coal was to be delivered at Peck slip, East river, to William Jarvis, or his assigns, on the payment of freight, at one dollar and eighty-five cents per ton. The libel charges, that the vessel arrived, with the coal, at the port of New York; that notice was given to the consignee, who requested that it might be delivered at his place of business in the city, 59 Ann street, and agreed to pay the expense of such delivery at the rate of twenty-five cents per load; that the coal was delivered accordingly, in good order and condition, and accepted and received by him; and that, nevertheless, he refused to pay the freight and the expense of delivering the coal. An answer was put in, but it is not material to notice it, as the case was heard in the court below, and in this court, upon the admission by the claimant, that the facts were as stated in the libel. I lay out of view the deposition taken and produced in this court, as not put in in time to be read as a part of the proof.

The question presented is, whether or not, upon the case as made out in the libel, the libellant, by delivering the coal, parted with his lien upon it for the freight? If he did, he cannot pursue and attach it in the admiralty, as being still a security for the freight money. The claimant must defeat the demand, if at all, upon a dry point of law, as the case admitted assumes that the money is justly due to the libellant, and the rights of no third or innocent party exist or intervene. Now, the mere manual delivery of the coal by the carrier to the consignee, does not, of itself, operate, necessarily, to discharge the lien. The delivery must be made with the intent of parting with his interest in it, or under circumstances from which the law will infer such an intent. The act of the party is characterized by the intent with which it is performed, either expressly or by necessary implication. Therefore, a delivery of the article according to the terms of the bill of lading, and the taking possession of it by the consignee, under the expectation that the freight will be paid at the time, is not such a delivery as parts with the lien.

I remember a class of cases, where, by the bill of lading, the freight was to be paid on delivery, but, according to usage, the bills were not presented till two or three days afterwards, so that the consignee might have time to ascertain the correctness of the shipment of the goods, and in which it was held, that, as between the parties, the delivery was conditional, not to become absolute till the payment of the money. It was otherwise where the rights of third parties intervened. These cases illustrate the principle above stated.

Now, as I understand this case, as presented in the libel, the demand of the freight was made as soon as the coal was delivered, and the delivery was made under an expectation of the payment. According to the bill of lading, the coal was to be delivered at Peck slip; but, by an agreement between the parties,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 6 Am. Law Rev. 759, contains only a partial report.]

[2] [Affirming Case No. 5,273.]

the place was changed to 59 Ann street. This changed the mode of delivery. Instead of being delivered at the dock, or the ship's tackle, it was delivered in carts, and, when thus delivered, to the satisfaction of the consignee, the payment was demanded. This is, I think, the fair interpretation of the facts admitted, and, in this view, it is clear that the lien was not discharged.

As to the objection that the court below included in its decree the amount of the cartage across the city, it is not sustained, as will be seen by a reference to the decree itself. It allows the cartage to be deducted from any payments that may have been previously made. Whether any had been so made nowhere appears, and, if they had, unless they were specially made upon the freight, the application of them to the cartage would be unobjectionable. Decree affirmed.

ONE HUNDRED AND FIFTY-ONE TONS OF COAL (GAUGHRAN v.). See Case No. 5,273.

ONE HUNDRED AND FIFTY-SIX PACKAGES OF TEA (UNITED STATES v.). See Case No. 15,933.

ONE HUNDRED AND FIFTY-THREE BARRELS OF DISTILLED SPIRITS (UNITED STATES v.). See Case No. 15,934.

ONE HUNDRED AND FORTY BARRELS OF FLOUR (SPRAGUE v.). See Case No. 13,253.

ONE HUNDRED AND FORTY-SIX THOUSAND, SIX HUNDRED AND FIFTY CLAPBOARDS (UNITED STATES v.). See Case No. 15,935.

Case No. 10,521.

ONE HUNDRED AND NINETY-FOUR SHAWLS.

[1 Abb. Adm. 317;[1] 6 N. Y. Leg. Obs. 369.]

District Court, S. D. New York. July, 1848.

ADMIRALTY—SUITS BETWEEN FOREIGNERS—SALVAGE.

1. It rests in the discretion of a court of admiralty whose aid is invoked to the settlement of a controversy between foreigners, to hear and determine it, or to remit the parties to their home forum.

[Cited in The Maggie Hammond v. Morland, 9 Wall. (76 U. S.) 450; The Carolina, 14 Fed. 426.]

2. There is no authority of weight which imposes on the courts of our own country the necessity of determining controversies between foreigners resident abroad, either in common-law proceedings, transitory in their nature, or in maritime suits prosecuted in rem.

[Cited in The Belgenland, 114 U. S. 365, 5 Sup. Ct. 864.]

3. As a general rule, where the only question in a salvage suit is as to the rate of reward, and the salved property is within the jurisdiction of the court; a court of admiralty, in this country, will entertain the suit, notwithstanding that all the parties are foreigners.

[Cited in Studley v. Baker, Case No. 13,559.]

4. It seems, that when in a salvage suit between foreigners, the answer charges the libellant with wanton misconduct in obtaining possession of the property, and prays the privilege to contest the claim of the libellant before the courts of their common country, the case should be dismissed to the home forum.

5. What considerations will govern a court of admiralty in determining to exercise or decline jurisdiction of a suit between foreigners.

[Cited in The Russia, Case No. 12,168; Bernhard v. Creene, Id. 1,349.]

This was a libel in rem, filed by Thomas Crowell and others, the owner, master, and crew of the bark Reliance, against one hundred and ninety-four shawls, and certain other articles salved by the libellants from the wreck of the Lady Kenneway, to recover salvage compensation. The Reliance was a British vessel, owned in Liverpool. The libellants were all of them British subjects and residents, and the crew of the bark were all shipped for the voyage during which the salvage for which compensation was now claimed was effected, under British articles. The leading circumstances upon which the claim to salvage compensation was based, were, according to the statements of the libel as follows: The bark Reliance left Liverpool on November 1, 1847, bound to New York, and ultimately back to Liverpool—having a crew of nineteen men and five boys, and being laden with a cargo of iron and salt, and having on board, also, about 280 passengers. On the 16th of November she fell in with the Lady Kenneway, as alleged in the libel, in latitude 44° 54′, and longitude 9° 54′, on soundings, near the coast of England, and boarded her at mid-day. The wind was light, and the weather, at the time, mild. No person was found on board. The rudder of the Lady Kenneway was gone, and she had five feet water in her hold, but otherwise she appeared staunch and sound. Another British brig was found lying off near her at the time, and a boat's crew from that vessel came on board whilst the libellants were there, and took away a boat load of her cargo, but refused to give the name of their vessel. The Lady Kenneway was a British East Indiaman. She was owned in London, and was on a voyage from Bombay to London, laden with a cargo of shawls, silks, coffee, rice, and arrowroot. The mate of the Reliance offered to take the Lady Kenneway into port, with the aid of a small crew, but the master of the Reliance considered that it was not advisable to attempt her salvage with his own vessel or crew, and ordered to be taken from her to his vessel several cases, which were found to contain 194 shawls; there were also so taken some pieces of silk, portions of the sails of the vessel, of her tackle, provisions, and ship's stores, &c. After being engaged in that service three or

[1] [Reported by Abbott Bros.]

four hours, the libellants abandoned the vessel, leaving the British brig near her, and continued their voyage to New York, where they arrived on December 1, 1847. The Lady Kenneway was subsequently taken into Portsmouth, England, but who were the salvors did not appear upon the proofs in this case.

On the 22d of December, the first libel was filed in this court against the chief part of the articles brought from the Lady Kenneway; on the 24th a supplemental bill was filed, specifying various other articles omitted in the first. On the 30th of November, the British consul, by leave of the court, intervened in behalf of the unknown British owners, praying the court to order restitution for their benefit of the property attached, after allowing the libellants a reasonable salvage, if, in the judgment of the court, "they proved a case of derelict, and their consequent right to salvage." On January 3, 1848, an appearance and claim was entered in behalf of Arbuthnot, Evart & Co., of Liverpool, for forty shawls, parcel of the one hundred and ninety-four taken out of the Lady Kenneway. On March 28, 1848, Frith, Sands & Co., of Liverpool, by leave of the court, filed their claim to sixty-six of said shawls; and on June 8, 1848, John Bibby & Sons, of Liverpool, in like manner filed their claim to fifty-one of said shawls. No claims were interposed by owners for the residue of the property under attachment in the suit.

The individual claimants, as well as the consul, set up defences against the award of salvage, charging that the libellants embezzled portions of the goods taken out of the Lady Kenneway, and committed waste, damage, and destruction of the apparel and stores of the vessel whilst on board of her. The claims and answers also insisted that the libellants had no rightful authority, under the circumstances, to remove from the vessel the portion of her cargo taken away. The answers and claims of Frith, Sands & Co., and of John Bibby & Sons, furthermore insisted that the court should decline jurisdiction in the case, because the Lady Kenneway was an English vessel, then on a homeward voyage, with her cargo for an English market, and the Reliance, at the time, was an English vessel, with a British crew on board, who had signed British articles, and that accordingly both vessel and libellants were bound to return to terminate the voyage at a British port.

On March 7, 1848, an action by the United States against the master of the Reliance, for a penalty of $400, for landing in this port some of the said shawls without a permit, was tried in this court; and on the 22d of March a like action against the carpenter of the vessel for a like offence, was also tried, and by written stipulation between the proctors of the libellants and of the claimants, the testimony given on those trials was received as part of the proofs in this cause. Each of the parties, also, put in voluminous documentary proofs upon the issues involved.

Phillip Hamilton and W. Q. Morton, for libellants.

Charles Edwards, for claimants.

BETTS, District Judge. An objection is taken by the claimants to the mode of proceeding adopted in this cause, which is deemed by them to be of great importance in its bearing upon the merits; as is also the omission in the original and supplemental libel of any averment that the master of the Reliance entered in his log a full specification of the articles taken by him from the Lady Kenneway. The conclusion to which the court has arrived upon another branch of the defence will, however, render it unnecessary to consider those points.

I have carefully examined all the proofs in the cause, as well those taken originally in this action as those introduced by stipulation from the suits prosecuted on behalf of the United States, in order that I might satisfy my mind whether the libellants had established a case of manifest justice on their part; and whether the property under arrest was so circumstanced as to render it important to all interested in it, that this court should determine to what extent it was chargeable in behalf of the libellants; or whether, in order to insure the ultimate realization of its value to those concerned, it was advisable that the court should decree its sale; for I regard it as resting in the sound discretion of the court, on all the facts and circumstances of the case, to exercise or decline jurisdiction over the property arrested.

As a general principle, the citizens or subjects of the same nation have no right to invoke a foreign tribunal to adjudicate between them, as to matters of tort or contract solely affecting themselves. It rests in the discretion of the court, whose authority is invoked, to determine whether it will take cognizance of such matters or not.[2] Rea v. Hayden, 3 Mass. 24; Gardner v. Thomas, 14 Johns. 134; Johnson v. Dalton, 1 Cow. 548; The Courtney, Edw. Adm. 239; The Madonna, 1 Dod. 37. The last two cases in admiralty proceed upon the same doctrine, although maritime courts will probably exercise a discretion in support of actions between foreigners, upon a broader view of collateral equities than would be entertained by courts of law. The Jerusalem [Case No. 7,293].

As maritime courts proceed upon a common rule of right and compensation in salvage cases, the question of jurisdiction in that class of actions will seldom be raised or regarded before them.

The courts will take cognizance of those

[2] See, also, upon the subject of jurisdiction over foreigners, the case of Davis v. Leslie [Case No. 3,639]; The Infanta [Id. 7,030]; and Bucker v. Klorkgeter [Id. 2,083], decided in January, 1849.

cases as matters of course, if either party is territorially within the jurisdiction of the court; and the property being brought within their jurisdiction, although the salvors and claimants may be citizens or subjects of different nations, the court will unhesitatingly dispose of the subject, if satisfied that the whole right is before it,—salvage being essentially a question of the jus gentium. The Two Friends, 1 C. Rob. Adm. 271; The Blaireau, 2 Cranch [6 U. S.] 248.

In The Jerusalem [supra], Judge Story maintains strenuously the propriety of admiralty courts taking cognizance, it would seem, of all actions in rem, although foreigners are solely interested, whenever the situs rei under contestation is found within their territorial authority. But his reasoning still moves within the qualification that the court, having the legal capacity to adjudicate in such matters, is not bound to remit them to the forum of the litigant parties.

Guarded by that limitation, the rule may be serviceable to the navigation and intercourse of commercial nations, and be of convenient and wholesome application.

I find no authority of weight which imposes on the courts of our country the necessity of determining controversies between foreigners resident abroad, either in common-law actions, transitory in their nature, or maritime proceedings when the remedy is in rem.

If the doctrine were peremptory, imparting to suitors the right to such aid, and imposing on courts the obligation to afford it, actions for supplies and materials, on charter-parties and bills of lading, or by mechanics for labor, would be comprehended within the class, equally with suits for wages on bottomry bonds or for salvage compensation.

I am satisfied the law is not so. In my judgment it would be lamentable if courts were compelled to defer the business of the citizens of the country to bestow their time on litigations between parties owing no allegiance to its laws, and contributing in no way to its support.

Should it transpire, in the progress of the litigation, that the law of the domicile of the parties must be ascertained in order to adjudge rightly on their claims, or that witnesses must be examined there to fix the facts in controversy, the court might be compelled to suspend its movement, and wait until these cardinal particulars could be supplied from abroad. Every tribunal experiences the inconvenience and unsatisfactoriness of so settling controversies between those even who can have no other means of redress, and will recognize the value of the principle which enables them, in regard to foreigners, to remit their controversies to their home tribunals, where the law is known, and the facts can be more surely determined.

This court has, in repeated instances, acted upon this acceptation of the law; and believing it to be the sound and safe rule, I

shall adhere to it in all cases authorizing that exercise of discretion.

The question to be considered is, whether, in this case, the rights of parties would be best promoted by retaining the case and disposing of the subject here, or by remitting it to the home courts of the salvors and claimants.

The answer advances many grave imputations against the conduct of the master and seamen on board the wreck, and after the property came into their possession, and these charges are not without color of proof to support them. Their case does not, accordingly, come before the court with the most persuasive claims to its interposition and favor. When salvage services are eminently meritorious, and the only inquiry to be made is the rate of reward to be allotted, admiralty courts would be solicitous to give every practicable dispatch to suits by the salvors, and relieve them both from delay and expense in obtaining their just reward. It would scarcely occur that any court would withhold its aid from such suitors.

It is quite different when the foreign owner of the property charges his fellow-subject with embezzlement and spoliation, and other wanton misconduct in respect to it, and prays the privilege to contest his claim to compensation before the authorities of their common country.

Independent of that aspect of this case, it is attended by other particulars most proper to be inquired into and adjudicated by an English court, and which could hardly be fitly appreciated or justly disposed of by a foreign one. There are several of these particulars:

1. The application and effect of certain provisions in two acts of parliament in relation to salvage services.

The claimants supposed this transaction within the provisions of the act of 1 & 2 Geo. IV., c. 75, and that the master of the Reliance had acted in direct violation of section 13 of that statute.

It had escaped the notice of the advocates that the acts of 9 & 10 Vict. c. 99, § 2, repeals the former statute. The latter act has been closely criticized by English writers, because of its unskilful and somewhat confused enactments (Law Mag., Feb., 1847, art. 2); yet section 30 would seem, notwithstanding, to embody substantially the provisions of section 13 of the act of 1 & 2 Geo. IV. At all events, it more appropriately belongs to the English judiciary to settle its meaning, and determine whether the master of the Reliance has acted in violation of the directions of the statute; as also what were his obligations by the local law, under the circumstances, in regard to the wrecked vessel or her cargo.

If that statute applies to this transaction, then there is a further and urgent reason for referring the whole matter to the English courts, because the master would, by the provisions of the act, be subject to a penalty

of £100, and double the value of the goods taken by him, for failing, on the return of his vessel, to bring before the commissioner of salvage or the high court of admiralty, the property removed from the Lady Kenneway.

2. The Lady Kenneway was, shortly after the libellants left her, saved and taken into England. Most intimately, if not necessarily, connected with the manner and merit of the salvage of the vessel and the appropriate reward for it, must be that also of the salvage of the cargo, whether made by one or different sets of salvors. The Emma, 2 W. Rob. Adm. 315.

3. The termination of the voyage of the Reliance was in England, where it is to be presumed she would arrive within a short period after leaving this port, and it is most fitting that the question of the obligations and privileges of her master and crew, in respect to services rendered a British vessel, a wreck or in distress on the English coast, should be determined in the courts of that nation.

4. The shawls taken from the wreck were of great price, composing the chief value of all the property removed to the Reliance. It was found on the trials before referred to, that these articles were essentially adapted to the English and European market, and were comparatively unsalable in the American market. They were transshipped from a vessel bound to London, and near her destination, and it is a question of deep import, which cannot be evaded in the decision of the cause, whether the conduct of the master of the Reliance, in transporting such a cargo, situated as he found this, to a distance so remote from its proper and available market, was excusable; and even if excusable in law, whether he can found upon it a claim to remuneration as for a meritorious salvage.

Not only is this question itself more suitably addressed to the consideration of an English than an American court, but an ingredient for its just disposition not in the case before me, must necessarily be brought to the attention of the tribunals there—the actual condition of the Lady Kenneway at the time, and the facility or delay the Reliance would have incurred in saving her, in the estimation of her salvors, or of persons who visited her after she had been deserted.

Other particulars in the case, of no unimportant influence, might also be referred to, but enough have been stated to satisfy my judgment that the exercise of a sound discretion requires me to dismiss this prosecution, and remit the property and cause to the proper forum in Great Britain.

A decree will accordingly be entered, discharging the property from arrest, each party to pay his own costs in this court, except that in respect to the British consul, who intervened officially in protection of the rights of absent and unknown owners, his taxable costs are to be paid before the order for delivering up the property is executed. It will be manifest from the face of the order, that the payment of these costs is compulsory, and by authority of the court having possession of the property, and as a condition to its surrender; and it will doubtless be a document which may avail in evidence before the British tribunals, and be there regarded in the final award of compensation and costs between the libellants and the owners of the property.

I regret that other engagements in the circuit court, and in the business before this court having precedence of this cause, have delayed the disposal of the case much beyond the period usual in these courts, after a hearing is completed. But as the property is not in its nature perishable, it is presumable that no other consequence has resulted from a delay of six weeks, than an inconvenience to the parties; to the one in having the reward they may be entitled to deferred, and to the other in losing for the time the use or proceeds of the property.

As the libellants may not reclaim the property attached in their behalf, the decree will make provision enabling the claimants who have intervened in their own right, and the British consul in behalf of unknown owners, to take the goods out of court and ship them to their port of destination.

Decree accordingly.

ONE HUNDRED AND NINETY-FOUR SLAVES (JERBY v.). See Case No. 7,288.

ONE HUNDRED AND SEVENTEEN PACKAGES PLUG TOBACCO (UNITED STATES v.). See Case No. 15,936.

Case No. 10,522.

ONE HUNDRED AND SEVENTY-FIVE TONS OF COAL.

[9 Ben. 400.] [1]

District Court, S. D. New York. March, 1878.

BILL OF LADING—FREIGHT—DELIVERY—DAMAGES FOR DELAY.

1. Under a bill of lading given by a canalboat for 250 tons of coal, deliverable to M. or his assigns, "he or they paying freight for the same at" so much per ton, no freight is due until all of the coal is delivered, unless the delivery is prevented by the act or fault of the shipper or the consignee.

[Cited in Clark v. Five Hundred and Five Thousand Feet of Lumber, 12 C. C. A. 628, 65 Fed. 239.]

2. Under a bill of lading containing no clause as to rate of discharging, the only obligation resting on the consignee is to take the cargo in the customary way, with reasonable diligence; and a delay of the boat in waiting for her regular turn at the wharf for unloading was held, in this case, not to make the owner of the cargo liable in damages for the detention of the boat.

In admiralty.

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

H. O. Southworth, for libellant.
G. P. Hawes, for claimants.

BLATCHFORD, District Judge. On the 18th of July, 1876, the Lehigh Valley Railroad Company shipped on board of a canal-boat owned by the libellant, at Perth Amboy, New Jersey, 250 tons of coal, under a bill of lading, which bound the boat to deliver the coal at Jersey City, New Jersey, unto Matthiesen & Werchers "or their assigns, he or they paying freight for the same at the rate of thirty-five cents per ton." The bill of lading states that the coal is shipped on account of the New York Fuel & Grate Bar Company. Matthiesen & Werchers carried on a sugar refinery at Jersey City. This coal was for use by them and was to be unloaded at their wharf. The libellant, who was also master of the canal-boat, arrived with his boat and cargo at a point near the sugar-refinery wharf, on the 19th of July, and reported his arrival, and on that day notified the clerk of the refinery, who was the proper person, of the arrival of the coal. At that time there were other boats with cargoes of coal lying there awaiting their turns to discharge on the wharf, and having precedence, in time, of this canal-boat. These prior vessels were discharged as rapidly as the existing facilities of the wharf permitted, and there was no unreasonable delay in giving a berth, in turn, to this canal-boat. She lay outside of the other boats, awaiting her turn, until July 26th. On that day she was put alongside of the wharf and some of the coal was discharged, leaving the libelled coal on board. The libellant then demanded of the secretary of the New York Fuel & Grate Bar Co., who owned the coal and are the claimants of the coal libelled in this suit, that that company should pay him damage for the detention of the boat. This was not done, and the libellant refused to deliver any more of the coal. On the 29th of July this libel was filed against the coal still on board of the canal-boat. It claims to recover the balance due for full freight on the 250 tons, namely, $35. The freight by the bill of lading is $87.50. The libellant was paid $5 on account of freight, and credits on the freight $7.50, being 3 cents a ton paid by the shippers for trimming, and $40 more, being 16 cents a ton for unloading, which unloading he was chargeable with. The libel also claims for five days' damage for detention, at $10 a day, allowing four days of the nine as a proper time for unloading.

It is quite clear that the libellant was not entitled to his freight-money when the libel was filed. He had not delivered his cargo. The freight was not due till the whole was delivered. The rate of freight stated in the bill of lading—so much per ton—does not make the freight payable ton per ton, as the coal is delivered. The 250 tons are to be delivered, and then the freight for the 250 tons is payable. The expression of the rate per ton has no more effect than if the bill of lading had said, "paying $87.50 freight for the same, which is at the rate of thirty-five cents per ton." There can be no action for freight unless delivery is either made, or prevented from being made by the act or fault of the shipper or the consignee. 1 Pars. Shipp. & Adm. 220. Here there was no fault on the part of the consignees or the owners of the coal. The bill of lading contained no clause that there should be "despatch in discharging," or "quick despatch in discharging," nor any clause prescribing a given number of days for discharging, or a given rate of speed in discharging, after arrival or reporting. Under such circumstances, the only obligation resting on the consignees was to take the cargo in the usual and customary way, with reasonable diligence. Coombs v. Nolan [Case No. 3,189]. There is no evidence that the boat was delayed otherwise than by waiting for her regular turn, and a delay from such cause does not, under the bill of lading in this case and the circumstances proved, make the owners of the coal liable in damages for the detention of the canal-boat. Cross v. Beard, 26 N. Y. 85; Rodgers v. Forresters, 2 Camp. 483; Burmester v. Hodgson, Id. 488. As the boat was only waiting for her regular turn, the owners of the coal were not in fault for the non-delivery of the cargo, and so were not liable to pay the freight when the libel was filed. What has been said shows that the claim for delay or demurrage is not established.

The libel is dismissed, with costs.

ONE HUNDRED AND SIXTY-THREE, Etc., BARRELS OF WHISKEY (UNITED STATES v.). See Case No. 15,937.

ONE HUNDRED AND THIRTY BARRELS OF WHISKEY (UNITED STATES v.). See Case No. 15,938.

Case No. 10,523.

ONE HUNDRED AND THIRTY-FOUR THOUSAND NINE HUNDRED AND ONE FEET OF PINE LUMBER.

[4 Blatchf. 182.][1]

Circuit Court, N. D. New York. July 1, 1858.

CUSTOMS DUTIES — FORFEITURE FOR FAILURE TO PRESENT MANIFEST — ACT OF MARCH 2, 1821 — WAIVER — RECIPROCITY TREATY WITH GREAT BRITAIN.

1. Under section 1 of the act of March 2, 1821 (3 Stat. 616), which provides, that merchandise, subject to duty, coming into the United States, from any foreign territory adjacent to the United States, shall be forfeited, if the master of the vessel in which it is brought, does not, immediately on his arrival within the United States, present a true, sworn manifest of the merchandise to the proper collector, or deputy

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

collector, the forfeiture is incurred if either a false manifest is presented, or if none is presented.

2. The officer, to whom the manifest must be presented, has no power to waive the requirements of the law, and allow the goods to enter the United States without a compliance with them.

[Cited in U. S. v. One Sorrel Stallion and One Roan Horse, 51 Fed. 879.]

3. The law requires the master to present the manifest immediately on his arrival, and he is not entitled to twenty-four hours time to do so.

4. The reciprocity treaty between the United States and Great Britain, of June 5, 1854 (10 Stat. 1089), and the act of August 5, 1854 (Id. 587), providing for carrying into effect that treaty, did not operate to repeal the previous laws, as it respects penalties and forfeitures that had already been incurred. Their effect was to suspend the previous statutes after a given time, so far only as they affected certain enumerated articles, and to admit them thereafter free of duty.

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

This was a libel of information, filed in the district court, by the United States, against a quantity of pine lumber, brought in a vessel from Canada into the United States, to condemn it as forfeited, for a violation of the 1st section of the act of congress, of March 2, 1821 (3 Stat. 616). That section provides, that it shall be the duty of the master of any vessel coming from any foreign territory adjacent to the United States, into the United States, with merchandise subject to duty, to deliver, immediately on his arrival within the United States, at the office of any collector, or deputy collector, which shall be nearest to the boundary line, or to the waters by which such merchandise is brought, a sworn manifest of the cargo or loading of such vessel, containing a true account of the kinds, quantities, and values of the merchandise, and that, for a neglect or refusal to deliver the manifest, the merchandise subject to duty, and so imported, shall be forfeited to the United States. The lumber in question was subject to duty, and the master of the vessel had neglected to present a true, sworn manifest immediately on his arrival. The importation took place before the making of the reciprocity treaty between the United States and Great Britain, of June 5, 1854 (10 Stat. 1089), and before the passage of the act of congress of August 5, 1854 (Id. 587), providing for carrying into effect that treaty, and the first section of which enacts that, after a specified time, timber and lumber of all kinds, round, hewed, and sawed, unmanufactured in whole, or in part, imported from Canada, shall be introduced into the United States free of duty, so long as the treaty shall remain in force. The district court condemned the property [case unreported], and the claimant appealed to this court.

NELSON, Circuit Justice. 1. This case arises under the act of congress of March 2, 1821; and the facts show, either that a false manifest was presented to the deputy collector, or that none at all was presented, in either of which cases the property was forfeited.

2. The deputy collector had no power to waive the requirements of the law, and allow the goods to enter the United States without a compliance with them. In this case, however, no such permission was given.

3. The master was bound to present the manifest immediately, and conform to the requirements of the law, and was not entitled to the twenty-four hours.

4. The reciprocity treaty and the act of congress did not operate to repeal the previous laws, as it respects penalties and forfeitures that had already been incurred. The effect of the treaty and of the act was, to suspend the previous statutes after a given time, so far only as they affected certain enumerated articles, and to admit them thereafter free of duty. Decree affirmed.

ONE HUNDRED AND THIRTY-SEVEN BALES OF COTTON (UNITED STATES v.). See Case No. 15,939.

ONE HUNDRED AND THIRTY-THREE CASKS OF DISTILLED SPIRITS (UNITED STATES v.). See Case No. 15,-940.

ONE HUNDRED AND THREE CASKS OF RICE. See Case No. 10,535.

Case No. 10,524.

ONE HUNDRED AND TWELVE STICKS OF TIMBER.

[8 Ben. 214.][1]

District Court, E. D. New York. July, 1875.

DEMURRAGE—CHARTER PARTY AND BILL OF LADING—LIEN—COSTS.

1. A schooner was chartered to bring a cargo of timber and lumber from Savannah to New York, at specified rates of freight. The charter contained no clause specially binding the cargo for its performance. In loading the cargo the vessel was detained six days by default of the charterer. The master signed bills of lading for the lumber and others for the timber, which provided for the delivery of the cargo at New York to order, on payment of freight as per charter: which bills came into the hands of third parties, who made advances on them without notice of any claim for demurrage. On the arrival of the vessel in New York, the master offered to deliver the cargo on payment of the freight, and demurrage for the six days. The consignees were willing and offered to pay the freight, but refused to pay the demurrage; whereupon the master filed a libel against the cargo to recover the freight and demurrage. The consignees of the lumber and of the timber intervened and defended separately. After the suit was brought, the freight on the lumber was paid. *Held*, that the bills of lading, when in the hands of innocent third parties, released the cargo from all lien except for the freight,

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

and that the master should have delivered the cargo on being paid his freight.

[Cited in The Querini Stamphalia, 19 Fed. 125; Gronn v. Woodruff, Id. 144. Distinguished in The Peer of the Realm, Id. 217. Cited in The Pietro G., 39 Fed. 368.]

2. That the libel, as against the lumber, must be dismissed, with costs, and that, as against the timber, the libellant might have a decree for the freight due thereon, less the claimant's costs.

[Distinguished in Lindsay v. Cusimano, 12 Fed. 505. Cited in Addicks v. Three Hundred and Fifty-Four Tons Crude Kainit, 23 Fed. 729; The Mary Riley v. Three Thousand Railroad Ties, 38 Fed. 255.]

In admiralty.

W. W. Goodrich, for libellant.

Beebe, Wilcox & Hobbs, for claimant of the timber.

O. H. Weller, for claimant of the lumber.

BENEDICT, District Judge. This action is to enforce a lien upon a cargo of timber and lumber for the amount of freight and demurrage claimed to be due upon a charter, made between the master of the schooner Gertrude E. Smith and H. H. Colquit & Co., of Savannah. The charter fixes the freight at the rate of $7 on timber, and $6 on lumber, per thousand superficial feet, payable on proper discharge of cargo, for each thousand feet delivered. There is no clause in the charter in terms binding the cargo to the performance of the contract. Under this clause the lumber and timber proceeded against was loaded; and, as the libellant insists, a claim for six days' demurrage was created by delay on the part of the charterer in loading the vessel. After the loading was completed, the master issued bills of lading for the timber and the lumber, respectively, which provided for a delivery to order in New York on paying freight as per charter-party. These bills of lading contain no other reference to the charter, and make no mention of a claim for demurrage. Afterwards these bills came into the hands of two parties in New York, who made advances upon them, without notice of the existence of any other charge upon the cargo except that for freight, at the rates of $7 and $6 per thousand feet, as stated in the bills of lading. Upon the arrival of the cargo in New York, delivery was tendered, on payment of freight and demurrage. The holders of the bills of lading offered to pay freight, but refused to pay the demurrage; whereupon the shipmaster libelled the cargo for the freight and demurrage. The holders of the bills of lading intervened and defended separately. Upon these facts the question to be determined is, whether the shipmaster was entitled to hold this merchandise as against the holders of the bills of lading, not only for the freight named in the bills of lading, but also for the amount of the demurrage, which he claimed to have shown to have become due by reason of the charterer's delay in loading.

This question I must determine adversely to the libellant. Such bills of lading as were in this instance given, in the hands of innocent third parties who have advanced upon the faith of them, have the effect to release the merchandise from any lien, except for the freight. Consequently, the master had, as against the claimants, no lien on the cargo for the demurrage, and should have delivered it upon payment of freight. It appears that, as respects the lumber, there has been a full payment of the freight on that since the commencement of this action. The freight upon the timber has not yet been paid. It also appears that the consignees of both the lumber and the timber were at all times ready and willing to pay the freight upon receipt of the cargo.

The decree will accordingly be, that the libel against the lumber be dismissed, with costs to be taxed; and that, as against the timber, the libellant recover the freight according to the bill of lading, less the claimant's taxed costs.

ONE HUNDRED AND TWENTY-NINE PACKAGES (UNITED STATES v.). See Case No. 15,941.

ONE HUNDRED AND TWENTY-SIX BALES OF PADDING (UNITED STATES v.). See Case No. 15,942.

ONE HUNDRED AND TWENTY-THREE CASKS OF DISTILLED SPIRITS (UNITED STATES v.). See Case No. 15,-943.

Case No. 10,525.

ONE HUNDRED AND TWENTY-THREE PACKAGES OF GLASS.

[5 Hunt, Mer. Mag. 450.]

Circuit Court, S. D. New York. April Term, 1841.

CUSTOMS DUTIES—EVIDENCE AS TO VALUE OF IMPORTED GOODS—OPINION OF APPRAISERS—AFFIDAVIT OF VALUE — QUESTION FOR JURY — ACT MAY 28, 1830.

[1. Upon the trial of an information under Act Cong. May 28, 1830 [4 Stat. 409], seeking the forfeiture of imported goods on the ground that the actual value thereof was falsely stated in the invoice, evidence, on behalf of the importer, of the selling price of the goods at the port of importation, and of what would be the market price at the place of manufacture, in order to yield a profit, is proper and relevant.]

[2. Although, under the revenue laws as existing in 1841 [5 Stat. 463], the opinion of the appraisers as to the foreign cost or market value of imported goods is prima facie evidence of the fact, it is not conclusive upon a question of forfeiture, and its weight, as compared with other evidence, is a question for the jury.]

[3. Where, upon the trial of such an information, the affidavit as to value, annexed to the invoice, pursuant to statute, is introduced in evidence, it is error to instruct the jury that such affidavit is of no weight, and is not to be looked to at all by them; such affidavit being a voucher required by law, and intended as some evidence of the verity of the invoice, the weight of which it is for the jury to determine.]

[Error to the district court of the United States for the Southern district of New York.]

[In admiralty. This was an information under section 4 of the act of congress of May 28, 1830, claiming forfeiture of 123 packages of glass. Barclay & Livingston interposed a claim to the goods. The district court rendered a decree for the government. Claimant brings error. Reversed.]

THOMPSON, Circuit Justice. This case comes up on a writ of error from the district court for the Southern district of New York. An information was there filed under the fourth section of the act of congress of the 28th of May, 1830 [4 Stat. 409] (8 J. W. S. 340), claiming a forfeiture of the goods in question upon an allegation that the invoice was made up with intent, by a false valuation, to defraud the revenue of the United States; alleging that the goods were charged in the invoice at a less price than they actually cost the importer. The information also contains an allegation that, the goods having been procured otherwise than by purchase, the same were charged in the invoice at a price less than their actual value at the time and place when and where procured.

The claims interposed by the claimants allege that the goods were bona fide the property of Booth & Co. of Sunderland, in England, manufacturers, and were sent out and consigned to the claimants for sale. That an entry was duly made, and invoice produced and left with the collector, and denying that such invoice and entry were made with intent to defraud the revenue. From these allegations in the pleadings, it appears that the entry was made by the claimants as consignees of Booth & Co., who were the manufacturers and owners of the goods; so that the inquiry upon the trial could not involve the actual cost of the goods, they not having been purchased; but must have turned upon the actual value of the articles. The case comes upon a bill of exceptions taken at the trial.

The district attorney gave in evidence the entry made by the claimants as consignees of Booth & Co. upon the oath of Schuyler Livingston, and the production of the invoice and bill of lading. The district attorney also read in evidence an affidavit annexed to the invoice, made by one John French, one of the firm of Booth & Co., as evidence that they were the manufacturers of the glass in question, which affidavit stated that they were the true and lawful owners of the goods, and that he and his partners were the manufacturers, and that the net prices charged in the invoice were the current value of the same at Sunderland. The district attorney then introduced Abraham B. Mead, one of the appraisers, and other witnesses, who appraised the goods at the time and place of importation at a higher value than that stated in the invoice.

On the part of the claimants, testimony taken under a commission was introduced to show that the fair market value of the goods at the time and place of importation was according to the prices stated in the invoice. Among other witnesses, James Riche swore that he knew the shipment in question and the invoice thereof (a copy of which was annexed to his deposition), and which exhibits the fair market value of the articles at Sunderland, at the date of the invoice. That his knowledge was gained by occasionally selling goods in Booth & Co.'s warehouse, and by having access to their books at all times. James Wilson was then called as a witness on the part of the claimants, who swore that for two years and a half last past he had been conversant with the importation and sales of glassware from the Tyne river and its vicinity. And the claimants then offered to prove by this witness the selling price of glass of this kind in New York, and what would be market price at Sunderland, in order to yield a profit here. This inquiry was objected to, and excluded by the court, and the admissibility of such inquiry is one of the questions that has been made in the case, and the only one relating to the admissibility of evidence. The affidavit annexed to the invoice was introduced on the part of the United States, and the force and effect of it, and the light in which it was considered by the court, in the charge to the jury, will depend on other considerations than the admissibility of the evidence.

I do not see on what grounds this inquiry, offered to be made of Wilson, was improper or irrelevant. Had the goods in question been purchased in England, the actual cost might have been proved, and would perhaps have been the evidence required. But the issue was as to the real or market value of the article at the date of the invoice. And this was a point not susceptible of absolute certainty in proof, but was to be made only by circumstances, and depending in some measure upon the opinion of witnesses. The selling price in New York was certainly not entirely irrelevant. It contributed in some measure to aid an opinion upon the actual or market value of the article at the place of exportation. It is not to be presumed that an importation would be made at a valuation upon which a loss must be sustained, according to the selling price, in the market here. It was evidence of the same character as that given on the part of the United States by the appraisers. That testimony could be no more than mere matter of opinion, derived from their acquaintance with the article, and their knowledge of the market price here and in England. And it was precisely the inquiry that had been made of Thomas D. Moore, a witness on the part of the United States. And although made on a cross-examination, it

was made without objection, nor do I perceive any objection that could have been made. The opinion of the appraisers as to the foreign cost or market value of the goods, is undoubtedly, under the revenue laws, prima facie evidence of the fact, and unappealed from may be conclusive evidence as to the amount of duties, but certainly cannot be conclusive upon the question of forfeiture. It must undoubtedly be rebutted by clear and satisfactory evidence. The weight to which it is entitled, when compared with the evidence on the other side, is to be weighed by the jury, who are to decide whether the inventory was made up with intent to defraud the revenue. I think, therefore, that the inquiry offered to be made of Wilson was improperly excluded.

The other question in the case relates to the affidavit annexed to the invoice. This was introduced on the part of the United States, and the inquiry respecting it grows out of the charge of the court. The judge instructed the jury: "That the affidavit accompanying the invoice was not to be looked to by them at all as evidence in the case. That it was not taken as evidence, was given without the presence of the adverse party, or any notice to him, was a voluntary affidavit of the party in his own behalf, and was merely a custom house document, required to accomplish the entry. That it was not a judicial oath on which the party could be indicted, and was no higher evidence than the invoice itself, or a letter of the party, and that the claimants were not entitled to any presumption in their favor as to its verity, or to the benefit of any doubt, so far as this allegation of the claimant is concerned." I cannot view the affidavit annexed to the invoice in this light. It was evidence introduced on the part of the United States, and was of course before the jury for some purpose. And if it was properly before the jury, it was their province to decide upon the weight of it. And they could not be instructed by the court not to look to it at all. It was not, to be sure, taken as evidence in a cause pending in court, and which would require notice to the other party, but it was a voucher required by law to accompany the invoice, and could not be considered merely as the voluntary oath of the party; but as evidence of the verity of the invoice, not conclusive, but still adding some sanction to the invoice. It can hardly be supposed that the government would require an affidavit to be annexed to an invoice, and at the same time considered it of no force or effect whatever. It was the voucher required by law, and upon which the goods would be admitted to an entry, unless objected to by the collector, upon the ground of a false and fraudulent valuation. It can form no objection that the party could not be indicted for perjury. This arises from want of jurisdiction of the case in our courts. Had the affidavit been taken here, and is false, the party might have been indicted for perjury. If the affidavit was no higher evidence than the invoice itself, it is not easy to understand why the act of congress should have required it to be superadded to the invoice; it must certainly have been intended to give it some additional sanction. Admitting the seventy-first section of the act of 1799, 3 Laws [Bior. & D.] 200 [1 Stat. 678], to be in force and applicable to the case, it does not call for the view taken of the affidavit in the court below. The act only declares that if upon the seizure, the property shall be claimed by any person, the onus probandi shall lie upon such claimant but that such onus probandi shall lie on the claimant only where a probable cause is shown for such prosecution.

The evidence of the appraisers was undoubtedly sufficient to make out the probable cause, and to throw upon the claimants the onus of proving the valuation of the article as stated in the invoice, and that must be shown by testimony satisfactory to the jury, but it determines nothing with respect to the kind of evidence necessary to establish the fact. Had the goods in question been purchased, it would have been in the power of the claimants to show the actual cost. And if that had not been done, it would have afforded a strong inference against them; such evidence being in their possession or within their power; but not presumed to be in the possession or within the power of the United States. But that principle does not apply to the present case. The inquiry here was as to the real or fair market value of the article, and this did not depend upon any private knowledge in the possession of the claimants; but upon matters of public information equally open to the United States as to the claimants. The cases referred to upon the argument, where a construction had been given to the onus probandi, required on the part of the claimants under the seventy-first section, do not apply to the case now before the court. The inquiry in those cases was as to the actual cost of the goods. This was a fact susceptible of positive proof within the power of the claimant; and its non-production, or not accounting for its absence, was a kind of negative evidence which ought to have great weight in the case. I cannot, upon the whole, concur with the district court in the view taken of the affidavit annexed to the invoice. It was an authentication of the invoice required by law, and was in evidence before the jury, and the weight to be attached to it was for them to decide. The judgment of the district court must therefore be reversed.

ONE HUNDRED AND TWO PACKAGES DISTILLED SPIRITS (UNITED STATES v.). See Case No. 15,944.

ONE HUNDRED BARRELS OF CEMENT (UNITED STATES v.). See Case No. 15,-945.

ONE HUNDRED BARRELS OF DISTILLED SPIRITS (UNITED STATES v.). See Case No. 15,946.

ONE HUNDRED BARRELS OF HIGH WINES (UNITED STATES v.). See Case No. 15,947.

ONE HUNDRED BARRELS OF SPIRITS (UNITED STATES v.). See Case No. 15,-948.

Case No. 10,526.

ONE HUNDRED BARRELS OF WHISKEY.

[2 Ben. 14;[1] 6 Int. Rev. Rec. 179.]

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

WHO IS AN INFORMER.

1. Where C., being advised that whiskey was being taken from a distillery without payment of tax, went to the district attorney of the United States, and stated the facts in general, without naming any place, and afterwards procured and gave to the district attorney an affidavit, made by T., setting forth certain specific violations of law, and T. afterwards made an affidavit contradicting his first one, and alleging that he was drunk when he made it, and made it from purposes of revenge, and the property was afterwards seized, and a libel filed to condemn it, and R., a special revenue agent, being directed to examine into the case, found conclusive evidence of entirely different frauds, whereupon the property was condemned: *Held*, that, under section 179 of the internal revenue act of June 30th, 1864 [13 Stat. 305], as amended by Act July 13, 1866, § 179 [14 Stat. 145], C. was not entitled to the informer's share, and R. was entitled to it.

2. As between C. and T., the latter would be entitled to the informer's share.

3. It is not the one who gives information which leads to the seizure of property, but the person who gives information of the cause which leads to its condemnation, who is entitled to the informer's share.

[Cited in U. S. v. Simons, 7 Fed. 712; The City of Mexico. 32 Fed. 106.]

This was a libel of information, filed November 26th, 1866, on behalf of the United States, against "100 barrels of whiskey, and all the tools, implements, instruments and personal property whatever, found in the distillery, 48 Broadway." It averred, that the property proceeded against had been seized on the 23d of November, 1866, as forfeited. On the 7th of January, 1867, on the consent of the claimant of the property, a decree was entered, the purport of which was to condemn all of the property except the whiskey, and release it to the claimant, in consideration of the payment by him, into the registry of the court, of $2,000, which had been fixed by appraisement as its value, and to condemn the whiskey and release it to the claimant, if he should pay the internal revenue tax upon it in thirty days. The $2,000 was paid into court. On the 2d of July, 1867, an order was made by the court, referring it to John A. Osborn, a commissioner of this court, to ascertain and report to the court the facts and his opinion thereon as to who was the informer entitled to the moiety of the moneys paid into court. The commissioner reported that A. B. Clarke was entitled to be adjudged the informer, and to receive the share of the proceeds provided by law for the informer. There were three persons, each of whom claimed to be entitled to the whole of the informer's share in the case, A. B. Clarke, Henry J. Trumble, and William Richards. Richards excepted to the commissioner's report, on the ground that the commissioner erred in reporting in favor of Clarke as the informer, and ought to have reported in favor of Richards. [The case has been argued upon the testimony, the report and the exception.][2] Clarke and Richards were examined, each on his own behalf. It appeared that Clarke, being advised that whiskey was taken from the distillery, No. 48 Broadway, without the payment of the tax upon it, went to the district attorney, and stated the facts in general, without naming any place. The district attorney directed him to procure affidavits. He drew an affidavit, which was sworn to by Trumble on the 9th of November, 1866, and formed part of the testimony. In that affidavit, Trumble, who had been an employee of the distillery, but had been discharged, stated, as the frauds which had been committed, that false dates in inspection brands had been put upon barrels of rum sent away from the distillery, that 200 barrels of the rum were then in a store in Morris street, naming it, and 150 barrels of the rum were then in a store in Water street, naming it, and large quantities were at other places, naming them, away from the distillery, and that 75 barrels of the rum had been sent to Boston, without any tax having been paid on them, and without having any inspector's brand on them. This affidavit Clarke gave to the district attorney. On the 15th of November, 1866, Trumble made another affidavit, utterly contradicting his first one, and stating that he had been discharged from employment in the distillery for drunkenness, and, while still drunk, encountered Clarke, and, for revenge, told Clarke what was contained in the first affidavit, and was drunk when he swore to it, and that he knew of no reason why a complaint should be made against the distillery, and knew of no violations of law there. This second affidavit of Trumble was supported by the affidavits of three other persons, one of whom was the father, and one the brother, of Trumble. The purport of them was, that Trumble was a habitual drunkard, and not to be believed on

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

[2] [From 6 Int. Rev. Rec. 179.]

oath, and had been discharged from employment at the distillery for drunkenness, and had offered to withdraw for money the charge contained in his first affidavit. After all these affidavits were presented to the authorities, the seizure referred to in the libel of information was made, on the 23d of November, 1866; and the libel was filed. In December, 1866, Richards, who was a revenue agent, residing at Washington city, was directed by the commissioner of internal revenue to advise with the district attorney in regard to the case as it then stood. The affidavits above referred to were exhibited to Richards, and also two other affidavits, which were in evidence, in contradiction of a statement in Trumble's first affidavit, and also the report of a revenue inspector, made after the seizure, which was not in evidence. Richards then went to the distillery and questioned the proprietor and other persons there, and examined the premises, and discovered that the spirits were conducted from the worm of the still to a large spirit tank not in the cistern room, in violation of law, and that the proprietor had not complied with the law in regard to keeping his books and making reports. These facts Richards reported to the district attorney, and he and Richards came to the conclusion that on those facts the property could be condemned. The district attorney, after the affidavits in contradiction of Trumble's first affidavit had been presented to him, had, in a letter to the commissioner of internal revenue, stated that, in view of such contradiction, he regarded the case as a doubtful one. In consequence of this Richards was directed to make the investigation. After all this had taken place the claimant consented to the condemnation of the property represented by the $2,000.

The provision of the 179th section of the internal revenue act of June 30th, 1864, as amended by the act of July 13th, 1866, was, that when any sum was received for a fine, penalty or forfeiture, under a judgment or decree in a suit, such share of it "as the secretary of the treasury shall by general regulations provide, not exceeding one moiety nor more than five thousand dollars in any one case, shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty or forfeiture, who shall first inform of the cause, matter or thing whereby such fine, penalty or forfeiture shall have been incurred."

The commissioner reported, that the first information which led to the seizure of the property was furnished to the government officials by Clarke; that no other information, on which the property was seized, was lodged, except that furnished by Clarke; that the property was seized on that information, and had been held ever since it was so seized; that the libel was filed on that information and seizure; that Richards had no connection with the case till after the seizure was made and after the libel was filed; that the information or facts which Richards furnished to the district attorney could be considered only in the light of evidence to justify a condemnation of the property seized, and could not reach back to the time of seizure and deprive the person who first called the attention of the government to the place, and furnished such information as led to the seizure, of the right which vested in him as informer; that the question being, whether the information which led to the seizure and the libelling, or the evidence subsequently obtained, which was necessary to condemn the same, was to control in determining who was entitled as informer, he was of the opinion that the person who gave the information on which the seizure was based was the informer; and that, as the property in question was seized on Clarke's information, and never abandoned, Clarke was entitled to be adjudged the informer.

S. G. Courtney, U. S. Dist. Atty., for Richards.

E. F. Brown, for Clarke.

BLATCHFORD, District Judge. The report of the commissioner proceeds upon an erroneous view of the statute. The informer's share is not given to the person who first gives information on which property is seized, but to the person who first informs of the cause, matter or thing whereby the forfeiture was incurred. In most cases, the distinction is unimportant and does not arise. The property is generally seized, libelled and condemned for the cause of forfeiture pointed out by the information furnished by the informer before the seizure. But this case illustrates the distinction between information given on which property is seized, and information given as to the matter whereby the forfeiture was incurred. And the distinction is a very proper and sound one. In this case, information as to specific frauds was furnished with considerable detail in the first affidavit of Trumble. On that information the property was seized and the libel was filed. But the only conclusion that can be arrived at from the evidence is, that if Richards had not investigated the case and examined the premises, the government would never have obtained a condemnation of the property. The information furnished by Trumble was utterly worthless to the government, as information of any cause whereby a forfeiture of the property had been incurred. The property, it is true, was seized and libelled on that information, on the assumption that it was true, but, as it must be held, on the evidence, to have been false, the seizure and libelling stand as having been made on no information whatever from Clarke. The government received, from what was communicated to it by Clarke, no information which was of the least benefit to it, as to the existence of any cause for which it could enforce, by condemnation of the property, any forfeiture that had been incurred. The statute intends that the re-

ward shall be given to the person who gives information of the cause for which the government can condemn the property. The condemnation is what the government aims at. It is not its policy to seize property and file a libel on false information given by one person, and afterwards condemn it wholly on true information given by another person, and then bestow the informer's reward wholly upon the former. That is this case, if, on the evidence, Clarke is to be adjudged the informer. Such is not the law. No forfeiture of anything was incurred on account of any cause, matter or thing contained in Trumble's first affidavit, and for the very good reason that no cause, matter or thing contained therein had any existence in fact. The error of the commissioner consists in holding that, as Clarke furnished information on which the property was seized and libelled, a right vested in him as informer; and that, as Richards only furnished evidence which justified a condemnation of the property, he is not entitled to be adjudged the informer. It is because Richards, in this case, furnished the information which justified the condemnation that, he was the informer; and it is because Clarke furnished no information which justified a condemnation that he was not the informer. If Clarke had furnished information of any fact which was true as a cause of condemnation for a forfeiture incurred, the case might have been different.

The exception taken by Richards to the report of the commissioner must, therefore, be allowed. If, however, any party interested shall desire to put in further testimony on the subject, or to further examine or cross-examine any of the witnesses already examined, an order may be entered referring the matter back to the commissioner for that purpose.

I have considered the question wholly as one between Clarke and Richards, inasmuch as Richards alone excepts to the report; but, in view of the fact that there may be further testimony and another report, it is proper to say, that, irrespective of the claim of Richards, and as between Clarke and Trumble, on the version of the affair given by Clarke himself, it is difficult to see why Trumble would not be entitled to be adjudged the informer. When Clarke first called on the district attorney, he named no place, and, therefore, gave no information, in the sense of the statute. When he came the second time, all that he testifies to having done was to hand the district attorney Trumble's affidavit. On this state of facts, if the affidavit contained a true statement of any cause for which a forfeiture of the property had been incurred, Trumble was the first person who informed the government authorities of such cause.

ONE HUNDRED TONS OF IRON (SQUIRE v.). See Case No. 13,270.

Case No. 10,527.

Ex parte O'NEIL.

In re FOWLER.

[1 Lowell, 163;[1] 1 N. B. R. 677.]

District Court, D. Massachusetts. July, 1867.

BANKRUPTCY—PROVABLE DEBTS—JUDGMENT—IMPEACHMENT COLLATERALLY.

1. When a judgment-debt is offered for proof against the estate in bankruptcy of the debtor, whose petition was filed after the date of the judgment, it may be objected to by other creditors on the ground of fraud or irregularity, including fraudulent preference, for they are not parties nor privies to the judgment, and may impeach it collaterally.

[Cited in Partridge v. Dearborn, Case No. 10,-785.]

2. But the consideration of a judgment regularly obtained in a court having jurisdiction cannot be collaterally inquired into in bankruptcy, except for fraud.

3. The costs and interest are, in such case, a part of the debt, and can be proved.

[In the matter of James L. Fowler, a bankrupt. An adjudication of bankruptcy was made in Case No. 4,998.] The register took evidence touching the right of O'Neil to prove the amount of a judgment which he had obtained against Fowler before his bankruptcy, and ruled pro forma that the question whether all just credits had been given by the creditor before obtaining his judgment could not be inquired into. He certified that question to the court, and also whether interest and costs could be proved.

A. Wellington, in opposition to the proof.

A judgment is only binding between parties and privies; it may be impeached collaterally by third persons. Denison v. Hyde, 6 Conn. 508; Shrewsbury v. Boylston, 1 Pick. 105; Downs v. Fuller, 2 Metc. 135.

R. M. Morse, Jr., for O'Neil.

This is not a case in which a court of equity would enjoin the judgment, and therefore this court will not interfere. Ex parte Mudie, 3 Mont. D. & D. 66.

LOWELL, District Judge. Creditors, whose interests are affected by a judgment against their debtor, may avoid it collaterally, because they have no right to have it reviewed directly. Pierce v. Jackson, 6 Mass. 244; Downs v. Fuller, 2 Metc. 135. In bankruptcy the creditors are interested in contesting a judgment which is offered for proof in competition with their own debts; and I have no doubt they may show, by any appropriate evidence, that the judgment is void or voidable for fraud or irregularity. A debtor might suffer judgment against him for the very purpose of affecting the proceedings in bankruptcy; or a judgment may be

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

obtained for a just debt, but under circumstances which would make it a fraudulent preference. In all such cases it must be open to other creditors to object to the judgment when offered for proof against the assets. On the other hand, where the court rendering the judgment has jurisdiction, and there has been no fraud and no preference, no one can examine into the consideration of a judgment, and show by evidence, outside of the record, that the judgment ought not to have been rendered, or not for so large a sum. While the debtor is not a bankrupt nor acting in contemplation of bankruptcy he binds all the world by his acts and omissions in relation to his own affairs; and if he does not choose to defend an action to which he has a legal defence, and of which he has had full notice, his estate will be committed by his act or neglect, just as it would be by any improvident bargain he might make, or by any new promise to pay a debt barred by the lapse of time or a former discharge in bankruptcy.

When, therefore, the judgment is either void or voidable as of right by the debtor or by creditors, it may be examined into here if offered for proof; where it is valid as against the debtor, and no fraud on creditors is shown, it is valid here. If there be an intermediate case, in which it would be discretionary with the court which rendered the judgment to vacate it upon the ground of mistake, I should probably leave the assignee to pursue that remedy, postponing the proof in the mean time.

It was said in argument that the English practice goes farther than this, and permits the creditors to inquire into the consideration of all judgments. Some statements as broad as that may perhaps be found in the text-books; but I suppose the English practice, whatever it may be, is founded on the consideration that courts of equity may in many cases re-examine judgments at law, and grant new trials or restrain executions. See Ex parte Bryant, 1 Ves. & B. 211; Ex parte Marson, 2 Deac. 245; Ex parte Prescott, 1 Mont. D. & D. 199. If this is the reason of the practice, it should not extend beyond the limits that I have laid down; for a court of equity would certainly not stay an execution where the party had had ample opportunity of defence, and there was no fraud.

There being in this case no offer to prove fraud or irregularity, but only an excessive assessment of damages, I must reject the evidence, and admit the proof for the full amount of the judgment.

The costs are part of the debt and can be proved, judgment having been recovered before the bankruptcy; and so can the interest, which, by a statute of Massachusetts, all judgments bear. Debt admitted to proof.

[NOTE. The case was subsequently heard upon the question of the proper stage in the proceedings at which a creditor might oppose the granting of a discharge to the bankrupt. Case No. 4,999.]

Case No. 10,528.

In re O'NEIL.

[2 Lowell, 470; [1] 14 N. B. R. 210.]

District Court, D. Massachusetts. March, 1876.

BANKRUPTCY—COMPOSITION.

Privileged creditors, whose claims will be paid in full, to the extent of fifty dollars, there being sufficient assets for the payment of them, should be permitted to vote for a composition only on the excess of their debts over fifty dollars.

In bankruptcy. The bankrupt offered fifteen per cent. to his creditors, excepting those having priority; and it appeared in evidence that a large number of the creditors who voted upon the question were privileged to the extent of fifty dollars for their wages as workmen of the bankrupt, and that the assets were ample to pay them in any event.

C. P. Gorely, for objecting creditors.

T. F. Maguire, for bankrupt.

LOWELL, District Judge. A long examination was held by the register upon the questions of fact, and he has reported that the composition of fifteen per cent. offered by the bankrupt is more than the creditors would be likely to receive in bankruptcy. This is denied by the opposing creditor. He likewise takes the point that the vote at the meeting and the confirmation of the resolution are irregular, because a large number of workmen having privileged debts exceeding in amount those of the ordinary creditors were permitted to vote and to sign, and have been reckoned in making up the requisite number and amount to pass and confirm the resolution, which provides for paying them in full, for which there are sufficient assets. The statute says that the value of the debts of secured creditors above the amount of such security shall be estimated; and, again, that creditors whose debts are fully secured shall not vote or sign, without first relinquishing their security. Are the debts due the workmen fully secured to the extent of fifty dollars each, within this statute, when the assets are sufficient to pay them in full? In my opinion, this question must be answered in the affirmative. No doubt the law refers chiefly to creditors having mortgages, pledges, and other security by contract upon specific property; but a case may easily be put where a large part of the creditors are secured by attachment of the debtor's property on mesne process. This is a security

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

until the attachment is dissolved by an assignment in bankruptcy. There is nothing in the composition clauses to dissolve any such attachment, if the composition is offered before the first meeting of creditors in the case. In re Clapp [Case No. 2,785]. Shall these creditors be voters, when by the very composition their attachment is necessarily a security which will be preserved, and by bankruptcy it will be dissolved? I think not. So of the workmen. Although before the bankruptcy they have no security, yet in bankruptcy their claims are at once secured to them. The ordinary meaning of "secured" is, "made safe or sure;" and the law makes these debts so when there are assets enough for that purpose.

[It will be admitted by every one that privileged creditors, whose pay is certain, have no interest in the question how much shall be paid to those who are less favored. It is proved by experience that an employer often can make use of his workmen to vote for any settlement that he chooses to propose; and that he can make or unmake voters by paying or neglecting to pay his workmen, as he finds them disposed to comply with his wishes or to oppose them. In composition cases, one great effect of which is to enable a debtor to continue his business, the influence which the employer can exert is very great, because he can discharge any workman who does not meet his views. The question has not been directly presented to me at any time, whether privileged creditors may vote for an assignee; but the practice has been to permit it, and the statute seems to admit all creditors to vote at the first meeting excepting those who hold a mortgage, pledge, or lien upon the property of the bankrupt. The composition statute is not content to say that those creditors may vote who could vote at a first meeting of creditors, but puts in the words above cited—that creditors holding security shall only vote upon the excess of their debts above the security, and that creditors secured in full shall not vote at all. I grant that the meaning of the clause is substantially like that concerning creditors having a mortgage, pledge, or lien upon the property of the bankrupt by contract, but the ordinary meaning of the words is much broader; a secured creditor is one who is safe, or secure of payment; and if this safety is assured by any lien or hold of any sort on the bankrupt's property, as, for example, by an attachment levied more than four months before the bankruptcy, he is certainly within the words and the spirit of the act. Nay, more, there is nothing in the statute which dissolves attachments at all, unless an assignee has been appointed; and I have decided that if a composition is offered and accepted before that time, attaching creditors hold their liens. It seems to follow that they are secured to the extent of the value of the property attached. So, here, the workmen have a sort of equitable lien, to be worked out through the assignee, if one is appointed, or by the debtors, if they compound with their creditors, by which, when the property is ample for that purpose, they are in fact "secured;" and I feel at liberty to say that, being undoubtedly within the equity of the law, they are also within its language, and cannot vote, except to the extent of their respective debts above fifty dollars. It is a new doctrine because the situation is new.] [2]

It was suggested that these creditors might have an interest to promote an early settlement, and to obtain their money sooner than they would in bankruptcy. But there is no quicker way that I know of than that which the assignee is authorized and bound to take. He must convert the property into money, and pay the debts. It is the proper practice to pay the privileged debts as soon as money enough is realized. In this case fifty per cent has already been paid on these debts. It is obvious that such creditors have no real interest in the amount of dividend, which shall be voted to those who are less fortunate. Experience teaches us that workmen whose debts are safe are usually ready to vote in any way their employer may wish. A part of the operation of the law of composition is to enable a bankrupt to keep on in business without substantial interruption, and this adds greatly to the power of the employer. Besides, a bankrupt may make or unmake such creditors at his pleasure. He may pay any workman to whom he owes no more than fifty dollars, without being guilty of a preference, if there is enough for other creditors of that class. He may pay such as he finds are hostile to him, and retain a body of clients to vote for an assignee, or a composition, or whatever he desires. I have had occasion to say before now that I cannot deprive such creditors of their vote for assignee, if they choose to exercise it, because creditors having no actual security upon the bankrupt's property are by the statute permitted to vote. But it has been my practice, when the votes of workmen are brought in to make a majority in number, and they have caused a failure to elect, to give but little weight, in my appointment, to the votes of workmen, if it appears that the assets are enough to secure them in any event. In re Houghton [Case No. 6,730]. And this course has approved itself to the judgment of the profession here. I think these workmen have debts that are fully secured, within the usual meaning of those words, and within their just intent; and as they have taken a large, and, as I understand it, a preponderating part in the meeting and confirmation, I must refuse to record the resolution. Leave to record refused.

[2] [From 14 N. B. R. 210.]

O'NEIL (BURLEW v.). See Case No. 2,167.
O'NEIL v. FINK. See Case No. 12,250.

Case No. 10,529.

ONEIL v. HOGAN.

[2 Cranch, C. C. 524.][1]

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

WOMEN—SERVICE OF PROCESS—NOTICE TO APPEAR—DEFAULT.

A woman, against whom a justice of the peace has issued a warrant for a small debt, and who is notified by the officer to appear before the justice at a certain time and place named in the warrant, is bound to appear and answer; and if she does not, the justice may proceed ex-parte and render judgment against her by default.

Appeal from the judgment of John Chalmers, Esq., a justice of the peace for the county of Washington, for $20 and costs. The warrant was issued by E. Reynolds, Esq., on the 23d of June, 1823, directed to J. W. Beck, constable, commanding him to take into his custody, the body of Mary Oneil, and her safe keep, so that he should have her before a justice of the peace in and for said county, on the 25th day of June, instant, to answer to Thady Hogan in a plea of debt. "Hereof fail not, and make your return as aforesaid," &c. The constable's return was: "C. P. for trial for 10 o'clock, a. m., 26th instant, June. J. W. Beck." The following was indorsed on the warrant: "Judgment for plaintiff, $20 debt on interest, and fifty-eight cents costs. John Chalmers. 26 June, 1823."

Mr. Ashton, for appellant, contended that the judgment below was irregular, and that the justice had not jurisdiction, because the process was capias, and appointed a certain day for the hearing; and by the act of congress of the 1st of March, 1823 (3 Stat. 743) no female can be arrested for a debt. It appeared in evidence that she was not arrested, but was notified, by the officer, of the time and place when and where she was to appear and answer, to wit, at the office of Messrs. Wharton & Chalmers, two justices of the peace, at ten o'clock, a. m. Mr. Justice Wharton, being consulted by her, advised her not to attend, saying that the justice had no right to issue a capias against her, and that she was not bound to appear. She did not; and when the capias was returned, Mr. Wharton refused to act in the case; but Mr. Justice Chalmers being satisfied that the defendant was notified, gave judgment by default.

THE COURT (MORSELL, Circuit Judge, contra) was of opinion, that the defendant was bound to appear upon such a notice, and that the justice might give judgment by default, and affirmed the judgment, but without costs. Quære?

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

Case No. 10,530.

O'NEIL v. SEARS.

[2 Spr. 52;[1] 24 Law Rep. 731.]

District Court, D. Massachusetts. Oct., 1862.

COLLISION—VESSEL AT ANCHOR—LOOKOUT—MUTUAL FAULT.

1. Where a vessel anchored in Boston Harbor, without an anchor-watch, was run into by another vessel while getting under way, and the collision could have been avoided if there had been an anchor-watch, both vessels were held in fault,—the one at anchor for not having a watch, and the other for not notifying the one at anchor of the intention to get under way,—it appearing that there was danger of a collision, and that it was known to the vessel getting under way that the other had no watch.

[Cited in The Lady Franklin, Case No. 7,984; The James M. Thompson, 12 Fed. 189; The Delaware, Id. 574.]

2. Where both vessels are in fault, the damages and costs are divided.

[Cited in The Clover, Case No. 2,908; The Mary Patten, Id. 9,223; Vanderbilt v. Reynolds, Id. 16,839; Wells v. Armstrong, 29 Fed. 220.]

This was a libel in personam against the respondent as owner of the yacht Actæa in a cause of collision.

C. G. Thomas, for libellant.
John A. Loring, for respondent.

SPRAGUE, District Judge. The collision took place between two schooners in the harbor of Boston, on a fair day, a whole-sail breeze blowing. The inference is, that one or both the vessels must have been in fault, because on such a day, and in such weather, a collision ought not to take place.

I shall first consider whether the libellant was in fault. His vessel, the January, was lying at anchor in Fore Point channel. The Actæa was getting under way, and in doing so ran foul of the January.

It is insisted that the January was in fault in two particulars:

1st. In being anchored in an improper place.

And 2d. In having no anchor-watch.

These facts are established by the evidence. An ordinance of the city of Boston provides, that all vessels at anchor in the harbor of Boston shall keep an anchor-watch at all times. Another ordinance of the city authorizes the appointment of a harbor-master, and provides, among other things, that he shall have authority "so to regulate the anchorage of vessels, that as far as may be practicable, ferry-boats may pass unobstructed, and the channel shall be kept clear, from the wharves to Castle Island." Among the regulations adopted by the harbor-master, is one

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

providing that no vessels shall anchor in Fore Point channel. The January in this case was anchored in this channel, and is therefore prima facie in the wrong. In the case of Cushing v. The John Fraser, 21 How. [62 U. S.] 184, it seems to have been held, that a vessel remaining at anchor in a place longer than allowed by a city ordinance can still recover for injury done to her while there, the custom being to allow vessels to remain there when the thoroughfare was not overcrowded. I do not rest my decision, however, upon the fact of the January being anchored in an improper place, and express no opinion upon it. But as the vessel was in a place where vessels were constantly passing, and as there is an express regulation requiring all vessels at anchor to have an anchor-watch, the January was in fault in not having one; and more especially so, as it is in proof that if a person had been on board the January, the collision would not have happened. The immediate cause of the collision was the bowsprit of the Actæa catching in the toppinglift of the January, and this caused her to swing, and then the bobstay struck the rail of the January. It is proved, that if a person had been on the deck of the January, the collision might have been avoided in three different ways:

1st. By veering the vessel by her rudder.

2d. By letting go the mainsheet, and shoving the mainboom over.

And 3d. By putting out an oar or a boathook, and pushing the Actæa off.

I therefore consider the January in fault in not having a proper watch on board.

The next question is, was the Actæa also in fault? The evidence shows that the Actæa came to anchor on the flats near Fore Point channel, and remained there two days; that on the morning of the last day, the January came in, and anchored one hundred feet from her, a little to windward. There were other vessels anchored ahead of the Actæa, and so near, that she could not get under way in the usual manner without running into them. After consultation, it was determined to hoist the jib, haul it to windward, and swing her round on her heel. In doing this the collision occurred. It is insisted that this method of getting under way was an improper one. The evidence shows that it is not the usual way; but I am satisfied, that if the vessel had the right to get under way at all, this was the most judicious way of doing it. I am not prepared to say she had not the right to get under way at all; but considering that she was getting under way in an unusual manner, and there being danger of a collision, it was the duty of the respondent to adopt all means in his power to prevent a collision. According to the testimony introduced by the respondent, if there had been a man on the deck of the January, the collision would not have happened. It was the duty of the respondent to have hailed the January, or to have sent a boat off to her; and if either of these things had been done, the collision would not have happened. It is said the respondent had a right to presume that there was an anchor-watch on board the January. This is very well in theory; but, as he knew there was no anchor-watch, he cannot excuse his not hailing, by saying that there ought to have been one. I consider both vessels to have been in fault; and the damage done to both is to be added together, and divided between the two. The costs also are to be divided.

O'NEIL (STRONG v.). See Case No. 13,543a.

Case No. 10,531.

O'NEIL v. WABASH AVE. BAPTIST CHURCH SOC.

[4 Biss. 482.] [1]

Circuit Court, N. D. Illinois. Aug., 1867.

CONVEYANCE DOES NOT RELATE BACK TO CONTRACT—EFFECT OF RECORDING LAWS—JUDGMENT BEFORE CONVEYANCE.

1. A deed made in pursuance of a recorded contract does not relate back so as to cut off intervening equities, and convey the title as of date of contract. Snapp v. Peirce, 24 Ill. 156, criticised.

2. They only enable the purchaser to compel the consummation of the title under the contract; but where the contract is subject to forfeiture, and only a small part of the purchase money, was paid, the conflicting interests should be adjusted by a court of equity.

3. The legal title remains in the vendor until the conveyance, and a judgment against him binds his interest in the land.

Action of ejectment [by Thomas H. O'Neil against the Wabash Avenue Baptist Church Society,] for the recovery of a lot in Chicago, a part of the southwest quarter of section 22, township 39 north, of range 14 east of the 3d P. M., commencing at a point 350 feet south of the southeast corner of lot 6, of block 4, of Clarke's addition to Chicago, thence south 65 feet to 18th street, west 191 feet, and thence north 65 feet, the property being the lot on the northwest corner of Wabash avenue and 18th street.

DRUMMOND, District Judge. The title was admitted to be in Stephen Bronson, Jr., on the 18th day of June, 1852. On that day Bronson made a contract with the plaintiff, by which he agreed to sell him the lot on certain terms, the money to be paid in installments. The contract was recorded on the day it was made. Bronson conveyed the land to the plaintiff in 1865. This was the title shown by the plaintiff.

At the time Bronson made the contract with the plaintiff, there was only a nominal sum paid in money, viz., $12.09, a note was given

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

payable in ninety days, $180.59 was to be paid on the 18th day of June, 1853, and the same sum on the 18th of June, 1854, and the 18th of June, 1855; and the contract provided that if default was made in any one of the payments as therein mentioned, the whole contract was forfeited, time being made of the essence of the contract. None of the money was paid according to the terms of the contract, and a judgment was recovered against Bronson in the circuit court of Cook county on the 14th day of June, 1855. At that time Bronson was the owner of the legal title, and all that could be said of the title of the plaintiff when acquired by him was that, under his contract, he had an equity to be enforced before the proper tribunal. Under this judgment an execution was issued, the property was sold, and a deed made by the sheriff, under which the defendant claims.

All these proceedings took place prior to the execution of the deed by Bronson, under which the plaintiff claims, and the question is: Where was the legal title at the time of the commencement of this suit?

This action was brought in consequence of a decision of the supreme court of this state, Snapp v. Peirce, 24 Ill. 156; and if that decision is correct and binding upon this court, it may be said to rule this case.

In that case Patton executed a bond for a deed to Peirce, which was duly recorded on the 4th of April, 1836. Afterward Patton mortgaged the same premises to another party, and the mortgage was foreclosed.

The case does not state when the mortgage was executed, but only when it was recorded. Prior, however, to the recording of the mortgage, Patton executed a deed to Peirce, which was recorded after the mortgage was recorded. The question, therefore, before the court in that case was as to the effect of the deed from Patton to Peirce, and the court say that if it was executed in pursuance and in satisfaction of the bond for the deed of Patton to Peirce, then the deed related back to the date of the bond, and conveyed the title as it stood at the time the bond was recorded. That is to say, it necessarily cut off all equities that existed between the date of the execution of the bond and the date of the deed.

It is claimed that such is the effect of the deed of Bronson to the plaintiff in this case; that, being made in pursuance of the contract of 1852, it puts an end to the judgment which was obtained against Bronson in 1855, as a lien upon this land.

I confess that there seems to me to be a misapprehension of the effect of the recording laws by the supreme court in the case of Snapp v. Peirce. It is true, that where a man makes a contract with the owner of a tract of land, by which, in consideration of certain payments to be made to the owner in the future, a deed is to be made after the payment, and the contract is recorded, nothing which the owner can do subsequently can deprive the vendee of his rights under the contract when he has complied with its terms; but I do not understand that the effect of the recording law is anything more than to compel the consummation of the title under the contract, when its terms have been complied with. It seems to me that, under such circumstances, where a contract of sale is made, and only a small part of the purchase money paid, and a judgment is afterward obtained against the owner of the land, that judgment binds his interest, whatever it may be, and it is subject to sale under that judgment. It is a doctrine attended with very serious consequences, to hold that, under such circumstances, when a deed is made by a vendor to a vendee, it relates back so as to cut off all equities which may have intervened, and of which it may be the whole world would be obliged to take notice.

In this case the contract under which the plaintiff claimed was a stringent one in its terms. Time in the payment of the money was made the essence of the contract. That money never has been paid.

It seems to me that the only safe course to pursue is to leave a court of equity to deal with the equities of notes or bills given for the payment of money under such a contract as this—whether they are held by the original party who made the contract, or transferred to a third party for value. It is easy to perceive that circumstances may exist where it may be of the utmost consequence that the rights and equities of parties in possession of such evidence of indebtedness should be protected.

I cannot, therefore, give my assent to the application of the case of Snapp v. Peirce to the facts of this case. Indeed, it seems to me that the principle there stated, in the extent to which the language of the opinion would seem to carry it, cannot be sustained. Without, therefore, deciding many of the questions which were argued in this case, and which are, undoubtedly, of considerable interest and importance, I find the issue for the defendant, on the ground that the legal title was not in the plaintiff. At the time that Bronson made the deed of 1865, his title was gone; and I do not think that that deed related back to the contract of 1852, so as to put an end to everything that had been done in relation to the land between the date of the contract and the date of the deed.

Judgment for defendant.

O'NEILL (GILPIN v.). See Case No. 3,924.

O'NEILL (UNITED STATES v.). See Case No. 15,949.

Case No. 10,532.

ONE LARGE WATER TUB.

[3 Ben. 436;[1] 10 Int. Rev. Rec. 139.]

District Court, E. D. New York. Oct., 1869.

INFORMER'S SHARE—COSTS—VALUE LESS THAN $250.

1. The proviso in the 91st section of the act of congress of March 2d, 1799 (1 Stat. 697), that where the value of the property forfeited is less than $250, the share of the United States is to be applied towards the costs of the prosecution, is general in its application, and is applicable to forfeitures under the internal revenue laws.

2. Treasury regulations on that subject, issued under the authority of the 9th section of the act of July 13th, 1866 (14 Stat. 145), are not binding in cases which come within that proviso.

At law.

BENEDICT, District Judge. The question raised in this case is, whether, in a case arising under the internal revenue laws, where the value of the forfeited property is less than $250, the portion of the forfeiture which accrues to the United States shall be applied to the costs of prosecution, as is provided in the 91st section of the act of 1799, or whether, as provided in the treasury regulations of September 2d, 1867, the share allotted to the informer shall be subject to a proportionate deduction for costs and charges.

Treasury regulations, upon subjects like the present, issued within the scope of the authority conferred by the 9th section of the act of July 13th, 1866 (14 Stat. 145), have hitherto been considered as effective regulations, and no question as to the validity of the statute upon which they are based is here raised. But it is insisted that if the regulation referred to is intended to apply to cases like the present, it is beyond the scope of the authority conferred by the act of July 13th, 1866, above referred to, which confines the action of the secretary to cases not otherwise provided for, and thus, as it is claimed, excludes cases where the value is under $250, inasmuch as such cases are provided for by the act of 1799.

Upon an examination of the words of the 91st section of the act of 1799, I am of the opinion that the provision in question must be considered to be general in its effect, applicable to all cases, and not intended to be confined to the forfeitures which might arise under the act containing the proviso, or any other particular act. This appears by the studied omission from this provision of the words, "incurred by virtue of this act," which appear in the previous parts of the section, and also by the fact that the condemnations provided for are not required by the proviso to have arisen under particular laws or classes of laws. Nor can it be claimed that any particular class of laws was within the intention of the legislature; for, at the time of the passage of the proviso, seizures, condemnations, and sales of goods as forfeited, were provided for by several statutes, some of them having no relation to the revenue—such as the act of September 1, 1789 [1 Stat. 55], the act of March 3, 1791 [1 Stat. 199], which relates to taxes on domestic spirits; the act of May 8, 1792 [1 Stat. 267], in regard to 90-gallon casks; the act of December 31, 1792 [1 Stat. 287], in regard to registration of ships; the act of March 22, 1794 [1 Stat. 347], in regard to the slave trade; the act of July 9, 1798 [1 Stat. 578], in regard to captured vessels of France. Under all these and other acts, seizures, condemnations, and sales had been provided for, and they are clearly covered by the words of the provision in the act of 1799, which is, in terms, made applicable to all cases where a seizure, condemnation, and sale of goods shall take place within the United States.

Until repealed, therefore, the act of 1799 must be held to be controlling, in the cases to which its terms apply, as well when the case arises under the internal revenue laws, as those under the customs laws. If, then, it was intended by the regulation of September 26th, 1867, to forbid the appropriation of the government's share of a forfeiture to the payment of the costs, in cases where the value is less than $250, the regulation must be held to be unauthorized, and the appropriation must be made, in accordance with the 91st section of the act of 1799.

It is accordingly ordered, in this case, that the share of the proceeds of the property forfeited in this action, which accrues to the United States, be applied toward payment of the costs of the prosecution.

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

Case No. 10,533.

The ONEOTA.

[The case reported under above title in 11 N. Y. Leg. Obs. 353, is the same as Case No. 4,273.]

ONE PACKAGE OF READY-MADE CLOTHING (UNITED STATES v.). See Case No. 15,950.

ONE PIECE OF SILK (UNITED STATES v.). See Case No. 15,951.

ONE RECTIFYING ESTABLISHMENT (UNITED STATES v.). See Case No. 15,-952.

ONE SORREL HORSE (UNITED STATES v.). See Case No. 15,953.

Case No. 10,534.

ONE STILL.

[1 Ben. 374; 6 Int. Rev. Rec. 59.][1]

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

INFORMER'S SHARE—PERCENTAGE ON GROSS AMOUNT.

Under section 179 of the internal revenue act of June 30th, 1864 [13 Stat. 305], as amended

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 6 Int. Rev. Rec. 59, contains only a partial report.]

by the act of July 13th, 1866 [14 Stat. 145], and the regulations of the secretary of the treasury of August 4th, 1866, the amount of an informer's percentage is to be calculated upon the gross proceeds of the forfeiture, without deducting the costs.

At law.

S. G. Courtney, Dist. Atty., for the United States.

Henry & Clarkson, for informer.

BLATCHFORD, District Judge. In this case, William H. Craig was the person who first informed of the cause, matter, and thing whereby the forfeiture of the property proceeded against and condemned in this suit was incurred. The condemnation was by default. The informer now asks the court to decree, that he is entitled to have the share or percentage of such forfeiture, to which, as such person, he is entitled, computed on the whole or gross amount of the proceeds of the sale of the property.

By section 179 of the internal revenue act of June 30th, 1864 (13 Stat. 305), as amended by the act of July 13, 1866 (14 Stat. 145), it is provided, that "all fines, penalties, and forfeitures which may be imposed or incurred, shall and may be sued for and recovered, where not otherwise provided, in the name of the United States; * * * and, where not otherwise provided for, such share as the secretary of the treasury shall, by general regulations, provide, not exceeding one moiety, nor more than five thousand dollars in any one case, shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty, or forfeiture, who shall first inform of the cause, matter, or thing whereby such fine, penalty, or forfeiture shall have been incurred." In pursuance of this provision, the secretary of the treasury issued circular instructions, dated August 14, 1866, which are still in force, wherein, after reciting the language of the act of July 13th, 1866, he says: "Under the authority here conferred, the following schedule of informers' shares is hereby prescribed: Of the first five hundred dollars of any penalty, the informer shall receive fifty per cent.; of the next fifteen hundred dollars, forty per cent.", &c., &c. The secretary then says: "Thus, if the penalty is five hundred dollars, the informer will receive two hundred and fifty dollars; if one thousand dollars, four hundred and fifty dollars; if two thousand dollars, eight hundred and fifty dollars," &c., &c. These regulations are still in force, and it is not disputed that they are applicable to the present case. But it is contended, on the part of the government, that it is the meaning of the statute, that the informer's share, whatever it may be, shall be estimated on the sum actually received by the government; that, until recently, the marshal, on the sale of forfeited property, paid its proceeds into the registry of the court, and the clerk then paid, out of such proceeds, the costs and expenses of the suit, and paid over the remainder to the collector of internal revenue, for distribution; that, in such case, the sum received by the government was the sum received by the collector, and not the sum paid into the registry of the court, the clerk receiving the money from the marshal, not as the agent of the United States, but as the officer of the court; that where, as now, the practice is for the clerk to pay the informer's share directly to him, and the balance directly to the proper government officer, the government does not, any more than in the other case, receive that portion of the proceeds which has been consumed in the payment of costs; that this view is supported by the decision made by Judge Benedict, in the case, in the Eastern district of New York, of U. S. v. Seven Large Fermenting Tubs [Case No. 16,254], who, while holding that, under the statute and the general regulations made by the treasury department, the percentage of the informer is to be calculated upon the gross proceeds of the forfeited property, also held, that the costs of the proceedings, through which the fund in court is realized, are a charge upon the whole fund, and must, in the distribution, be paid out of the proceeds of sale, before the share of the informer can be distributed to him; that, in this view, the government cannot be said, in any proper sense, to receive the costs, so as to distribute a portion of them to the informer; and that the informer has nothing to do with anything but what the government actually receives.

This whole argument on the part of the government is based on a fallacy. The share given to the informer by the statute, is such share of the fine, penalty, or forfeiture, whether it is recovered with or without judgment or decree (but not exceeding one moiety, nor more than five thousand dollars in any one case), as the secretary of the treasury shall prescribe by general regulations. The statute confides the whole matter of the amount of the informer's share to the discretion of the secretary, to be exercised by general regulations, subject to the limitation fixed by the statute. In the case of a fine, penalty, or forfeiture recovered by suit, the statute requires that the court decreeing the recovery shall ascertain who was the first informer; and, in the case of any sum paid without suit, or before judgment, in lieu of fine, penalty, or forfeiture, the statute requires the secretary to determine, under general regulations to be made by him, who was the first informer. The first informer is defined by the statute to be the person who first informed of the cause, matter, or thing, whereby the fine, penalty, or forfeiture was incurred. That person is the person declared by the statute to be entitled to the share so to be prescribed by the secretary, by gen-

eral regulations. The statute contemplates that the general regulations shall assign to an informer one and the same share of a fine, penalty, or forfeiture, whether it is recovered by suit, or whether a sum is paid in lieu of it, by way of compromise; and the secretary has so interpreted the law. The shares he prescribes are for shares of all proceeds and moneys, whether recovered by judgment or paid without suit or before judgment, and are applicable to all fines, all penalties, and all forfeitures incurred under the internal revenue laws. The fallacy of the view taken by the government, is in the idea that, under the statute or the general regulations, the informer's share is to be estimated on the sum received by the government. There is, in the first place, nothing in the statute to uphold this view. That portion of the section which speaks of the vesting of a right in the informer, has reference solely to the time when the right shall vest in the informer, and says that no right shall accrue to or be vested in the informer until the fine, penalty, or forfeiture is fixed by judgment or compromise, and the proceeds or amount shall have been paid, and that then the informer shall become entitled to his legal share of the sum adjudged, or agreed upon, and received. There is nothing in this provision which necessarily restricts the informer's share to a share of the proceeds or amount paid to or received by the government. The provision has no reference to amount, but concerns only the question of time, and was intended to guard against all claim by an informer to a vested right in a fine, penalty, or forfeiture incurred. Nor, in any view, can the word paid, or the word received, in this provision, mean paid to the government, or received by the government. The provision, so far as the import of the words paid and received is concerned, means, that until, in the case of a recovery by judgment, the fine, penalty, or forfeiture is fixed by the judgment, and the amount or proceeds shall have been paid thereunder, and until, in the case of the payment of a sum without suit or before judgment, in lieu of fine, penalty, or forfeiture, the sum is fixed by compromise and paid, the informer shall have no right, or title or vested interest to or in any share of it. The words paid and received have no reference whatever to the payment to, or the receipt by, the government of its share of the amount or proceeds of the recovery, or of its share of the sum paid by way of compromise. In the present case, under the decree of condemnation, the right of the informer did not vest until the payment to the marshal of the proceeds of the sale of the condemned property, but, when those proceeds were paid to the marshal, then the informer became entitled to his legal share of those proceeds. That share is a percentage, to be calculated, according to the general regulations, on the gross amount of the proceeds so paid to the marshal. Those gross proceeds are the forfeiture, or, in other words, the property condemned as forfeited, and ordered by the decree to be sold by the marshal; and the general regulations give to the informer, as his share, a percentage to be calculated on the amount of the forfeiture, that is, on the amount of the gross proceeds of the sale of the property condemned as forfeited. If any interpretation were to be given to the provision of the statute which says that the informer shall be entitled to his legal share of the sum adjudged, or agreed upon, and received, as in any way defining the amount of the share, such interpretation would be, that the informer is entitled to a share of the sum adjudged, or the proceeds of the property adjudged, to be the forfeiture, or the sum agreed upon in lieu of the forfeiture, and received, and thus to a share, in the present case, of the gross proceeds of the sale of the property condemned as forfeited. But the whole question of the amount of the share, within the limits fixed by the statute, is left to the secretary. He may, by general regulations, make it greater or less. He might have followed the example set by the ninety-first section of the tariff act of March 2d, 1799 [1 Stat. 697], which says, that all fines, penalties, and forfeitures, recovered by virtue of that act, shall, "after deducting all proper costs and charges," be disposed of in a certain way. He might have directed that the costs and expenses of the suit should be first deducted, and that the informer should then have a certain percentage of the net proceeds remaining. But he has not seen fit to do so. He has said, as strongly as negative language can say it, that the costs and expenses of the suit shall not be first deducted, but that the informer shall receive a percentage, to be calculated on the amount paid as a fine or penalty, by the person on whom the fine or penalty is imposed, or on the proceeds of the sale of the property condemned as forfeited, and that no part of the costs or expenses shall be charged upon the share of the informer. The secretary had a right to say this. He had a right to give to the informer such share, within the limits fixed, as, in the exercise of his discretion, he thought calculated to promote the objects aimed at by the statute. The statute was intended to encourage persons to inform as to causes of forfeiture, and the presumption is, that the secretary deemed it wise, on the whole, to hold out to informers the inducements offered by his regulations, by saying to them that no part of the costs or expenses should be charged upon the share resulting from the percentage affixed to a given case. And, in this connection, I am free to say, that I do not concur with Judge Benedict in his view, that the costs and expenses of the proceedings, through which the fund in court is realized, are a charge on the whole fund, and must be paid out of the proceeds of sale, before the share of the informer can be distributed to him, if the conclusion from that view is, that the informer's share, ascertained by computing his percentage on the

gross proceeds, can be made liable for a portion of the costs and expenses, if the residue beyond the informer's share is not sufficient to defray those costs and expenses.

The result is, that an order must be entered, in this case, declaring William H. Craig to be the person who first informed of the cause, matter, or thing whereby the forfeiture of the property condemned in this suit was incurred, and that he is entitled to have the share or percentage of such forfeiture, to which, as such person, he is entitled, computed on the gross amount of the proceeds of the sale by the marshal, under the decree herein, of such property.

[At a subsequent reargument of this case, Judge Blatchford confirmed the conclusion at which he had arrived in the first hearing of the case. Case No. 15,955.]

ONE STILL (UNITED STATES v.). See Cases Nos. 15,954–15,956.

ONE THOUSAND FIVE HUNDRED BALES OF COTTON (UNITED STATES v.). See Cases Nos. 15,957 and 15,958.

ONE THOUSAND FOUR HUNDRED AND SIX BOXES OF SUGAR (UNITED STATES v.). See Case No. 15,959.

ONE THOUSAND FOUR HUNDRED AND TWELVE GALLONS OF DISTILLED SPIRITS (UNITED STATES v.). See Case No. 15,960.

ONE THOUSAND SEVEN HUNDRED AND FIFTY-SIX SHARES OF CAPITAL STOCK (UNITED STATES v.). See Case No. 15,961.

ONE THOUSAND SIX HUNDRED AND TWENTY-FIVE VITRIFIED PIPES (DUNHAM v.). See Case No. 10,536.

ONE THOUSAND THREE HUNDRED AND EIGHTY-TWO HOGSHEADS OF SUGAR (UNITED STATES v.). See Cases Nos. 15,962 and 15,963.

ONE THOUSAND THREE HUNDRED AND SIXTY-THREE BAGS OF MERCHANDISE (UNITED STATES v.). See Case No. 15,964.

Case No. 10,535.

ONE THOUSAND TWO HUNDRED AND FIFTY-THREE BAGS OF RICE.

ONE HUNDRED AND THREE CASKS OF RICE.

[Blatchf. Pr. Cas. 211.][1]

District Court, S. D. New York. Sept., 1862.

PRIZE — WHAT IS — WHO AUTHORIZED TO MAKE PRIZES—ENEMY PROPERTY—SEIZURE ON LAND NEAR WATER.

1. Property seized by an armed vessel of the United States empowered to make prizes while afloat in an enemy port, on board of an enemy vessel, is lawful prize under the law of nations.

2. Enemy property captured by a public vessel in an enemy port, although, when seized, stored in a warehouse on land, near the water, *held*, under the facts in this case, to be lawful prize.

In admiralty.

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

BETTS, District Judge. The first above-named action is for the forfeiture of 1,253 bags of rice captured in lighters afloat on the Edisto, or North Santee river, in South Carolina, on the 30th of January, 1862, by the United States gunboat Albatross and her consort, and brought into this port for adjudication. The lighters had, at the time of the capture, no crews or persons on board, and have not been brought into port for adjudication. The gunboats were armed vessels of the United States, empowered to make prizes, and the property seized was taken afloat, in an enemy port, on board enemy vessels. That is a capture within the law of prize, independently of any special legislation authorizing it. Wheat. Mar. Capt. 14, § 3; Genoa and Its Dependencies, 2 Dod. 444; Pratt, Prize Prac. 115; 2 Wheat. App. 71, by Story, J.; The Donna Barbara, 2 Hagg. Adm. 366; The Charlotta, 1 Dod. 388; The Melomane, 5 C. Rob. Adm. 51. No legislation was required in respect to the seizure of enemy property found within the belligerent territory at the commencement of hostilities. The case of Brown v. U. S., 8 Cranch [12 U. S.] 110, only calls for such legislation when the seizure is made within the territory of the captors.

In the first suit above named, the launches or small boats of the gunboats acted under the full powers of the gunboats themselves, in effecting the capture; and, therefore, there is legal cause for the attachment of the property as prize. The vessels, when seized, having been deserted by their crews, the libellants are entitled to prove the facts and circumstances of the capture by other testimony. The assistant surgeon, then acting on board the Albatross, was present, and proves that the property seized was within the enemy's territory. No person appearing to the suit, or giving evidence as to the innocence of the cargoes so seized, the libellants are entitled to a judgment of condemnation and forfeiture of the cargoes, as enemy property and prize of war, upon the regular default entered. 2 Wheat. App. 20.

The distinction in respect to the second above-named suit is, that the rice there captured was not water-borne when seized, but was found stored in a warehouse in the enemy's country, contiguous to the river up which the United States vessels were pursuing the enemy's vessels, which were, seemingly, endeavoring to convey the two parcels of rice to the enemy's troops in Charleston. The river on which the warehouse stood communicated with Charleston harbor, and was entered by the ship of war and her boats. The warehouse and the rice deposited in it were captured by the launches of the Albatross and her consort. Rebel forces, stationed near the warehouse, fired upon the United States forces when making the capture, and the fire was returned at the time by the United States vessels which were engaged in the capture. The property was laden on

board of vessels of the captors, and was sent to New York for adjudication. The question specially presented in this suit is, whether the seizure on land was, in law, a maritime capture.

The libel is sufficient in form in a suit by the government. It might be vitally defective in a prosecution in behalf of private cruisers, unless subsequently ratified by the sovereign. Brown v. U. S., 8 Cranch [12 U. S.] 130–133. And, although no defence is interposed, the court will look at the record to see that the case is within its cognizance. The decision upon the merits, in Brown v. U. S., went upon the principle that the enemy property there seized was landed in this country before the war commenced between England and the United States, and that it was not liable to capture as prize in the absence of positive law authorizing its seizure. The majority of the court who adopted that doctrine did not controvert the decision of the circuit court, declaring the suit to be of a prize character, nor the historical and judicial fact that the practice of the United States courts is governed by the rules of admiralty law disclosed in the English reports. Glass v. Sloop Betsey, 3 Dall. [3 U. S.] 6. It is very clear that in England the prize jurisdiction does not depend upon locality, but upon the subject-matter. As is said by Sir William Scott, in The Rebeckah, 1 C. Rob. Adm. 227, this was a maritime capture, effected by naval persons using a force subject to their use, distinguished from an ordinary land force subject to military persons, and was, therefore, a maritime prize. 1 Kent, Comm. 356.

The casks of rice proceeded against in the second suit are, therefore, properly confiscable as prize, being enemy property, captured by public vessels, in an enemy port. Decree accordingly.

ONE THOUSAND TWO HUNDRED AND NINETY-ONE BALES OF TOBACCO (UNITED STATES v.). See Case No. 15,965.

ONE THOUSAND TWO HUNDRED AND SEVENTY-SEVEN DOLLARS AND FIVE CENTS (CASH v.). See Case No. 2,498.

Case No. 10,536.

ONE THOUSAND TWO HUNDRED AND SIXTY-FIVE VITRIFIED PIPES.

[14 Blatchf. 274; 5 N. Y. Wkly. Dig. 194.] [1]

Circuit Court, S. D. New York. July 19, 1877. [2]

CARRIERS—WHEN FREIGHT IS DUE—DELIVERY IN PARCELS—DISCHARGE WITHOUT NOTICE TO THE CONSIGNEE.

1. Under an ordinary bill of lading, freight is demandable only when the goods are discharged from the vessel and an opportunity is had for their examination by the party who is to receive them; but the carrier is not bound to part with the possession, or to make actual delivery, except upon payment of the freight.

[Cited in Clark v. Five Hundred and Five Thousand Feet of Lumber, 65 Fed. 239.]

[Cited in Barker v. The E. M. Wright, 1 D. C. 27.]

2. Neither party can require of the other, as of right, that goods under one bill of lading shall be delivered in parcels, on the freight of such parcels being separately paid.

3. Where a carrier of goods by a vessel stood upon his legal right not to deliver a cargo, or any part of it, till payment of the freight, and the consignee of the cargo stood upon his right not to pay the freight untill the cargo was discharged ready to be completely delivered upon payment of freight, and subsequently the cargo was landed, but no notice was given to the consignee nor any demand made upon him for the freight: *Held*, that a suit against the goods for the freight was prematurely brought, when brought before such notice or demand.

4. Where the amount involved in an admiralty suit is not sufficient to permit a review by the supreme court of the judgment of the circuit court, a general finding of facts and law by the latter court is sufficient, under the act of February 16, 1875 (18 Stat. 315, § 1).

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

[This was a libel for nonpayment of freight by Mary Dunham, executrix, and others, against one thousand two hundred and sixty-five vitrified pipes (William Nelson, Jr., claimant). From a decree of the district court for libellants (Case No. 14,280), claimant appeals.]

Franklin A. Wilcox and W. R. Beebe, for libellants.

Edwin W. Stoughton and Edward Seymour, for claimant.

JOHNSON, Circuit Judge. The rule of law in respect to the delivery of merchandise from vessels is well settled. Under the ordinary bill of lading, the freight is demandable only when the goods are discharged from the vessel, and an opportunity is had for their examination by the party who is to receive them. On the other hand, the carrier is not bound to part with the possession, or to make actual delivery, except upon payment of the freight. Neither party can require of the other, as of right, that goods under one bill of lading shall be delivered in parcels, on the freight of such parcels being separately paid. All such arrangements rest upon the special agreement of the parties concerned, and not upon the general law. In Clark v. Masters, 1 Bosw. 177, 185, Duer, C. J., states the rule thus: "The consignee is not bound to pay the freight until the goods are delivered, nor the master to deliver the goods until the freight is paid. If the goods are withheld, the freight must be tendered, if the freight, the goods, to enable either party to maintain an action against the other for a breach of contract." In the case of The Eddy, 5 Wall. [72 U. S.] 481, Mr. Justice Clifford, giving the opinion of the supreme court of the United

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 5 N. Y. Wkly. Dig. 194, contains only a partial report.].

[2] [Reversing Case No. 14,280.]

States, says: "Delivery on the wharf, in the case of goods transported by ships, is sufficient under our law, if due notice be given to the consignees, and the different consignments be properly separated, so as to be open to inspection, and conveniently accessible to their respective owners. Where the contract is to carry by water, from port to port, an actual delivery of the goods into the possession of the owner or consignee, or at his warehouse, is not required, in order to discharge the carrier from his liability. He may deliver them on the wharf; but, to constitute a valid delivery there, the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods, or put them under proper care and custody."

The question in this case, therefore, is whether the libellants, at the time the libel was filed, were in that condition, in respect to the goods in question, which entitled them to demand payment from the claimants, or entitled them to assert, as against the goods themselves, not a mere lien for payment, or a right to hold the possession of the goods until payment was or should be made, but a right to require immediate payment of the freight, as against the goods carried.

In illustration of this position, Mr. Justice Curtis may be cited, who says, in Salmon Falls Manuf'g Co. v. The Tangier [Case No. 12,265]: "If the carrier is not ready to deliver, it is of no importance from what cause such want of readiness proceeds. Whether it be because the goods are still in the vessel, or because they are so mixed with others on the wharf, that they are not accessible, * * * is immaterial. If he is not ready to deliver, the law does not deem the delivery made." In the case of The Middlesex [Id. 9,533], the same learned judge says: "When the master of the vessel gives notice to consignees of cargo, that the vessel is about to discharge at a particular wharf, it is deemed equivalent to a declaration by him that he will be in readiness to deliver the cargo there, at some proper time, as soon as, by the use of due diligence, he can get it out of the vessel in a state to be delivered. * * * It must be remembered, that it is not knowledge of the arrival of the vessel, and that she is discharging, but notice of the readiness of the master to deliver, which is the operative fact."

The first communication upon the subject of the delivery of the pipes was contained in a note from Thomas Dunham to Nelson, dated February 21st, in which Dunham says: "I am anxious to secure to the vessel the freight on the pipes before delivery, and beg of you to send me check for the amount. Otherwise, I must take legal measures to secure the payment of the same." This communication was made before the vessel was ready to commence the discharge of the pipes. On the 26th another note was sent to Mr. Nelson from Mr. Dunham, notifying him that the vessel would that morning commence to discharge on pier No. 19, East river, the stoneware sewer pipes, rings, &c., consigned to him. It adds: "You are requested to pay the amount of freight named in the bill of lading upon the same, and remove them from the wharf. Upon payment of the freight, the pipes, &c., will be delivered to your carts. If not paid and removed from wharf I shall proceed against them to collect it." On the same day and immediately upon the receipt of the note last mentioned, Nelson wrote to Dunham, and had delivered at the office of the latter, his answer, in which he says: "When the goods are on the wharf, and I am properly notified of same, I shall then pay the freight due on them; or, I will take them away from wharf and pay you, ton by ton, freight on same, for all pipes, rings and covers delivered as per bill of lading held by me. If I do not hear from you by one p. m., to-day, of your election of either of above propositions, I shall be in attendance on the wharf at that time, and make formal demand of my property, and shall hold you responsible," &c. To this communication no reply was made, and about or shortly after one o'clock, Mr. Nelson, the claimant, with his clerk Mr. Walmsley, went to Mr. Dunham's office, and there, having in his hand the amount of the freight, according to the bill of lading, said to a person in charge of the office, that he was ready to pay the freight, and demanded his pipes by the H. L. Routh. To this the reply was, that the pipes would not be delivered except upon the payment of the full amount of freight, as per bill of lading. The parties then proceeded to the wharf where the vessel was, and there it appeared that a part only of the pipes were discharged. As to what then took place the witnesses are not exactly agreed, except that no adjustment took place of the questions as to the respective claims of the parties. The libellants appear to have insisted that the whole freight should be paid, before the claimant should take any part of the goods from the wharf. On the other hand, the claimant insisted that he was not bound to pay the freight until all the goods were discharged from the ship, in order that there might be opportunity to examine the goods before the completion of the delivery and payment of the freight. Each party seems, by law, to have been right in the view thus presented; and, of course, neither was, so far, in fault. The claimant further offered to take the cargo in parts, as the same was landed, paying the proportional part of the freight, but this the libellants refused to permit, as was their right; and the parties separated without any adjustment of their conflicting views. The claimant reiterated, on leaving, that, when his goods were discharged and ready for delivery, he would, on notice, pay the freight and take them away. It was made a question, in the district court, whether the claimant did not insist that he was not liable

to pay for any broken pipes or rings contained in the cargo, even though not broken by the fault of the carrier; and such was the view of the evidence taken by the district court. Further evidence was adduced in the circuit court, which satisfies me that no such ground was taken by the claimant. From some controversy which had formerly taken place between the same parties, the persons acting for the libellants probably apprehended that the claimant would object to pay for broken pipes and rings, and they, therefore, stood upon their legal right not to complete the delivery of the cargo, or any part of it, till payment of the freight. On the other hand, the claimant stood upon his right not to pay the freight until the cargo was discharged, ready to be completely delivered upon payment of freight. Neither party was, at this period, in default, and neither was in a condition to maintain an action against the other. Subsequently, the cargo was landed, but no notice was given to the claimant, nor was any demand made upon him for the freight. Assuming that the libel was not filed until after the pipes and rings were all discharged, it was premature, because there was no offer, tender or notice of readiness to deliver, at any time when it was in the power of the carrier to make delivery on receiving the freight. In the ordinary course of trade, property is allowed to be taken away as landed, either on receiving the pro rata freight or security for payment; but the claimant's offers in these respects were rejected. Each party chose to stand upon the legal right, and must be adjudged accordingly. The libellants fail, therefore, to maintain their case, because, when the libel was filed, the claimant was not in fault in not paying the freight. But, I might well go further and assert, that, upon the proof, it appears that the libel was filed before the pipes and rings were discharged from the vessel. I do not see that the examination of this question, upon the evidence, in detail, can be of any advantage to the parties or to the law in general, and I, therefore, content myself with stating the conclusion at which I have arrived.

In regard to the findings of fact and law required by the act of February 16, 1875 (18 Stat. 315, § 1), they seem to be required in view of the exercise of the appellate power of the supreme court of the United States, and, therefore, where the amount involved is not sufficient to permit a review of the judgment of the circuit court by the supreme court of the United States, a more general finding only must be sufficient.

The decree of the district court—Twelve Hundred and Sixty-five Vitrified Stoneware Sewer Pipes [Case No. 14,280]—must be reversed, and the libel be dismissed, with costs.

ONE THOUSAND TWO HUNDRED AND SIXTY-FIVE VITRIFIED STONEWARE SEWER-PIPES (DUNHAM v.). See Case No. 14,280.

Case No. 10,537.

ONE VAPORIZER.

[2 Ben. 438.][1]

District Court, E. D. New York. May, 1868.

DISTILLING—USING ALCOHOLIC VAPOR IN MAKING VINEGAR.

1. Where a manufacturer of vinegar, in good faith, used a "Foubert's patent vinegar apparatus," in which a mash, fermented in the same way as for the production of whisky, was used, and, by the application of heat, alcoholic vapor was produced, which passed directly into a chamber, where it was condensed by cold water and vinegar, and the mixture, passing thence to standards, was there oxidized, and thence flowed out in the form of vinegar,—alcohol, as known in commerce, being present at no stage of the process,—*held*, that the manufacturer was not a distiller within the meaning of the sixteenth section of the act of March 2, 1867 (14 Stat. 481), and the apparatus was not liable to forfeiture for nonpayment of the special tax imposed on distillers.

2. The mixture was not a "product of distillation" under the joint resolution of February 5, 1864 (14 Stat. 566).

This was a proceeding in rem, on behalf of the United States, to enforce the forfeiture of certain property, which was, at the time of its seizure, being used by the claimant in the manufacture of vinegar. The property in question consisted of a still, or vaporizer, connected at the top with a set of ordinary vinegar standards, by means of a chamber, designated in the diagram by the letter M, constituting together an apparatus known as "A. Foubert's patent vinegar apparatus." This apparatus, it was conceded, was used by the claimant, in good faith, for the manufacture of vinegar, and nothing else. But it was contended, on the part of the government, that the process of making vinegar by the apparatus consisted, in part, of distilling spirit from an ordinary mash, and that, therefore, the property was liable to forfeiture, inasmuch as the claimant had never paid the special tax imposed by law on distillers. The cause was tried before the court, without a jury, and, for the most part, upon a statement of facts agreed upon between the parties.

E. L. Parris, for the government.
Wm. H. Hollis, for claimants.

BENEDICT, District Judge. This case presents an ingenious device for the evasion of the tax upon distilled spirits.

The claimant is a manufacturer of vinegar, an article produced, as is well known, by the oxidation of alcohol. The ordinary method of producing this article, when what is known as the "quick method" is used, is to mix whisky, or some other alcoholic fluid, with a quantity of water and some strong vinegar, and then pass the mixture slowly through tubs filled with shavings saturated with vinegar, in which

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

tubs, or standards, as they are called, the alcohol is very thoroughly exposed to the action of the air; and the vinegar in the mixture, and in the shavings, acting as a ferment, the alcohol in the mixture is enabled to combine with the oxygen of the air, oxidation ensues, and the product flows from the standards in the form of pure vinegar. The method pursued by the claimant differs from the ordinary method in this, that instead of using whisky—an article subject to a high tax—he uses a mash, fermented in the same manner as a mash to be used for the production of whisky, which is placed in an ordinary vaporizer, or still, and, by the application of heat, alcoholic vapor is produced from it. The still has, however, no worm or doubler connected with it; but the alcoholic vapor, when produced, passes directly from the head of the still into a chamber (M), which connects the head of the still with a set of vinegar standards. In this chamber (M), the alcoholic vapor comes in contact with a mixture of cold water and vinegar, which is flowing slowly through the chamber toward the standards; the vapor, thus passing into this cold fluid, is condensed, and there is formed a mixture of alcohol, water, and vinegar, which passing to the standards, is there fully oxidized in the manner above described, and flows out below in the form of vinegar. Thus it is seen, that while at no stage of the claimant's process is there to be found the fluid known as alcohol, or distilled spirits of commerce, the product of the whole process is vinegar made by the oxidation of alcohol. The object of the apparatus is manifestly to evade the tax imposed by law upon distilled spirits; and the question is, whether the tax can thus be evaded without a violation of the law.

To bring the claimant within the provisions of the law, he must be found to be a distiller. As a manufacturer of vinegar, he is subject to no tax; but if he be a distiller within the meaning of the internal revenue law, then he is subject to all the provisions of the law applicable to the makers of distilled spirits.

The act of 1867, § 16 (14 Stat. 481), thus defines a distiller: "Every person, firm, or corporation who distills or manufactures spirits or alcohol, or who brews or makes mash, wort, or wash for distillation, or the production of spirits, shall be deemed a distiller; and the making or keeping, by any person, of grain, mash, wash, wort, or beer, prepared or fit for distillation, together with the possession by such person of a still, or other apparatus, capable of use for distilling upon the same premises, shall be deemed and taken as presumptive evidence that such person is a distiller."

Now, if the case rested simply upon the fact of the possession of the still, and the making of a mash fit for production of distilled spirits, the claimant might, perhaps, have been held to be a distiller of spirits, under this section of the act.

But the presumption which, under the law, arises from the possession of a still and mash capable of being used for the production of spirit, is in this case, as it appears to me, repelled by the further fact, that neither the still, nor the mash, is used with intent to produce distilled spirits. This is clearly so, if the intent to be considered is the intent with which the apparatus, as a whole, is used; for it is conceded that the product of the apparatus, as a whole, is simply vinegar, which contains no alcohol; while, if the intent to be considered is the intent with which the still and mash alone, as separated from the rest, are used, it seems, also, to be clear that they cannot properly be said to be used to produce distilled spirits. The only use of this still and mash is to form the mixture which is contained in the chamber (M); but that mixture is not distilled spirits, or alcohol. It contains alcohol, it is true, but in such a combination that it cannot be obtained from it by any mechanical or chemical process, and the elements of the mixture are such, that the alcohol in it is, from the moment of its condensation into a fluid, in process of destruction, for the vinegar and water in which the alcoholic vapor is condensed begin at once to act as a ferment, and oxidation of the alcohol accordingly then begins.

The mixture is neither the distilled spirits of commerce, nor is it of value as a merchantable article, nor can it be used for any purpose, except to make into vinegar.

Considered, then, in either aspect, either as a manufacturer of vinegar, or of the mixture which is produced in the chamber (M) of his apparatus, I am unable to see how the claimant can be held to be a manufacturer of distilled spirits or alcohol.

His process appears to be simply transferring alcohol by the action of heat, and in the form of vapor, from one mixture—the mash—where it is not taxable, to another mixture, from which it can be separated only by distillation, and where it is equally free from tax; the latter mixture being never distilled, but used and useful only to oxidize into vinegar, which is also free from tax.

The use of such a process does not, in my opinion, constitute the claimant a distiller of spirits within the meaning of the law.

Nor does the joint resolution of February 5, 1864 (14 Stat. 566), help the case of the government. By that resolution, it is enacted that all productions of distillation which contain distilled spirits or alcohol, on which the tax imposed by law had not been paid, should be considered and taxed as distilled spirits.

But neither the vinegar which the claimant manufactures, nor the fluid which he produces in the chamber (M) of his apparatus, can be said to be a "product of dis-

tillation." Certainly, the vinegar and the water, which form the greater portion of the fluid in the chamber (M) are no product of distillation. To make the resolution applicable, the whole mixture which contains the alcohol, must be a product of distillation. To hold otherwise, and, under this resolution, consider every article containing distilled spirits, which has not paid the tax, as distilled spirits, would lead to strange results, especially when so little of the distilled spirits in use ever pays tax.

I have thus considered the case upon the evidence as it appears in the agreed statement of facts. I am not, under the admissions in this statement, at liberty to consider the question, whether the apparatus of the claimant is not, in some of its fixtures, a still which forms distilled spirits by condensation of alcoholic vapor upon a cold surface, and then conveys the same, in its ordinary fluid form, to the vinegar and water in the chamber (M). If such a fact were made to appear, it might materially alter the case; but upon this record no such fact appears.

The judgment in the case, as the evidence stands, must accordingly be in favor of the claimant of the property.

ONE WATER CASK (UNITED STATES v.). See Case No. 15,966.

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

ONONDAGA SALT CO. v. The PORTSMOUTH. See Case No. 11,295.

Case No. 10,538.

The ONORE.

[6 Ben. 564.] [1]

District Court, E. D. New York. June, 1873.

JURISDICTION—COOPERAGE.

The admiralty has jurisdiction of a contract made between the master of a ship and a cooper, to put the cargo of the ship in landing order, the services being rendered partly on the ship and partly on the wharf, but before the delivery of the cargo.

[Cited in Roberts v. The Windermere, 2 Fed. 728. Followed in Constantine v. The River Queen, Id. 732. Cited in Endner v. Greco, 3 Fed. 413; The Erinagh, 7 Fed. 235; The Egypt, 25 Fed. 330; The Crystal Stream, Id. 576; Florez v. The Scotia, 35 Fed. 917; The Gilbert Knapp, 37 Fed. 214; The Main, 2 C. C. A. 569, 51 Fed. 957; Norwegian S. S. Co. v. Washington, 6 C. C. A. 313, 57 Fed. 225; The Seguranca, 58 Fed. 909.]

In admiralty.

Wilcox & Hobbs, for libellant.

Beebe, Donohue & Cooke, for claimants.

BENEDICT, District Judge. The question in this case is whether the admiralty has jurisdiction of a contract, made between the master of a ship and a cooper, to put in landing order the cargo of the ship, the services being rendered partly upon a wharf where the voyage terminated, and partly upon the ship, and prior to the delivery of the cargo to the consignees.

My opinion is that such a service is maritime, and consequently the contract is within the jurisdiction of the admiralty. The reason why such a service is maritime, is, because it is a service necessary to enable the ship to earn freight, which is the sole object for which the ship is constructed and navigated. The contract of a ship is to carry and deliver the cargo. When the cargo is received in good shipping order, the ship must deliver it in good landing order. All services which accomplish this end, or tend to accomplish this end, are compensated for by the freight paid, and in a proper sense form a part of the maritime adventure in which the ship is engaged; and the character of such services is determined by the character of the contract to which they are incident. Services such as are described in the present case seem to be of this description, and, in my opinion, are maritime in character. It is no objection to their being maritime that they are performed on land, or that they are performed by persons not seamen. Many maritime contracts are performed on land, and by persons having no immediate connection with the sea. The services in question are maritime, because they are a necessary part of the maritime service which the ship renders to the cargo, and without which the object of the voyage would not be accomplished.

The objection to the jurisdiction must, therefore, be overruled, and as there is no dispute as to the rendering of the services or their value, the libellant is entitled to a decree for the amount of his claim, with costs.

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

Case No. 10,539.

The ONRUST.

[1 Ben. 431.] [1]

District Court, S. D. New York. Oct., 1867. [2]

CHARTER PARTY—CONTRACT TO GO DIRECT—SEIZURE BY MILITARY OFFICER—VIS MAJOR.

1. Where a vessel was chartered in New York to bring a load of cedar from Bayport, Florida, to New York, the charter containing the clause "It is understood that the vessel is now loading for Key West or Tortugas, and is to proceed thence direct to load on this charter," and on her delivery of her outward cargo at the Tortugas, she was seized by the officer in command of Fort Jefferson on the ground that her services were necessary to bring from Key West a supply of coal, for the steam engine by which the fort was supplied with water, and was compelled to perform two voyages to Key West for coal with a file of soldiers on board, and then being released after a detention of fifty days, went at

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[2] [Affirmed in Case No. 10,540.]

once to Bayport, where she was loaded by the charterer's agent under a protest that loading the vessel should be no waiver of the charterer's right "to damages by reason of the failure of the schooner to go direct from the Tortugas to Bayport;" and, cedar having fallen in price in the New York market between the time when she would ordinarily have arrived in New York, had there been no detention, and the time of her actual arrival, the charterer libelled the vessel to recover the difference in price caused by such fall in the market, as his damages; *held*, that under that clause in the charter, the owners of the vessel had not agreed to be at the Tortugas or at Bayport at any specified time, and that time therefore was not a specific and essential element in the contract.

2. The meaning of the contract was that the vessel was to proceed without unreasonable delay and by the usual route; and the contract would have been the same if the word "direct" had been left out.

3. Under this charter the master of the vessel was bound to the highest degree of diligence in going from Tortugas to Bayport.

[Cited in The Giulio, 34 Fed. 911.]

4. He was not responsible for delays in that voyage caused by irresistible force.

5. On the facts in this case the master was entirely faithful and diligent, and the vessel was not responsible for any damages occasioned by the enforced delay.

On the 14th of December, 1865, Eberhard Faber chartered the schooner Onrust in New York to bring a load of cedar timber from Bayport, Florida, or some one of several other specified ports adjacent thereto, to New York. At the time the charter-party was signed by the parties, the schooner was in New York, and one clause in the instrument read: "Also, it is understood that the vessel is now loading for Key West or Tortugas, and is to proceed thence direct to load on this charter." In due time, the Onrust left New York and reached Fort Jefferson at the Tortugas, and on the 19th of January, 1866, had discharged her outward cargo of military stores for the fort, and was ready to proceed to Bayport for the purpose of loading under this charter, when she was forcibly seized, by order of the United States military officer, commanding at Fort Jefferson, and sent to Key West for a cargo of coal, on the alleged ground that it was necessary, in order to work the condenser upon which the post mainly relied for drinking water. To secure the enforcement of the order, a sergeant and a file of men were placed on board, and proceeded with the vessel to Key West. She performed the voyage, and brought three hundred tons of coal to the fort, which she discharged on or before the 9th of February, and was again ready to sail for Bayport, when she was again ordered to Key West by the same officer, or by his subordinate, and proceeded under duress to Key West, for another cargo of coal, which she delivered at the fort, whereupon she was released, and on the 11th of March sailed for Bayport. The captain of the Onrust, in both instances, protested against the seizure and enforced services of his vessel and crew. After her arrival at Bayport, she was loaded by the agent of the libellant, under protest that there should be no waiver of the right of the charterer to damages, "by reason of the failure of the schooner to proceed direct from Tortugas to Bayport." The schooner did not arrive in New York till the 24th of April. Between the 15th of March and the 24th of April, cedar timber fell in the New York market. But for the forcible detention by the military officers at Tortugas, she would, in the ordinary course of navigation, have arrived with her cargo at New York before the fall in the market. Faber thereupon brought this suit in rem for a breach of the charter-party, on the ground that the schooner did not proceed direct from the Tortugas on discharging her outward cargo, but deviated and delayed fifty-one days, and he sought to recover damages in proportion to the decline in the price of cedar timber in the New York market, between the time she would have delivered the cargo there, had there been no delay, and the time she actually delivered it.

G. DeForest Lord, for libellant, argued as follows:

1. The delay at Fort Jefferson was an admitted violation of the terms of the charter, "to proceed direct," &c. It is confessed on all sides that an interruption of the voyage, such as occurred, was against the intention of the contract. The captain's protest at the Tortugas, the conversations between him and the libellant's agents at Bayport, and all the facts of the case, show it to have been fully admitted that the contract, as understood by both the contracting parties, had been broken in this particular. Where the word "directly" is used, it imports more than the legal obligation of speed. Duncan v. Topham, 8 C. B. 225. The language of this charter is therefore wholly inconsistent with an interruption to make two trips to Key West and back.

2. The interruption of the Onrust's voyage, by the action of the United States military officers, affords no excuse for the breach of the charter. Their action was unwarranted, and amounted to a trespass, for which they would be personally liable to the owners of the vessel. The following doctrines, applicable to this case, are clearly laid down in the case of Mitchell v. Harmony (13 How. [54 U. S.] 115): (a) That, although in cases of extreme necessity, military officers may impress private property to the public use, yet it must be under circumstances of immediate and impending danger, which will not admit of delay, or of a resort to the ordinary methods of relief. (b) That the circumstances alleged to create such necessity, must be proved to the court by competent evidence. (c) That even where such necessity is shown to exist, although the officer would no longer be regarded as a trespasser, yet the government would still

be bound to make full compensation at all events.

As to the applicability of that case, it is suggested that the rule which was applied so stringently to acts done in time of active pressing war, will certainly not be relaxed in its application to acts done in a period of actual and perfect peace, when there was not an armed enemy throughout the land. If a seizure would not be justified, for the purpose of carrying out an important military enterprise (which Col. Mitchell's expedition was admitted to have been) very clear proof of a very pressing necessity would be required to sanction an act, which could have been easily avoided by a little foresight on the part of the very officers who made the seizure in this case. No necessity, however great, will excuse a seizure, where there is time and opportunity to meet the emergency by a resort to ordinary means for accomplishing the object. On the facts shown in this case, no such necessity is proved to exist, and the action of the officers was unauthorized.

But even if their action had been authorized, so as to relieve them from the character of trespassers, the government is still bound to make full amends, and the owners of the vessel are the persons, and the only ones, who should, or could obtain, such indemnity. "Private property shall not be taken for public use, without just compensation." Const. Amend. art. 5. "Just compensation" would certainly include all damages for which the owners would be responsible, by reason of this breach of charter. The owners alone could make a claim upon the government. The charterer's only remedy would be upon the contract. Gosling v. Higgins, 1 Camp. 451. The owners might justly claim that the damages caused by the breach of this charter, were the legitimate consequences of the interruption of the voyage. But the charterer could not pretend that there had been any trespass committed upon him. There had been no direct contract between him and the United States authorities, and his only claim would be through the contract with the owners.

3. Assuming that the seizure was unauthorized, and in law a trespass, the owners of the vessel are responsible for damages under their contract. This is an express contract to "go direct," and the rule of law in such cases is laid down as follows: "It is a well settled rule that when the law creates a duty and the party is disabled from performing it, without any default in himself, and has no remedy over, there the law will excuse him. But where the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or delay by inevitable necessity, because he might have provided against it by his contract." Harmony v. Bingham, 12 N. Y. 107; Add. Cont. p. 424, 1130.

The authority of this rule rests on innumerable decisions, and is too well settled to be shaken. The dictum of Lord Heath, in Beale v. Thompson, 3 Bos. & P. 427, that the rule did not apply to maritime contracts, because in them the perils of the sea were always excepted (even if it were received as authority), would not create an exception broad enough to cover this case, for the breach here was not caused by a peril of the sea.

Neither does the dictum of Judge Woodruff, in Conger v. Hudson River R. Co., 6 Duer, 375, that "the carriers' duty, to deliver within a reasonable time, is only relative, and they are not responsible for delays occurring without their fault," reach this case, because: (a) That dictum only applies to carriers, and the breach in this case occurred before the owners assumed the character of carriers, which they could not assume till the cargo was placed on board. (b) Judge Woodruff had in view the duty which the law imposes on carriers, and not the responsibility which parties assume for themselves. He was, also, doubtless influenced by the consideration that the risk of collision was one of those ordinary contingencies to which all such contracts are liable, and which might fairly be assumed to have been in the mind of the parties. (c) The breach in the case of the Onrust was not a mere delay in the performance of the contract, but a failure to perform it, for the contract was to "go direct," and that was broken.

The only exceptions to the obligation of the rule above cited, arise when the thing to be done becomes physically impossible, or positively unlawful. Thus, the death of a party, for whose appearance a recognizance has been given, is held an excuse. People v. Manning, 8 Cow. 297. So, also, the death of an animal that has been replevied. Carpenter v. Stevens, 12 Wend. 589. And all the cases in which embargoes have been held to suspend the performance of a contract, may be classed under the second of the above exceptions—the obligation of embargoes being recognized by the law of nations. But the act of the United States authorities in this case, had no legal sanction whatever, and in that respect differed from an embargo.

The act of God, or the interposition even of governmental action, proceeding from a source whose authority is not recognized, is not an excuse in such cases. Shubrick v. Salmond, 3 Burrows, 1637; Sjoerds v. Luscombe, 16 East, 201; Blight v. Page, 3 Bos. & P. 295, note; Gosling v. Higgins, 1 Camp. 451; Evans v. Hutton, 6 Jur. 1042.

The unauthorized act of an officer of our own government would be no better excuse for non-performance, than the above cases of the legitimate acts of unrecognized governments.

4. From these considerations, it seems

clear that the rule first laid down applies to this case, and the breach being unexcused by the facts, the owners are responsible for the damages sustained by the charterer.[3]

R. D. Benedict, for claimants, presented the following points:

1. Assuming that Fort Jefferson was dependent upon coal to supply it with water, and that the ordinary means of procuring coal had proved insufficient, so that on two occasions they had been entirely out of it, the first question for the court is, "Was not the officer in command justified in taking the Onrust to secure a sufficient supply? Or was his act a wrongful one, which made him personally liable in damages?"

The libellant relies upon the case of Mitchell v. Harmony, 13 How. [54 U. S.] 115. But the facts of that case were entirely different from those of the case at bar. There was no question in that case of what was necessary for the support or protection of the army, which is the question here. There is no question here of "insuring the success of an enterprise against a public enemy" yet to be undertaken, which was the only question there. Id. 115. The court in that case held, that assuming the necessity of taking the property for the object in view, viz., "the enterprise undertaken against the enemy," that was not such a necessity as would protect the officer. But it cannot be urged, that with the object in view in this case, viz., the protecting the army from thirst, the necessity of taking property would not be such an one as would protect the officer. It is clear, that in this case there was a "necessity urgent for the public service, such as would not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for." Id. 134.

2. If the seizure was authorized, the authorized act of an officer of the government is the act of the government, and such an act is a protection to the vessel.

(a) There can be no difference in principle between a seizure of all vessels and a seizure of one. The first is generally spoken of as an embargo, but the word embraces the latter also. "An embargo is commonly understood to be a prohibition of ships sailing, on the breaking out of a war, to hinder their giving any advice to the enemy. But it has a much more extensive signification, as they are not only stopped from the aforementioned motives, but are frequently detained to serve a prince in an expedition. * * * It is certainly comformable to the law, both of nature and of nations, for a prince in distress to make use of whatever vessels he finds in his ports, that are fit for his purpose." Beaw. Lex Mer. p. 260. See, also, Roccus, notes 10, 65. Now the embargo suspends the performance of contract, leaving the rights of parties untouched. Bouv. Law Dict. word "Embargo"; Hadley v. Clarke, 8 Term R. 259. The reason of this is well stated in Pow. Con. p. 267: "In all cases of contracts and agreements, the parties must be supposed not to have consented, but under a tacit condition that they shall be discharged, if the state throw any obstacle in their way."

(b) A restraint of princes has always been held to be a "casus fortuitus," for which the party restrained is not liable. "Regis et principis facta, inter casus fortuitus enumerantur." 1 Roccus, Ins. note 65. So says the Consulat de la Mer, which provides, that where a ship cannot be loaded as agreed, by reason of restraints of princes, the charterers are not called on to pay any freight, "for it is not their fault if a restraint of princes has arisen, since, against a hindrance by God and by the prince, no one can say anything or make opposition." 2 Consulat de la Mer (Boucher) § 472. Says Valin, speaking of a decision of the royal court of Rennes that a temporary restraint only suspends a charter: "This decision is applicable as well to the case where a ship is arrested in a port where it touches during the voyage, as to the case of her being restrained before sailing, inasmuch as there is no reason for a different rule as to the fate of the charter. In either case, the master and the freighter must wait for the opening of the port and the liberty of the vessel, without any claim for damages on either part." Valin, Comm. tit. 8; approved by 2 Boul. P. Dr. Com. p. 292. So, also, 2 Boul. P. Dr. Com. p. 37: "Every event, every loss, every damage received by goods, which the captain could not foresee, and which it was impossible for him to resist, cannot be considered as occasioned by his fault. Therefore he is not responsible for them."

(c) The reason of this exemption is the same as the reason of the exemption of "perils of the sea." It is, that "vis major" suspends the performance of the contract, by making it an impossibility. "Vis major" is that which cannot be resisted. "Cui resisti non potest." Emerig. Mar. Law, 15, § 2. The same rule applies to loss by pirates. Pickering v. Barklay, 2 Rolle, Abr. 248. The same reason lies at the bottom of the exemption arising from the acts of public enemies. Shall the court hold that the enemies of the ruler have more power than the ruler himself, so that while a seizure effected by a public enemy of the ruler would be a defence to an action, for breach of a contract caused by the seizure, the same seizure, effected by the ruler himself, is no defence? Now the exception of the "perils of the sea" is implied, even though not specified in the contract. Williams v. Grant, 1 Conn. 487;

[3] The arguments on both sides on the question of damages are omitted, as the case was decided without reaching that question.

Crosby v. Fitch, 12 Conn. 410. The reason of this is, because of the "vis major," and the same rule should hold of "restraints of princes" for "eadem ratio, idem jus."

3. But it is said that the vessel is not protected, because the exception was not made in the charter, as it might have been. All the cases which bear upon this principle start from the case of Paradine v. Jane, Aleyn, 26, where the language is, "Where the party, by his own contract, creates a duty or a charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by unavoidable necessity, because he might have provided against it by his contract."

Now, there is a distinction to be always kept in mind, in discussing this principle, between maritime contracts and others. The sea is not to be judged by the same rule as the land. It is a different element. It has a law—it has usages and customs of its own; and a rule, in force as to contracts on land, may have no force as to contracts on the sea. Says Judge Heath, in Beale v. Thompson, 3 Bos. & P. 427, in reference to this very rule: "The maxim, cited out of Aleyn, does not apply to marine contracts." That was an action upon shipping articles, in which, if the rule in Aleyn had been applied, the plaintiffs must have recovered. But the court gave judgment for the defendant.

Now a charter, like shipping articles, is a contract peculiar to the sea, and the law of covenants and deeds is not to be too closely applied to it. A bill of lading is a similar contract, as to which, under the cases above cited, the exception of "perils of the sea" applies, though not specified. If the acts of the king's enemies excuse non-performance of a marine contract, though not specified in it, as held in Beale v. Thompson, and the perils of the sea, though not specified, also excuse its non-performance, as held in Williams v. Grant and Crosby v. Fitch, why shall not the "restraints of princes" be equally an excuse, although not specified in the contract? All the old authorities which we have quoted, the Consulat de la Mer, Valin and Boulay-Paty, agree that the excuse is valid, and there is no necessary conflict between them and the maxim in Aleyn, for they all are speaking of marine contracts.

4. But these words of Paradine v. Jane have been, as I think, misconstrued by the subsequent decisions. The facts of the case have not been adverted to; the illustration used by the court has not been considered, and the words "if he may" have been left out of view entirely.

(a) The facts of that case were, that as against an express covenant to pay rent, the defendant set up that by force of armies he had been deprived of the profits of the land —not that he had been prevented from paying. If he had pleaded that, by reason of the force of armies, the payment could not be made, although he was always willing to pay, would not that have been a defence?

(b) The illustration is, "If a lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it." But it is by no means the same thing to say that enemies caused the injury which he agreed to repair, and to say that enemies prevented him from repairing. If the lessee should plead that he was always ready and willing to repair, but enemies prevented, is there anything in the case of Paradine v. Jane, which would hold it to be bad pleading?

(c) Why did the court say, "He is bound to make it good, if he may?" The argument here is, that he is bound to make the agreement good, whether he may or not. Apply the language of the decision to the case at bar, and it would be, "The owners of the Onrust having, by the charter, created this duty or charge upon themselves (to go direct), they are bound to make it good, if they may." But the question in the case is, whether they might or not.

5. The insertion of the word "direct" in the charter, adds nothing to the liability of the vessel. The word "directly" in the case of Duncan v. Topham, cited by the libellant, is used in a different sense from this. The Onrust was bound to go "direct," just as much, whether that was in the charter or not. Fland. Mar. Law, § 208. The duty to go direct was thrown upon her by the law, not assumed by her own contract. Now, it cannot be held, that where a party merely expresses in words the contract which the law throws upon him, he is thereby prevented from availing himself of the exceptions which the law gives him. The rule in Paradine v. Jane does not go so far as that, nor does the case of Harmony v. Bingham, cited by the libellant. In that case there was an agreement by a carrier to carry freight from New York to St. Louis in so many days, and this limitation of time only is what the court refer to. But suppose the defendant in that case had simply agreed in writing to "carry and deliver." That would have been expressly contracting to do a duty which the law threw upon him. Would it be pretended that he could not set up delays by inevitable accident? Nothing in the decision indicates that the court would press the doctrine so far. Besides, that suit was brought to recover $50,000 damages, but the recovery was only $1,158, which plaintiff recovered simply on the ground that by the contract the defendants had agreed to make deductions from the freight at a certain rate, if the goods were not delivered in so many days. The deductions amounted to a greater sum than the freight, which the plaintiff had been compelled to pay to get his goods. But the referee (Judge Bosworth) held that, "as the failure to deliver occurred from causes beyond the control of the de-

fendants, their only liability is a loss of all right to any freight." 1 Duer, 222. And that judgment was sustained. That being the law, how can the vessel in this case be liable for damages?

6. But again, the vessel is not liable for mere delay in performance, caused by this seizure, whether it was authorized or unauthorized. Delay in the performance of a contract is different from a failure to perform it, or such a performance as works injury to the property. "Where the goods are actually delivered, and the complaint is only of a late delivery, the question is simply one of reasonable diligence, and accident or misfortune will excuse the carrier unless he have expressly contracted to deliver the goods within a limited time." Wibert v. Erie R. Co., 12 N. Y. 251. This rule is sustained by numerous authorities. 1 Pars. Cont. p. 659; Ang. Carr. § 289; Parsons v. Hardy, 14 Wend. 217; Hadley v. Clarke, 8 Term R. 259; Constable v. Cloberie, Palmer, 397; Conger v. Hudson River R. Co., 6 Duer, 375. Now, under the facts in this case, the vessel certainly used reasonable diligence. She could have done nothing more than she did.

SHIPMAN, District Judge. The obvious question in this case is, whether the seizure and enforced deviation and delay by the military force at Tortugas, constitutes a breach of the agreement to proceed direct, for which the owners are liable. As there are no exceptions in the charter party under which the deviation can be sheltered or justified, we must look to the general legal import of the contract, and the responsibilities under which it placed the owners of the vessel. The point on which the case turns lies in this clause of the charter party: "Also, it is understood, that the vessel is now loading for Key West or the Tortugas, and is to proceed thence direct to load on this charter." What were the obligations assumed by the owners under this clause of the contract? Clearly, not to be at Tortugas, or Bayport, within any specified time. Time is, therefore, not a specific and essential element in the contract. Of course, if the owners had agreed that their vessel should be at Bayport on or before a specified day, then a failure to comply would have been a breach, for which they would have been liable. No exceptions of perils of the sea, irresistible force, or inevitable accident were inserted in the charter, and none could have been set up to excuse a failure to be at a given port within a time expressly limited by the contract. It is well settled law that even the act of God will not excuse the performance of an express and positive stipulation of a valid contract. School District v. Dauchy, 25 Conn. 530. But the clause of this charter now under consideration is not express as to time. The words, "to proceed thence direct to load on this charter" are not clear and precise when applied to the subject matter—the voyage in question. "Direct" does not mean in a straight line nor instanter. The language does not measure the exact obligation imposed by the contract. Here the law steps in, and implies that the obligation assumed was to proceed without unreasonable delay and by the usual route. The same legal implication would have sprung from the contract in the absence of the word "direct;" for where the undertaking is to proceed from one port to another, a direct voyage is always prima facie intended. The law implies this, and the legal presumption is conclusive, until rebutted by some custom to deviate or proceed by another route. Lowry v. Russell, 8 Pick. 360. If the word "direct" had, therefore, been left out of this clause, the law would have raised an implied promise to proceed direct from New York to Key West or Tortugas, and thence direct to Bayport or some one of the other ports named. The time, within which such a promise is to be performed, is regulated by law. As the law implies the promise or obligation, so it implies the rule which must govern its performance. No time having been prescribed by the parties, the legal presumption is that they intended a reasonable time.

The case of Duncan v. Topham, 8 C. B. 225, was cited at bar by the libellant. That case held, that where a contract was to be performed "directly," it meant something more than a reasonable time, and that the word "directly" imported "speedily," or, at least, "as soon as practicable." A glance at that case shows that it was very little like the one now under consideration. The subject matter bore no resemblance to the one we are now considering. The contract itself was the result of a correspondence between the parties, and, when expounded with reference to the subject matter, clearly presented a limitation as to time. But if we apply the doctrine of that case to the one now before us, we shall construe the clause of this charter to be an agreement of the owners of the Onrust that she shall proceed from New York to Key West or Tortugas, in a reasonable time, and from thence as soon as practicable, or speedily, to load on this charter. Still we have no express stipulation, by which time is made an essential element in the contract. We must resort to the rules of law for the measure of the obligation assumed. From New York to Key West or Tortugas reasonable diligence is required in expediting the voyage by the direct route, and from Tortugas to load on this charter, the highest degree of diligence. It is hardly necessary to cite authorities to show, that where a party is bound to the exercise of even the highest degree of diligence, he is not responsible for delay, caused by the interposition of irresistible force, where that force confronts and overpowers him without any fault of his own. "By irresistible force is meant such an interposition of human agency, as

is, from its nature and power, absolutely uncontrollable." Story, Bailm. 25. For delay caused by such a force, a ship bound to proceed on her voyage with any the highest degree of diligence, is no more responsible than she would be for delay caused by lightning or the gale. The most extraordinary diligence cannot go beyond the most exacting fidelity and care in the performance of duty. When these are exhausted in the execution of a contract, where no time is expressly prescribed, the obligations of the party, upon whom the duty rests, are discharged. In the present case the master of the Onrust was entirely faithful and diligent. He not only refused to charter his vessel to the military officers at Tortugas for the purpose of transporting the coal, but he formally protested against the seizure of his vessel, and submitted only to an overpowering force. For this enforced detention, whether lawful or unlawful, the vessel is no more responsible than she would have been if the same delay had resulted from her being driven out of her course by a storm which she could not resist. It follows, therefore, that, as the contract only bound the owners to prosecute the voyage with diligence, and that diligence was exercised, the delay caused by military force constituted no breach.

In view of this conclusion it is hardly necessary to dwell on the cases cited by the libellant, to show that a party may be responsible for the non-performance of a contract, where his failure has been caused by the interposition of illegal force. I will, however, notice one, for the purpose of suggesting in the same connection the distinction which separates that class of cases from the one now before us. Gosling v. Higgins, 1 Camp. 451, was an action for the non-delivery of ten pipes of wine, shipped at the Island of Madeira, on board of a vessel of which the defendant was owner, to be carried to Jamaica, and from thence to England. When the vessel arrived off Jamaica, she was seized, with her cargo, for a supposed violation of the revenue laws, and there condemned; but, upon appeal to the privy council in England, the sentence of condemnation was reversed. A verdict for the plaintiff was ordered by Lord Ellenborough, who remarked to the defendant's counsel, "You have an action against the officers. The shipper can only look to the owner or master of the ship." Here it will be seen was a breach of an express and essential stipulation in the bill of lading, which was to deliver the wine in England. No delivery was ever made. In other words, there was no performance. But the present controversy does not arise out of the breach of any express stipulation. The voyage was performed and the cargo delivered. The only pretended breach consists in not proceeding from Tortugas to Bayport in proper time. But no particular time was stipulated in the contract, and the only time to which the vessel was bound, was that implied by law from the use of the word "direct," which, under the strictest construction, can only mean that period necessary, in the use of the highest diligence, under all the circumstances, to accomplish the voyage. The distinction is obvious. In one case, there was a breach of an express stipulation in the contract. In the other, the time of performance was prolonged by no fault of the master, but, as time was not made the essence of the contract, enforced delay was no breach.

It is obvious that the claim of the libellant would stand upon no higher ground if the word "direct" were held to apply primarily to the route, rather than the time of the voyage from Tortugas to Bayport. The word, applied to either aspect of the case, would be governed by the same rules of law. But, in fact, the gravamen of the libellant's complaint, is not that the Onrust did not pursue the customary route from Tortugas to Bayport, but that she did not start from the former port at the time she ought.

Let a decree be entered dismissing the libel with costs.

[On appeal to the circuit court, the decree of this court was affirmed. Case No. 10,540.]

Case No. 10,540.

The ONRUST.

[6 Blatchf. 533.] [1]

Circuit Court, S. D. New York. Aug., 1869. [2]

CHARTER PARTY—DIRECT COURSE — DEVIATION — IMPRESSMENT BY MILITARY AUTHORITIES —JUSTIFIABLE SEIZURE.

1. Where, by a charter-party, the owner of a vessel agreed that she should proceed direct from the Tortugas, whither she was bound, to another port, to load under the charter, and, after arriving at the Tortugas, she was seized by the military authorities of Fort Jefferson, and compelled to go on two voyages to Key West, for cargoes of coal, which it was alleged was necessary to be used in condensing fresh water for the use of the post, and the seizure was against the protest of the master of the vessel, and without any fault on his part: *Held*, in a suit against the vessel, on the charter-party, to recover damages for its breach and for the delay, that the military authorities were justified in impressing the vessel.

2. If they had erred, and their error had been simply an error of judgment, on the facts as they appeared to them, they would still be justified.

3. The word "direct," in the charter-party, means that the vessel is to take a direct course from the Tortugas to the loading port, without deviation or unreasonable delay, and not that she shall depart from the Tortugas immediately.

4. The duty to perform the agreement to proceed direct from the Tortugas to the loading port, was an obligation imposed by law.

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

[2] [Affirming Case No. 10,539.]

5. A forcible detention will excuse from the performance of an obligation created by law.
[Cited in The Coventina, 52 Fed. 157.]

6. The case of Paradine v. Jane, Aleyn, 27, commented on.

7. The seizure of the vessel being justified, and her owner having been disabled from performing his contract without any fault on his part, the fact that he has a remedy over against the government does not make him responsible to the charterer for the delay.

8. In this case, he is not responsible for such delay, even though the military authorities were trespassers in seizing and detaining the vessel.

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

This was a libel in rem, in the district court, against the schooner Onrust, to recover damages on a charter-party, by which the owner of the schooner chartered his vessel for a voyage from a place, or places, designated, in the state of Florida, to the port of New York, with a cargo of cedar. The charter-party, which was dated December 14th, 1865, contained this language: "It is understood, that the vessel is now loading for Key West, or the Tortugas, and is to proceed thence direct, to load on this charter." The vessel reached Fort Jefferson, at the Tortugas, January 19th, 1866, and discharged her cargo, and was ready to start for the port in Florida, as required by the charter, when she was seized by the authorities of the fort, and compelled to go on two voyages to Key West for cargoes of coal, for the alleged necessities of the place. The allegation was that the officers and soldiers in the fort depended upon coal to condense water for the post. The district court decreed for the claimant [Case No. 10,539]; and the libellant appealed to this court.

George De Forest Lord, for libellant.
Robert D. Benedict, for claimant.

NELSON, Circuit Justice. There is no doubt that the vessel was inpressed by the authorities, for the voyages to Key West, against the will and protest of the master, and without any fault on his part; and that, while thus engaged, she was under the control of the public authorities. This detention occasioned the delay complained of in the libel as an infraction of the charter-party.

In Mitchell v. Harmony, 13 How. [54 U. S.] 115, 134, Chief Justice Taney says: "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed, to prevent it from falling into the hands of the public enemy; and, also, where a military officer, charged with a particular duty, may impress private property into the public service, or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser." He admits that, in all such cases, the danger must be immediate and impending, or the necessity urgent for the public service, and such as will not admit of delay. In that case, the court held, upon the testimony, which was undisputed, that, a case of danger or necessity, within the rule of law, had not been made out, and sustained the judgment for the plaintiff. The chief justice further observes, that, in deciding upon the necessity, "the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for, he must necessarily act upon the information of others, as well as his own observation; and if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous, will not make him a trespasser." Within this principle, I am inclined to think, that, in the case now before us, the authorities at Fort Jefferson were justified in impressing the vessel for the purposes and uses alleged. Something is due to the decision, made by these officers under the circumstances and relative situation and condition of the fort—remote from any supply of fresh water for the garrison, and dependent upon the article of coal, as a necessary material in obtaining it. The officers may have erred, but, if their error was simply an error of judgment, on the facts as they appeared to them, they will still be justified.

It is argued, however, that, assuming this to be so, it constitutes no defence against delay in the voyage, in this case, as the carrier had expressly agreed in the charter-party, that he would proceed directly from the Tortugas, on discharging his cargo, to the port or ports of loading in Florida; and that, as he thus, in terms, covenanted to proceed directly, and without any delay, this forcible detention will not excuse him, within the rule laid down in Paradine v. Jane, Aleyn, 27, and that class of cases. In other words, it is claimed, that, if a party charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. The law, however, is otherwise, if the obligation or duty is created by law.

It is supposed, by the counsel for the libellant, that, by the clause in the charter-party to which I have referred, there is an express and positive obligation entered into by the carrier, to proceed at once from the Tortugas, on unloading his outward cargo, to the port or ports in Florida, and that the only excuse for delay is to be found in the instances given in the case of Paradine v. Jane. I am of opinion that this is too narrow and strained a construction of the word "direct," in the connection in which it is found; and that a plainer and more natural interpretation is, that that word is used to express, simply, the course of the voyage to be performed by the vessel, after arriving at the Tortugas. She was to go direct, that is, she was to take

a direct course thence, to the port or ports in Florida, without deviation or unreasonable delay. Giving to the word this interpretation, the duty to perform the covenant with diligence, and in a reasonable time, was an obligation imposed by law, as contradistinguished from one imposed by positive contract. It did not mean that the vessel should depart from the Tortugas instantly or immediately, but that she should, at that place, enter upon the voyage provided for in the charter, and proceed in a direct course to the place of loading in Florida. The degree of diligence and despatch, according to this interpretation, is a question of law, under the particular circumstances of the case.

It is insisted, however, that, admitting that the officers at the fort were justified in seizing the vessel, and that the party was disabled from performing his contract without any fault on his part, still, as he has a remedy over against the government, he is not exempt from responsibility for the delay. The answer is, that the remedy over is, within the contemplation of the rule in Paradine v. Jane, a legal remedy, which may be enforced in a court of justice.

Upon the interpretation thus given to the contract, the defence here is complete, even assuming that the officers of the fort were trespassers in seizing and detaining the vessel. Harmony v. Bingham, 2 Kern. 99; Parsons v. Hardy, 14 Wend. 215; Wibert v. New York & E. R. Co., 19 Barb. 36, 2 Kern. 245; Conger v. Hudson River R. Co., 6 Duer, 375.

Decree affirmed.

Case No. 10,541.

The ONTARIO.

[8 Ben. 500.] [1]

District Court, E. D. New York. July, 1876.

SALVAGE—DERELICT—DISTRIBUTION.

1. Where a canal-boat in heavy weather broke loose from a tow, in going across the upper bay of New York, and was picked up by a tug and taken to Staten Island, the towing boat being present but not interfering with the labor of the tug; *Held*, that, while the canal-boat was not a derelict, as her towing boat was in sight and watching her, nevertheless the service rendered by the tug was a proper salvage service, and the court would award as a proper compensation $400 and costs, the value of the canal-boat and cargo being $1600.

2. A fireman, who at some risk, jumped on board the canal-boat to make a line fast, should receive a share equal to that of the master of the tug.

In admiralty.

Beebe, Wilcox & Hobbs, for libellants.

G. P. Hawes, for claimant.

BENEDICT, District Judge. This is an action to recover for salvage services rendered to the canal-boat Ontario, which boat, while being towed in the harbor, between Robbins' reef and Bedloe's Island in a heavy sea, broke loose from her tow and, thereafter, having no one on board, was picked up by the tug Conover and taken safely to Staten Island.

Clearly a salvage service was performed. The canal-boat was adrift, and in such weather would have been wholly lost, if she had not been picked up. But she was not strictly derelict, for the tug Virginia Jackson, from whose tow she had broken loose, was present, and it cannot be said that she would not have rescued the canal-boat, if the Conover had not come to her assistance. It is nevertheless plain that, in view of the ability of the Conover to secure the canal-boat, the Virginia Jackson, although ready to make the effort if necessary, considered it prudent to leave the boat to be so rescued, rather than endanger the other boats of the tow in an attempt to secure the one adrift.

The case being then not one strictly of derelict, I do not think it would be just to award one-third, although the value of the property saved is no more than $1600. And yet, considering the importance of encouraging the rendition of aid to this class of vessels, which are often, when being towed about the harbor and the sound, exposed to weather which they are poorly adapted to withstand, I shall give a liberal compensation for the time and labor expended. The libellant may have a decree for $400. In the distribution of this sum, the fireman, Matthew Kane, who, at some risk, volunteered to jump on board the canal-boat to fasten the line, will share equally with the master of the tug.

No tender having been made, the libellants must also recover their costs.

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

Case No. 10,542.

The ONTARIO.

[The case reported under above title in Brown, Adm. 480, is the same as Case No. 8,283.]

Case No. 10,543.

The ONTARIO.

The HELEN MAR.

[2 Lowell, 40; 7 Am. Law Rev. 754.] [1]

District Court, D. Massachusetts. Aug., 1871. [2]

COLLISION — LIGHTS — IGNORANCE OF STATUTE — PRESUMPTION AS TO FAULT — ABANDONMENT — TOTAL LOSS—WHALING VOYAGE—FREIGHT.

1. A whale-ship in the Arctic ocean, which had been twice refitted at San Francisco, after the statute of 29th April, 1864 [13 Stat. 58], concerning collisions, was passed, and which could have procured the colored lights at that port, *held* in fault for not having such lights,

[1] [Reported by Hon. John Lowell, LL.D., District Judge, and here reprinted by permission. 7 Am. Law Rev. 754, contains only a partial report.]

[2] [Affirmed in part and reversed in part, in Case No. 13,695.]

though her master had never heard of the statute.

2. A vessel having the right of way in the night-time, and not having the statute lights, is presumed to be in fault in respect to a collision with a vessel that should have seen her and given way.

[Cited in The City of Savannah, 41 Fed. 893.]

3. The vessel bound to give way is likewise in fault, if by diligence and attention her lookout might have discovered the vessel that had not proper lights.

[Cited in The City of Savannah, 41 Fed. 893.]

4. Where one of the ships damaged by a collision was abandoned in the Arctic ocean, under a reasonable apprehension that the lives of the crew would be endangered by trying to save her, *held*, her loss should be assessed as a total one, though the other ship similarly damaged was saved.

[Cited in The C. H. Foster, 1 Fed. 734.]

5. Under the statute limiting the liability of ship-owners, the outfits of a whaleman are part of the appurtenances of the ship in estimating value.

6. Under the same statute, there is no freight pending in a voyage for catching whales.

[7. Cited in The Abby Ingalls, 12 Fed. 218, to the point that where two vessels are meeting, end on or nearly end on, the one close-hauled on the starboard tack and the other having the wind on her port side, the vessel close-hauled has the right of way.]

[8. Cited in The Ada A. Kennedy, 33 Fed. 624, to the point that a vessel hove to and making both headway and leeway is a vessel close-hauled within the meaning of the rules of navigation.]

Cross-libels for damage by collision between the whale-ships Ontario and Helen Mar, in the Arctic ocean, Sept. 26, 1866, at ten o'clock at night. A gale was blowing from the north-west, and both vessels were lying-to under storm-sails. They were bark-rigged vessels; and, according to their several pleadings, the Ontario was close-hauled on the starboard tack under close-reefed main topsail and foretop-mast staysail, and the Helen Mar was close-hauled on the port tack, having set her lower main-topsail, fore-staysail, and foretop-mast staysail. Each vessel was making from one and a half to two and a half knots, a considerable part of which was to leeward. The libel on behalf of the Ontario alleged that the night was bright moonlight, with occasional snow-squalls, and that the men of the Ontario saw the Helen Mar about half a mile off, and expected her to give way. The owners of the Helen Mar pleaded that there were thick snow-squalls, with intervals of clear weather; that there was a good lookout, but it was impossible to see the Ontario in time to avoid her, she having no sufficient lights.

The starboard sides of the vessels came together, and each lost the foremast and main and mizzen topmast and head-gear, besides the anchors, and all boats but one. The Ontario was abandoned, and the loss to her owners was alleged to be $150,000. The Helen Mar was brought out of the Arctic ocean, and reached San Francisco in safety, with a damage pleaded at $20,000. She made several more cruises, and reached New Bedford in 1870. Witnesses were examined from time to time, as they arrived in this part of the country, and a few were produced in court; others could not be found. It was admitted that the Ontario had not the red and green lights required by law, Captain Barnes being ignorant of the statute. On her part it was contended that she carried a bright light in the lee mizzen rigging, and ought to have been discovered sooner, and, having the right of way, should have been avoided by the Helen Mar.

Two men were stationed amidships on the Helen Mar as lookout men,—one on the main hatch, and one on the vice-bench, just forward of that hatch, and raised several feet above it. This man was not examined; and it was proved that efforts had been made to find him, without success. The other man testified in court that he saw a light on the lee bow, and reported it to the second mate. The second mate, Mr. Shiverick, swore that immediately on the light being reported he went to the waist, but could see nothing; that he then ordered the wheel hard up and the main yard to be squared, and then went immediately to the bow and saw the light of a vessel not more than a ship's length off, and heard a voice on board of her say, "Hard up that helm," which he supposed to be addressed to the men of the Ontario. He thereupon ordered his own wheel to be put down again, and very soon afterwards the vessels came together. He said that the effect of his last order would be to ease the blow if the Ontario was falling off, as she had every appearance of doing; thinks they would have come together head and head if he had not given this order. This witness said, that during the snow-squalls it was dark, and between the squalls it was light, so that you could see a vessel for about half a mile. He afterwards said there was a kind of blur on the water, from the blowing of the water, and that he thought a vessel without lights could be seen about a quarter of a mile off at the time of the collision. He also said, that when he went to the bow he saw the Ontario, though by this he may have intended to refer to her light. The lookout confirmed substantially the evidence of Mr. Shiverick, excepting that he heard nothing from the other vessel, and he thought the light was about four points off the lee bow. The people of the Ontario denied that any change of her course was made at any time. They represented the weather as bright and clear for some time before the collision. Some of them swore that the moon was shining.

T. M. Stetson and O. Prescott, for the Ontario.

We admit that we had not the lights, but we had one nearly or quite as good, which ought to have been seen. The obligation to keep a good lookout was as strongly resting on the

Helen Mar, as that of showing a light rested on us. We could do nothing more than we did; and, the weather being such as it was, the fault lies with the other vessel, for the night was bright in the intervals of the slight snow-squalls.

Upon the evidence it was prudent and proper to abandon our vessel. There was great danger of losing both ship and crew at that season of the year in the Arctic ocean.

To the point that the want of regulation lights must have been the operative cause of the collision in order to affect the decision, see The Gray Eagle, 9 Wall. [76 U. S.] 505; The Eclipse, Lush. 422; The Flavio Gioja, 3 Mitch. Mar. Reg. 757; Morrison v. General Steam Nav. Co., 20 Eng. Law & Eq. 455.

If the night was clear, the Helen Mar should have seen us. The Niagara, 21 How. [62 U. S.] 7; Whittredge v. Dill, 23 How. [64 U. S.] 451; Union St. Co. v. New York, etc., Co., 24 How. [65 U. S.] 314. A case almost exactly like this is The Cynosure [Case No. 3,528]. We could have justified a departure from the duty of keeping our course by any inference that the Ontario would not do her duty, but were bound to keep on, as we did. Bentley v. Coyne, 4 Wall. [71 U. S.] 509; The Fairbanks, 9 Wall. [76 U. S.] 425; The Dumfries, Swab. 126.

G. Marston and W. W. Crapo (C. W. Clifford with them), for the Helen Mar, cited The Osprey [Case No. 10,606]; Clapp v. Young [Id. 2,786]; The Rob Roy, 3 W. Rob. Adm. 190; The City of London, Swab. 245; The Calla, Id. 465; The Livingstone, Id. 519; The City of Paris, Holt, Rule of Road, 15, 22; The Gustav, Id. 28, 34; The Lady of the Lake, Id. 37, 38; The Smales, Id. 40; The Eclipse, Lush. 422.

LOWELL, District Judge. The delay in this case seems to have been unavoidable by the parties, owing to the very great distance of the place of disaster from the home port of the vessels, and the dispersion of one of the crews; but it is much to be regretted. The contradictions of evidence for which this class of cases is noted have always seemed to me to be comparatively harmless, when the witnesses can be brought forward immediately after the event, so that their accuracy can be tested by those minute circumstances which escape with the lapse of time. Most of the leading facts of this collision are plain; but two or three matters of very great importance are disputed, and are not easily determined at this time.

I cannot doubt that the Ontario must bear at least one-half of the loss, because she had not the red and green lights. She had been refitted twice at San Francisco since the statute was passed, and it is not alleged that she could not have procured lanterns at that port, as the Helen Mar, in fact, did procure hers. No equivalent can be admitted for these signals, and, even if that were possible, the evidence does not show that the light used by this vessel was as powerful, or likely to be as useful, in giving precise information as the red and green lights would have been. Of the many cases arising under this and similar statutes there are very few in which the vessel having the duty to keep her course, and, therefore, to make known her presence, has been wholly excused when her lights were wanting, or were not of the required kind. If the night was so very bright that the lights would be of little or no practical use, or if the negligent vessel was, in fact, seen long before the collision, the fault might be held to be immaterial. The case of The Palestine, Holt, Rule of Road, 52, seems to come under the former alternative. But such cases are rare; the presumption must always be that the statute lights are the best signals, and that the absence of them on the vessel whose particular province it is to give notice of her position must have contributed to the disaster.

The fault alleged against the Helen Mar is, that she did not see the Ontario, and avoid her, notwithstanding the want of the signal lights. The decision of this question depends on doubtful and contradictory evidence concerning the weather and the distance at which a vessel could be seen. The law requires great vigilance of the vessel that should give way, and the want of lights on the other vessel does not at all relieve this obligation. Article 20 of the statute (13 Stat. 61); Chamberlain v. Ward, 21 How. [62 U. S.] 548; Nelson v. Leland, 22 How. [63 U. S.] 48; Rogers v. The St. Charles, 19 How. [60 U. S.] 108; The Gray Eagle, 9 Wall. [76 U. S.] 510. However gross and palpable, therefore, may be the fault on one side, we are bound to examine into those alleged against the other. The question is very nearly this: Suppose the statute had not required these lights, were the night and the gale such as to excuse the Helen Mar for not seeing or for not avoiding the Ontario? I say the question is nearly the same, because I am not sure that something may not properly be conceded to the surprise of seeing a white light when you had a right to expect a colored one. I take for granted, as did both the counsel, that the Ontario had the right of way, because, although by the rule both were bound to port helms, yet the vessel that is absolutely close-hauled on the starboard tack can port no more without going in stays, which, it has been often decided, the statute does not require unless, indeed, in very extreme cases. The Helen Mar, then, was bound to port her wheel and go to the right; this she did, but when the vessels were so near together that their meeting was not prevented. I do not lay much stress upon the fact that the wheel was put to starboard after it had been put to port; because it seems to

be true, as alleged in the answer, that it was then too late to avoid the collision. And for the same reason I do not find the squaring of the Ontario's yard was of any importance. Her helm was not changed. The inquiry, therefore, is, whether there was any negligence in the lookout of the Helen Mar. The actual state of the weather, if we could ascertain it, would settle this point; but, in the contradictory state of the direct evidence, we are obliged to examine all the facts and circumstances which can give us any assistance. The Helen Mar had her wheel lashed, had but half her watch on deck, and her two lookout men were stationed nearly amidships. The testimony shows that these variations from ordinary rules are not unusual when a whale-ship is lying-to in that ocean in a gale of wind. The cold of even the month of September in that region is such as to require every care to be taken of the men; and they are often permitted, when there is not much work to do on board, to keep what are called quarter watches, by which each watch is divided, and every man is on deck only half the usual time. The great number of hands which whale-ships carry makes this possible, without imprudence. There were four men on deck besides the officer, two of whom were on the lookout, and two were near the wheel, which could be freed in an instant. The position of the lookout is said to have been chosen amidships, because water came over the bows and froze, so that men ought not to be exposed there, the ship having no top-gallant forecastle. There was evidence that the position was a good one for seeing a vessel to leeward, if the sail was such as is sworn to on the stand by the officer of the deck and the lookout, namely, a foretop-mast staysail only on the foremast; but if there was a fore-staysail, as that would come below the rail, it would be likely to interfere with the view. Now it is a circumstance of some importance that the answer sworn to in May, 1868, and the deposition of the mate taken in September, 1867, and the deposition of the master, all say that there was a fore-staysail. Four of the witnesses from the Ontario, two of whom were examined early in the case, say they saw the sails of the Helen Mar, and three of them remember only a lower main top sail and a foretop-mast staysail, the fourth adds a fore-staysail. There was no close examination on this point, the importance of which was not then developed. The number of witnesses preponderates in favor of the present contention of the respondents; and yet very great weight must be given to the answer, which is supposed to be made with care, and to be the statement on which the other party has a right to rely.

I must hold it to be a doubtful question of fact, whether the vessel had not a fore-staysail. Then the witnesses all agree that there had not been a snow-squall for some time, several of them on both sides say for fifteen or twenty minutes before the collision; and the decided preponderance of the evidence is, that between the squalls the night was so bright that a vessel without a light could be seen at least a quarter of a mile off. It appears that the lookout of the Ontario was in the bow, and that the hull of the Helen Mar was seen a considerable time before the collision; and there are several little circumstances which tend to show that the night was not very dark. When the Helen Mar was next refitted, a staging was put in her bow, to accommodate the lookout. Taking all these circumstances together, I am constrained to say that I think the Ontario or her light, or both, ought to have been seen sooner. I reach this conclusion with some reluctance, because the fault on the part of the Ontario was in the very appointments of the vessel, for which the owners and master are personally accountable; while the fault on the other part may have been the momentary carelessness of a sailor, after the responsible agents of the ship had done their duty in all respects. If, therefore, I could persuade myself that the night was thick, or even very dark, I should attribute the whole loss to the first fault, as was done in several of the cases cited by the respondents; but the pleadings themselves, and the decided preponderance of testimony, convince me that at the time of the collision, and for at least fifteen minutes before, there was an interval of clear weather, in which the vessel or her light might have been seen; and that there was a light in her mizzen rigging, though there is certainly a singular confusion in the testimony as to whether it was in the starboard or port rigging. I must order the damages on both sides to be added together, and each party to bear one-half of this aggregate loss.

The details of damage will be settled by an assessor; but one point not less important than that just considered was argued at the hearing, upon evidence of the opinions of many most accomplished experts, as applied to the other facts in the case. In actions of tort "the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act." Loker v. Damon, 17 Pick. 288. If, therefore, by reasonable prudence, firmness, and skill the Ontario might have been saved, her owners cannot recover for a total loss. The Linda, Swab. 306; The Pensher, Id. 211. But in a case of doubt and difficulty, if the master acts in good faith, his decision is of itself evidence of the necessity of the abandonment, and ought not to be lightly overruled. The Flying Fish, 2 Pritch. Adm. Dig. 705, tit. "Registrar and Merchants," No. 171. And the master is not to be expected to risk the

lives of his crew, or to possess a higher degree of skill and judgment than are usually found in men in that position. The Blenheim, 1 Spinks, 289; Sherman v. Fream, 30 Barb. 478.

In this case, the hull of the bark was not injured, and in the open ocean there would have been, I suppose, little danger to the crew, while her provisions held out. But she could not work to windward, and was in a sea which would be closed by ice before long, and the passage from which was somewhat to windward, and was considered dangerous and difficult. The master consulted with two other captains, one of whom was in the employ of the same owners, and made up his mind that the only prudent course was to abandon his ship. The result attending the Helen Mar's attempt seems to show that this decision was unfortunate. Still I am not prepared to say that there was such a want of ordinary firmness and judgment that the loss should be thought to be too remote a consequence of the collision. The result of the very full evidence upon this head seems to be that expressed by one of the experts,—that many whaling masters would have made the effort. But, on the other hand, I think it is shown that it could hardly be less than a somewhat desperate effort, and one that many excellent captains would not be willing to make. Upon the whole, therefore, I am of opinion that the total damage actually sustained by the owners of the Ontario must be brought into the account.

Interlocutory decree that both vessels were in fault.

LOWELL, District Judge. In assessing the damage suffered by the owners of the Ontario, the oil and bone which were lost in the Arctic ocean have been estimated according to the rule laid down in Bourne v. Ashley [Case No. 1,699]. Exception is taken to this mode; and as it differs from that adopted in Taber v. Jenny [Id. 13,720], it cannot be considered as definitively established, until it shall have passed under review in the circuit court. In this case, the very large interests involved make it not improbable that the supreme court may eventually be called on to settle the important questions which are raised. All damages are more or less conjectual, unless when the subject is some article which has a value that is fixed, day by day, in the dealings of merchants or bankers, and the most reasonable and expedient rule must be imperfect. Upon a reconsideration of the case above cited, with the aid of the argument against it, I am unable to find any better rule, or one more likely to do justice in the general run of cases. It was argued that the price of oil and bone was exceptionally high at New Bedford at the time of the loss of the Ontario, and that, by making the assessment at that price, I should give the libellants what they never could have obtained in any possible combination of circumstances. There might be, and I think would be, a propriety in taking the average price for a few days or weeks, rather than that of any one day, as fixing the supposed value of a cargo, in order to avoid any mere accident of the market. I do not understand that this would relieve the difficulty, nor that it has not in fact been done by the assessor. The argument goes further, and insists that if we take New Bedford prices, they should be such as the owners might by possibility have realized. It does not seem to me that any such modification of the rule can be adopted. The libellants had a thing in the Arctic sea which would not have come home at that time, and perhaps never, and of which we must find the value then and there, as well as we may. Some of the evidence in Bourne v. Ashley [supra] tended to show that the oil and bone were worth in the Arctic ocean what they were in New Bedford, after deducting the expense of getting it home. Nothing in the assessor's report here contradicts it. I suppose that, for purposes of sale, insurance, or any other contract, the owners of the cargo really had a property there of the estimated value, and, if they had been able to know the quantity, could have realized that value. It was suggested that the market price in New Bedford of the article at the time and place it was in is the true rule. This would be so if there were any such market price; that is to say, if such sales were made often enough to establish a tariff of prices. But there is no evidence of any such thing. If sales to arrive were often made, there is no reason to suppose, and no evidence, that any very material allowance would be made in them for subsequent fluctuations of the market.

Two most interesting and difficult questions of law have been argued in reference to the limitation of liability of the owners of the Helen Mar. I may as well say at the outset that the ship appears to have been appraised at her value before the collision, which is opposed to the decision in Norwich Co. v. Wright, 13 Wall. [80 U. S.] 104. Counsel were familiar with that case, and I understood them to say it had been followed; but I do not so read the assessor's report.

The other questions are: whether the outfit of the vessel is to be included in the valuation; and whether any and what freight is to be reckoned on her oil and bone. The case of The Dundee, decided by Lord Stowell, and affirmed by the king's bench under the presidency of Lord Tenterden, established the interpretation of the English statute 53 Geo. III. c. 159, as including the fishing stores, as they are called in that case, of a whaler, among the appurtenances of the ship. The Dundee, 1 Hagg. Adm. 109; Gale v. Laurie, 5 Barn. & C. 156. In the trial at common law the jury found that by the usage of the trade such stores are not covered by a policy on a ship, her tackle, apparel, munitions, and furniture, and were not so covered at the date

of the act of parliament; and the defence relied much upon that usage as proved, and as shown by the report of the case of Hoskins v. Pickersgill, 3 Doug. 222. In deciding the case in the admiralty the learned judge said:

"It may not be a simple matter to define what is and what is not an appurtenance of a ship. There are some things that are universally so, things which must be appurtenant to every ship, qua ship, be its occupation what it may. But, I think, it is rather gratuitously assumed that particular things may not become so from their immediate and indispensable connection with a ship, in the particular occupation to which she is destined, and in which she is engaged. * * * Whether a whaler is originally built with any peculiarity of construction for that service is more than I know; but this is clear, that unless she has various appurtenances not wanted in other ships, as well as a crew peculiarly trained, she had better stay at home than resort to the Arctic regions, where alone her function can be exercised. A ship of war, public or private, has a special character, and it is a necessary consequence that she shall have special appurtenances. A packet, and particularly a steam packet, has its specialties. A Greenland ship is not a merchant ship, carrying out a cargo to be exchanged; she has character superadded by her special occupation, and must have the machinery adapted to the catching of whales, and to the dressing them, in part, on board the vessel." 1 Hagg. Adm. 126.

The court of king's bench followed the same general course of reasoning, and in respect to the argument from the usage in policies said:

"It is true that, in case of insurance, these stores are not considered as covered by an ordinary policy on the ship. But insurance is a matter of contract, and the construction of the contract depends in many cases upon usage. The construction of a policy can furnish no rule for the construction of this act of parliament which was passed for purposes of a different nature." 5 Barn. & C. 164.

It cannot be denied that a great part of the discussion in both courts in the case of The Dundee turned upon the meaning of the word "appurtenances," which is used in the English statute, but is not found in our act of 1851. We hold the owner to respond only for the value of his ship and the freight then pending. The only question for me is whether this whaling outfit is part of the ship in the sense of the statute. In my opinion it is. I understand that a ship in that law includes her appurtenances. If not, I am at a loss to know where the line is to be drawn, and whether we are to appraise the sails, rigging, boats, furniture, and general fittings, or which of them. In the common speech of merchants the whole adventure of a vessel, in full employment, consists of ship, freight, and cargo. The whaling equipment has been decided not to be cargo, Hill v. Patten, 8 East, 373, and it certainly is not freight. The argument for the owners of the Dundee was, that "appurtenances" means no more than tackle, apparel, and furniture, and was used to save the repetition of those words; and as those words did not, in insurance law, include the equipment, the word "appurtenances" should be restricted in like manner. The courts, though dwelling, as was fit, upon the precise words of the statute, yet did not reject the premises of the defendants, but only their conclusion. They did not deny the pertinency of the citation, as giving a construction to appurtenances, if the question had been one of insurance, but only its effect in construing that word in a statute. In fact, there are two rules in the law of insurance: One, that in a policy on a merchant ship the outfit is included. The other, that in a policy on a fishing vessel it is excluded. The former rule was established by the courts; the latter, which may well enough be called an exception, is founded in usage. Phil. Ins. §§ 463, 496, 497, and cases.

Mr. Phillips (section 463) says that the usual form of policy in this country is simply on the ship, and that it is well settled that on a policy for a commercial voyage this includes sails, rigging, boats, armaments, provisions, and all the appurtenances suitable or usual on such a voyage as is described; but that the rule is different in fishing voyages. This difference, as we have seen, had its origin in usage. No doubt, it is a reasonable usage, arising out of the great value of the outfit in many of these voyages; but in construing a statute of general application, we ought not to assume a different doctrine for different kinds of vessels, varying with the accidental variations of value in the outfits, and especially in a statute restricting remedies. This will hardly be maintained; and if not, then it only remains to ascertain whether appurtenances should be included or excluded in all cases. As I said before, it is the better opinion that the statute, in using the word "ship," intended to include her appurtenances.

It is much more doubtful whether it can be held that there was any freight pending on the voyage of the Helen Mar. Had it been a freighting voyage, the English statute in terms, and ours by construction, would have authorized the assessment to the owners of the value of the freight to them for the carriage of their own goods. St. 53 Geo. III. c. 159, § 2; Allen v. Mackay [Case No. 228]. In a whaling voyage the share of the catch which is retained by the owners has many analogies to freight, because it represents the earnings of the ship. The Antelope [Id. 484]. Still it has been decided not to be so far analogous to accruing freight as to pass by a sale of the

ship, Langton v. Horton, 5 Beav. 9; and I do not doubt the soundness of that ruling. It is not commonly called freight, and it would be an unwarrantable stretch of construction to bring it within that word in the act. In The Dundee it was taken for granted in both courts by the learned and eminent judges who delivered the judgments, that there would be no freight in that case, even under the second section of the statute, which puts owners who carry their own goods upon an exact equality with those who earn freight from carrying the goods of others. They thought the point a clear one, and used it as an argument for including the outfit, that there was no freight in such a voyage. So far as the proportion of the oil and bone which is the share of the officers and crew is concerned, the owners are not benefited by its being carried to a port of delivery; and, on the whole, I think that there is no freight pending in a whaling or fishing voyage in the sense of the statute. If there should be held to be a constructive freight, it would be almost impossible to assess it, because in many of these voyages there is no place from which it can be reckoned. The whales are caught at various parts of the ocean, hundreds or thousands of miles apart, at various times during a period of from one to five years, and there would be in most cases no means of arriving at any thing like a fair estimate of a freight which never in fact exists.

I affirm the assessor's report as to all matters of fact found by him, and decide: (1) The Helen Mar is to be valued immediately after the collision, instead of before it, (2) with her equipment, (3) with no allowance for freight.

[On appeal to the circuit court, this decree was affirmed so far as it held both vessels in fault, and the aggregate damages to be divided, and reversed so far as it included in the valuation of the Helen Mar her whaling outfits, as a basis for determining the extent of the liability of her owners. Case No. 13,695.]

ONTARIO The (FLANNERY v.). See Case No. 4,856.

ONTARIO (SMITH v.). See Cases Nos. 13,085 and 13,086.

Case No. 10,544.

The ONYX.

[Cited in Treat v. The Rainbow, Case No. 14,161. Nowhere reported; opinion not now accessible.]

Case No. 10,545.

OOLOGAARDT v. The ANNA.

[12 Int. Rev. Rec. 130; 9 Am. Law Reg. (N. S.) 475.]

District Court, D. Rhode Island. 1870.

BOTTOMRY—SUBSEQUENT GENERAL AVERAGE LOSS.

1. Where a vessel is libelled and sold on a bottomry bond, the fund in court is not subject, as against the bondholder, to any claim for a general average loss subsequent to the date of the bond.

2. Whether the admiralty has jurisdiction of a suit in rem for a general average loss, quære?

This was a petition by T. & J. Coggeshall, of Newport, against the proceeds of the sale of the brig, on account of general average expenses. On the 24th of February, 1870, the firm of Oologaardt & Bruinier, of Amsterdam, in the kingdom of the Netherlands, exhibited in this court their libel against the brig Anna, of Maitland, Nova Scotia, Robert Dart, master, then lying in the port of Providence in this district, articulately propounding in substance, that by virtue of a certain instrument of hypothecation and bottomry, made by said Dart, as master, on the 25th of November, 1869, in the parish of Helden, in the province of North Holland, in the kingdom of the Netherlands, they were entitled to a decree of this court against the said brig for the sum of $2,195.14 in gold,—and praying process in admiralty against said vessel, to compel or secure payment of said sum, with incidental costs and charges. A decree of sale was entered, without opposition, on the 2d of March, 1870, when, also, the claim of the libellants for the sum aforesaid was ascertained and allowed, and on the 19th of March the net proceeds of the sale ($2,300, less $98.94, costs of sale), $2,201.06, were lodged in the registry. Out of this fund, the libellants assenting, on the 21st of March, were paid to petitioning seamen and material men, the gross sum of $159.42, leaving in the registry for the payment of taxable costs and the libellant's claim as aforesaid, the sum of $1,541.54. Out of this, the said Capt. Dart, although a part owner of the vessel, by petition, prayed payment of his wages in arrears, amounting to $270, grounding his claim upon section 52, St. 7 & 8 Vict., and notice was given to the court and the libellants that yet another claim upon the fund, for salvage or of the nature of a salvage claim, would be preferred in the course of a few days. On the 26th of March the petition of the captain was dismissed with costs, and in pursuance of notice as aforesaid, the petition of T. & J. Coggeshall claiming payment of the sum of $218.67 was filed.

Payne & Tobey, for petition.

Browne & Van Slyck, for libellants.

KNOWLES, District Judge. The claim is in the name of T. & J. Coggeshall, but it appears from the testimony that, as regards this matter, we may view John Coggeshall as composing the firm. He alone acted, spoke and wrote, and he alone testifies in support of the claim. In fact, the only evidence submitted is his deposition with its exhibits, A and B,—the first a document entitled "General Average Statement," signed "Bradford & Folger, Adjusters of M. Losses"; the second an account of T. & J. Coggeshall

against the "Brig Anna, of Maitland, N. S., cargo and all concerned," amounting to $710.46, comprising thirty-five items, the largest of them $200 for their "services and responsibility," the smallest 27 cents for a telegram from Capt. Dart to somebody not named. To this amount the adjusters add a charge of $50 for their services, one of $3 for drawing a marine protest, and a third of $19.08 for commissions for collecting general average at 2½ per cent., making a gross sum of $782.54—of which amount the petitioners, quoting as unimpeachable and unobjectionable, the adjusters' statement, claim that $218.63 should be paid them out of the proceeds of the vessel in the registry; freight being bound (as say the adjusters) to pay $105.63, and the owners of the cargo, $458.28.

In support of this claim the petitioners first invite attention to a paragraph (said but not proven to be an extract from the brig's log book) prefixed to the adjusters' statement, narrating as facts the following, viz.: That the vessel sailed from Amsterdam, November 15, 1869, with a cargo of scrap iron and empty casks for Providence, R. I.; had severe weather all the voyage, and on the 6th of December discovered a leak of three to four hundred strokes per hour, requiring the use of one pump all the time in bad weather; the jib stay sails and other sails split. That on the 10th of February, the vessel arrived at Newport, and anchored off Rose Island between 1 and 2 p. m., when, after furling sails, it was discovered that the vessel was leaking very much more. That then, with four extra men from shore, commenced and continued pumping until 4 a. m., February 11th, when the revenue cutter came along side and towed the vessel into the inner harbor about 5 a. m., where she grounded in 14 feet water, having 7½ feet of water in her hold; and that subsequently she was pumped out and towed to Providence, (a distance of thirty miles,) with cargo on board.

Next in support of the claim, the deposition of John Coggeshall, the claimant, was read, of which the material portions were these, viz.: He is 38 years of age, resides in Newport, and is, and has been for many years, the agent for the New York board of underwriters. On the morning of the 11th of February, in consequence of a message from the captain of the revenue cutter, he went on board the cutter, where he was informed that the Anna was lying in the outer harbor in a leaky condition, liable to sink; in view of which fact the captain of the cutter had deemed it proper to notify the witness, as an agent of underwriters, who might be interested in the vessel or her cargo. The result of the conference between the captain and the witness was, that some of the cutter's men were put on board the brig, her anchor taken up, and she taken in tow by the cutter and brought into the inner harbor of Newport, in shoal water. Then says the witness: "I went on board the brig, and found there part of the cutter's crew, and the mate of the brig Anna and a portion of her crew. After that, by my advice, the brig was put in shoal water where she would ground at low tide, extra men being put on board to pump. I then went on shore and immediately telegraphed to the New York board of underwriters, receiving a reply from the Atlantic M. M. Insurance Company of New York, that they had insured $1,000 on the freight money of said brig from Amsterdam to Providence, and asking me to protect their interest. Up to this time I had not seen the captain of the Anna, but had sent a messenger to him on shore. I wished to learn who was the owner or consignee of the cargo in Providence. The captain came to my office and informed me that he did not know as the cargo was consigned to order. I advised him to telegraph immediately to some owner of his vessel or to some agent, advising him of the condition of the vessel. He telegraphed to D'Wolf & Co., of New York; and it happened that one part-owner of his vessel, Mr. Crow, was in New York, who replied to Captain Dart's telegram that he would be in Newport the following morning. He came accordingly, and learned from the captain that a bottomry bond had been given upon the vessel at Amsterdam. Mr. Crow thought that the amount of the bond exceeded the value of the vessel, and therefore would not take any responsibility or agree to pay any portion of the expenses of pumping the vessel, or of towing her to Providence. I kept three pumpers on board, by agreeing to pay their expenses. The following morning I came to Providence, to find the consignee of the cargo, and there learned that A. & W. Sprague were expecting a cargo of iron from Europe. These gentlemen referred me to their agent, Mr. Greene, who declined to take any responsibility because the cargo was to be delivered on the wharf in Providence, he agreeing, however, that when the cargo should be delivered he would sign a general average bond, to pay a portion of the general average charges. I kept the men pumping, and became responsible for all the bills, and advised the captain to get the stern of the vessel out of water as much as possible. The men carried some twenty-five tons of iron forward by my and the captain's directions, which brought the leak out of water enough, so that the vessel was pumped out. I can't say whether this iron was carried forward by the men I assured for their pay, or by the crew. Probably both parties assisted. I don't say I sent these men on board. I told Captain Dart to get all the men that were necessary, and I assured him I would pay them. After the vessel was pumped out so that the pumps sucked, I telegraphed to Providence for a steam tug, agreeing to be responsible for the bill. I then, before the vessel started for Providence, had a survey by three competent men, a ship-carpenter, a captain and a retired

sail-maker, who approved of my plan to send the vessel to Providence, by means of the tug-boat, with extra men to pump, if necessary. The tug came down that night, and took the brig in tow about 4 o'clock next morning and delivered her safely in Providence. Before she started for Newport, I put on board of the brig a watchman at the instigation of the holder of the bottomry bond (a Mr. Blake), and also two or three men to pump. The watchman was to see that nothing was taken from the vessel. After the vessel was delivered in Providence A. & W. Sprague signed the average bond, and my action was approved by them, the insurers on the freight, Captain Dart and Mr. Crow." The witness further stated that he believed the vessel arrived in Providence the 17th of February, and that he had procured the average statement to be made up by Messrs. Bradford & Folger.

Upon this state of facts and proof the petitioners rest their claim—contending that under the law as it is, or as it should be declared, the expenses incurred and the services rendered by them are general average expenses, and that the fund in the registry is bound to contribute ratably to such general average expenses.

On behalf of the libellants it is averred and maintained: First—That no claim upon a general average lies against the bottomry bondholder, whether regard be had to the principles involved in the contract of bottomry, or to the recorded adjudications of the admiralty courts of England or the United States. Second—That the facts in proof in this case show no occasion or justification for an assessment by general average for the expenses incident to the springing aleak of the brig Anna. In a word, that had the petitioners (virtually but volunteers, or at most, but very active agents of the insurers of the freight), kept aloof, the captain and the crew of the brig would have brought her to Providence quite as soon, and in quite as good a condition as she was brought by the petitioners' aid. Third—That by the law of Holland, the locus contractus, a bottomry bondholder is exempt from a general average. Fourth—That divers of the charges comprised in the statement of general average on file are either illegal or very exorbitant, and few, if any of them, supported by any proof whatever, one of said charges being for expenses and services of Mr. Crow, an owner, to the amount of $40, and another of $25 for Captain Dart's services and provisions, to specify no others.

To these positions of the parties respectively, I have given deliberate and prolonged consideration, and to the many authorities cited by them, as well as to scores of others not cited at the bar, have given a not hurried examination. The conclusion to which I arrive is, that the petitioners' claim must be disallowed. Were the judgment of this court a final one—that is, not a subject of review on appeal, I should deem it warrantable, if not expedient, here to state in extenso, my views of the several points presented, and the processes of reasoning, upon the authorities examined and the facts in proof, which lead me to the conclusion I have announced. But as an appeal lies to the circuit court, and as it seems to me not improbable that the petitioners may desire the judgment of that court upon the principal question involved (now for the first time, so far as I can learn, distinctly raised in a federal court), I refrain from saying anything in support or vindication of my judgment. I have only to add, and this from abundant caution, that my ruling in this matter is not to be received or represented as pro forma merely, on the contrary, it is the result of deliberation and research.

It may not be unprofitable to add, that upon a question not raised at the bar, viz.: Whether the admiralty has jurisdiction of a suit in rem for average contribution, the inquirer may with great advantage, consult [Cutler v. Rae] 7 How. [48 U. S.] 729; Beane v. Mayurka [Case No. 1,175]; [Dupont v. Vance] 19 How. [60 U. S.] 171; Rea v. Cutler [Case No. 11,599]; [Cutler v. Rae] 8 How. [49 U. S.] 615, Append.; and Dike v. The St. Joseph [Case No. 3,908]. As to this point, I here express no opinion.

The petition is dismissed, with costs.

Case No. 10,546.

OPDYKE v. PACIFIC R.

[3 Dill. 55;[1] 8 West. Jur. 670.]

Circuit Court, E. D. Missouri. 1874.

CONTRACTS — RIGHT OF STRANGERS TO ENFORCE STIPULATION FOR THEIR BENEFIT IN CONTRACTS BETWEEN OTHER PERSONS—GUARANTY.

1. When one who is not a party to a written agreement, but who is the person to be benefited by a performance of stipulations therein, may maintain an action against the promissor, considered.

2. On demurrer, held, that if the facts alleged in the petition were true, the defendant had made itself liable for the payment of interest on bonds issued by another railroad company, containing a representation that the defendant had in consideration of a lease to it of the road of such company, guaranteed the payment of such interest.

[Cited in Ellerman v. Chicago Junction Ry. & Union S. Y. Co., 49 N. J. Eq. 217, 23 Atl. 297.]

On demurrer to the answer. The plaintiff [George Opdyke] brings this action at law to recover of the Pacific Railroad Company of Missouri the amount of seventy-three coupons for interest due Nov. 1st, 1873, upon that number of bonds, of the St. Louis, Lawrence & Denver Railroad Company. The action is brought upon the theory that the facts stated in the petition make the defendant

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

(the Pacific Railroad Company), liable by reason of a guaranty or promise for the benefit of each bearer of the bonds of the Lawrence Company, above named, to pay the interest thereon for the full period for which said bonds were to run. To understand the questions made by the demurrer to the answer, it is necessary to state the substantial parts of the pleadings.

The petition alleges that the defendant, the Pacific Railroad, is a railroad corporation, incorporated, organized and acting, and was so at the several times hereafter mentioned, under and by virtue of the laws of the state of Missouri, and particularly an act of the general assembly of the state of Missouri, entitled "An act to incorporate the Pacific Railroad" [Laws 1849, p. 219], approved March 12th, 1849. Plaintiff says that the St. Louis, Lawrence & Denver Railroad Company was, at the several times hereafter mentioned, a railroad corporation, duly authorized, organized and acting under and by virtue of the laws of the states of Kansas and Missouri, for the purpose of making, constructing, equipping and using a railroad extending from Pleasant Hill, in the state of Missouri, to Lawrence, in the state of Kansas. That at the time of the formation of said last named corporation for said purpose, the said defendant, the Pacific Railroad, was engaged in operating a railroad from St. Louis to Kansas City, Missouri, and that another railroad corporation named the Union Pacific Railroad Company, eastern division, commonly called Kansas Pacific Railroad Company, was engaged in operating a railroad from Kansas City, in Missouri, to Denver, in the territory of Colorado, and that the two railroads last named were, on and before November, 1870, being operated harmoniously and so as to contribute to each other's success. That the said St. Louis, Lawrence & Denver Railroad Company was organized for the purpose of making a new connection between said Kansas Pacific and said Pacific (commonly called Missouri Pacific) Railroads, and which road and the use of which was then and there expected by said Pacific Railroad Company of Missouri to be of great value and benefit to it. And plaintiff says that it was, by and between said St. Louis, Lawrence & Denver Railroad Company and said defendant, then and there known that a large sum of money would be essential to enable said St. Louis, Lawrence & Denver Railroad Company to build its said road, and that no sufficient security would or could be by said last named company given to enable it to negotiate or sell its bonds or evidence of indebtedness in the market. And plaintiff says that said defendant then and there, in view of the supposed advantage to accrue to it by the creation, construction and use of said railroad by said St. Louis, Lawrence & Denver Railroad Company, and to make a security sufficient to induce the purchase of the bonds of said last named company, and in contemplation of the execution and issue of the bonds by said last named company for the sum of one million dollars, bearing interest at the rate of six per cent per annum in gold, payable semi-annually at the National Bank of Commerce in the city of New York, and expressly for the purpose of providing a fund sufficient to meet said interest, did heretofore, to-wit, June 14th, 1870, make and enter into a certain lease and contract with said St. Louis, Lawrence & Denver Railroad Company, in the words and figures following, to-wit:

"This lease and contract, made the fourteenth day of June, eighteen hundred and seventy, between the St. Louis, Lawrence & Denver Railroad Company, a corporation reorganized by consolidation under the laws of the state of Kansas and the state of Missouri, of the first part, and the Pacific Railroad Company, of Missouri, duly incorporated by the laws of the state of Missouri, of the second part, witnesseth: That the party of the first part, in consideration of the covenants and agreements of the party of the second part hereinafter mentioned and contained, and by them to be kept and performed, and of one dollar paid by the party of the second part to the party of the first part, has granted, leased and demised, and by these presents doth grant, lease and demise unto the party of the second part, and their successors, the whole of the railroad of the party of the first part as now located and hereafter to be built and constructed by the party of the first part from its terminus, to-wit, from the city of Pleasant Hill, in the county of Cass and state of Missouri, thence westwardly across the state line, upon the most direct and practicable route to its terminus at the city of Lawrence, in the county of Douglas and state of Kansas, say fifty-eight miles, more or less, making a junction with the Leavenworth, Lawrence & Galveston Railroad, at said last mentioned city, with all the lands, railways, rails, sidetracks, bridges, rights of way, depots, stations, turn-tables, water stations, station houses, and all other buildings and improvements, and appurtenances of every nature whatsoever, now enjoyed, held or owned, or which may hereafter at any time be acquired by said party of the first part for the purpose of operating said railroad. * * * * To have and to hold said demised railroad and premises as aforesaid to the Pacific Railroad Company, its successors and assigns, for and during the term of thirty years, from the first day of August, A. D. eighteen hundred and seventy-one (1871) or as much sooner as the said road shall be completed, delivered to, and accepted by said Pacific Railroad Company, ready for operation; and in consideration of the premises the parties hereto have respectively covenanted and agreed to and with each other for themselves, their respective successors and assigns in manner following, viz: 1st. That they, the party of the first part, shall furnish, provide and pay

for, when payment shall be required, all the right of way for the line of said railroad, one hundred feet in width, and all the land for station houses and all other buildings on the line of said railroad; shall also pay for all work to be done and materials to be used or furnished for use in or about the location or construction of said railroad or its appurtenances, and complete and deliver the same to the party of the second part, in good condition for operating and in all respects equal in its construction to the Pacific Railroad (of Missouri), and of a like gauge therewith. 2d. That the party of the second part and its assigns, shall and will at all times during the continuance of the hereby demised term, after the delivery and acceptance thereof, in good faith, work, use, manage, maintain and operate and keep in use and repair the said railroad of the party of the first part, with its appurtenances, and with such locomotives, cars and rolling stock as the said party of the second part shall deem to be necessary, reasonable and proper for the full accommodation of the business of the road. 3d. That the party of the second part will, at their own cost, employ during the continuance of the said demised term, all such superintendents and employés as shall by them be deemed necessary to maintain, work, use and operate said railroad hereby demised, and shall and will return and deliver up the said railroad at the expiration of the hereby demised term in good order and repair. 4th. That the party of the second part, and its assigns, shall at all times during the hereby demised term have the full and exclusive right to manage and control the said demised railroad and premises, and to regulate and determine the rates of tolls, freight and charges of all the transportations over the whole or any part of the demised railroad and premises, and to charge and collect the same and appropriate the same to their own use, and shall have, use and exercise and enjoy all the rights, power and authority over the railroad aforesaid, and all powers and privileges now possessed or which may hereafter be acquired by the party of the first part, relating to the said road as herein provided, which can or may be lawfully exercised and enjoyed on and about said demised railroad and premises. 5th. It is further agreed that the party of the second part shall pay the party of the first part an annual rental for the use of said road of thirty-five (35) per cent of the gross earnings thereof for the first ten years from the acceptance of said road, and for the next twenty years following the first ten, or for the period of any renewal, an annual rental of thirty-three and a third (33⅓) per cent of the gross earnings of said road; and in determining the gross earnings all receipts for passengers or freights over said road shall be pro-rated with the Pacific Railroad solely with reference to distance of carriage upon the respective roads. 6th. Whereas the St. Louis, Lawrence & Denver Railroad is about to issue its first mortgage bonds upon the said railroad for the sum of one million dollars, bearing interest at the rate of six per cent. per annum, in gold, payable semi-annually at the National Bank of Commerce in the city of New York; and whereas, the said company has agreed to pay all taxes upon the said road and to fence the same and make other expenditures hereinafter particularly specified; now, for the purpose of providing a fund sufficient to meet the said interest (and to make the other payments referred to) the Pacific Railroad Company covenants and agrees to pay the said Bank of Commerce, on account of said rental, to the credit of the interest account of said St. Louis, Lawrence & Denver Railroad, the sum of sixty thousand dollars in gold annually, thirty thousand ($30,000) of which shall be paid on or before the first day of May, and thirty thousand ($30,000) on or before the first day of November in each year after the delivery to and acceptance of said road by the Pacific Railroad Company, under the terms of this lease, and has also agreed to pay said company the sum of fifteen thousand dollars ($15,000) in current money, payable one-half on the first day of January and the remainder on the first day of July at the office of the Pacific Railroad Company, making in all the sum of seventy-five thousand dollars ($75,000), to be paid annually during the entire period of the lease. And it is expressly covenanted and agreed, that if the said sum of sixty thousand dollars ($60,000) in gold, with the premium thereon, and fifteen thousand dollars ($15,000) in currency, should amount to more than the amount to the credit of said St. Louis, Lawrence & Denver Railroad Company, as rental upon the per centage of gross receipts hereinbefore specified, the excess paid by said Pacific Railroad Company, with the premiums paid for gold, shall be charged to said St. Louis, Lawrence & Denver Railroad Company, and shall bear interest at the rate of ten (10) per cent per annum, until such per centage of gross receipts shall itself be sufficient to provide for the annual payments of said sum of sixty thousand dollars in gold and fifteen thousand dollars in currency, and thereafter any surplus to the credit of said St. Louis, Lawrence & Denver Railroad Company over and above the amount so required shall be retained by the said Pacific Railroad Company (of Missouri) until the amounts so advanced, with premiums and interest at the rate of ten per cent, shall have been fully reimbursed to said company. And it is expressly stipulated and agreed, that until all amounts so advanced by said Pacific Railroad Company shall be fully reimbursed and paid, said Pacific Railroad Company shall have a lien upon the road and franchises of said St. Louis, Lawrence & Denver Railroad Company to the amount of such

advance and interest, and no incumbrance, mortgage or lien of any kind or character, except the said mortgage for one million dollars, shall be placed upon said road without the consent of the board of directors of the Pacific Railroad for the time being, until all the amounts so due shall be fully satisfied and paid. It is expressly agreed, that for any fractional portion of a period of six months elasping between the acceptance of said road and the maturity of the first interest payment thereafter on the first mortgage bonds, said Pacific Railroad Company shall pay only a pro rata share in accordance with the time so elapsing. 9th. And it is further agreed and understood, that the said party of the first part shall pay all taxes and assessments at any time hereafter imposed under the authority of the United States, state, county or city laws upon the whole or any part of said road, its buildings or appurtenances hereby demised, and also all taxes which may hereafter be imposed by authority of law, either federal or state, upon the capital stock and the dividends thereon, or upon their bonds or interest thereon, which said party of the first part are or may be liable to pay, and also the interest and principal of any bonds or other debts incurred by the party of the first part, when the same shall mature, and in case of the neglect or refusal of said party of the first part to pay said taxes and liabilities which may be or can be collected by levy on said road, then the said party of the second part shall be authorized to pay said taxes and demands, and shall deduct the amount so paid for taxes, etc., from said semi-annual payments in currency, as they may become due, and the receipts for said payments, so made by said party of the second part shall be taken by said party of the first part on account of such payment to the extent aforesaid. * * * 12th. It is further agreed and understood between the parties, that the party of the first part shall fence the said road with a good and sufficient fence of such height as may be required by the laws of Kansas and Missouri; and one third part of said fence shall be erected within two years, one third part additional within four years, and the whole within six years from the date of acceptance of said road by the party of the second part. The general superintendent of the said second party shall designate the parts of said road which shall be first fenced. But if the said Pacific Railroad Company shall deem the erection of such fence necessary before the period named, said company shall have the right to erect the same and charge the cost thereof, with interest at the rate of ten per cent per annum, to said party of the first part, to be reimbursed out of its proportion of gross receipts as provided in section sixth (6)."

After setting out in full the sixth section of the contract as above given, the petition alleges that it was intended by defendant, by means of the several parts of said agreement of lease, to create a security for the payment of the interest of said bonds as the same became due for the whole period of the existence of said bonds and said lease, and to induce persons desiring to invest their money to purchase said bonds on such security offered by defendant, and that in pursuance of said intention and design on the part of said defendant, plaintiff says that said St. Louis, Lawrence & Denver Railroad Company did, afterwards, to-wit, on the first day of May, 1871, by its president, George W. Dietzler, attested by its secretary, B. W. Woodward, and under its corporate seal, all then and there duly authorized, make, execute and offer for sale, for money, its one thousand certain writings obligatory or bonds, each for the sum of one thousand dollars, payable twenty-five years after its date, and each of which was in words and figures following, to-wit:

"St. Louis, Lawrence & Denver Railroad Company of the State of Kansas. First Mortgage Bond. No. ——. $1000. Interest six per cent per annum, payable semi-annually, at the National Bank of Commerce, in the city of New York, principal and interest payable in gold, secured by mortgage of road and payment of interest guaranteed by the Pacific Railroad of Missouri. Know all men by these presents, that the St. Louis, Lawrence & Denver Railroad Company acknowledges itself to be indebted to the holder of this bond in the sum of one thousand dollars, which said sum it promises twenty-five years after date hereof to pay to the bearer in gold, at the National Bank of Commerce, in the state and city of New York, negotiable and payable without defalcation or discount, with interest from date at the rate of six per cent per annum, payable semi-annually on the first days of May and November of each year, in gold, at the aforesaid bank, on the presentation of the interest coupons hereto attached. This bond is issued to aid in the completion of the St. Louis, Lawrence & Denver Railroad and is secured by a first deed of trust on said road, duly executed and stamped in accordance with the revenue laws of the United States and recorded in the recorder's office for the counties of Douglas and Johnson, Kansas, and Cass county, Missouri, in and through which said railroad passes. Said deed of trust is on said railroad and all its franchises, and is executed to the Union Trust Company of New York, as trustee, and the payment of interest is secured by a contract of lease with the Pacific Railroad of Missouri, dated June 14th, 1870. In testimony whereof, the said St. Louis, Lawrence & Denver Railroad Company has caused this bond to be signed by its presi-

dent and attested by its secretary, and its corporate seal affixed, and the interest coupons attached to be signed by its president. Done at the city of Lawrence in the county of Douglas, state of Kansas, this first day of May, A. D. 1871. Geo. W. Dietzler, President. Attest: B. W. Woodward, Secretary. [Seal.]"

And to each of which said bonds there were then and there annexed fifty instruments in writing, or coupons, signed by said president for said company, in words and figures following, to-wit:

"$30. Kansas. $30. The St. Louis, Lawrence & Denver Railroad Co. will pay to bearer, on the first day of ——, 18—, thirty dollars in gold, at the National Bank of Commerce, in the city of New York, on the presentation of this coupon, being interest due on bond No. —. Geo. W. Dietzler, President."

Said coupons being payable respectively on the first day of May and first day of November in each of said twenty-five years, from 1871 to 1896.

And plaintiff says that after said agreement by and between said St. Louis, Lawrence & Denver Railroad Company, and said Pacific Railroad (of Missouri), as hereinbefore set forth, was made, and at the time said bonds and coupons were made and executed by said St. Louis, Lawrence & Denver Railroad Company, and when the same were being offered for sale in the market, and to induce purchasers to buy the same, it was, with the knowledge and approval, and by request of said defendant, expressly stated on the face of said several bonds, that the payment of interest thereon was guaranteed by said defendant. And plaintiff further says, that by the express terms of sale of said bonds, it was further, with the express knowledge and approval, and at request of said defendant, to induce the purchase of said bonds by whomsoever might desire the same, expressly stated therein that the payment of interest thereon was secured by a contract of lease with said defendant, dated June 14th, 1870 (meaning the lease and contract aforesaid). And plaintiff further says, that afterwards, to-wit, on the 22d day of December, A. D. 1871, the defendant, by its president, did, under and in pursuance of said contract and lease, receive and accept the said St. Louis, Lawrence & Denver Railroad, and did then and there enter upon said lease. And plaintiff further says, that thereupon, by and with the approval, and at the request of said defendant, and with the said facts and inducement expressed on the face of said bonds, said St. Louis, Lawrence & Denver Railroad Company did proceed to offer and negotiate said bonds for sale, and by means of the premises plaintiff was induced to purchase seventy-three of said bonds, relying upon the said promises and agreements of said defendant to pay said sums of money, to meet the semi-annual installments of interest thereon. And plaintiff further says, that afterwards, and as the same became due, the defendant, with full knowledge of all the facts aforesaid, did promptly pay at the place where the same were made payable, the several installments of interest on said bonds, as the same became due, up to the installment due and payable on the first day of November, A. D. 1873, which defendant then and there failed to pay. Plaintiff says that by means of the premises, the defendant did promise and agree, to and with each and every of the bearers of said several bonds and coupons, as the same became due and were negotiated and sold, as aforesaid, and for the purpose of providing a fund sufficient to meet said interest, to pay the said Bank of Commerce on account of said rental, to the credit of said interest account, the sum of sixty thousand dollars, in gold, annually, thirty thousand dollars of which should be paid on or before the first day of May, and thirty thousand dollars on or before the first day of November, in each year, after the delivery and acceptance of said road by defendant, for the entire period of thirty years, unless said bonds were sooner paid. And plaintiff says, that the defendant, by means of the premises, did agree and guarantee, to and with plaintiff, when he became the holder and bearer of each of said bonds, that the interest thereon, as the same became due, was collectible, and that the defendant would pay the same, in gold, at said Bank of Commerce, for the use of plaintiff. And plaintiff says, the defendant has not performed its said agreement and promise to pay said interest that became due on November 1st, 1873, and that there is $30 now due on each of said several bonds, owned by plaintiff, and of which he is the bearer, and said last named company promised to pay to bearer on the first day of November, 1873, in gold at the National Bank of Commerce, in the city of New York, on the presentation of said coupon, being interest due on said bond No. —, etc. And plaintiff further says that before the negotiation and sale of said bonds and coupons to plaintiff, and to induce plaintiff to purchase the same, the said defendant, then and there, a corporation duly authorized thereunto, did, for value received, promise to pay said Bank of Commerce, for the use of the bearer of said coupon, the amount thereof, on said first day of November, A. D. 1873, in gold; and plaintiff relying on defendant's said promise, did purchase same. That plaintiff was, at the date last aforesaid, and is now, the bearer of said coupon, that defendant did not pay the amount of same to said bank, and though often requested, hath failed, and does still fail and refuse to pay the same, or any part, to said bank for use of plaintiff. Wherefore, plaintiff asks judgment for said sum

of thirty dollars, with interest from November 1st, 1873, in gold, with ten per cent damages.

The defendant filed an answer in denial and also setting up new matter. To this new matter the plaintiff demurred, on the ground that it constituted no defence to the causes of action in the petition. The portion of the answer demurred to is as follows:

"And for further answer in the premises and to each and every count in said petition, defendant alleges that the said St. Louis, Lawrence & Denver Railroad Company did not perform the stipulations and covenants on its part contained in said contract. Said St. Louis, Lawrence & Denver Railroad Company did not build said road in the manner and of the character and with the equipments and appurtenances required by said contract; said St. Louis, Lawrence & Denver Railroad Company did not furnish or provide or pay for, when payment was required, a large part of the right of way and land required for said road and the station houses and other buildings on the line of said road, but a large portion thereof still remains unpaid for, whereby defendant has been subjected to many vexatious law suits, and has been obliged to pay out large sums of money, on account of said failure on the part of said St. Louis, Lawrence & Denver Railroad Company, which has never been repaid defendant, but still remains due and unpaid. Defendant further alleges, that said St. Louis, Lawrence & Denver Railroad Company failed to pay for a large amount of work done and material used and furnished for use, in and about the location and construction of said railroad and its appurtenances, as required by said contract, whereby defendant has been subjected to many vexatious law suits, and has been obliged to pay out large sums of money on account of said failure of the St. Louis, Lawrence & Denver Railroad Company, which money has never been repaid, but still remains due and unpaid. Defendant further alleges, that said St. Louis, Lawrence & Denver Railroad Company failed, neglected and refused to build the fence which by said contract it agreed to build, although the general superintendent of the defendant has designated the parts of said road which should be fenced, and said fence has never yet been built, although, by the terms of said contract, said fence should have been built long ago, and by reason of said failure, defendant has been obliged to pay out large sums of money for cattle killed and other damages, for which sums it has never been reimbursed. And said St. Louis, Lawrence & Denver Railroad Company has failed to pay any of the taxes levied by the states of Missouri and Kansas, and the several counties and other municipal corporations therein, upon said railroad and its appurtenances, and other property demised by said lease, although by said contract the said St. Louis, Lawrence & Denver Railroad Company agreed to pay the same, and by such failures, defendant has been forced to expend large sums of money, which have never been reimbursed. And the amounts paid out by defendant by reason of the several defaults and omissions of the St. Louis, Lawrence & Denver Railroad Company, hereinbefore set out, far exceeded, each year, the sum of fifteen thousand dollars. Defendant further alleges, that the thirty five per cent of the gross earnings of said St. Louis, Lawrence & Denver Railroad Company never, in any year, equalled fifty thousand dollars a year, but in truth did not amount to that sum. And each and all of said defaults and neglects on the part of said St. Louis, Lawrence & Denver Railroad Company existed long prior to November 1st, 1873, and remain in that condition until this day. And said St. Louis, Lawrence & Denver Railroad Company being unable to reimburse defendant for the sums expended by it on account of the several neglects and defaults on the part of said St. Louis, Lawrence & Denver Railroad Company, above set out, and being unable to give defendant any security or assurance that it would do so, the defendant and the said St. Louis, Lawrence & Denver Railroad Company, mutually agreed to, and did, on the —— day of December, 1873, rescind, cancel and annul said contract set out in the petition made as therein stated, and all other contracts supplementary and amendatory thereto, and the said property by said contract demised was then delivered to the said St. Louis, Lawrence & Denver Railroad Company, and the said St. Louis, Lawrence & Denver Railroad Company did then and there, for a valuable consideration, release and absolve defendant from the performance of any and all the covenants in said lease and contract contained."

Noble & Orrick, for plaintiff.

James Baker and J. N. Litton, for defendant.

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

DILLON, Circuit Judge. On June 14th, 1870, the defendant made a contract with the St. Louis, Lawrence & Denver Railroad Company, to lease its road for thirty years. This "lease and contract" is under the seal of the two companies. It appears from the instrument that the road thus leased was then located, but was thereafter to be constructed by the lessor. The defendant agreed to operate the road during the whole of the demised term and to keep the same in use and repair. The defendant was to pay to the lessor (the Lawrence Company) "as an annual rental for the use of said road thirty-five per cent of the gross earnings thereof for the first ten years, and thirty-three and one-third per cent for the next twenty years." Then follows the sixth section of the contract, which recites that the Law-

rence Company is about to issue $1,000,000 first mortgage six per cent gold bonds, payable at the Bank of Commerce, New York, and that that company had agreed to pay all taxes upon its road and to fence the same, and concludes thus: "Now, for the purpose of providing a fund sufficient to meet said interest (and to make the other payments referred to), the Pacific Railroad Company covenants and agrees to pay the said Bank of Commerce on account of said rental, to the credit of the interest account of said St. Louis, Lawrence & Denver Railroad, the sum of $60,000 in gold annually, $30,000 of which shall be paid on or before the 1st day of May, and $30,000 on or before the 1st day of November in each year, and has also agreed to pay said company $15,000 in current money each year, making in all $75,000 to be paid annually during the entire period of the lease." This was to be paid irrespective of what at the stipulated rate the actual rental would amount to. Any excess was to be charged by the defendant to the Lawrence Company, and was made a lien upon its road and franchises.

The bonds subsequently issued by the Lawrence Company, as to amount, rate of interest, place and times of payment, corresponded with these provisions in the contract between the two companies, and contained on their face this statement: "Payment of interest guaranteed by the Pacific Railroad of Missouri;" also the statement: "The payment of interest is secured by a contract of lease with the Pacific Railroad of Missouri, dated June 14th, 1870." These bonds were sold in the market, and the plaintiff, as he alleges, became the owner of seventy-three of them, on which interest was paid out of the fund provided for in the lease until November 1st, 1873, when the payment of interest ceased, and in December, 1873, as the answer alleges, the contract and lease of June 14th, 1870, was rescinded and the property surrendered by the defendant to the Lawrence Company.

The plaintiff alleges that to induce persons to buy the bonds, the present defendant requested the statements to be made therein that the payment of interest was guaranteed by it and secured by the contract of lease of June 14th, 1870; that it approved of this statement in the bonds, and afterwards, with full knowledge of these facts, and that the purchase of bonds had been induced thereby, paid to the Bank of Commerce the several installments of interest on said bonds up to that which fell due November 1st, 1873.

Assuming these allegations of the petition to be true, our opinion is that they constitute a good cause of action in favor of the plaintiff, and one which may be enforced in an action at law directly against the defendant. The petition does not count upon the promise of the defendant in the sixth article of the contract to provide annually a fund of $60,000 with which to pay that amount of interest on the bonds, as the sole ground of the defendant's liability to the bondholders, but states this promise on the part of the defendant as only one of the elements of such liability.

There is much conflict in the judgment of the courts as to the right of third persons for whose benefit stipulations are made in a contract between other persons, to enforce those stipulations against the promissor. And the general rule undoubtedly is, that one who is a stranger to the contract, that is not a party to it, and from whom the consideration for the promise does not move, and to whom the promise is not made, cannot enforce it by action, although he would be benefited if the promise were kept and be injured if broken; and the difficulty has frequently been considered to be increased where the contract is under seal. The adjudications on the subject are collected and examined by the editors of the American Leading Cases (volume 2, pp. 164, 337), and it is not proposed here to review them, nor to determine whether the present case, if the plaintiff relied alone upon the promises of the defendant in the lease and contract of June 14th, 1870, would fall within the general principle. In form the promise of the defendant in the sixth article of that lease is to the Lawrence Company; and, in form, at least, that company, and not the bondholders, furnished the consideration for the promise of the defendant to pay annually on account of the interest on the proposed loan, the sixty thousand dollars. In reality, however, it is probable the bondholders under the mortgage furnished to the Lawrence Company the means to build the road, the use of which under the lease constituted the consideration of the defendant's promise. But it is not necessary to determine whether upon the lease alone the plaintiff would have any action, because, as above observed, he does not bring his suit upon this theory. This claim of the plaintiff is, that the defendant being interested in the construction and completion of the Lawrence road, and having become bound to the Lawrence Company to pay it $60,000 in gold, annually, to enable it to negotiate its bonds and raise money to build the road, and to keep the road when built out of the way of the foreclosure of the mortgage securing the bonds (the Lawrence road having no resources except its earnings or rental), the defendant caused or consented to the representations contained in the bonds, that it had guaranteed and would pay the interest on them annually during the entire term of its lease, which was longer than the period when the bonds by their terms fell due. If this allegation can be proved, our opinion is that the defendant is bound to make good the guaranty, and that this guaranty attaches to and follows the bonds and is available to every holder of them who relied upon it. In this view the promise by the defendant is a

direct one to whoever becomes the holder of bonds on the faith of it, and, although the facts are different, the case falls within the principle of morality, fair dealing, and enlightened justice asserted by the supreme court of the United States in the cases of Lawrason v. Mason, 3 Cranch [7 U. S.] 492, annotated 2 Am. Lead. Cas. 298; Woodruff v. Trapnall, 10 How. [51 U. S.] 206; Curran v. Arkansas, 15 How. [56 U. S.] 304; Furman v. Nichols, 8 Wall. [75 U. S.] 50. If the foregoing is a correct view of the legal relations and rights of the parties, it follows that the contract between the defendant and the plaintiff was complete when the plaintiff bought the bonds upon the strength of the promise or representation which the defendant authorized (as it is alleged) to be made, and that the plaintiff's rights are in no wise dependent upon whether the Lawrence Company kept its contract in respect to taxes, fences, &c., and could not be affected by a subsequent rescission of the contract of June 14th, 1870, and the surrender of the road by the defendant to the Lawrence Company. For these reasons the demurrer to the affirmative defence in the answer is sustained.

Judgment accordingly.

NOTE. As to the enforcement of promises made by one person to another for the benefit of a third, the latest cases in New York are Claflin v. Ostrom, 54 N. Y. 581, decided by the commissioners of appeals in January, 1874, and Merrill v. Green, 55 N. Y. 270, decided by the court of appeals in December, 1853, and which seem to be conflicting.

Case No. 10,547.

In re OPELOUSA & G. W. R. CO. et al.

[3 N. B. R. (Quarto) 31.] [1]

District Court, D. Louisiana. 1869.

BANKRUPTCY—RAILROAD CORPORATIONS.

At law.

(We have waited some time to ascertain the result of an endeavor to obtain a more detailed and authentic report of the opinion of Judge DURELL in this case. We understand that it was, like most of the opinions delivered by that learned judge, an oral one, and has not been written out. The points given below are believed to be substantially correct, and are laid before our readers with these remarks.—Ed.)

DURELL, District Judge, rendered an elaborate opinion, taking up the various points involved in the case seriatim, and discussing them at length. He decided, first, that railroad corporations, from their character as branches of the great system of internal improvements did not, in his opinion, come within the regime of the bankrupt law, and spoke in the most eloquent terms of these great national highways of commerce.

Judge DURELL also decided that, were the road subject to be placed in bankruptcy, it had not committed an act which could place it there. The judge cited at length the act creating the corporation, and a supplemental act touching the same, showing that special provisions were made in them for the manner of placing the road in insolvency, when it could be shown by its creditors that it was insolvent, the president and directors to act as commissioners in such an event to wind up the business of the corporation.

The judge refuted the idea that, because the bonds of the road were at a mere nominal value, the road could be considered insolvent, and cited instances where commercial paper was sold on the market at a very depreciated rate, and still the maker could not be considered by any means a bankrupt.

The tender in open court to pay the coupons sued upon, the court considered an error of counsel, for which the company was not to be held responsible.

In making a resume of the assets and liabilities of the road, the judge was of opinion that the road was able to meet all demands made upon it, though he did not consider that the corporation had been managed in a very successful manner.

THE COURT held that bonds and coupons of a railroad were not commercial paper within the meaning of the bankruptcy act [of 1867 (14 Stat. 517)] and that the paying of coupons of interest after suit was brought or threatened upon the same, was not a preferring of one creditor over another.

[1] [Reprinted by permission.]

Case No. 10,548.

OPEN BOAT.

THREE PUNCHEONS OF RUM.

[1 Ware (26) 18.] [1]

District Court, D. Maine. June Term, 1823.

TREATY OF GHENT—ISLAND OF POPE'S FOLLY—JURISDICTION OF UNITED STATES.

1. A case arising upon the construction of the decision of the commissioners under the fourth article of the treaty of Ghent.

2. The small island called Pope's Folly, in the Bay of Passamaquoddy, is within the jurisdiction of the United States.

These two cases, arising out of the same facts, and involving the same principles of law, were considered and argued together as one case.

Dist. Atty. Shepley, for United States.

Mr. Longfellow, for claimant.

WARE, District Judge. These two cases, growing out of the same transactions, and depending on the same facts, have been argued together as one case, nor do I see any cause for making a distinction between them. Upon the evidence which has been

[1] [Reported by Hon. Ashur Ware, District Judge.]

produced the decision of one must determine the fate of the other.

The history of the case, as it comes from the witnesses, is shortly this. A few days before the seizure was made, an English vessel called the Ocean, of which the claimant, Capt. Ricker, was master, arrived in the Bay of Passamaquoddy, with a cargo of from forty to fifty puncheons of rum. Where she was from does not appear, but it is suggested by some of the witnesses that the rum, having been imported into the neighboring province, subject to a duty there, but entitled to a drawback on its re-exportation, the object of the owner was to obtain this drawback by a pretended exportation to the United States, and then smuggle it back into Campobello. In pursuance of this plan, or whatever may have been the real destination of the cargo, the Ocean came to anchor a little to the south-eastward of a small island known by the name of Pope's Folly, situated between Frederick Island and Campobello, and in a line drawn from the eastern shore of Lubec at low water to Dudley Island. While she remained in that situation the rum was unladen, and put on board of an American vessel, the Atlantic, Capt. Richardson, master. The Atlantic remained with the rum on board in the place where she received it, three or four days, taking in a cargo of gypsum, when, having completed her cargo and got ready for sea, and the rum remaining on board undisposed of, it became necessary to remove it again, and it was transferred to the Commerce, Capt. Drinkwater. The Commerce, soon after the rum was put on board, moved up and came to anchor to the northward of Pope's Folly. She having completed her cargo in three or four days, and being ready to sail, it became necessary again to make some provision for the rum. Twenty puncheons were landed on Campobello, and put into Mr. McLain's store, and in the following night, eight were put on board the open boat in question, which, in the morning, was seized, with the rum in it, to the south-eastward of this island. The Commerce drifted during the night, and the three puncheons were seized in her, in the morning, while lying south-westerly from Frederick Island. All these transfers of the rum, from vessel to vessel, were made while the vessels were lying near to Pope's Folly, and nearer to that than to any other land.

If these transactions took place while the vessels were lying within the waters of the United States, there cannot be a doubt that a forfeiture attaches, under the 50th section of the collection act of March 2, 1799 [1 Stat. 665]. The law annexes the forfeiture to every unlading of goods brought from a foreign port, without a permit from the collector, whatever may be the pretext. Where the law has made no exception, the court can make none. Admitting, therefore, the object to have been, what was suggested by some of the witnesses, and insisted upon at the argument, not to land the goods in the United States, but to smuggle them into Campobello, in fraud of the British revenue laws, this intention, if fully proved, would not withdraw them from the forfeiture annexed to the act by our law. If it be true, as argued by the counsel for the claimant, that the courts of this country will not lend their powers to enforce the revenue laws of a foreign country, and this is admitted to be in conformity with the usage of all nations, it is equally true, that if foreigners choose their station within our territory, from which to commit frauds upon their own government, they must take care, at least, so to manage their business as not to violate our laws. The common practice of commercial nations, not only to connive at the frauds committed by their subjects upon the revenue laws of other countries, but even indirectly to favor them, has been carried quite as far as is consistent with a wise policy; for a wise policy cannot often be in opposition to an honest one, and it has been carried somewhat further than can be vindicated on any principles of sound morality. Pothier, Traitè Des Assurances, No. 58. The argument, however, would require this court to go one step further on this questionable ground than any court has yet gone, and that is, to admit the avowed intention of violating the revenue laws of a neighboring and friendly nation, as an excuse for violating our own.

The whole case turns upon a single fact, whether the unlading alleged in the libel, took place within the waters of the United States, or not; whether it was upon the American or British side of the jurisdictional line; and this depends upon another, and that is, whether the small island called Pope's Folly, in the vicinity of which the unlading took place, belongs to the United States or to Great Britain. The acts complained of as the ground of forfeiture, were done near this island, and much nearer to it than to the island of Campobello. Assuming that it belongs to the United States, and it will follow, from the well-established principles of the laws of nations, that the right of exclusive jurisdiction extends to the middle of the channel, at low water, between the two islands. The whole of the waters are common to both nations for the purposes of navigation, as a common highway, but the exclusive rights of the two nations meet in the centre or thread of the channel. Kirkland v. The Fame [Case No. 7,845]. The laws of each country extend in their full vigor up to this line, without leaving, as seems to have been imagined by persons in the habit of trading in that quarter, a space or belt of neutral ground, where the laws of both countries may be set at defiance.

It is contended by the counsel for the claimant, that whatever claims the United States might formerly have had to this island, the decision of the commissioners under the fourth article of the treaty of Ghent

has finally and definitively established it as belonging to Great Britain. The terms used by the commissioners are, it must be admitted, sufficiently comprehensive to support this position. In their report, they say that they "have decided, and do decide, that Moose Island, Dudley Island, and Frederick Island do, and each of them does, belong to the United States; and that all the other islands, and each and every of them, in the Bay of Passamaquoddy, do belong to his Britannic majesty." This is undoubtedly language of the most comprehensive import, and as this island is situated in the Bay of Passamaquoddy, and is not one of the islands named as belonging to the United States, if there is no principle of interpretation by which the universality of the words can be limited in their operation, the island in question must clearly belong to Great Britain. But there are insuperable objections to taking the language of the commissioners in its largest signification. It would give to their decision an operation which cannot be supposed to have been intended. This will be apparent by adverting to the topography of the bay, and the islands within it. The three islands, named in the decision as belonging to the United States, namely, Moose Island, Frederick Island, and Dudley Island, lie nearly in a right line drawn from the south-eastern extremity of the town of Perry, on the right bank of the Schoodiac, to Lubec Point and West Quoddy Head. Between these islands and the American shore, there are a number of small islands, some of them inhabited, and several lying close to the shore of the main land. Our title to these has never, at any stage of the controversy, been called in question. If we are to give to the words of the commissioners their most extensive operation, all these islands must be assigned to Great Britain, and the consequence will be that, while the United States possess Moose, Frederick, and Dudley Islands, in front, Great Britain will possess six or seven small islands, in the rear, situated between them and the main land of the American shore. Such cannot reasonably be supposed to have been the intention of the commissioners. Some principle of interpretation must be adopted, that will not involve so glaring an absurdity, and one fraught with so much inconvenience to both parties.

By taking into view the state of the controversy between the two countries respecting the title to the islands in the Bay of Passamaquoddy, as it stood at the time of the decision of the commissioners, a key will be found to an interpretation of their report, consistent with the interests of both parties. The dispute commenced at a very early period after the peace of 1783. The British claimed all the islands in the bay, as being originally a part of the province of Nova Scotia, while the line claimed on the part of the United States, would include a large part, if not all of them, within our limits. In the process of the controversy, the debatable ground was narrowed down principally to four islands, namely, to Moose, Frederick, and Dudley Islands, in the Bay of Passamaquoddy, and Grand Manan in the Bay of Fundy. As early as 1785, the British provincial authorities attempted to enforce their jurisdiction over the three first-mentioned islands. The sheriff of Charlotte county summoned from there grand-jurors to attend the county court, but the government of Massachusetts resisted these attempts, and was supported in its resistance by the continental congress; and at one time it seems to have been contemplated to resist the peace officers of the province, and to protect the inhabitants, if it should become necessary, by an armed force. The Nova Scotia authorities never succeeded in enforcing their jurisdiction in these islands. But possession was taken, by the British, of Grand Manan, grants made to private purchasers, and settlements effected, under the authority of the provincial government; so that on the breaking out of the war of 1812, the British had possession of Grand Manan, and the United States of Moose, Dudley, and Frederick Islands, each party claiming title, so far as regards these islands, not only to what was in its possession, but also to what was in possession of the other party. With respect to all the other islands in the Bay of Passamaquoddy, which are very numerous, each party seems tacitly to have dropped its pretensions to those which were in possession of the other. 10 Wait, St. Pap. pp. 10–40; 3 Wait, St. Pap. pp. 117–120. Of these, by far the greatest portion, both in number and value, were in the possession of the British. Those in the possession of the United States were but few in number, all of them small, some uninhabited, and some of too inconsiderable importance to have acquired a name. No one of them is named, so far as I have been able to learn, in any stage of the controversy, and their position is such that the title of the three principal islands, which I have mentioned, being settled to be in the United States, these follow of course. While, on the other hand, of those not named in the commissioners' report, and in the possession of Great Britain, two, which have been formerly claimed by the United States, namely, Campobello and Deer Island, are of considerable magnitude, have extensive settlements, and a number of smaller islands as dependencies, which must follow their fate. The commissioners have named in their report only these islands, the title to which was considered, at that time, as liable to serious doubts, and which may be said, in fact, to have embraced the whole of the disputed ground. Three of these had been in the actual possession of the United States from the peace of 1783, to the war of 1812, and to these the title of the United States was confirmed; one had, in like manner,

been in the possession of Great Britain, and her title was confirmed to that. Why the commissioners did not proceed to name the other islands in the Bay of Passamaquoddy, the title to which was referred to their decision, is not for me to say. But any one who will look into a chart of the bay will easily be satisfied that any attempted enumeration would probably be incomplete. In deciding, also, on the title to Grand Manan, no notice is taken of the large number of small islands which would naturally follow the principal, as dependencies, and which, as well as that, were in the actual or constructive possession of Great Britain. It would, as it appears to me, be an unwarrantable construction of the report, to hold that it leaves the title to these islands undecided; yet if they do not follow as accessories of Grand Manan, they must be considered as still in controversy, for their geographical position leaves the title involved in the same uncertainty as that of the principal island. It seems to me that a fair construction of the report confirms to both parties their title to the islands, as they were held by actual possession and occupation, from 1783 to 1812. This is the principle, or at least the effect of the decision, as to the islands which are specifically named, and which, in point of fact, constituted the whole subject-matter of controversy, at the time when the decision was made.

The difficulty which this construction has to encounter, is in the general words, by which all the other islands in the Bay of Passamaquoddy, except the three named, are decided to belong to Great Britain. If we take the language of the decision literally, it will put Great Britain in possession of six or seven small islands, lying directly between Moose, Frederick, and Dudley Islands, and the main land on the United States side of the bay, and to which she has never preferred a claim; a result which we cannot suppose to have been in the intention of the commissioners. The amount of territory involved is but of trifling value, but it would introduce a confusion and uncertainty in the jurisdictional line, extremely inconvenient to both parties, and multiply the embarrassments already sufficiently perplexing, in the way of enforcing the revenue laws of both governments. A reasonable construction may be given to the decision, which will not involve such a glaring absurdity, and one fraught with so much inconvenience, by supposing the intention to be to confirm the title of Great Britain to Deer Island and Campobello and their dependencies, which had formerly been in controversy, and extinguish any claim which the United States might be supposed to have to them.

Adopting this construction of the commissioners' decision, that it assigns to each party a title according to its possession, as it was held in 1812, it becomes important to inquire which party had the possession of Pope's Folly at that time. This is a small island, situated between Frederick Island and Campobello, and nearer by one half to Campobello than Frederick Island. It does not contain more than half an acre of land, and the title is of importance only as affecting the jurisdictional line. It is uninhabited, and its name, if it can properly be said to have one, does not occur in any part of the controversy respecting these islands, so far as I have been able to learn. The small size and little value of this island may be presumed to be the cause why no direct or conclusive evidence of possession is shown, and the court is left to grope its way by such faint lights as the case affords. It is in evidence that the principal ship channel is between this island and Campobello. Though the passage next to Frederick Island is wider, and as deep, this is the most direct, convenient, and most usually taken. Vessels coming up the bay, proceed through it without changing their course; but to take the western passage they alter their course nearly at right angles, and come down into the harbor of Lubec, and then are obliged to bend round and get back precisely upon the line they had left. It is further proved that the jurisdictional line has always been considered as being between this island and Campobello, leaving it consequently in the waters of the United States. The evidence on both sides is, that this is the line which has been heretofore acknowledged, and that which has been practised upon by the revenue officers of both countries. These circumstances, going to show the common opinion of the inhabitants living on the spot, are entitled to some weight in the absence of all contradictory evidence. It is also to be further remarked that the legislature of Massachusetts has twice legislated upon the idea that this island was comprehended within the territory of that commonwealth. It appears to have been included within the limits of the town of Eastport, by the act incorporating that town, and when the town was divided, and a part erected into a new corporation by the name of Lubec, this island was included within the latter town, by the name of Green Island. From these facts, and in the absence of all contradictory evidence, though the island has never been actually occupied, I feel bound to say that it has been constructively in the possession of the United States, and it results from the construction given to the decision of the commissioners, that the title is in the United States. It follows as a necessary consequence that the unlading was within the territorial jurisdiction of the United States, and the goods are forfeited under the 50th section of the collection act.

Case No. 10,549.

OPEN BOAT.

[1 Ware (128) 124.] [1]

District Court, D. Maine. Dec. Term, 1827.[2]

NAVIGATION LAWS — TRADE WITH BRITISH PROVINCES IN AMERICA—ACT OF 1820.

1. The navigation laws of the United States, of April 18, 1818 [3 Stat. 432], and of May 15, 1820 [Id. 602], and of March 1, 1823 [Id. 740], do not render unlawful the exportation of goods of the growth and produce of the United States, to the British North American provinces in any other than British vessels.

2. The object of these laws is to countervail the navigation laws of Great Britain which close the ports of the provinces against vessels of the United States, by interdicting the trade in British vessels,—leaving it open to all other vessels.

3. The act of 1820, closing the ports of the United States against British vessels arriving from the colonies, does not extend to small boats used for the conveyance of passengers.

This is the case of an open boat and lading, seized by the collector of Passamaquoddy, on her passage from Eastport to St. Andrews, in the province of New Brunswick. The boat was owned by persons who are natural born subjects of Great Britain, but who for several years had resided and had their domicil at Eastport, though they have never been naturalized in the United States. There was evidence that the boat had for a considerable time been employed in carrying on trade between Eastport and St. Andrews, and her cargo, when she was seized, consisted exclusively of merchandise the growth and produce of the United States. The libel contained two allegations, on which a forfeiture was claimed: 1st. That the boat was owned, wholly or in part, by subjects of the king of Great Britain, and had arrived from some port or place in the province of New Brunswick, in violation of the act of May 15, 1820. 2d. That sundry goods, wares, and merchandise of the growth and produce of the United States, were shipped and water-borne in said boat, on the waters of the bay of Passamaquoddy, for the purpose of being exported to some port in the province of New Brunswick, the said boat not being a ship or vessel of the United States.

Dist. Atty. Shepley, for the United States.
C. S. Daveis, for claimant.

WARE, District Judge. I am unable to see how a decree of condemnation can be sustained by the second allegation of the libel, even admitting the facts to be sufficiently proved. It is framed upon the idea that the exportation of the produce of the United States to the province of New Brunswick in any other than vessels of the United States, is prohibited by our laws. I know of no act so universal in its prohibition; nor does it appear to me that any such intention on the part of the legislature can be inferred from the general spirit and scope of our navigation laws. The general policy of these laws is to favor the shipping interest of our own country, or rather to countervail the exclusive and monopolizing policy of other countries. The act of April 18, 1818, prohibits the importation of goods from any foreign port or place in any other vessel than one of the United States, or one owned by subjects or citizens of the country of which the goods are the growth or manufacture, or from which they can be or most usually are shipped for transportation. But the operation of this act is confined to the vessels of those nations which have adopted similar regulations in relation to vessels of the United States, and the act is entirely silent on the subject of the export trade, leaving that perfectly free. The act of May 15, 1820, closes the ports of this country against all British vessels arriving from any port in a British colony or territory which by the ordinary laws of trade and navigation are closed against vessels of the United States, and it requires of British vessels which have entered and taken cargoes for exportation, a bond that the goods shall not be landed at any British colonial port which by the ordinary laws of trade are closed against vessels of this country; but it contains no clause restricting the free exportation of goods in any other than British owned vessels. The supplementary act of March 1, 1823, closes the ports of the United States against all British vessels arriving from any port in the British North American provinces, West Indies, and certain islands in the Atlantic Ocean, named in the act, and requires a bond of British vessels taking cargoes in this country, that they shall not be landed in any port of any of the colonies named or described in the act. But there is no clause in this act restricting the free exportation of any merchandise from this country in any other than British vessels. The obvious policy of these acts is to put an end to the trade in British vessels, between this country and the colonial ports from which our vessels are excluded. The object of the British laws was to exclude our vessels from this trade, and confine it to their own. Ours are clearly retaliatory, and are intended, not to put an end to the trade altogether, but to exclude British vessels from it, so long as the ports are closed by British laws against our ships, but our laws leave the trade free to our own vessels or the vessels of any other nation except those of Britain. The counsel for the libellants has argued that it was the intention of these acts of congress to establish a non-intercourse between this country and all the British colonial ports which are closed against the vessels of this country. That such was the effect of our laws connected with those of Great Britain, is very evident. The British laws interdicted the trade in all except their own vessels, and

[1] [Reported by Hon. Ashur Ware, District Judge.]

[2] [Affirmed in Case No. 15,967.]

our laws met them by an interdict of the trade in British vessels. The act of 1823, which opens the trade to British vessels coming from the free ports, restricts the export trade in their vessels to the free ports, but it contains no restrictions on the export trade in any other vessels. It does indeed satisfactorily appear, and it is not denied, that the lading of this boat was "shipped and water-borne for the purpose of being exported to some port in the province of New Brunswick." It is equally certain, whatever may be the character, description, or ownership of this boat, that she is not technically a ship or vessel of the United States, as vessels can only have that character when they have the documents required by our laws. The difficulty is, that when the matter of the allegation is proved, it does not constitute an offence which draws after it the penalty of forfeiture.

The remaining allegation presents a question of more difficulty. In this, the ownership of the boat is alleged to be British, and that she had arrived at Eastport from some port or place in the province of New Brunswick. This clearly works a forfeiture under the act of May 15, 1820, since that act has been revived by the president's proclamation of the 17th of March last. This renders all British vessels liable to forfeiture which shall enter or attempt to enter any port of the United States, coming from New Brunswick, or any of the colonies mentioned in the first section of the act. There was, indeed, no precise or particular proof that this boat had come from New Brunswick and entered any port of the United States, at any particular time. But there was proof that her constant employment had been, for a considerable length of time, in carrying on a trade or intercourse between St. Andrews and Eastport, and this testimony the claimant did not attempt either to contradict or explain. It was satisfactorily proved, also, that the boat belonged to persons who are natural born subjects of the king of Great Britain, who have not been naturalized in this country, but who are residents and have had a bona fide domicil for several years at Eastport. It is quite clear that persons of this description cannot be the owners of registered or licensed shipping of the United States. The registry and coasting act requires an oath, before papers can be issued for any vessel, that the ownership is exclusively in American citizens, and the forfeiture immediately attaches on the false swearing for the purpose of obtaining a register or license for any vessel in which a foreigner has an interest. The difficulty in this case lies in another direction. This is a boat which might be employed in certain trade without taking out papers from the custom-house. The last section of the coasting act provides that the provisions of that act shall not extend to any boat or lighter without a deck, or if having a deck, without masts, employed exclusively in the harbor of any city or town. I know of no law making it penal for a foreigner, domiciled in the United States, to be the owner of such craft, or subjecting it to forfeiture when so owned or employed in any way in which such a boat may be employed when owned by a citizen. This boat is proved by the witnesses for the libellant to be under five tons burden.

But though it be admitted that such a boat as this is not liable to forfeiture when owned by a foreigner domiciled in the United States, and employed as a pleasure boat, or in the trade of a harbor, it is contended that under this allegation she is liable to forfeiture by the express words of the act of May 15, 1820, § 1. It is conceded that the language of the act is strong and explicit. "The ports of the United States shall be and remain closed against any vessel owned wholly or in part by any subjects of his Britannic majesty, arriving from any port or place in Lower Canada, New Brunswick, &c." And it applies the penalty of forfeiture to any such vessel that shall enter or attempt to enter any of the ports of the United States. There is no doubt, within the meaning of the revenue and navigation laws of the United States, that the ownership of this vessel was British. It is argued by the counsel for the claimant that the word vessel in this act is not used in its largest signification, as comprehending every kind of vehicle for water transportation, but is restricted to vessels of that class and description which are entitled to be invested with a national character by receiving the usual documentary evidence of that character. But in the view which I take of the case, it is unnecessary for me to go into a full consideration of this argument. My opinion proceeds upon a narrower ground. It is that the act does not, upon a reasonable construction, embrace such a case as that set forth in this allegation of the libel. The boat, in this allegation, is not charged with being engaged in trade. The allegation is simply that she arrived from New Brunswick. If the owner had arrived in her, simply on a visit across the bay, or if she had been employed as a ferry-boat, in carrying passengers across the river, the allegation would have been in the precise form as the one in this libel; nor can a decree of forfeiture be sustained on any principle that would not equally apply to these cases. This would be giving the act an operation beyond what could have been within the intention of the legislators, and beyond what is required by the policy of the act, as this would go to put an end to all intercourse and communication between the inhabitants on opposite sides of the bay and river, there being no communication but by water.

The decree, therefore, will be for the restoration of the goods.

[On appeal to the circuit court the decree of this court was affirmed. Case No. 15,967. See, also, Id. 15,968.]

OPEN BOAT (UNITED STATES v.). See Cases Nos. 15,967 and 15,968.

OPHIR SILVER MIN. CO. (BRODIE v.). See Case No. 1,919.

OPPENHEIMER (BOBYSHALL v.). See Cases Nos. 1,589–1,592.

Case No. 10,550.

In re ORCUTT.

[5 Ben. 19; 4 N. B. R. 538 (Quarto, 176).][1]

District Court, S. D. New York. March, 1871.

ADMITTING FALSE OR FICTITIOUS DEBT — BURDEN OF PROOF.

1. If a bankrupt put into his schedule, as due, a debt which is false or fictitious, it will, under the 29th section of the bankruptcy act [of 1867 (14 Stat. 531)], prevent his obtaining a discharge, even though the debt be not proved.

2. The burden of proof is on the objecting creditor, to prove that the debt was false and fictitious.

[In the matter of C. Corydon Orcutt, a bankrupt.]

A. Dickinson, for creditors.

O. R. Steele, for bankrupt.

BLATCHFORD, District Judge. There are two specifications of objection to the bankrupt's discharge in this case: (1.) That he has admitted a false and fictitious debt in favor of Alvah Clark, his father-in-law, against his estate; (2.) That, having knowledge that Alvah Clark, his father-in-law, had proved a false and fictitious debt against his estate, he did not disclose the same to his assignee in this matter within one month after such knowledge.

I find no evidence that Clark has proved any debt whatever against the bankrupt. Therefore, the second ground above named fails.

As to the first ground—what is meant by admitting a debt? How does the bankrupt admit a debt? Can a debt which is not proved be said to be admitted? In the present case, which is a voluntary one, the bankrupt has put a debt due to Clark in the list of debts due by the bankrupt in the schedule appended to his petition.

The 29th section provides that no discharge shall be granted if the bankrupt has admitted a false or fictitious debt against his estate, or if, having knowledge that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge.

I am not aware of any decision on the question here involved. Lord Eldon, in Freydeburgh's Case (in 1814) 3 Ves. & B. 142, expressed himself in the following terms: "If the bankrupt has permitted one fictitious debt to be proved, knowing it, he is not entitled to his certificate, as not having made that full disclosure which justifies the commissioners in giving the certificate required by the act." In Ex parte Shirley (in 1814) 2 Rose, 71, he expressed his determination never to allow a certificate where it appeared that the bankrupt had knowingly suffered fictitious debts to be proved against his estate. The act under which these decisions were made was the act of 1732 (5 Geo. II. c. 30). There was no specification, in that act, of particular grounds for withholding a discharge. The act required that, to procure a discharge, the bankrupt should have made a full discovery of his estate, and in all things conformed himself according to the directions of the act.

The 130th section of the act of 1825 (6 Geo. IV. c. 16) provided, that no bankrupt should be entitled to his certificate, and any certificate, if obtained, should be void, if, in case any person should have proved a false debt under the commission, the bankrupt, being privy thereto, or afterwards knowing the same, should not have disclosed the same to his assignees within one month after such knowledge.

The 38th section of the act of 1842 (5 & 6 Vict. c. 122) provided, that no bankrupt should be entitled to a certificate under the act, and any such certificate, if obtained, should be void, if, in case any person should have proved a false debt under the fiat, the bankrupt, being privy thereto, or afterwards knowing the same, should not have disclosed the same to his assignees within one month after such knowledge.

By the 221st section of the act of 1861 (24 & 25 Vict. c. 134), the following act, if done by a bankrupt with intent to defraud or defeat the rights of his creditors, is made a misdemeanor, namely, if, in case of any person having, to his knowledge or belief, proved a false debt under his bankruptcy, he shall fail to disclose the same to his assignees within one month after coming to the knowledge or belief thereof. By the 159th section, the commissioner has power, in case the bankrupt is convicted of such misdemeanor, to direct that the order of discharge be either wholly refused or suspended during such time and upon such conditions as he shall think fit.

In none of the English statutes is it made a ground for refusing a discharge that the bankrupt has admitted a false or fictitious debt against his estate, as distinguished from the suppression, by the bankrupt, of knowledge that a false or fictitious debt has been proved against his estate.

The first time, so far as I am aware, that it was made, by any insolvency or bankruptcy act, a ground for refusing a discharge, that the bankrupt had admitted a false or fictitious debt against his estate, was in the 4th section of the United States bankruptcy act of August 19th, 1841 (5 Stat. 443). That section provided, that if a bankrupt should, in the proceedings under that act, admit a false or fictitious debt against his estate, he should not be entitled to a discharge or a cer-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 4 N. B. R. 538 (Quarto, 176), contains only a partial report.]

tificate thereof. The failure by the bankrupt to disclose to the assignee knowledge that a false or fictitious debt had been proved against his estate, was not made, by the act of 1841, a ground for refusing a discharge, except as it might have been regarded as the admission of a false or fictitious debt against his estate.

The 87th section of the Massachusetts insolvent law (Gen. St. Mass. 1860, c. 118), provides that a discharge shall not be granted or valid, if the debtor, having knowledge that any person has proved a false debt against his estate, has not disclosed the same to his assignee within one month after such knowledge.

The provision in question in the 29th section is thus commented on in the treatise of Avery & Hobbs (page 220, note h): "If the debtor admits a false debt to be proved against his estate, or, knowing that any such debt has been proved, omits to give notice of the fact to the assignee for thirty days, he is not entitled to his discharge. This ground of objection is similar to the provision of the English law respecting which the lord chancellor, in Fredeburgh's Case, 3 Ves. & B. 142, held, that if the bankrupt has permitted one fictitious debt to be proved, knowing it, he is not entitled to his certificate." As we have seen, the English statute of 5 Geo. II., on which that decision was made, did not contain a similar provision to the one under consideration. But, the view of the authors seems to be that, for a bankrupt to admit a false or fictitious debt against his estate, it is necessary he should admit it to be proved against his estate, and, of course, that it should be proved against his estate. Such, also, seems to be the view of another writer. James, Bankr. Law, pp. 130, 131.

The literal provision in the 4th section of the act of 1841 was this: "And, if any such bankrupt * * * shall, in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate." By the 1st section of that act, a petitioner in voluntary bankruptcy was required to set forth, in his petition, a list of his creditors and of the amount due to each, verified by oath or affirmation. By the 4th section, the bankrupt could be examined, on oath or affirmation, in all matters relating to his bankruptcy, and his acts and doings, which, in the judgment of the court, were necessary and proper for the purposes of justice. By sections 5 and 7, creditors were to prove their debts on their own behalf, by oath or affirmation, without the action or concurrence of the bankrupt. Under the provision of the 4th section of the act of 1841, it seems to me it would have been impossible to say that the word "admit" did not require that there should be some affirmative action by the debtor in regard to the debt, or that the passive act, on the part of the debtor, of suffering, even knowingly, a false debt, when proved, to remain proved, without his taking steps, under section 5 of that act, to procure the debt to be set aside and disallowed, could have been called an admission of the debt against the estate. Such admission could be affirmatively made by setting forth the debt in the list of debts in the voluntary petition, or in a list of them which might be required by the court in the proceedings in an involuntary case, or, perhaps, by swearing to it as a true debt on an examination.

Now, under the act of 1867, in view of the provision that a discharge shall not be granted if the bankrupt, having knowledge that any person has proved a false and fictitious debt against his estate, shall not disclose the same to his assignee within one month after such knowledge, it is impossible to say that merely the knowledge, on the part of the debtor, that a person has proved a false debt, and merely the failure to disclose it, and merely the suffering it to remain proved, without taking steps, under section 22, to have it rejected, can be held to be the admission of a false debt against the estate. If so, the imposition of the penalty of a refusal of a discharge for not disclosing the knowledge to the assignee within one month would be superfluous, for the penalty would follow the mere existence of the knowledge, under the clause imposing it for admitting a false debt. So, also, the entire provision in regard to knowledge of the falsity of a proved debt must be held to be covered by the second clause; and the first clause must be held to apply to the admission, by some affirmative action of the debtor, of a debt not proved. This may be done by swearing to it in the petition in voluntary bankruptcy (section 11), or in the schedule of creditors, in involuntary bankruptcy (section 42), or, perhaps, in an examination (section 26). It is true, that the language of the 29th section of the act of 1867, as was the language of the 4th section of the act of 1841, is a false or fictitious debt "against his estate;" and that, in one sense, no debt can become a debt against the estate till it is proved. It cannot become a debt, under the act of 1867, for the purpose of voting for an assignee, or for the purpose of receiving a dividend, till it is proved. Still, there is a prejudice to honest creditors if the debtor puts false ones into his schedules. The notices for the first meeting to choose an assignee are sent to all the creditors sworn to by the debtor, and the action of honest creditors may be seriously affected as to its energy and promptness, or even as to the taking of any action at all, by the exhibition of an array of false debts. This is prevented by the penalty referred to. Besides, some effect must be given to the first clause; and, unless the effect I have suggested be given to it, none can be given it.

In this case, the bankrupt set forth in the schedule to his petition, which was a voluntary one, the debt in favor of Clark, which is alleged to be a false and fictitious debt. If it was a false and fictitious debt, the so set-

ting it forth was an admission of it against the estate, which would bar a discharge. But, the burden of proof is on the objecting creditors to show that the debt was false and fictitious. The only proof they have furnished on the subject is the examination of the bankrupt himself, and I think they have failed to substantiate the allegation.

A discharge is granted.

Case No. 10,551.

ORDT v. OCEAN STEAM NAV. CO.

[N. Y. Times, Feb. 1, 1855.]

District Court, D. Connecticut. Jan. 30, 1855.

CARRIERS—DAMAGE TO CARGO.

[Ribbons on spools, in pasteboard boxes covered with wrapping paper, packed in cases made of pine wrapped around with straw and covered with linen wrappers, were shipped fresh from the factory on the berth deck of respondent's steamer and carefully guarded from heat and steam. When the ribbons were delivered the boxes and wrappings of all sorts were in perfect condition, but the ribbons were badly discolored. *Held*, that the damages must have been caused by their being damp when packed, and respondent was not liable.]

[This was a libel by Clement A. Auffin Ordt and others against the Ocean Steam Navigation Company for failure to deliver goods under the terms and conditions of a bill of lading.]

On the 23d of May, 1853, the duly-authorized agent of the Ocean Steam Navigation Company at Havre signed a bill of lading for 10 cases of ribbons, which the respondents had received from Messrs. Dose & Kopetadt. By the bill of lading they acknowledged the receipt of the goods in good order and well-conditioned, to be forwarded from Havre to Southampton by the Southwestern Steam Navigation Company's steamer Nord, and there transhipped on board the respondents' steamer Washington, to be carried to New York, and there delivered to the libelants in like good order and condition, the acts of God, enemies, pirates, restraints of princes and rulers, fire at sea and on shore, accidents from machinery, boilers, steam, or any other accidents of the seas, rivers, and steam navigation, of whatsoever nature or kind, excepted. The goods were carried to Southampton and placed on board the Washington, which arrived in New York in the first part of June, having had a quick and pleasant passage, with no rough weather, and without any accident to the steamer or her machinery. But on the delivery of the cases here it was found that some of the ribbons in three of them had been damaged, and the libel is filed to recover the loss occasioned thereby, which is stated at about $780.

The ribbons were fresh from the manufactory and came from different establishments. Each piece was rolled on a block in the usual way, and all were packed in boxes about 12 inches by 6, and about 3 inches high, from 12 to 15 rolls being packed in each box. The boxes were made of white pasteboard, some of them glazed. Common wrapping paper was put around each box, and about 50 boxes were placed in each case. The cases were made of French pine, and wrapped round with straw, over which was a linen wrapper. They were placed in a dry part of the steamer, on the orlop or berth deck, a place appropriated for French goods, which was separated from the boiler, furnace and engine by a thick partition of boiler iron, and every precaution which prudence could dictate was taken by the respondents to exclude heat and the escape of steam from those decks. The ribbons were of various colors, the more delicate colors being in these three cases. The damage complained of was manifested in a change in their color, in streaks and in spots, the less delicate colors not being injured. The milk-white was changed to a dull yellowish tinge, and where this change of color appeared, it extended over the whole piece, from the outside to the block. There was no appearance of damage on the wrappers of the cases, or on the cases, or on the wrappers of the boxes, or on the boxes, and no appearance that they had been wet or damp.

W. A. Butler, for libelants.

Martin, Strong & Smith, for respondents.

HELD BY THE COURT (INGERSOLL, District Judge). That, under the bill of lading, the respondents must be responsible for the damage, unless they show that it was occasioned by one of the excepted causes in the bill of lading, or that it existed before the ribbons came into their possession, or that it was produced by a cause which had its origin before they received them at Havre. That upon the evidence the damage was not occasioned by heat merely. Damage occasioned by heat shows itself in a different way. To occasion it, the heat must be excessive, and there was no such excessive heat where these ribbons were stowed. That it was not occasioned by the escape of steam after they were packed in the boxes. If it had been, some trace of damage would have been shown by the paper around the boxes. No such trace was found. Steam could not penetrate to these decks, except in case of an accident to the machinery, and no such accident happened. That there can be no doubt that the original cause of the damage was dampness, the damage being made to manifest itself as it did by heat. That if this dampness had been occasioned by water reaching the ribbons after they were placed in the boxes, some evidence of it would have appeared on the boxes, wrappers and cases. But none such could be found. There is no probability that water could have reached them where they were stowed, under the circumstances. That the ribbons

must therefore have been damp when rolled, or must have become so after they were rolled but before they were packed, and therefore before they came into the possession of the respondents. That though this damage would have manifested itself differently if the ribbons had been brought in a sailing vessel, and though the peculiar manner of manifestation of the damage was caused by the warmth and dryness of the steamer, yet the dampness was the cause of the damage to the ribbons, and for that the respondents are not liable.

Libel dismissed with costs.

Case No. 10,552.

In re ORDWAY.

[19 N. B. R. 171;[1] 19 Alb. Law J. 482.]

District Court, D. Massachusetts. May 24, 1879.

BANKRUPTCY—DISCHARGE—OBJECTIONS — REQUEST TO CREDITORS TO FILE PETITION.

1. There is nothing in the bankrupt act [of 1867 (14 Stat. 517)] which prohibits a debtor from desiring or requesting his creditors to file a petition to have him adjudged a bankrupt when he has committed an act of bankruptcy. The mere fact that he has done so is no objection to a discharge.

2. In the absence of all fraud, the original adjudication must be considered as final and conclusive upon all the creditors, and cannot be disputed upon the question of granting a discharge.

[In the matter of Ordway Bros., bankrupts.]

NELSON, District Judge. The members of this firm were adjudicated bankrupts, upon their own petition, on the 4th day of August, 1876, and were discharged from their debts under a resolution of composition accepted by their creditors and recorded September 16, 1876. They were again adjudicated bankrupts on the 4th day of September, 1878, upon a petition filed by certain of their creditors. They now ask for their discharge. O. S. Currier, who is the only creditor who has proved a debt against their estate, objects to the discharge and specifies as the ground of his objection that the second petition, though in form involuntary, was in fact voluntary, and was filed and prosecuted by the petitioning creditors at the solicitation and procurement of the debtor for the fraudulent purpose of enabling the debtors to obtain their discharge without the assent in writing of any portion of their creditors, and without assets equal to 50 per cent. of the debts. This objection cannot prevail. There is nothing in the bankrupt act which prohibits a debtor from desiring or requesting his creditors to file a petition to have him adjudged a bankrupt, when he has committed an act of bankruptcy. It is a right which the creditors possess, and it cannot be illegal for the debtor to request them to exercise it. It may be that the debtor will derive some advantage under the proceedings which he would not have upon a petition filed by himself, but it would only be an advantage which the law gives to him. Whether a discharge should be granted without the assent of creditors, if it could be shown that the involuntary petition was filed by collusion between the debtor and petitioning creditors, that the debts of the petitioning creditors were fictitious, or the alleged act of bankruptcy had not been committed, or a fraud had been practiced upon the court in obtaining the adjudication, I have no occasion to decide now. That is not this case. In the absence of all fraud, the original adjudication must be considered as final and binding upon all the creditors, and cannot be disputed upon the question of granting the debtors' discharge.

Discharge granted.

[1] [Reprinted from 19 N. B. R. 171, by permission.]

Case No. 10,553.

The OREGON.

[1 Deady, 179.][1]

District Court, D. Oregon. July 7, 1866.

CARRIERS — DELIVERY TO INTERMEDIATE TRANSPORT VESSEL—DELIVERY TO VESSEL ON WHARF.

1. Where an ocean steamer is making regular voyages to a port, and for any reason she is unable to reach such port, and the agent of her owner charters a steamboat to take the passengers and freight down a river to such steamer and bring back her cargo, a delivery of goods under such circumstances to the steamboat for the purpose of being conveyed by such steamer, is a delivery to the latter, and she is thenceforth bound for their safe carriage and timely delivery.

2. Where a vessel is discharging and taking on cargo at a wharf, a delivery of goods thereon by the direction of the master, for the purpose of carriage upon the same, is a delivery to such vessel, and her responsibility for the carriage and delivery thereof commences from that time.

[Cited in Pearce v. The Thomas Newton, 41 Fed. 108.]

In admiralty.

Lansing Stout, for libellant.

William W. Page, for claimant.

DEADY, District Judge. The libel in this suit was filed January 30, 1866, and alleges, that about January 28, 1865, the libellant, M. Mansfield, shipped a package containing furniture and clothing of the value of $1,172, on the steamship Oregon, at the port of Astoria in Oregon, to be delivered at San Francisco, California, in good condition—the perils of the sea excepted—and that by the negligence and misconduct of the master and his servants, the package was wholly lost. On April 3, John McCraken, as agent for the

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

claimant, Ben. Holladay, answered the libel, denying that the package in question was ever delivered to the steamship or received by it or its officers; as also the value and quality of the goods alleged to have been in it. The answer also attempts to deny that any contract was made between the libellant and the master of the Oregon for the conveyance of this package from Astoria to San Francisco. But the language of the answer in this respect is wholly irrelevant to the charge in the libel, and does not controvert any allegation therein. It is as follows: "That the said steamship Oregon, whereof Francis Connor was master, neither on January 28, nor at any other time, made a contract with the master of said steamship, whereby he agreed in consideration," etc. As will be seen, this only denies a contract between the vessel and her master—a matter not alleged by the libellant, and with which he has no concern, let the fact be as it may. For the purposes of this suit, the answer must be construed to admit the contract as alleged in the libel. Besides, if it is found that the vessel received the package under the circumstances stated, the law will imply the contract to convey and deliver as alleged.

The facts in the case I find to be as follows: (1) That in January, 1865, the steamship Oregon was engaged in carrying passengers between Portland and San Francisco, and in the latter part of that month was expected to arrive at Portland, but ice being then in the river it was uncertain whether she would come up or not, and therefore McCraken, the resident agent of the vessel, employed the river steamboat Cascades to take the passengers and freight then at Portland, by the Wallamet slough to the steamship at St. Helen, or wherever she should be found between there and Astoria, and bring up the Portland freight and passengers then on the Oregon; and that there was some doubt whether the Cascades would be able to get through to the steamship, in which event it was agreed between the agent and the shippers that the Cascades would return to Portland, and the latter must pay the expense of the attempted trip, but if she should reach the Oregon, then the former would pay the Cascades her bill for lighterage and charge it over upon the freight. (2) That the libellant was then in San Francisco, but his family were in Portland, where he had lived for several years, and that such family took passage on the Cascades for the Oregon, and at the same time B. L. Norden, the agent of libellant, shipped thereon thirty-one packages of merchandise marked diamond M, S. F., for which the purser of the Cascades gave him a receipt, specifying that they were "in good order" and at "shipper's risk and expense;" and that such packages contained household stuff, and were shipped as freight. (3) That the Cascades met the steamship a short distance below St. Helen, and the master of the latter being in doubt about the ability of reaching St. Helen with his vessel, directed both vessels to proceed to Astoria, because that was the only place below St. Helen at which there was a wharf, whereon to transfer the respective cargoes of the Cascades and Oregon. (4) That the wharf at Astoria was in charge of a third party, and had a small warehouse upon it, and the Cascades and Oregon arrived there in company on the afternoon of January 26; that the former discharged her freight upon the wharf, from whence it was passed through the warehouse to the steamship on the other side; that the steamship at first discharged her cargo upon the wharf also, but as soon as the Cascades was discharged she laid alongside the Oregon and received the freight of the latter directly on her deck; that the transfer of cargo continued through two nights and until January 28, when the Cascades returned to Portland and the steamship went to sea; and that no receipt was given by the Oregon to the agent of the libellant who accompanied his family to Astoria, nor to any other of the individual shippers, but one receipt was given to the Cascades for the whole number of packages according to the freight list of the latter. (5) That on February 2, the San Francisco agent of the steamship gave libellant a receipt for the freight and lighterage of his packages, and described them therein as thirty-one in number; but subsequently, on March 2, such agent endorsed on such receipt the return of $4.50 of such freight to the libellant, because as therein asserted, one of the packages had not been delivered. (6) That among the thirty-one packages shipped on the Cascades for the Oregon, and marked diamond M, was the package described in the libel, containing the articles of household furniture and wearing apparel therein described; that such package was the one not delivered to the libellant by the steamship at San Francisco; and that the contents thereof were of the value of $1,172.00.

In considering the question of the liability of the vessel for the missing package, I will first endeavor to ascertain the effect of the shipment on the Cascades. The rule insisted upon by the claimant that the vessel is not liable until the receipt of the goods, is of course admitted. But cargo may be received within the meaning of this rule before it is actually on deck. "The reception of the goods by the master on board the ship, or at a wharf or quay near the ship, for the purpose of carriage therein, or by any person authorized by the owner or master so to receive them, or seeming to have this authority by the action or assent of the owner or master, binds the ship to the safe carriage and delivery of the goods." 1 Pars. Mar. Law, 132. "The manner of taking the goods on board, and the commencement of the master's duty in this respect, depend on the custom of the particular place. More or less is done by the wharfingers or lightermen ac-

cording to the usage. If the master receive the goods at the quay or beach, or send his boat for them, his responsibility commences with the receipt." Conk. Adm. 151. Upon the facts of this case, I am of the opinion that the receipt of the goods by the Cascades was the receipt of them by the vessel, so as to bind her for their safe carriage and timely delivery, provided the Cascades was able to reach her. McCraken was the agent of the owner, and he chartered the Cascades as a lighter to take the freight to and from the Oregon. In legal effect this is the same as the master's sending his boat for the goods. In this respect the owner represented by McCraken has as much authority in the premises as the master. That this was the understanding of all the parties at the time, is evidenced by the fact, that the vessel did not receipt separately for the goods to the individual shippers, but in gross to the Cascades, and also by the fact that the vessel paid the Cascades her bill and charged it over to the shippers as lighterage. The Cascades was treated by the master of the vessel as a lighter or boat in his employ. From the time of the meeting below St. Helen, the master of the Oregon controlled the movements of the Cascades, and instead of receiving the goods alongside in the river as was expected and given out when the latter left Portland, required her to proceed in company with the Oregon to Astoria for the convenience of the wharf. The cases of The Freeman, 18 How. [59 U. S.] 182, and The Yankee Blade, 19 How. [60 U. S.] 82, cited by counsel for claimant, are not in point.

But admitting for the moment that the delivery to the Cascades was not a delivery to the Oregon, was the missing package delivered from the former to the latter, at Astoria? There can be no doubt that the package was delivered to and received on the Cascades at Portland. Counsel for the claimant admit this, but insist that it was lost before it came to the Oregon, and that the latter is not responsible for such loss. There is no direct and explicit evidence that the package was discharged upon the wharf at Astoria, yet the inference from all the facts of the case is irresistible that it was. I am morally certain of it. Such a discharge was a delivery to the vessel. The Cascades, in any view of the matter, was not engaged in an independent voyage, but was attendant upon the Oregon. The Oregon was her destination down stream; and she went to this Astoria wharf under the direction and orders of the master of the vessel, as a convenient place for the vessel to receive this freight and deliver her upward-bound cargo. It was not convenient—perhaps not possible—for the vessel to receive this freight at once upon her decks. She must first discharge cargo. Therefore it was delivered to her upon the wharf. This was a delivery in the immediate vicinity of the vessel and in the presence of its officers; not only that, but at the place appointed by the master to receive the goods. In addition to this, Hoyt, the purser of the Cascades, testifies positively that the vessel receipted for the whole cargo of the former, package by package, and that such receipt corresponded with the freight list of the Cascades, from which the receipt given the libellant's agent, was prepared. This fact itself is primary evidence of a delivery to the Oregon. The whole includes all its parts, and a receipt of the whole of the cargo of the Cascades, includes the package in question, which is shown to have been upon her freight list, and delivered to her at Portland. True, this receipt may be incorrect in this respect, but the presumption is otherwise, and the burden of proof is upon the claimant to show wherein it is false, if at all. The only evidence opposed to this is the testimony of two or three officers of the vessel, who, on being interrogated upon the subject at this late day, answer that they do not now remember to have seen such a package put on board the Oregon. Mere negative testimony like this, is of little or no weight against well established facts or reasonable deductions therefrom. Besides the right of the libellant to recover, does not depend upon the fact of whether the package was actually put on board the vessel or not. From the time of its delivery upon the wharf at Astoria, it was delivered to the vessel. If, thereafter, it was left upon the wharf, or stolen therefrom, or dropped in the river while the freight was being handled, during the night, as is quite likely, the vessel would be liable to the libellant for the loss.

Upon the question of the value of this package, the libellant and his wife, are the only witnesses who have any direct knowledge. The goods contained in it, are alleged to have been of a fine quality and superior workmanship, such as are commonly used and worn by people of refined taste, and comparative wealth. It appears that some eight years ago the libellant lived in New York, and was in good circumstances. His subsequent failure would not affect the quality or quantity of his wife's clothing, owned by her before that time, but might induce her to preserve it with extraordinary care—at least such valuable articles as figured silk dresses, a velvet cloak and fine shawl. One of the claimant's witnesses testifies, that the wife of the libellant dealt with him some years in Portland, for dress and household goods, and that she always purchased the best article in the market. Nor do I think that damages for the loss of costly wearing apparel, are to be measured by what such articles might bring at auction, as mere second-hand clothing. What they were worth to the libellant and his family, and what it would cost to replace them, ought also to be considered. It must also be borne in mind that the claimant has the legal right to satisfy any decree which the libellant may obtain for the non-delivery of this package in legal tender notes, and that as he seriously contests this claim, he will most probably

satisfy such decree in that kind of lawful money which has the least commercial value. The libellant is entitled to recover the value of the goods, as set forth in his libel, with interest, at the rate of ten per centum on that amount, from the time of the non-delivery.

Decree, that the libellant recover $1,-342.62½, with costs and disbursements of suit.

OREGON, The (NAUNTON v.). See Case No. 10,057.

OREGON, The (STURGIS v.). See Case No. 13,577.

Case No. 10,554.

OREGON & W. TRUST INV. CO. v. RATHBURN et al.

[9 Chi. Leg. News, 377; 4 Law & Eq. Rep. 254.[1]]

Circuit Court, D. Oregon. July 16, 1877.

SUIT IN EQUITY TO FORECLOSE A MORTGAGE—CONTRACTS—LEX LOCI.

1. Where a foreign corporation loans money to an inhabitant of Oregon through the intervention of an agent resident in Oregon, subject to the approval of the corporation at its home office, the contract of loan is made in Oregon; and unless such corporation had complied at the time with the laws of Oregon concerning foreign corporations doing business therein, it is void.

2. Where the notes given for such loan are made payable to such corporation at its office in Scotland, so far as the performance of the contract is concerned, including the rate and payment of interest, its validity is to be tested by the law of the place of performance, as if made there; and this rule is not affected by the fact, that a mortgage was given on real property in Oregon to secure the payment of said notes.

[This was a bill in equity by the Oregon & Washington Trust Investment Company against John A. Rathburn and others to enforce the lien of a mortgage.]

Ellis G. Hughes, for plaintiff.

Julius C. Moreland, for defendants.

DEADY, District Judge. This cause was heard on bill and answer. Giving full effect to the denials and statements of the answer, it appears that the plaintiff is a foreign corporation, having its principal place of business in Dundee, Scotland, and had not, at the date of the transactions involved in this suit, complied with the laws of Oregon requiring a foreign corporation, before doing business in this state, to appoint an attorney authorized to receive service of all process in actions against such corporation (see Laws Or. 1864, p. 617, §§ 7, 8); that in 1874 the defendant Rathburn negotiated a loan of $10,000 with the agent of the plaintiff at Portland, and gave his promissory notes therefor, payable to the plaintiff, with interest, at Dundee, together with a mortgage of certain premises situate in Multnomah county, executed by himself and wife, to secure the payment of the same; that the notes and mortgage were delivered to said agent, at Portland, who thereupon delivered to the defendant Rathburn, at the same place, the sum of $9,800 and no more. Default being made in the payments of the notes, this suit was brought to foreclose said mortgage and subject the mortgaged premises to sale for the purpose of satisfying the same. Upon these facts, the defendant maintains that the contract of loan is void because (1) it was made in Oregon, contrary to the law of the state; and (2) it is usurious by the same law. On the contrary, the plaintiff maintains that the contract was made in Scotland, to be performed there, and being valid there, is valid here.

On the facts stated, I am of the opinion that the contract between the plaintiff and defendant Rathburn was made in Oregon, the former acting through its agent at Portland. If the defendant had gone to Dundee to procure the loan, or had obtained it through his agent there, the case would have been otherwise. But this transaction took place as a matter of fact in this state, although it may have been done subject to the approval of the corporation in Dundee. The validity of the contract, so far as the same depends upon the manner of its execution or the capacity of the parties to it to make the same, is to be tested by the law of the place where made,—the lex loci contractus. 2 Kent, Comm. 459. In Re Comstock [Case No. 3,078], it was held by the district court of this district that a foreign corporation had no power to make a contract in this state until it had complied with its laws upon that subject. The contract of loan being invalid, the plaintiff is not entitled to the relief sought.

The fact that this contract is to be performed in Dundee,—that is, that the notes were to be paid there,—does not make it a contract formed or entered into in Scotland. So far as the payment of the notes is concerned, including the rate and payment of interest thereon, the contract is for that reason to be tested by the laws of Scotland. The parties having provided that this contract should be performed in Scotland, so far as such performance is concerned it is to be governed by the laws of the place of performance, as if made there. Andrews v. Pond, 13 Pet. [38 U. S.] 77. And the fact that the performance of the contract was secured by a mortgage upon real property in this state does not affect the question. De Wolf v. Johnson, 10 Wheat. [23 U. S.] 383. The mortgage is considered a mere incident or accessory of the debt, to be governed by the law applicable to the principal contract. Storey, Confl. Laws, § 304.

Admitting then, for the purposes of this case, that judged by the laws of Oregon this transaction would be usurious, because the sum actually loaned was $200 less than the

[1] [4 Law & Eq. Rep. 254, contains only a partial report.]

sum expressed in the notes, it would not be void on that account. It must appear that the contract is usurious by the law of the place of its performance,—the law of Scotland,—and therefore void.

[NOTE. On motion of the complainant, a rehearing was allowed by the district judge, and it was held that the mortgage was invalid if made contrary to the laws of Oregon. It was then suggested by counsel for complainant that sections 8 and 9 of the act of Oregon of October 21, 1864, did not apply to complainant or any foreign corporation, except those mentioned in the title of the act, and it was therefore ordered that the cause be reargued before the district judge upon that question. Case No. 10,555.]

Case No. 10,555.

OREGON & W. TRUST INV. CO. v. RATHBURN et al.

[5 Sawy. 32; 4 Law & Eq. Rep. 650; 10 Chi. Leg. News, 58; 6 Am. Law Rec. 523; 1 Tex. Law J. 39; 23 Int. Rev. Rec. 377.] [1]

Circuit Court, D. Oregon. Oct. 25, 1877.

PLACE OF CONTRACT — BANKING CORPORATIONS — SUBJECT OF ACT—MUST BE EXPRESSED IN THE TITLE.

1. A promissory note made in Oregon, and payable in Scotland, is to be considered as if made in Scotland. Per Field, J.

2. The validity of a mortgage upon real property in Oregon to secure the payment of such a note is to be tested by the laws of Oregon. Per Field and Deady, JJ.

[Cited in Dundee Mortgage, Trust Investment Co. v. School District No. 1, 19 Fed. 372. Cited in brief in Dearborn Foundry Co. v. Augustine, 5 Wash. 67, 31 Pac. 328.]

3. A corporation engaged in loaning its own money upon note and mortgage is not a banking corporation.

4. An act entitled "An act to tax and regulate" certain named foreign corporations, cannot, under section 20 of article 4 of the Oregon constitution, contain any provision in relation to any other foreign corporation.

[Cited in Semple v. Bank of British Columbia, Case No. 12,659; Dundee Mortgage, Trust Investment Co. v. School District No. 1, 19 Fed. 368; Oregonian Ry. Co. v. Oregon Ry. & Nav. Co., 22 Fed. 250, 23 Fed. 235; New England Mortgage Security Co. v. Vader, 28 Fed. 268.]

Suit to enforce the lien of a mortgage. This cause was first heard on bill and answer before the district judge who then stated the case as follows: "Giving full effect to the denials and statements of the answer, it appears that the complainant is a foreign corporation, having its principal place of business in Dundee, Scotland, and had not at the date of the transactions involved in this suit, complied with the laws of Oregon, requiring a foreign corporation before doing business in this state, to appoint an attorney, authorized to receive service of all process in any action against such corporation (see Act Oct. 21, 1864, §§ 8, 9; Or. Laws p. 617); that in 1874, the defendant Rathburn negotiated a loan of ten thousand dollars with the agent of the plaintiff, at Portland, and gave his promissory notes therefor, payable to the plaintiff, with interest, at Dundee, together with a mortgage of certain premises situate in Multnomah county, executed by himself and wife to secure the payment of the same; that the notes and mortgage were delivered to said agent, at Portland, who thereupon delivered to the defendant Rathburn at the same place, the sum of nine thousand eight hundred dollars, and no more. Default being made in the payment of the notes, this suit is brought to enforce the lien of said mortgage by the sale of the premises and the satisfaction of the debt." [Case No. 10,554.]

The defendants [John H. Rathburn and others] then maintained that the transaction was void, because (1) it took place in Oregon contrary to the statutes thereof; and (2) the loan is usurious by the law of the state. To the contrary, the complainant maintained that the contract was made in Scotland, and to be performed there, and being valid there is valid here. The court held that the contract was formed or entered into in Oregon, and contrary to the law of the state upon the subject of foreign corporations doing business therein, and was therefore invalid; citing In re Comstock, [Case No. 3,078]; 2 Kent, Comm. 459; Andrews v. Pond, 13 Pet. [38 U. S.] 77; Wolf v. Johnson, 10 Wheat. [23 U. S.] 383; Story, Confl. Law, § 304; but that it was not usurious, because the note being payable in Scotland, so far as the rate and payment of interest is concerned, it is considered to be a contract made in that country.

On motion of the complainant a rehearing was allowed by the district judge, which took place before said judge and Mr. Justice Field. On this argument the latter was of the opinion that the notes, being made payable in Scotland, their validity was to be wholly tested by the laws of that country, but that the mortgage—the transaction upon which the suit is brought, is a contract made and to be performed in Oregon, and therefore invalid if made contrary to the laws thereof. Thereupon it being suggested by counsel for the complainant that said sections 8 and 9 do not apply to the complainant or any foreign corporations, except those mentioned in the title of the act, it was ordered that the cause be reargued before the district judge upon this question, which was done.

Ellis G. Hughes, for complainant.
Julius C. Moreland, for defendants.

DEADY, District Judge. Section 20 of article 4 of the constitution of the state, declares: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title,

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 4 Law & Eq. Rep. 650, contains only a partial report.]

such act shall be void only as to so much thereof as shall not be expressed in the title." On October 21, 1864, the assembly passed an act entitled: "An act to regulate and tax foreign insurance, banking, express and exchange corporations or associations doing business in the state." After providing, that before doing business in this state, the corporations named must make a deposit with the treasurer of the state for the security of the persons transacting business, with them, upon which deposit a tax should be paid as in the case of individual property in the state, the act requires, that "A foreign corporation before doing business in this state" must appoint a resident attorney with authority to receive service of process in any action which may be brought against it in this state. It appears from the journal of the assembly of 1864 that this act was introduced as house bill No. 102, and entitled: "A bill to tax foreign insurance, banking and express companies." In its course through the house it was referred to a committee, who reported it back with two other bills in relation to foreign corporations, substantially embodied in it, namely, house bill 106, "A bill to license and tax foreign corporations doing business in this state," and senate bill 27, "A bill to provide for foreign insurance companies giving security and appointing an attorney to receive service of process, doing business in this state," with the title amended as it now stands, after which it became a law. The sections under consideration are evidently a part of the senate bill 27, enlarged so as to apply to any foreign corporation.

For the complaint it is contended that under section 20 aforesaid of the constitution, said sections 8 and 9, so far as they purport to apply to corporations, other than those mentioned in the title of the act, are void; and that the complainant being neither an "insurance," "banking," "express," nor "exchange" corporation, is not embraced in the subject expressed in the title of the act, and therefore not within its constitutional purview.

The defendant contends that the complainant, being engaged in loaning money, is a banking corporation, and therefore within the purview of the act upon the complainant's own construction of it; and that if this be held otherwise, still, the matter of requiring any foreign corporation to appoint a resident attorney for the purpose aforesaid being a matter properly connected with the subject expressed in the title of the act, said sections 8 and 9 are therefore valid and the mortgage made in disregard of them is not.

Is the complainant a "banking" corporation within the meaning of that term as used in the act of October 21, 1864? Nothing appearing to the contrary it is to be presumed that the word "banking" is here used in its ordinary signification. It is not alleged in terms that the complainant is a banking corporation; but only that it is engaged in the business of loaning money in Oregon upon note and mortgage. Neither does it affirmatively appear whose money it loans, but the reasonable inference is, that it loans its own money, consisting of its capital stock contributed by its shareholders. Under the authorities, this is not sufficient to constitute the complainant a bank or corporation engaged in banking. The complainant having a certain fund, formed probably from the contributions or assessments of its shareholders, is engaged in loaning this fund—investing it in trust for these shareholders as its name implies—upon note and mortgage in Oregon and Washington. For this purpose it must be assumed, and no other, it was organized. Now, if this constitutes it a banker, then every individual who loans his private funds in like manner is a banker also. In Bank for Savings v. The Collector, 3 Wall. [70 U. S.] 512, it is said by the court that, "banks, in the commercial sense, are of three kinds, to wit: (1) Of deposit; (2) of discount; (3) of circulation. All or any two of these functions may, and frequently are, exercised by the same association." To the same effect is the ruling in Oulton v. Savings Institution, 17 Wall. [84 U. S.] 118; German Savings & Loan Soc. v. Oulton, [Case No. 5,362]; People v. Utica Ins. Co., 15 Johns. 390; Bouvier, verba "Bank."

So far as appears, the complainant is neither engaged in the business of receiving deposits, discounting the notes of others, nor issuing its own for circulation. True, discount, is in effect, a mode of loaning money; and so far as the mischief intended to be guarded against by this act is concerned, the difference between loaning money by discounting the notes of third persons and doing so directly, upon the note and mortgage of the borrower, may be immaterial. But the difference itself is substantial, and according to established definitions, distinguishes between banking and the mere loan of money.

Upon the question whether said sections 8 and 9 go beyond the subject expressed in the title of the act there is not much room for argument. The judicial exposition of the constitution of the state belongs to the courts thereof; and their interpretation of that instrument furnishes the rule of decision for the national courts. The only time that section 20 of article 4, supra, has been before the supreme court of the state for construction is in Simpson v. Bailey, 3 Or. 516, where it is said that the object of the provision is "to prevent matters, wholly foreign and disconnected from the subject expressed in the title, from being inserted in the body of the act." A more limited operation than this has not been claimed for the provision. It is a very necessary and wholesome restraint upon improper legislation, and ought not to be frittered away or unduly circumscribed in its operation by considerations of convenience or expediency. In Simpson v. Bailey,

supra, it is assumed rather than said, that the provision is mandatory; and so a similar one has been held in other states of the Union, except California and Ohio, where considerations like the one suggested seem to have induced the courts to declare it only directory—practically null. Cooley, Const. Lim. 150. It will be noticed that the word "subject," where it occurs the second time in said section 20, is printed in the compilations of 1864 and 1876 in the plural; and assuming this to be the correct reading, the complainant maintains that not only the principal subject of the act, but "the matters properly connected therewith," if any, must be expressed in the title. The case of Simpson v. Bailey appears to have been decided upon the assumption that the word is used in the constitution in the singular. In the Session Laws of 1860 the constitution is published with this word in the singular number. It is so written in the original report of the legislative committee of the constitutional conventions and from a copy of the section duly certified by the secretary of state, it appears that the word is used in the singular number in the enrolled copy of the constitution.

The subject of this act as expressed in the title is the taxation and regulation of certain foreign corporations, of which the complainant is not one. The body of the act goes farther, and provides in effect that all foreign corporations, before doing business in this state, shall appoint a resident attorney therein. Is this regulation a matter properly connected with the subject expressed in the title? So far as the corporations named in the title are concerned, undoubtedly it is. Indeed, as to them, we may safely go farther, and say that it is a part of the subject expressed in the title—the regulation of "foreign insurance, banking, express and exchange corporations" doing business in Oregon. But as to corporations not so named the case is different. They are different and distinct subjects, and the regulation of them in any particular is not a mere matter which in some way pertains to and may therefore properly be connected with legislation concerning those named in the title. There is no relation or connection between the complainant and any of the corporations named in the title of the act, and therefore a regulation concerning it is not a matter properly connected with or incident to a regulation concerning them. Cattle, sheep and hogs are distinct objects. One does not pertain to or depend upon the other. But some regulation applicable to them all—for instance, concerning their going at large—might well be the subject of a legislative act. But an act entitled an act concerning sheep and hogs cannot contain a valid provision concerning cattle, because the latter has no connection with the former and is no part of the subject expressed in the title. In Mewherter v. Price, 11 Ind. 199, it was held that "an act concerning promissory notes and bills of exchange," which contained a provision concerning "other instruments in writing," was so far void, because the subject—other instruments in writing—was not expressed in the title. See, also, Cooley, Const. Lim. 149, and cases there cited. So in the case under consideration. The act is broader than the title, and so far is void. The subject of the act was restricted by the title to certain corporations of which the complainant is not one, and therefore no regulation concerning it can be embodied in the act. The constitution has made the title the limit of what the act may contain, and the court has no power to enlarge its scope. When sections 8 and 9 were taken from senate bill 27 aforesaid and made applicable to all foreign corporations, by some oversight the title of the bill was not enlarged accordingly, and therefore so far as they go beyond the purview of such title they are void.

I trust it is not necessary to apologize for holding this act of the legislature partially void, or rather restraining the generality of the language of sections 8 and 9 thereof, so as to confine their operation within the scope of the title—the true index of the legislative intention. It is only to be regretted that the matter had not been first passed upon by the supreme court of the state, so that this court might have had an authoritative precedent for a guide. In a plain case like this it is as much the duty of the court to declare an act of the legislature invalid as to reform or set aside a contract for mistake or fraud. In so doing it but upholds and obeys that supreme law—the constitution—to which both courts and legislatures are bound to conform their conduct. There must be a decree for the complainant for the relief sought.

Case No. 10,556.

OREGON & W. TRUST INV. CO. v. SHAW et al.

[5 Sawy. 336.][1]

Circuit Court, D. Oregon. Dec. 6, 1878.

MERGER—ASSIGNMENT OF MORTGAGE.

1. The record of deeds does not impart notice of merger, which depends upon the intention of the party or other extrinsic facts; and if any one takes a conveyance of premises upon the assumption that a former mortgage to his grantor has been merged in a subsequent conveyance of the fee, he does so at his own peril.

[Cited in Stubblefield v. Menzies, 11 Fed. 273.]

2. A party purchasing premises upon which, as appears by the record, there is an unsatisfied mortgage, takes the conveyance with notice that the mortgage is an existing lien in the hands of some one; and that he takes subject to it, unless the mortgagee is the owner thereof.

3. A valid mortgage in the hands of a bona fide assignee is preferred to a subsequent one, although the assignment is not recorded, unless the statute requires such record; but as between

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bona fide assignees of the same mortgage, the assignment first recorded will have priority.

This suit is brought to enforce the lien of a mortgage executed to the complainant by C. W. Shaw and wife upon the south half of the donation of John W. Chambers and wife, situate in Polk county, Oregon, and being parts of sections 31, 32 and 33, in township 6, south range 3 west of the Wallamet meridian.

Ellis G. Hughes, for complainant.
H. W. Holmes and Claude Thayer, for defendant Swegle.

DEADY, District Judge. The cause was heard on the bill and answer of Charles Swegle. The facts appearing therefrom are as follows: On April 28, 1877, Shaw borrowed three thousand dollars of the complainant, for which he gave his note, payable on June 1, 1882, with interest thereon at the rate of ten per centum per annum, payable semi-annually; and on the same day, as a security for the payment thereof, executed, together with his wife, a mortgage upon the premises aforesaid, which was duly recorded on May 9, 1877. This mortgage contained a clause to the effect, that if default was made in the payment of any of said installments of interest, the complainant might then declare the whole debt due; and such default was made on December 1, 1877, and the debt declared due on account thereof. On February 12, 1877, one W. Q. Adams, being indebted to said Shaw & Co. in the sum of one thousand five hundred dollars, gave his note for said amount, payable to them or bearer, on November 1, 1877, with interest at the rate of one per centum per month, and upon the same day executed a mortgage to Shaw & Co. upon the premises to secure the payment of said note, which mortgage was duly recorded on February 13, 1877; and that on said last-mentioned day said note and mortgage was, for a valuable consideration, transferred by said Shaw & Co. to the defendant, Charles Swegle; and that he is now the bona fide owner and holder of the same. At and from February 12 to April 1, 1877, said Adams was the owner in fee of said premises, as appeared by the records of said county; but thereafter, and at the date of the note and mortgage given by said Shaw to complainant, the former, as appeared by said records, was such owner thereof.

The transfer or assignment of the note and mortgage to Swegle was not recorded, but complainant had notice of the existence of the same and might, with reasonable diligence, have ascertained the fact of the transfer to the defendant Swegle.

It does not appear directly in the bill and answer, as it should, that after the mortgage to Shaw & Co., and after April 1, but before the mortgage to the complainant, Adams conveyed the premises in fee-simple to Shaw, but in this way, according to the admissions on the argument it came to pass, as stated in the pleadings, that Adams was the owner of the premises at the date of the mortgage to Shaw & Co., and Shaw the owner of the same at the date of the mortgage to the complainant.

The complainant contends that it was entitled to deal with Shaw as the absolute owner of the premises free of charge or lien, if it so appeared upon the record of conveyances in Polk county; and that upon the facts stated, at the date of Shaw's mortgage to it there was, as appeared by such record, a union of the lien of the Adams mortgage and the fee in Shaw whereby it appeared therefrom that there was a merger of the former in the latter and the mortgage was thereby extinguished—satisfied. In the consideration of this case the interest of the mortgagee will be spoken of as a mere lien—the equitable doctrine on the subject prevailing in this state—and the interest of the mortgagor as the fee. Witherell v. Wiberg [Case No. 17,917].

When two estates or interests in the same land become united in the same person the less estate or interest is annihilated, and in law phrase said to be merged or drowned in the greater, unless there be some purpose beneficial to such person or contrary intent declared by him, to prevent it, in which case they remain separate. 2 Black, 177; Forbes v. Moffat, 18 Ves. 384; Starr v. Ellis, 6 Johns. Ch. 396; James v. Johnson, Id. 422, 2 Cow. 303.

But in this case there never was any merger of the Adams mortgage and fee in Shaw, because they were never united in his person—Shaw having transferred the former to the defendant, Swegle, before he became the owner of the latter. Neither did the record show that there was any such merger, but only, that there might have been. Because Shaw owned the mortgage on February 12, 1877, it did not follow that he owned it on April 28, when he received the conveyance of the fee—and upon this material point the record was silent. Indeed, it does not appear that the conveyance of the fee to Shaw even purported to be in satisfaction of the mortgage debt, or that there was otherwise any relation or connection between them.

But it matters not what was the state of the record on this question. The record of deeds is not made for the purpose of giving notice of when the merger of estates takes place, and is therefore of no authority upon the subject. If a party examines the record and concludes there has been a merger of estates in certain premises, and acts upon that conclusion he does so at his own risk, and if mistaken must bear the consequences. Purdy v. Huntington, 42 N. Y. 350.

As is said in a late work (Jones, Mortg. § 872), "Inasmuch, therefore, as merger takes place or not, according to the actual or presumed intention of the mortgagee, subse-

quent purchasers cannot rely upon the record as showing merger. They must go beyond this, and ascertain whether there has been a merger in fact; and they act at their own peril if they do not require their grantor to produce the mortgage and note supposed to be merged, and discharge the mortgage of record, or show that it constitutes a part of the title to the estate."

The question of priority, then, between these two mortgages must depend upon the proper construction of the statute regulating the recording of deeds and mortgages. Upon this point the argument for the complainant is, that as the record stood at the date of its mortgage, Shaw, as the mortgagee of the Adams mortgage, had an apparent right to acknowledged satisfaction thereof before the clerk, and thereby discharge the same; and that if he had done so, any one would be protected in dealing with him as the absolute owner of the property as against the prior assignee of such mortgage—the assignment thereof not being recorded; and that as the effect of the conveyance to Shaw by Adams was to satisfy the mortgage of the latter, therefore the complainant had the same right to deal with Shaw as the owner of the property, discharged from the lien of the mortgage, as if satisfaction thereof had been directly acknowledged by him on the record. In this argument there are several erroneous assumptions: First, that the record of deeds and mortgages is but one record, and that an entry upon either of them may be qualified or affected by an entry in the other. But the statute (Or. Laws, p. 518, § 23) provides that there shall be separate books for the record of deeds and mortgages, and the satisfaction of a mortgage must be entered in the book of such records. Therefore, a satisfaction of a mortgage entered in the record of deeds would be without effect for any purpose. It is well settled that a deed recorded in the book of mortgages, and vice versa, is no record, and gives notice of nothing. James v. Morey, 2 Cow. 316. Second, that a mortgagee who has assigned his mortgage has still authority to acknowledge satisfaction thereof on the record; or that if he does so, his prior assignee is bound by it as against a subsequent bona fide purchaser for a valuable consideration.

The statute (Or. Laws, p. 519, §§ 30, 39) provides that a mortgage may be discharged upon the record thereof "by the mortgagee, or his personal representative or assignee" acknowledging satisfaction thereof before the clerk, or executing a certificate to that effect with the formalities of a deed, and presenting the same to the clerk.

Probably the statute is defective in not requiring the party making such acknowledgment or certificate to produce evidence that he is at the time such mortgagee or assignee, and is entitled to discharge the mortgage. The production of the note and mortgage, or the latter only, where there is no personal obligation, ought at least to be provided for, and an indorsement made upon them to the effect that they are no longer in force.

But certainly it cannot be maintained that an acknowledgment of satisfaction of a mortgage by a person without interest in the subject—as a mortgagee after assignment, or an assignee who has assigned—can in any degree affect the right of the assignee, who was then the bona fide owner and holder of the debt and security. Such an acknowledgment is simply a fraud, and if any person must suffer by it, it ought to be the person who, by ignorance or carelessness or otherwise, was deceived by it, and acted upon it, and not the assignee who acquired the mortgage without fault, and is a stranger to the fraudulent transaction. As well say that a purchaser in good faith from the grantee in a forged deed, that has been admitted to record, is thereby protected at the expense of the true owner, who is without error or fault in the premises.

Besides, the assertion that Shaw appeared to have the right to satisfy the mortgage is based, not upon the record, but an inference therefrom, that there was a merger of the fee and lien of the mortgage in Shaw, which is now shown to have been erroneous. These assumptions being unfounded, the argument based upon them falls to the ground.

But a sufficient answer to this argument lies in the fact that Swegle's mortgage was not satisfied on the record, and did not appear to be. Prima facie it was still due to some one, and therefore not extinguished. As it is well said in Jones on Mortgages (section 474): "If the premises are conveyed to the mortgagee after he has assigned the mortgage, there is no merger of the mortgage title. It makes no difference that the assignment is not recorded. * * * Of course, the purchaser is charged with constructive notice of the existence of a mortgage, and the continuance of its lien, by its record. Having this information, he is chargeable in law with the further notice that the mortgage is a lien in the hands of any person to whom it may have been legally transferred, and that the record of such transfer was not necessary to its validity, nor as a protection against a purchaser of the property mortgaged, or any other person than a subsequent purchaser in good faith of the mortgage itself, or the bond or debt secured by it; but rather that one purchasing the premises would take them subject to the lien of the mortgage irrespective of the ownership of it, unless the mortgagee was the owner. That knowledge and notice made it his duty, in the exercise of proper diligence, to inquire whether his vendor, the mortgagee, was still the owner and holder of the mortgage; and his omission to make that inquiry deprives him of the protection of a bona fide purchaser."

A mortgagee is a purchaser and comes within this rule. But it is further contended that it was the duty of Swegle to have recorded his assignment, and not having done so, and the complainant having been thereby led to believe that the mortgage was still the property of Shaw, equity will, as between the two bona fide creditors, impose the loss arising therefrom upon the one whose negligence made such loss possible.

This argument also rests upon the assumptions which are disputed. First, that it was the duty of Swegle to have the assignment to him recorded; and, second, that the record of mortgages in some way showed that the Adams mortgage was satisfied or extinguished.

As to the second assumption that there can be no doubt of its incorrectness. From the record of mortgages, it appeared on April 28, 1877, that the Adams mortgage was then a valid subsisting lien on the premises as security for the payment of a negotiable note not yet due, and nothing more. What else appeared on the record of deeds, if anything, was immaterial.

But as to the first assumption, the question is not so clear; and being one which arises simply upon the construction of a local statute, it is to be regretted that it has not been considered by the supreme court of the state. The general utility and convenience of recording the assignment of a mortgage, or in default thereof of postponing it to the conveyance of a subsequent purchaser or mortgagor in good faith, and for a valuable consideration, which shall be first recorded, may be admitted. But it must not be forgotten that at common law a conveyance or other instrument relating to real property was effective without being recorded, and that the registration of such instruments is purely a creature of statute. Unless then the statute required Swegle to record the transfer or assignment of the Adams mortgage, he is not in fault for omitting to do so. It is admitted that there is no specific direction in the statute upon the subject. The only mention of an assignment, as such, is found in section 27 of the chapter on conveyances (Or. Laws, 519), which provides that "the recording of the assignment of a mortgage shall not in itself" be notice to the mortgagor, so as to invalidate a payment made by him to the mortgagee. This is merely the assertion of a rule that had long been established by the courts. Murray v. Lylburn, 2 Johns. Ch. 443; Livingston v. Dean, Id. 479; Livingston v. Hubbs, Id. 512; Hubbard v. Turner [Case No. 6,819].

The most that can be said for this provision is that it impliedly authorizes an assignment to be recorded, or rather contemplates that it may be recorded by virtue of some other provision or statute. And yet by a still stronger implication arising out of sections 22 and 34 of said chapter, and the very nature of the case, it is provided that no instrument affecting the realty, which includes an assignment, shall be admitted to record, unless acknowledged and certified as a conveyance. An assignment of a mortgage may be made by an instrument in the form of a conveyance, and, in such case, may be admitted to record. But an assignment of a mortgage may be a mere writing under the hand of the assignor, declaring that he thereby assigns the mortgage to a person therein named. Such a writing is effectual to pass the lien of the mortgage, but it would not be entitled to record unless acknowledged and certified. But in the case of a mortgage given as security for a negotiable note, the debt being the principal and the security the incident, the same may be assigned by the simple indorsement or delivery of the note. In such case there is no assignment to record.

In the absence, then, of any legislative direction to that effect, there does not seem to be any obligation resting upon an assignee to record his assignment, to protect himself against any subsequent purchaser or mortgagee. As between different assignees of the same mortgage, the question of priority could not well arise, because an assignment without the delivery of the note and mortgage, except under peculiar circumstances, could hardly be considered as made or accepted in good faith; yet if such question should arise between assignees acting in good faith, I suppose that under section 34 of the recording act, the assignment first recorded would prevail, because it is considered a conveyance of the interest assigned. But the question here is an altogether different one. Shaw was not the owner of the Adams mortgage when he made the mortgage to the complainant, and his conveyance could not affect what he did not own. On the record, the mortgage appeared unsatisfied and the complainant must be held to have taken its mortgage with knowledge of that fact. The equity of the defendant Swegle being prior in point of time is the stronger in law. If the complainant has made a mistake it must take the consequences, and if a fraud has been practiced upon it by Shaw it ought not to be allowed to shift the burden to the defendant Swegle.

A decree will be entered directing a sale of the premises, and a distribution of the proceeds among the parties hereto according to the priority of their liens in point of time.

[This decree was affirmed on rehearing. Case No. 10,557.]

Case No. 10,557.

OREGON & W. TRUST INV. CO. v. SHAW et al.

[6 Sawy. 52.] [1]

Circuit Court, D. Oregon. Sept. 1, 1879.

MERGER — UNION OF MORTGAGE AND THE FEE IN ONE PERSON—TRANSFER OF MORTGAGE BEFORE ACQUIRING FEE—RECORDING.

[1. A mortgage transferred by the mortgagee, though not recorded, does not become merged in the fee afterwards acquired by the mortgagee.]

[2. Even where a mortgage and the fee unite in the mortgagee, there is no merger where the mortgagee transfers the mortgage before dealing with the property, though such transfer is not recorded.]

[3. The Oregon statutes do not require a transfer or assignment of a mortgage to be recorded, and if there were such requirement, a failure to observe it would not render such mortgage void as against one taking another mortgage on the premises.]

[This was a bill in equity by the Oregon & Washington Trust Investment Company against C. W. Shaw and wife and Charles Swegle to enforce the lien of a mortgage. A decree was entered directing a sale of the mortgaged premises and a distribution of the proceeds among the different parties, according to the priority of their respective liens. Case No. 10,556. It is now before the court on rehearing.]

Ellis G. Hughes, for complainant.

W. H. Homes and Claude Thayer, for defendant Swegle.

DEADY, District Judge. After hearing this cause on bill and the answer of the defendant Swegle, the court decided that the lien of Swegle's mortgage was never merged in the fee, and was prior to that of the complainant. Upon the petition of the complainant a rehearing was granted. After a careful study of the learned and voluminous brief of counsel for complainant, my conclusion is that:

1. There never was any merger of the mortgage and fee in Shaw, because the two interests never were united in him, Shaw having transferred the Adams mortgage to Swegle some weeks before he received the conveyance of the fee from the former.

2. The transfer of the mortgage to Swegle by Shaw was valid as against Shaw, even if it was necessary to record it as against a subsequent bona fide purchaser of the same property, and therefore the mortgage remained the property of Swegle, and could not be merged in the fee afterwards acquired by Shaw from Adams.

3. Even if the mortgage and fee had been united in Shaw, there was no merger, because Shaw, having transferred the former to Swegle, thereby plainly manifested his intent to keep the mortgage and fee separate, and therefore the mortgage to the complainant was at most only a conveyance or pledge of the premises, subject to the lien of the prior mortgage before then transferred to Swegle.

4. The statute of this state does not require a transfer or assignment of a mortgage to be recorded, particularly when such transfer occurs by operation of law, upon the indorsement or delivery of a promissory note for the payment of which it is only a security.

5. If the statute did require the transfer or assignment of a mortgage to be made after the manner of a conveyance and recorded, still the failure to record such assignment would not render it void as against the complainant, because it is not a purchaser of the same property, the mortgage from Adams to Shaw, but only of the fee, subject to said mortgage, or rather of a mortgage thereon subsequent to said mortgage.

6. The complainant, having taken a mortgage with notice upon the record that there was a prior unsatisfied mortgage upon the same property to secure the payment of a negotiable note not then due, has no right to complain if the lien of said mortgage is now preferred to its lien. Upon the record it took a second mortgage without inquiry as to the ownership or condition of the first one, and if it did so upon an impression that the prior mortgage was merged in the estate of its mortgagor, it acted, as appears, upon insufficient reasons, and must bear the consequences of its own mistake.

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

Case No. 10,558.

In re OREGON BULLETIN PRINTING & PUBLISHING CO.

[13 N. B. R. 199; 10 Am. Law Rev. 380; 8 Chi. Leg. News, 81.] [1]

District Court, D. Oregon. Nov. 18, 1875. [2]

BANKRUPTCY — PETITION AGAINST CORPORATION— REPEAL OF ACT OF 1867.

1. A petition to have a corporation adjudged a bankrupt may be maintained under section 5122 of the Revised Statutes by any creditor of such corporation, and the provision of section 12 of the act of June 22, 1874 [18 Stat. 180], in relation to the number and amount of the creditors required to join in such petition against a natural person does not apply.

[Disapproved in Re Leavenworth Sav. Bank, Case No. 8,166.]

2. The original bankrupt act of 1867 [14 Stat. 517], and all the acts amendatory thereof, except the act of 1874 aforesaid, were superseded by the title "Bankruptcy" of the Revised Statutes, and repealed by section 5596 of said statutes.

3. Quære, whether such appeal took effect from the enactment of the Revised Statutes, on June 22, 1874, or from December 1, 1873, the date on which said statutes took effect, as declared in section 5595 thereof.

[1] [Reprinted from 13 N. B. R. 199, by permission. 10 Am. Law Rev. 380, contains only a partial report.]

[2] [Reversed in Case No. 10,561.]

In bankruptcy.

George H. Durham, for motion.
Joseph Simon, contra.

DEADY, District Judge. On September 10, 1875, Blake, Robbins & Co., of San Francisco, Lewthwaite & Smith, H. W. Scott and H. L. Pittock, of Oregon, filed their petition in bankruptcy against the Oregon Bulletin Printing and Publishing Co., a corporation duly formed under the laws of Oregon, stating that they constituted one-fourth in number and one-third in value of the creditors of such corporation, and that the same owed each of them debts amounting in the aggregate to four thousand four hundred and eighty-one dollars; that within the six calendar months next preceding the date of said filing, said corporation committed five several acts of bankruptcy; for that, being insolvent, said corporation did make four certain payments to certain of its creditors, amounting in the aggregate to sixteen hundred and ten dollars, with intent to thereby give such creditors a preference, and also procure its property to be taken on legal process, for the purpose of foreclosing a chattel mortgage held by one of its creditors for the sum of six thousand dollars, and praying that for these causes said corporation may be adjudged a bankrupt. On September 21, the corporation filed an answer to the petition, containing, among other things, a denial that the petitioners constitute one-fourth in number and one-third in value of the defendants' creditors; and also a separate statement in writing to the same effect. The petitioners now move to strike out said denials as being irrelevant.

The motion is made upon the ground that a petition to have a corporation adjudged a bankrupt is not, as to the number and value of the creditors necessary to join therein, within the purview of section 39 of the bankrupt act, as amended by section 12 of the act of June 22, 1874, but is governed in this respect solely by section 5122 of the Revised Statutes. The latter section is given in the title "Bankruptcy" of the Revised Statutes, in place of section 37 of the act of 1867. By the latter the provisions of the act were applied to corporations. It provided that a corporation might be declared a bankrupt "upon the petition of any creditor or creditors" of the same, without any reference to the value of their debts. The section, as contained in the Revised Statutes, provides that the provisions of the act shall apply to private corporations, and that "upon the petition of any officer of any such corporation, * * * duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor of such corporation * * * made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors." The section further provides substantially as follows: 1st. All the provisions of the act "which apply to the debtor or set forth his duties" in relation to the bankruptcy are made applicable to the officers of such corporation. 2d. All payments, etc., declared fraudulent and void when made by a debtor are declared to have the same effect when made by a corporation. 3d. All the assets of a corporation declared bankrupt are to be distributed to its creditors, and no allowance or discharge is to be granted to it.

The Revised Statutes of the United States appear to have taken effect from December 1, 1873 (section 5595 et seq.), but were not enacted until June 22, 1874. They contain the title "Bankruptcy," numbered 61, which was intended as a substitute for the bankrupt act of March 2, 1867. On the same day congress passed "An act to amend and supplement" said Act of 1867. By this latter act, section 39 of the original act, the same constituting sections 5021, 5022, and 5023 of the Revised Statutes, was amended so as to require at least one-fourth in number and one-third in value of the creditors of a natural person to join in a petition to have him declared a bankrupt. Prior to this amendment it was only necessary that one or more creditors, the aggregate of whose debts amounted to two hundred and fifty dollars, should join in such petition. By means of section 5022 the statute is first applied to corporations. Upon its language it cannot be contended that any particular number of creditors whose debts are of any particular value are required to join in a petition to have a corporation adjudged a bankrupt. The words of the section are unambiguous and too plain to leave any room for construction. "Upon the petition of any creditor of such corporation, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors." The petition may be brought by "any creditor" of the corporation, without reference to the number of its creditors or the aggregate of their debts. True, the petition is to be "made and presented in the manner provided in respect to debtors." But surely, a direction as to the manner in which a petition is to be made and presented, does not touch the question by whom it is to be made and presented—more especially when, as in this case, the statute in that immediate connection—as it were in the same breath—declares that it may be made and presented by any creditor of the corporation. Does section 39, as amended by the act of June 22, 1874, expressly or by necessary implication modify or amend section 5122 of the Revised Statutes in any particular?

The act of 1874 was passed on the same day as section 5122. They are exactly cotemporaneous, and therefore there is nothing to be said in favor of such modification, upon the ground that section 39 is the later expression of the legislative will. If there really is any conflict between the two sections, there is as

much reason for holding that section 39 must yield to section 5122 as otherwise, so far as the time of their enactment is concerned. Again, the act of 1874, although it contains a general repealing clause (section 21), as to "all acts and parts of acts inconsistent with its provisions," does not contain any general amendments to the act of 1867, leaving the court to ascertain as best it might how far and where they are in conflict with the original, and therefore repel it by implication. On the contrary, all the amendments are specific; each section amended is named. The amendment is made by either striking out or inserting particular words at particular places, or, as in the case of section 39, by reforming the section so as to embody in it the desired changes, and then enacting it as amended. The rest of the sections are supplementary to the original act, and not in conflict with it. There is, then, no reason to presume that the amendment to section 39, providing who must join in a petition to have a natural person adjudged a bankrupt, was intended to amend or modify section 37 of the act of 1867 or its substitute, section 5122, as to who might maintain a petition to have a corporation declared a bankrupt. On the contrary, if it was intended to amend this section so as to require a certain proportion in number and amount of the creditors to join in a petition for that purpose, the inference from the circumstances is satisfactory, that it would have been done specifically and directly, as in the case of the other twelve amended sections. Section 5122 not being amended by the act of 1874, it and section 39 stand in the same relation to one another that they did in the original act. By that, as has been shown, while a natural person could only be declared a bankrupt upon the petition of one or more of his creditors, whose debts, in the aggregate, amounted to two hundred and fifty dollars, a corporation might be so declared upon the petition of such creditors without reference to the amount of their debts.

The two sections are separate provisions relating to distinct subjects—the one, the involuntary bankruptcy of natural persons and the other that of corporations. They are not contradictory or in conflict, and both may stand and have effect upon the subject-matter to which they respectively relate. The reason of the difference between the two sections may not be so apparent as the difference itself. But several reasons suggest themselves. In the case of a corporation the bankrupt is neither entitled to any allowance nor a discharge. By reason of the adjudication it is in effect dissolved, and its existence terminated. There is nothing left to grant a discharge to. It is stripped of all its property and rights of property, and can acquire no more. The law creates it and the law destroys it. But in the case of a natural person, the bankrupt is entitled to an allowance and a discharge from his debts upon certain conditions, and by the act of 1874 (section 12) in a case of compulsory bankruptcy, he is entitled to a discharge without reference to the proportion between his assets and debts, "or the assent of any portion of his creditors." On this account it may have been thought necessary to require, in the case of a natural person, a certain proportion in number and amount of the creditors to join in the petition to prevent collusion between a debtor and a friendly creditor. The very fact that the act of 1874 (section 12) requires the judge to be satisfied that the written admission of the debtor that the requisite number and amount of creditors have petitioned to put him into bankruptcy is made in good faith, gives strong color to this suggestion. When a statute requires a court to be satisfied that an admission in the pleadings of the defendant that the plaintiff is entitled to sue, is made in good faith, it is a reasonable inference that the enactment was intended to guard against collusion. Again, it is well known that the amendments contained in the act of 1874 were passed under the influence of the panic of 1873. Under such circumstances, sympathy for the debtor class may have induced congress to provide that a natural person should not be forced into bankruptcy except upon the petition of a large proportion of his creditors, and thereby prevent his being pressed to the wall, unless in an extreme case; while, in the case of an artificial person, as a corporation, which is created upon the implied condition that its existence depends upon its solvency, no such consideration would or ought to have effect.

By the laws of most civilized countries, mere inability to pay its debts is a cause of dissolution against a corporation. Being insolvent, it has ceased to fulfill the law of its being, and ought no longer to exist, unless by the consent or forbearance of all its creditors. But if section 39, as amended by the act of 1874, is applicable to corporations, then their existence may be prolonged with impunity, against the wishes and interests of any number of the creditors less than one-fourth in number and one-third in value of the whole, long after they are both insolvent and bankrupt. Or it may be that the difference between the two sections is a casus omissus—the result of a mere oversight on the part of congress. But however this may be the distinction exists, as to who may maintain a petition in involuntary bankruptcy. One rule is prescribed in the case of a corporation and another in that of a natural person. To confound or obliterate this distinction by construction—by the merest assumption that section 39 was intended to modify section 5122—is not only going beyond the office and power of a court but in a direct opposition to it. As is well said by a distinguished commentator: "Upon all acts of the legislature, such construction should be made as that one clause shall not frustrate or destroy, but on the contrary,

shall explain and support another—sound exposition requiring effect to be given to every significant clause, sentence, or word in a statute." Smith, Const. Law, § 575.

On the argument of the motion counsel for the defendant cited the clause in section 5013 of the Revised Statutes (section 48 of the act), which declares that, in the title "Bankruptcy," "the word 'person' shall also include corporation," and argued therefrom, that as by section 39 a "person" can only be adjudged a bankrupt upon the petition of a certain proportion of his creditors, so is it, also, in the case of a "corporation," for the reason, that the word "person" being made to include that of "corporation," any provision of this title relating to a "person" is also applicable to a "corporation." This conclusion may be admitted so far as the statute does not otherwise expressly or by necessary implication provide. For instance, the statute provides that a "person" shall be entitled to a certain allowance out of his property, and under certain circumstances to a discharge from his debts. Now in these two cases, the word "person" does not include a corporation, because the statute (section 5122, Rev. St.) expressly provides that "no allowance or discharge shall be granted to any corporation or joint stock company, or to any person or officer or member thereof." But the clause cited from section 5013 of the Revised Statutes, declaring that the word "person" in the title "Bankruptcy" shall include "corporation," has no application to section 39 of the act of 1867, as amended by section 12 of the act of 1874. A few words will make this apparent. The original act of 1867 and all the acts amendatory thereof, prior to that of 1874, are no longer in force. They are superseded by the title "Bankruptcy," of the Revised Statutes, which is itself a new statute, differing in many particulars from the original one, and were repealed by section 5596 of the Revised Statutes on December 1, 1873, or June 22, 1874. Therefore, section 48 of the act of 1867, containing this definition of the word "person," is no longer in force. Section 5013 has taken its place; but this section, in declaring the word "person" to include a corporation, limits its operation to the title "Bankruptcy" of the Revised Statutes. Now, section 39 of the act of 1867, as amended by section 12 of the act of 1874, is no part of the Revised Statutes, but is an independent statute passed on the same day as the latter. So it follows, that the word "person" in that section is not to be enlarged in its operation on account of the definition given to it as used in Rev. St. tit. "Bankruptcy." But it may be conceded that in the absence of any statute definition to that effect, the word "person" should be construed to include a corporation, unless it appears that it was used in a more limited sense. Such is the rule prescribed in section 1 of the Revised Statutes, which provides that, "in determining the meaning" of said statutes, or any act of congress passed subsequent to February 25, 1871, "the word 'person' may extend and be applied to partnerships and corporations, * * * unless the context shows that such word was intended to be used in a more limited sense."

The act of 1874 being passed since 1871 is within the purview of this provision, and therefore the word "person," wherever it occurs in it, ought to be construed to include a corporation, unless the context shows that such was not the intention. On this point there can be but little, if any, doubt. The context, which is the title "Bankruptcy," of the Revised Statutes and the contemporaneous act of 1874, shows plainly that the application of the statutes of bankruptcy, including section 12 of the act of 1874, to corporations, is generally provided for in section 5122 of the Revised Statutes, and particularly as to who may maintain a petition against a corporation.

It was also objected to this motion by counsel for defendant, that the allegations sought to be stricken out were made in response to an allegation in the petition. So far as I have looked into them, there seems to be some conflict or confusion among the authorities upon this point. None were cited on the argument. I think the better rule is to allow a motion to strike out irrelevant or immaterial matter in a pleading, although it may be a mere denial of an immaterial allegation in a prior pleading. But in such case, the motion, in analogy to the rule in case of a demurrer, should be held to reach back to and include the first fault.

The motion to strike out is allowed, including the allegation in the petition concerning the number and amount of the creditors joining therein.

[NOTE. An adjudication in bankruptcy was had, founded on a verdict of the jury. Case No. 10,559. Subsequently a motion to stay proceedings pending a petition for review in the circuit court was overruled. Id. 10,560. The case was heard by the circuit court on review in Id. 10,561.]

Case No. 10,559.

In re OREGON BULLETIN PRINTING & PUB. CO.

[13 N. B. R. (1876) 503;[1] 1 Cin. Law Bul. 87.]

District Court, D. Oregon.[2]

BANKRUPTCY—BURDEN OF PROOF—"INSOLVENCY" — PETITIONING CREDITOR — EVIDENCE AGAINST CORPORATION — PAPER SIGNED BY OFFICER — PAYMENT OF DEBTS BY SOLVENT DEBTOR — ANSWER TO PETITION—WAIVER OF OBJECTION.

1. In a case of involuntary bankruptcy, the burden of proof is on the petitioning creditor.

2. A debtor is insolvent if his property, put up on reasonable notice for sale, where it exists un-

[1] [Reprinted from 13 N. B. R. 503, by permission.]

[2] [Reversed in Case No. 10,561.]

der the circumstances of the case, will not bring cash enough to pay his debts.

[Cited in Re Jacobs, Case No. 7,159; Re Seeley, Id. 12,628.]

3. A petitioning creditor is not required to make full and complete proof of the debtor's insolvency, but may offer proof tending to show his insolvency, and the debtor must then explain the evidence if possible, for he is best acquainted with the condition of his own affairs.

4. A defense which has been stricken out of the case may be given in evidence as an admission.

5. A paper sworn to and filed by an officer of a corporation is competent evidence against it, but is not conclusive.

6. No particular or specific evidence of an intent to prefer is necessary when a payment is made by an insolvent debtor, for the act itself is sufficient evidence of the intent.

7. The law will not presume an intent to prefer when the debtor is not aware of his insolvency, but it is incumbent on him to show it.

8. The knowledge or motive of the preferred creditor is immaterial in an involuntary proceeding.

9. A payment by an insolvent debtor is an act of bankruptcy, although it is made in the usual course of business.

10. A debtor who is solvent may pay any or all of his debts, although proceedings in bankruptcy are pending against him.

11. A voluntary contribution received by a debtor, does not constitute a debt due by him.

12. A voluntary agreement between certain persons, to which the debtor is in no wise a party, to make a contribution to him, does not create an indebtedness to him.

13. A corporation by appearing and answering a petition, thereby admits that it may be proceeded against in bankruptcy, and cannot afterwards object that the petition does not allege that it is a moneyed, business, or commercial corporation.

[In bankruptcy. The case was formerly heard upon motion to strike out certain denials in defendant's answer as irrelevant. Case No. 10,558.]

H. G. Thompson and George H. Durham, for petitioning creditors.

Joseph N. Dolph and Joseph Simon, for defendant.

DEADY, District Judge. The plaintiffs in this case, Blake, Robbins & Co., Leuthwait & Smith, H. W. Scott, and H. L. Pittock, called in the pleadings the petitioning creditors, bring this action to have the defendant declared a bankrupt. The petition alleges that the defendant is a corporation organized under the laws of this state, with its place of business at the city of Portland, and that at the commencement of this action it owed debts to certain persons, naming them, amounting to about twelve thousand dollars, of which sum four thousand four hundred and eighty-one dollars was due these plaintiffs, and by them provable in bankruptcy; that the defendant on June and July 1, 1875, was insolvent, and committed two several acts of bankruptcy by paying the Western Union Telegraph Company the sums of six hundred and twenty dollars and seven hundred and ten dollars, with intent to give said telegraph company a preference, and also on August and September 1, 1875, was insolvent, and committed two other acts of bankruptcy, by paying to Alexander P. Ankeny on each of said dates the sum of one hundred and forty dollars, with intent to give said Ankeny a preference. The defendant, by its answer, admits that it is a corporation formed under the laws of Oregon; that it is and was indebted to the plaintiffs, except Scott's debt of three thousand dollars, as alleged; that the several payments to the telegraph company and Ankeny were made by it as alleged; and denies that it is or was indebted to Scott; that it is or was insolvent at the dates of said payments, or any of them; that said payments or either of them were made with intent to give said telegraph company or Ankeny a preference; but avers that said payments and each of them was made in the ordinary course of its business, when and as they became due, and without any intent to prefer said creditors, or to defeat, hinder, impede or delay the operation of the bankrupt act.

In the course of the argument, something has been said about the nature and operation of the bankrupt act [of 1867 (14 Stat. 517)],—the law under which this proceeding takes place. It is hardly necessary to say to you, that you and I are both here to administer the laws as we find them; and it does not become us in any way to obstruct the fair and full administration of any of the laws of the United States on account of our personal opinions or prejudices concerning its propriety or expediency. The bankrupt act has been enacted by the congress of the United States, representing the people of the United States, in pursuance of an express authority to that effect in the constitution of the United States. It is intended to meet the case when a debtor becomes unable to pay his debts as they become due in the ordinary course of business, to prevent any of his creditors from getting an advantage over the others, either by the pertinacity or industry of such creditor or connivance of the debtor. It goes upon the just and proper theory that the property of an insolvent debtor belongs to his creditors and not to himself, and that such creditors have a right to dispose of it and distribute the proceeds among themselves in proportion to the amount of their respective claims; that such debtor has not a right to dispose of and distribute it among his creditors as he may think proper or feel inclined to; and that this is a just and proper view of the subject it seems to me cannot be successfully gainsaid. The law also proceeds upon the theory in such cases, that economy, and the interest of the debtor and the whole body of creditors will be promoted, by preventing separate and expensive proceedings by each of such creditors, and therefore the whole matter of the insolvent estate, and the claims of the respective creditors upon it, shall be settled in one proceeding, with as little controversy and

expense as possible. There is then no special hardship in this law as compared with any other intended to regulate the rights and relations between creditors and an insolvent debtor. In some respects it is a hardship and an unpleasant thing to enforce the collection of a debt against a failing party by any means which can be provided, and which at the same time are effective. But as long as debts are to be collected by legal proceedings, and insolvent debtors are required to surrender their property to their creditors, the proceedings provided by the bankrupt act are as humane, just, and economical a mode of accomplishing this end as has ever been devised.

A question has been made at the last moment in this case as to whether the law casts the burden of proof upon the plaintiffs or defendant. As the law stood prior to June 22, 1874, it contained a provision in section 41, which in effect required the debtor to show upon the trial that the facts stated in the petition were not true, or else the verdict should be found against him. In some respects this was a harsh and hard rule of evidence, but from the nature of the case, in most respects it did not differ in operation from the ordinary rule on the subject. Most, if not all of the material allegations in a petition in bankruptcy relate to the conduct of the debtor or the state of his affairs. In the nature of things, he is usually better informed as to the truth and details of the alleged transactions than his creditors can be. Therefore, upon slight proof against him in these respects he would be called upon to explain and show that his conduct had been proper or that his estate was solvent. By section 14 of the act of June 22, 1874 (18 Stat. 182), section 41 of the act of March 2, 1867, was amended so as to repeal this provision requiring the debtor to disprove the facts in the petition, and therefore counsel for the defendant contends that the burden of proof is now upon the plaintiffs. On the other hand counsel for the plaintiffs insist that the act of June 22, 1867, supra, is void and inoperative, because the said act of March 2, 1867, was repealed by the first clause of section 5596 of the Revised Statutes on said June 22, 1874, and, therefore, there was no such act in existence to amend, at the time of the passage of the supposed amendatory act. How this question should be decided I am not quite certain in my own mind, but for the purposes of this trial I will follow my impression, and hold that the act is operative, and that the rule prescribed in section 41 of the act of March 2, 1867, is, therefore, changed. This being so, the burden of proof in this case is upon the plaintiffs, and the defendant is not called upon to show that the facts stated in the petition are not true, except it be in such particulars and under such circumstances as your attention will be called to particularly hereafter.

It is incumbent upon the plaintiffs, then, to make out their case to establish to your satisfaction under the instructions of the court three things: 1. That the defendant owed the plaintiffs, or some of them, the debts alleged to be due them in the petition. 2. That the defendant was insolvent at the dates of the several payments to the telegraph company and Ankeny, or one of them; and 3, that said defendant made said payments or one of them, being so insolvent, with intent to give such creditor a preference over its other creditors. Upon the first point you can have no difficulty, as it is admitted by the defendant in its answer that it did owe all the plaintiffs' debts as alleged in the petition, except Scott's. That admission is sufficient upon this branch of the case to enable plaintiffs to maintain this action. As to the second point, it is a matter for you to decide, and I instruct you upon it as I have heretofore held, in Re Randall [Case No. 11,551], that a party is insolvent when he is unable to pay his debts as they become due, no difference whether it is probable or not that if time is granted him he may be able to pay them sometime thereafter. A debtor must pay his debts in money; that is the only legal tender. He must be able to pay them in money; either because he has the money at the time or because his property, if put to sale at once, could be converted into cash sufficient to pay them. This is as favorable an exposition of the matter for the defendant as can be made. The defendant need not have the money on hand to pay its debts —not a cent of it—but if its property, put up, upon reasonable notice, for sale, where it exists, under the circumstances of the case, will bring cash enough to pay its debts, it is not insolvent—it is able to pay, and, therefore, solvent. But if it will not, then it is insolvent—unable to pay. As this court said in Re Randall, supra, if the amount of a debtor's debts cannot be made out of his property on legal process—on execution—when they become due, he is insolvent. This is a question upon which the plaintiffs are not required to make that full and complete proof that they would be of an ordinary issue in which they held the affirmative. Although the burden of proof is upon them, this is rather in the nature of proving a negative, or of a proposition concerning which the facts are best known to the adverse party. The defendant knows best what its assets are, what its debts are, and what the condition of its affairs is. It can most conveniently and certainly show the state of its affairs, and whether it is insolvent or not; and, therefore, when the plaintiffs offer proof tending to show that the defendant is insolvent and unable to pay its debts, explanation, so far as it appears that it can conveniently make it, is required at its hands. If any explanation of its affairs, which it appears to you it could conveniently have made, is not made by it, this is a circumstance against the defendant to

be considered by you in making up your minds upon this question. Still, in the matter of proof, you must be satisfied as reasonable men, considering the definition of insolvency given you by the court, that the defendant was insolvent at some of the dates of the alleged preferences, before you can find by your verdict that it was so.

In considering this question, you should take into account the nature of the defendant's property—what it consisted of—how marketable it was—whether it was of a kind that could be sold in the market at any time for something like its cost or ordinary value, or otherwise. If the defendant's means are in unsalable property, and it must be converted into cash for the purpose of paying its debts, it is the misfortune of the defendant, and it must bear the consequence of that misfortune. That circumstance does not preclude the plaintiffs from demanding their debts, or seeking the collection of them by any mode appointed by the law. It is alleged in the petition that the debts of the defendant, at the time of the filing thereof, amounted to nearly twelve thousand dollars. The answer of the defendant admits this allegation, except as to the debt claimed by Scott, upon which three thousand dollars is alleged to be still due. Counsel for the respective parties footed up in their arguments to you the statements made by the witnesses as to the value of the defendant's property. So far as this branch of the case then is concerned, take this property, and from the evidence, considering the kind of property it is, and relying upon your judgments and experience as men of common sense and ordinary observation, and say what it is worth—was worth on or between the date of the alleged preferences—what it was worth in cash—what could be realized from it on execution. Then ascertain what the defendant owed at the same time, and compare them; and if what it owed was substantially in excess of what its property was worth, the defendant was insolvent; but if not, then it was not insolvent.

A written admission of the defendant's has been offered in evidence upon this point, which it is the duty of the court to construe and give you the effect of. Eleven days after this action was brought, the defendant filed this paper in this court as a defense to the action. It was afterwards determined by the court that it was no defense, and it was stricken out of the case. But, nevertheless, it is a part of the files and records of this court, and is an admission as to the facts contained in it. The paper reads: "It (the defendant) denies that one-fourth in number of its creditors have petitioned to have it adjudged a bankrupt; and it denies that the aggregate of the debts of said creditors, filing said petition, constitute an amount one-third of the debts provable against it under the act of congress, entitled 'An act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867.'" This is an admission, statement, or assertion that four thousand four hundred and eighty-one dollars, which I believe to be the aggregate of the debts stated in the petition as being due the plaintiffs, was not one-third of the debts of the defendant, provable against it in bankruptcy. Of course, if this statement be true, the debts of defendant would amount to not less than thirteen or fourteen thousand dollars. But the writing proceeds: "And the Oregon Bulletin Printing and Publishing Company avers that the creditors filing said petition constitute less than one-fifth in number of its creditors, and the aggregate of their debts provable under said act amounts to loss than one-twenty-fifth of the debts so provable." If this statement is to be construed as referring to all the petitioner's debts, the same as the first one, it would follow that the debts of the company were then about one hundred thousand dollars, because twenty-five times the sum of the petitioner's debts amounts to that sum, and more.

It is contended on the part of the defendant, that the natural and legal signification of these words, "And the aggregate of the debts provable under said act amounts to less than one-twenty-fifth of the debts so provable," is, that the debts of the petitioners, which the defendant admits to be debts due by it and provable against it, are only one-twenty-fifth of the whole debts of the corporation. There is no allegation in this statement that the alleged debts of the petitioners do not exist; there is no direct allegation to that effect, nor that they are not provable under the act; but it is claimed that the statement in the writing that the aggregate of the debts of the petitioners provable under the act is less than one-twenty-fifth of the whole debts of the corporation does not admit that any of such debts are provable. It seems to me that this is rather a fine distinction to put upon the matter, and that it is not the natural and ordinary signification and effect of the words, "the aggregate of their debts provable under the act amounts to less than one-twenty-fifth of the whole debts of the defendant." However, I leave it for you to say what is meant by the statement. If it means that the aggregate of the petitioner's debts is only one-twenty-fifth of the whole debts of the corporation, then it is an admission that the debts of the corporation exceed the sum of one hundred thousand dollars. On the other hand, if it be assumed, as now claimed by the defendant, that there is an implied protest or assertion in this latter statement that all the debts of the plaintiffs were not provable under the act, still, it being now admitted that all the debts of the plaintiffs were then due and provable under the act, except Scott's, it is an admission that the debts of the corporation amounted to more than twen-

ty-five times the aggregate of the plaintiffs' debts, less Scott's—or a sum near thirty-seven thousand dollars.

With these suggestions, I leave this statement with you, to find the legal effect and purport of the words used in it—for you to construe and give its effect along with the other proof in this case; only adding this: a corporation is an invisible, intangible being; it is a legal entity, and an abstraction; it has no personal existence except through its officers, and whatever they do, it does, and it is bound by them the same as you are bound by your acts in your own affairs. A corporation cannot say, "True, this man said so and so, and he was our manager and secretary, but we are not bound by what he said,"—any more than you can. Corporations are represented to the world, and the world deals with them, through their officers; and whatever such officers do, binds the corporation the same as if it was a natural person. Of course, it is not always concluded by them any more than a natural person. It may show that the truth is otherwise, except where the law in particular cases estops a person to deny what he has said. A corporation is the same as a natural person in this respect; whoever represents it for the time being is the corporation, and whatever he does or says is its act. In this case, the president of the corporation, Mr. Denny, deliberately came into this court, filed this paper, signed by him, and verified by his oath, to the effect that the debts of the petitioners provable under the act did not amount to one-twenty-fifth of the debts of the company. But the defendant is not concluded by this statement. It may show that it was a mistake—that the contrary is true. But it is sufficient evidence of the facts contained in it, and unless explained, it is sufficient for you to act upon, just as any other solemn admission of any other person. If you should be satisfied from the evidence that it is incorrect, that it was a mistake, from whatever motive or reason it was made, then you would not follow it. But you are not to jump at the conclusion that it is a mistake, because an admission made under those circumstances by a party representing a corporation is presumed to be true. But as I have already stated, the corporation is not conclusively bound by it; and if upon the whole evidence you are satisfied that the fact is otherwise, you ought to act accordingly.

In regard to the claim of Scott, it is only material in this case upon the question whether the defendant is insolvent or not. If the defendant owed Scott this amount of money, of course, the fact is a material element in the inquiry whether it was solvent or insolvent. Otherwise it is not a matter to be inquired of in this case, because there are enough of admitted claims to maintain this action. Evidence has been introduced by the plaintiffs from the books and employees of the defendant, that Scott furnished it some five thousand five hundred dollars in money. It appears that during the summer of 1874 he furnished the bookkeeper of the defendant certain amounts of money from time to time, which money it had the benefit of. Prima facie, this shows that the defendant owes Scott that amount of money. But that may not be the case. There may be something behind this which would show the fact to be otherwise. But unless the defendant does show the contrary, if you believe the evidence of the plaintiff upon this point, you should find that the defendant owes Scott as stated in the petition. The only evidence offered upon this point by the defendant is a deed or declaration of trust executed by Scott, from which it appears there had been conveyed to him absolutely by the Oregon Real Estate Company certain blocks of land in East Portland. This instrument was executed to show the true nature of that transaction, and by it Scott acknowledges that he is not the absolute owner of the property mentioned, but that he holds it in trust for the purpose therein mentioned. By this instrument Scott acknowledges that he holds this property as a security for any money he might advance to the defendant. The transaction is not one between the Oregon Real Estate Company and the defendant, but the former and Scott, for his security. Scott might have pledged this property for this money, or he might have obtained it in another way, but, however he obtained the money, he furnished it to the defendant, and for aught that appears in this instrument, he is its creditor to that amount, and not the Oregon Real Estate Company. Therefore, I instruct you that this instrument does not in any way affect the case upon this point.

As to the third point in the plaintiffs' case: The payments to the Western Union Telegraph Company and Ankeny, or some of them, must not only have been made when the defendant was insolvent, but with an intent to prefer such creditor. If you find that the defendant was solvent when these payments were made, that will be the end of your inquiry, and your verdict should be for the defendant. But if you should find that the defendant was insolvent at the time any of these payments were made, then such payment being made with intent to prefer, is an act of bankruptcy. The bankrupt act declares that any debtor who, being insolvent, shall make any payment with intent to give a preference to one or more of his creditors, may be adjudged a bankrupt. If, then, the defendant was insolvent at the time it made any of the payments alleged in the petition to the Western Union Telegraph Company, or Ankeny, it thereby gave a preference—that is, it paid these parties their debts in full when it was not able to pay all its creditors in full, and by so much

as it paid these parties more than their proportion of the assets, it preferred them to its other creditors; and in this respect it makes no difference whether the transaction was a great or small one. If a debtor, being insolvent, pays any creditor the full amount of his debt, he thereby gives him a preference. This is the natural and necessary consequence of his act. No particular or specific evidence is necessary to prove the intention to prefer. The act itself is sufficient evidence of the intent, because a party is presumed to intend the natural and necessary consequences of his act. For instance, if either of you had but one hundred dollars in money, and owed four other persons one hundred dollars each, and were to pay one of them, who might be your friend, that one hundred dollars, it is to be presumed that you intended to prefer him to the others; the law makes this presumption, because such is the natural and necessary consequence of your act.

The only exception to this conclusion is, where an insolvent debtor makes a payment which is a preference, believing himself solvent, or not being aware of his insolvency. In such case the law would not presume that he intended the preference. A debtor may be insolvent and not know it; but if such be the fact, it is incumbent upon him to show it. The law presumes that a person, and particularly a corporation, knows the state of its own affairs; and if the fact is otherwise, the party claiming the benefit of it must show it. If a debtor is in fact ignorant of his own insolvency, the law will not presume that he made a payment with intent to prefer, although such was the effect of it; or rather proof of his want of knowledge will overcome the presumption that he did so intend. Upon this point I have been asked by the defendant's counsel to instruct you, that if the parties who received these payments did not know that the defendant was insolvent, then there was no intent to prefer. I decline to give you the instruction, because, so far as this proceeding is concerned, it is immaterial what was the knowledge or motives of the parties who received these payments. Counsel for the defendant also asks me to instruct you, that a payment made in the ordinary course of business, and for the purpose of carrying on such business, is not within the purview of the provisions of the act relating to payments by an insolvent with intent to prefer, and that an insolvent debtor making a payment under such circumstances does not thereby commit an act of bankruptcy. I do not so understand the law. If a debtor is insolvent and unable to carry on his business, there is only one of two things to be done. He must either stop business, or go on with the consent of his creditors. He is dealing with other men's property—the property of his creditors—and he must stop then or get their consent to go on. The payments to the Western Union Telegraph Company and Ankeny, if made when the defendant was insolvent, are acts of bankruptcy. The defendant, if insolvent, had no right to carry on business except with the consent of his creditors; it had no right to pay any of its debts in full. I am also asked by counsel for defendant to instruct you that it is admitted in the pleadings that these payments were made by the defendant in the usual and ordinary course of its business, when and as the same became due, without any intent, object, or design to hinder or obstruct the operation of the bankrupt act. I decline to give the instruction, because the question in this case is not whether the defendant made these payments with intent to hinder, delay, impede, or obstruct the operation of the bankrupt act, although such may have been the ordinary effect of them, but whether it made them with intent to give the parties receiving them a preference. It is true that it is admitted in the pleadings that these payments were made in the ordinary and usual course of business, but that is an immaterial matter, except as you may think it throws light upon the question of the defendant's insolvency at the time they were made. The fact that these sums were paid as such payments were usually made for telegrams and rent—on the first of the month—does not change the character of the act, because the defendant had no right to make such payments, if it was insolvent, at the expense of its other creditors. But the fact that it was not an extraordinary transaction—one not out of the usual mode of doing its business—may be considered by you, and given such weight as you think it ought to have. If a debtor makes an unusual payment to a particular person, it may be inferred from that fact, or it may tend to prove, that he is in failing circumstances, and intended to provide for this person. But no such inference could be made from these payments on any such ground, for they were not unusual or out of the ordinary course of business. But it does not follow from this fact that the debtor was solvent.

Counsel for defendant asks me to instruct you, that under the bankrupt law, a debtor cannot pay his debts after proceedings in bankruptcy have been commenced against him. This instruction is asked for, I suppose, to meet the suggestion to you in the closing argument of plaintiffs' counsel, which was, that if the defendant was solvent, why didn't it pay its debts and stop this proceeding; and you were asked to infer from the fact that it did not pay them, it was unable to do so. Upon this point I instruct you, that a debtor who is solvent may pay any or all of his debts, whether proceedings in bankruptcy are pending against him or not. Under such circumstances, a creditor might be disinclined to receive his debt and run the risk of being charged with knowingly receiving a preference, unless he had good reason to know or believe that the debtor was solvent notwithstanding the proceedings in

bankruptcy. But there is nothing in the fact that proceedings in bankruptcy are pending against a debtor which prevents him from paying his debts if he is in fact solvent. True, if the creditors, for fear of forfeiting their debts, will not receive them, he cannot do more than offer to pay them. But if a debtor is able and willing to pay all his debts, there can be no risk or danger in any creditor accepting his debt, because the payment of all his debts cannot operate to prefer any one, and, therefore, there is no one to question the transaction. Besides, the very fact of payment in full proves that he is, so far as the creditors are concerned, solvent. If a debtor has the means of paying all his debts in full, there can be no difficulty about doing it, even if proceedings in bankruptcy are pending against him; and therefore you have a right to take into consideration the fact that this proceeding is pending against this defendant upon these debts, and draw such inference therefrom as men of ordinary sense would do. In this connection, you may also consider the fact, that the defendant suspended business shortly before the commencement of this action. No particular explanation has been given of this suspension except what appears from the testimony of Mr. Odeneal, the business manager of the defendant. Corporations engaged in the business of publishing newspapers do not usually suspend operations without some reason for it. It also appears that the newspaper of the defendant was supported for some time—for eight months—by the voluntary contributions of certain persons who were interested in maintaining its existence; and this is a circumstance to be considered by you, and you are to say for yourselves whether a solvent corporation would be supported by voluntary contribution from the outside or not. Page 45 of a book, which is admitted to be the record or minute of the proceedings of the defendant, has been offered in evidence by the plaintiffs to prove that the mortgage executed to Odeneal was authorized by a vote of the directors. This minute or record of the proceedings also contains certain directions concerning the giving of a mortgage and note to Scott, one of the plaintiffs in the case. Counsel for defendant ask you to make an inference from what is therein stated concerning its indebtedness to Scott, and that I instruct you, the entry in this respect is to have the same effect as if it had been introduced by the defendant, which I do. You are to consider this page of this record as evidence before you; and, so far as it tends to prove any disputed fact in the case, you will give it whatever weight you think it is entitled to.

Counsel for defendant also asks me to instruct you, that the voluntary contributions received by the defendant are not debts owing by it, and that the amount of such contributions promised but not paid are to be considered as its assets. It appears from the evidence, and is admitted in the argument, that between October, 1874, and May, 1875, the defendant received from certain parties four thousand dollars, at the rate of five hundred dollars per month, to enable it to publish its newspaper; that this sum was furnished by these parties in pursuance of a written agreement with one another to that effect; and that when the defendant suspended business, there was behind on said subscription the sum of two thousand dollars, or four months' contributions. Upon this point I instruct you, that the four thousand dollars, being a voluntary contribution, is not a debt owing by the defendant, and is not to be counted among its debts in ascertaining the question of its insolvency. For the same reason, the two thousand dollars is not a debt due the defendant, and cannot be counted among its assets. The defendant's counsel ask me to instruct you, that this two thousand dollars is a debt due the corporation, because certain parties agreed between themselves to pay it. When it appears that two or three, or more persons agree together upon or for a sufficient consideration to pay a sum of money to a third person—as for instance, this defendant—I am inclined to the opinion, and so instruct you, that the defendant would be entitled to claim performance of the agreement at the hands of either of them, and that the amount, while unpaid, would be a debt due to it. But a mere voluntary agreement between parties to perform such an act, to which the defendant is in no wise a party, I don't think is founded upon a legal consideration, and, therefore, would not raise an indebtedness to the defendant. So far, then, as these contributions are concerned, they are neither assets nor debts. The only effect they can have in this case is upon the question of solvency. The transaction suggests the inquiry, whether it is probable that a solvent corporation would depend upon the voluntary contributions of its friends to carry on its business.

It is now first objected by the defendant, that it does not appear from the petition that the defendant is a "moneyed, business, or commercial corporation;" and, therefore, this court has not jurisdiction of this action; and I am asked to instruct you on that ground that your verdict must be for the defendant. The bankrupt act, by its terms, only applies to "moneyed, business, or commercial corporations," and does not reach other kinds of corporations, such as charitable, religious, and literary societies. There is no allegation in the petition that this defendant is "a moneyed, business, or commercial corporation;" but it is suggested by counsel for the plaintiffs that the court must take notice that it is one of these three kinds, because it is alleged to be a private corporation formed under the laws of Oregon, and that no private corporation can be formed under such laws but for some such purpose. But the corporation law of the state provides for the incorporation of religious, charitable, literary,

and other societies, which are, to all intents and purposes, private corporations, in contradistinction to public or municipal corporations, such as counties, cities, etc., which are invested with a portion of the political power of the state for the management of their affairs and the government of those who come within their limits. It may be that the allegation in the petition, that the defendant is a private corporation formed under the laws of Oregon, and that its principal place of business is in this county, taken in connection with the fact that the very name of the defendant indicates that it was organized for the purpose of engaging in, and carrying on, the business of publishing and printing, shows sufficiently that it is a business corporation. But I am not prepared to pass upon the question in this view of it, and refuse the instruction on the ground that the objection comes too late. If the defendant relied upon this matter as a defense to the action, it should have raised the question by its pleading. I think that by answering the petition and not making the objection, it waived it, and admitted that it was such a corporation as might be proceeded against in bankruptcy and adjudged a bankrupt. Deciding this question upon the spur of the moment, I may be mistaken, but while I have not perfect confidence in the correctness of this conclusion, I instruct for the purposes of this trial, that this action may be maintained notwithstanding this objection.

Take this case then, gentlemen, and find such a verdict thereon as evidence may indicate or satisfy you should be found. Your verdict may be: We, the jury, find for the plaintiffs or defendant, as the case may be.

The jury, after a short absence, returned a verdict for the plaintiffs, upon which an adjudication was afterwards had.

[For a motion for rule to show cause why the proceedings in the district court should not be stayed pending a petition for review, see Case No. 10,560.

[The judgment of this court was reversed by the circuit court, where it was carried by writ of error and petition for review. Case No. 10,561.]

Case No. 10,560.

In re OREGON BULLETIN PRINTING & PUB. CO.

[3 Sawy. 529; 14 N. B. R. 394; 8 Chi. Leg. News, 143.] [1]

Circuit Court, D. Oregon. Dec. 14, 1875.

PROCEEDING IN BANKRUPTCY — NATURE OF — REVIEW—STAY OF PROCEEDINGS—CASES AND QUESTIONS IN BANKRUPTCY—DIFFERENCE BETWEEN.

1. A proceeding to have a debtor adjudged a bankrupt is substantially an action at law, and terminates with the final judgment on the petition or verdict therein; and the subsequent proceedings to ascertain and distribute the estate of the bankrupt are merely consequent upon such action, but no part of it.

2. Such an action is a case at law, and the proceedings therein cannot be reviewed in the circuit court until after final judgment therein; and if the case, by the election of the defendant, becomes triable by jury, it cannot be reviewed otherwise than upon a writ of error.

3. A stay of proceedings in bankruptcy in the district court, is in the discretion of the circuit court, and ought not to be granted where it does not appear that the rights of the defendant will be prejudiced or seriously endangered, if the plaintiff is allowed to proceed to final judgment in the court below.

4. Semble, that all the appellate jurisdiction of the circuit courts in bankruptcy is conferred upon them by section 4986 of the Revised Statutes and that section 4980 of said Revised Statutes, to section 4984, inclusive, do not confer any such power, but only regulate its exercise; that the terms cases and questions are used in section 4986 in contradistinction to one another; that a case in bankruptcy, whether at law or equity, is only reviewable in the circuit court according to the mode prescribed in ordinary actions at law or suits in equity; and that the appellate jurisdiction, which the circuit courts may exercise upon bill or petition, is confined to the review of the action of the district courts upon isolated questions arising in the proceedings subsequent to an adjudication in bankruptcy.

[This case was first heard upon motion to strike out certain denials in the defendant's answer as irrelevant. Case No. 10,558. After this an adjudication in bankruptcy founded on verdict of a jury was had. Id. 10,559. It is now heard upon] rule to show cause why the proceedings in the district court should not be stayed pending a petition for review in the circuit court.

H. Y. Thompson and W. Lair Hill, for plaintiff.

Joseph N. Dolph and Joseph Simon, for defendant.

DEADY, District Judge. On September 10, 1875, Blake, Robbins & Co. and others, filed a petition in bankruptcy against the Oregon Bulletin Printing and Publishing Co., a corporation duly formed under the laws of Oregon. On September 21, the corporation filed a statement, in writing, denying "That a sufficient number of creditors had signed such petition," and also a denial of the acts of bankruptcy, and a demand for a trial by jury, as well as an answer denying the allegations of the petition.

On September 28, the corporation moved the court to award a venire facias to the marshal of the district, returnable before him for the trial of the facts set forth in the petition as provided in section 14 of the act of June 22, 1874 (18 Stat. 182), which motion, after argument, was denied by the district court.

On November 1, the petitioning creditors moved to strike out the statement in writing aforesaid, denying that a sufficient number of creditors had signed the petition, and also an allegation to the same effect in the answer of the corporation, because the same were

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 8 Chi. Leg. News. 143, contains only a partial report.]

irrelevant, which motion, after argument, on November 18, was allowed.

On November 22, the corporation filed a petition in this court, under section 4986 of the Revised Statutes, for a review of these two orders, and thereupon, in pursuance of the prayer of the petition, the court made an order requiring the petitioners to appear in this court and answer the petition within four days after the service upon them of a copy of such order, and also then and there to show cause why they should not be restrained from proceeding upon their petition in bankruptcy, pending this proceeding for review.

Upon the day appointed, December 1, the petitioners appeared and showed cause against a stay of proceedings, and the court took the same under advisement. The superintendence and jurisdiction conferred by section 4986 of the Revised Statutes extends to both cases and questions arising in the district court when sitting as a court of bankruptcy, and unless "special provision is otherwise made," it may exercise such jurisdiction by bill or petition of any party aggrieved, and "hear and determine the case as in a court of equity." By section 4980, Id. "special provision" is made for exercising this revisory jurisdiction in all "cases in equity" and all "cases at law" by a regular appeal or writ of error.

A proceeding by a creditor to have a debtor adjudged a bankrupt, is a case within the ordinary meaning of the term. It is a contest carried on before a court, between parties plaintiff and defendant, according to a form prescribed by law for the purpose of obtaining the judgment of the court upon a matter in controversy between them. Osborne v. U. S. Bank, 9 Wheat. [22 U. S.] 819. The proceeding is not only a case, but, by all analogies, it is a case at law. By it legal rights are to be ascertained and determined in contradistinction to equitable ones, by the intervention of a jury and in a mode otherwise analogous to the course of the common law. Parsons v. Bedford, 3 Pet. [28 U. S.] 446. In a proceeding or action to have a debtor declared a bankrupt, the pleadings in the district court are in no wise substantially different from those in an ordinary action at law, and the questions arising in it are such as usually occur in such an action. As was said by the supreme court in Knickerbocker Ins. Co. v. Comstock, 16 Wall. [83 U. S.] 268, in discussing the nature of this proceeding, "the process, pleadings and proceedings must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil actions at common law."

This action or case is commenced by the filing of the petition, and terminates with the judgment of the court that the debtor is or is not a bankrupt. In re Comstock [Case No. 3,077]. If, by the judgment of the court, the debtor is declared a bankrupt, then, as was said in that case, while "the action has passed into final judgment," there "may follow long and complicated proceedings in the court concerning the settlement and distribution of the bankrupt's estate, but these are only consequences or incidents of such final judgment." When this judgment is pronounced the case, so far as the district court is concerned, is at an end, and may be reviewed by the circuit court in the manner prescribed by law. If it has been tried with a jury the case can only be reviewed upon a writ of error, as in other cases at law. This has been expressly decided by the supreme court in Morgan v. Thornhill, 11 Wall. [78 U. S.] 65, and in Knickerbocker Ins. Co. v. Comstock, 16 Wall. [83 U. S.] 268. If this case is tried by the court without the intervention of a jury, as it may be with the assent of the defendant, implied from his failure to demand one, still it is a case, and a case at law, but according to a dictum in Morgan v. Thornhill, 11 Wall. [78 U. S.] 79, it may be reviewed on bill or petition. But if the review in the circuit court upon this process is confined to errors of law, the difference between it and a writ of error is only nominal. Ordinarily a case, whether at law or in equity, cannot be reviewed in an appellate court before a final judgment in the lower one. At common law, or in equity, a writ of error or an appeal is only allowed after final judgment in the court below, and this rule is applicable to the exercise of the jurisdiction conferred on the circuit courts by section 4986 of the Revised Statutes, unless the statute otherwise provides. No such provision has been shown or suggested in regard to the appellate or supervisory jurisdiction over cases mentioned in said section 4986. It is said the jurisdiction is comprehensive, and that it would be "difficult to use language capable of conferring a more complete supervision over all the proceedings of the district court in bankruptcy." That may all be, and still it does not follow that this supervisory jurisdiction can, or ought to be, invoked to the manifest delay of justice, at every step in the progress of a case or disposition of a question, in the district court.

This being a case at law, to be tried on the demand of the defendant with a jury, all questions of law which arise in the progress of it and are material to a correct determination of it, may be reviewed by the circuit court, but only upon a writ of error after final judgment declaring the corporation a bankrupt or not. If the law were otherwise every single ruling of this court in the progress of this case, from the filing of the petition to the final judgment upon it, including the trial of challenges to each juror and the admission or rejection of evidence could be made the ground for a separate petition for review and a stay of proceedings. The bare statement of the proposition seems to carry with it its own refutation. Such a practice would enable the defendant to protract the proceeding beyond the endurance of ordinary mortals, if not their lives, and would amount

to a denial of justice. For instance, in the progress of this case, it would be easy to raise a hundred or more separate questions for review. Supposing that a stay of proceedings is allowed in each instance, and supposing each petition for review to be heard at the following term of the circuit court, it would take at least thirty-three years, or the time of an average generation, to dispose of the case. But this is not all, for, with a reasonable exercise of ingenuity and perversity, these questions for review could as well be doubled in number as not.

In the construction of the statute of bankruptcy, in my judgment, care should be taken to assimilate the proceedings under it, as much as possible, to known and established modes at law and in equity. All mere arbitrary distinctions in procedure, are but unnecessary hindrances to the speedy and cheap administration of justice, and should be discountenanced and avoided. The appellate jurisdiction of the circuit court in bankruptcy is conferred upon it by section 4986 of the Revised Statutes. By section 4980, Id., special provision is made that such jurisdiction in cases in equity and at law shall be exercised by an appeal or writ of error. This extends to all cases in equity and at law, and should be construed to include every proceeding under the statute which contains the substantial elements or characteristics of a case as distinguished from a mere question litigated by a summary proceeding or on a motion.

The residue of this jurisdiction is to be exercised as provided in said section 4986, upon bill or petition, "as in a court of equity." By this means the court reviews the action of the district court in the disposition of a great variety and number of questions which arise after the judgment upon the petition, in the settlement and distribution of the bankrupt estate. But by analogy to the proceedings in ordinary cases, and in the absence of any provision of the statute directing otherwise, this appellate jurisdiction cannot be invoked before the case or question is finally decided in the lower court. No case has been found where a petition for review has been acted on, before a final judgment upon the petition in bankruptcy; and only two cases have been cited where such petition has been proposed or filed before such judgment. In the one, Adams v. Boston & E. Ry. Co., [Case No. 47], there was a motion to dismiss the petition upon the ground that the bankrupt act did not apply to railway corporations. Why there should have been a motion to dismiss rather than a demurrer to the petition is not stated. Ordinarily where a defendant denies the jurisdiction of the court before whom he is cited, he does so by a demurrer or plea in abatement to the plaintiff's pleading—by the former, if the want of jurisdiction appears on the face of such pleading, and if not, by the latter. However, the motion to dismiss being denied, it was suggested by counsel that a petition for review might be filed in the circuit court, and the question was asked if such filing would operate as a stay. The district judge assuming that the petition might be filed, answered that it would not operate as a stay. It does not appear that any petition was filed, and there is no ground to claim that this case decided the question, whether a petition for the review of the decision on a question arising in the progress of an action in bankruptcy, will lie before final judgment therein. Besides, it does not appear that there was any demand for a jury or defense made in that case; and it might well have been considered, in all that was there said, that judgment would pass against the corporation as a matter of course after the denial of the motion to dismiss, and that the proposed petition for review and stay of proceedings would follow rather than precede this judgment.

In the second one, Sweatt v. Boston, etc., Ry. Co. [Case No. 13,684], it appears, also, there was a motion to dismiss the petition upon the same ground as in Adams v. Boston & E. Ry. Co., supra, which being denied, a petition for review was filed in the circuit court, and afterwards withdrawn, whereupon the corporation was by consent adjudged a bankrupt in the district court. Neither was there any decision of the question under consideration in that case. True, it appears that a petition for review was filed in the circuit court, and that no further proceedings were had in the case until the withdrawal of the petition for review, but for aught that appears this was the result of an arrangement or the non-action of counsel. As in the case last cited, there was no demand for a jury or defense made, other than the motion to dismiss, and it might have been thought convenient by counsel to have the question made thereon reviewed at once, as, apparently, that was the only defense to the action. At all events, it does not appear that the matter was in any way ever considered by the court. On the argument, it was urged by counsel for the corporation that it would be a great inconvenience for the defendant, being a corporation, to be compelled to submit to a trial of the action in bankruptcy and thereby expose its private affairs, and therefore it was claimed that there ought to be a review of the orders complained of before final judgment and a stay of proceedings in the meantime, so that if it should be held by the circuit court that the district court had erred in making the same, such inconvenience might be avoided. But this inconvenience, so far as it is one, is imposed upon the defendant in all ordinary actions at law or suits in equity. In such cases, whatever the defense may be, and however much of the private affairs of the defendant may be involved in the litigation, he must submit to a final judgment with or without a trial upon the facts, before he can

claim a stay of proceedings or a review of the judgment of the court below in regard to any question in the case. On the score of inconvenience, it is not apparent why the mode of proceeding in this respect in an action in bankruptcy should be different from that which obtains in ordinary actions. Certainly the affairs of a delinquent debtor are not more sacred or exempt from investigation because it is also alleged that he is bankrupt. Nor is there any reason known or suggested to the court why the affairs of a corporation are of any more importance or entitled to any more privacy than those of an individual. As was said by this court in Newby v. Oregon Cent. Ry. Co. [Case No. 10,144]: "There is no divinity that doth hedge about the affairs of a corporation so as to preclude a judicial investigation of the facts concerning it, whenever and wherever such investigation becomes material to the determination of the rights of third persons."

Under the circumstances, the rulings sought to be reviewed having been made by me in the district court, and notwithstanding these views of the law, sitting here in the circuit court, I have, as stated, assumed that the petition for review would lie in this case and at this stage of the proceedings, so far as to make the order necessary to bring the plaintiffs in bankruptcy into this court, and require them to answer it. So much seemed necessary to be done by me in order to enable the defendant in bankruptcy to get the matter before this court; for as appears by section 4986 of the Revised Statutes, the appellate jurisdiction therein conferred cannot be exercised by either the circuit justice or judge of the circuit, unless he is here in court or it is in vacation. It is not usual to have a vacation in the circuit court in this district, nor is it likely that either such justice or judge will sit in this court before the next term thereof, which begins in April next.

But to grant a stay of proceedings is quite another thing. A party is not, in my judgment, entitled to a stay of proceedings of course, because he is entitled to maintain a petition for review. The power to stay proceedings in the district court, pending a review in this, is a matter in the discretion of the court, and it ought not to be exercised unless it is shown that the plaintiff in the review will otherwise be prejudiced or seriously endangered in his rights.

In this case, the defendant in bankruptcy cannot be prejudiced in his rights by allowing the action in bankruptcy to proceed to trial and final judgment in the court below. It has denied by its answer, duly verified, all the material allegations of the petition in bankruptcy. So far as it is concerned, it may be presumed that upon the trial it will obtain a verdict and a judgment in bar of the action. In this view of the matter, its rights cannot possibly be prejudiced or endangered. If, on the other hand, the trial should result in a verdict and judgment for the plaintiff in bankruptcy, the defendant will then be entitled to have the whole case reviewed in this court on a writ of error and to a stay of proceedings in the meantime, as a matter of course. Although some of the positions advanced or suggested in the course of this opinion may prove untenable, it seems very plain that at least the action to have the corporation adjudged a bankrupt is a case at law, and that when, by the election of the defendant therein, it became a case for trial by jury, thereafter, the action of the district court upon any question arising in the progress of it can only be reviewed according to the ordinary mode in actions at law, namely, upon a writ of error from this court after final judgment in the court below; also, that, even admitting that the case in the district court may be reviewed in this court upon petition after final judgment therein, or upon any question arising in the progress thereof, so soon as the district court has passed upon the same, still a stay of proceedings, pending such review, is in the discretion of the court, and ought not to be granted where it is not shown or does not appear that the defendant will be prejudiced or seriously endangered in his rights, if the plaintiff is allowed to proceed to final judgment in the court below.

The rule to show cause is discharged and the application for a restraining order denied.

[For subsequent proceedings in this litigation, see Case No. 10,561.]

Case No. 10,561.

In re OREGON BULLETIN PRINTING & PUB. CO.

[3 Sawy. 614; 14 N. B. R. 405; 11 Am. Law Rev. 181; 3 Cent. Law J. 515; 14 Alb. Law J. 130; 3 Am. Law T. Rep. (N. S.) 469.] [1]

Circuit Court, D. Oregon. May 24, 1876.[2]

REVISED STATUTES AND OTHER ACTS PASSED AT SAME SESSION—AMENDATORY BANKRUPT ACT OF 1874 CONSTRUED — CORPORATION — NUMBER OF PETITIONING CREDITORS — CHARACTER OF CORPORATION ALLEGED.

1. The Revised Statutes must be regarded as passed on the first day of December, 1873, and all other acts of the same session of congress passed that date are to be treated as subsequent acts, repealing the Revised Statutes, so far as they are inconsistent therewith.

[Cited in U. S. v. Auffmordt, 19 Fed. 896; U. S. v. Mason, 34 Fed. 130.]

2. The act of June 22, 1874 (18 Stat. 178), purporting to amend and supplement the bankrupt act of 1867 [14 Stat. 517] must be regarded as having passed after the passage of the Revised Statutes, and although referring in terms to the act of 1867, must be construed as referring to the provisions of that act as carried into, and expressed in the corresponding provisions of the Revised Statutes; and as amending and supplementing the provisions of the statutes relating to bankruptcy as therein found expressed.

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[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 11 Am. Law Rev. 181, contains only a partial report.]

[2] [Reversing Cases Nos. 10,558 and 10,559.]

3. Since the passage of the amendatory and supplemental bankrupt act of June 22, 1874, the same proportion of creditors must join in a petition seeking an adjudication in bankruptcy against a corporation, as is required in the case of natural persons.

4. A petition in bankruptcy against a corporation which does not show that the corporation is either a moneyed, business, or commercial corporation, is insufficient.

[In error to the district court of the United States for the district of Oregon.]

In September, 1875, certain creditors filed a petition in bankruptcy in the district court against the Oregon Bulletin Printing and Publishing Company, a corporation organized under the laws of Oregon, in which they alleged that they constituted one-fourth in number of the creditors, and held one-third in amount of the aggregate provable debts of the corporation, the amount due them exceeding four thousand dollars; that within the preceding six months the corporation had committed several acts of bankruptcy, for that being insolvent, said corporation made sundry payments to certain creditors named with intent to give such creditors preference; and in another instance procured certain of its property to be taken on legal process with like intent, and praying that for these causes the corporation be adjudged a bankrupt. The corporation answered the petition, among other things denying that the petitioners constituted one-fourth in number of its creditors, or that they held one-third of its aggregate debts, and filed a separate statement in writing to the same effect. The petitioners moved to strike out these denials as irrelevant, on the ground that the provisions of section 39 of the bankrupt act of 1867, as amended by section 12 of the act of 1874, requiring one-fourth in number of the creditors, representing one-third in amount of the aggregate debts of the bankrupt to join in the petition, do not apply to corporations. The district judge sustained that view, and struck out both the denials of the answer, and the corresponding allegations of the petition relating to the number of creditors and the amount of indebtedness [Case No. 10,558], and adjudged the corporation a bankrupt [Id. 10,559]. The adjudication and rulings were then presented to the circuit court for review, both on writ of error and petition for review.

[Subsequently a motion to stay proceedings pending the petition for review was overruled. Id. 10,560.]

Joseph Simon, for plaintiff in error.

H. Y. Thompson and Geo. H. Durham, for defendant in error.

SAWYER, Circuit Judge, after stating the facts. The question is, whether under the statute, as it now stands, a corporation can be adjudged a bankrupt upon the petition of a single creditor, or any number less than one-fourth of the whole, and without regard to the amount of the debts.

The district judge, in an elaborate and very able opinion, which merits, and which has received, the most careful and respectful consideration, held the affirmative of the proposition. [Case No. 10,558.] On the other hand, in Re Leavenworth Savings Bank [Id. 8,165], the district judge of the Second district of Kansas, adjudged the point the other way; and this ruling was affirmed on a petition for review by Mr. Circuit Judge Dillon in a well-considered opinion, notwithstanding the opinion of the district judge in this case, which was cited at the hearing. So far as I am aware, these are the only adjudications directly upon the point, and as there is no authoritative decision upon the question by the supreme court, it will be necessary to examine the question anew. Certainly no more important question has arisen under the bankruptcy act, and it deserves the most deliberate examination.

The Revised Statutes, which embodied in a different arrangement the provisions of the bankrupt act of 1867, and repealed the latter as a separate and independent act, were actually passed on the same day with the act of June 22, 1874, purporting to amend and supplement the act of 1867 so repealed. Which of the two acts passed first in point of time on that day, does not appear. It is necessary, to a proper discussion of the question presented, to ascertain and keep in view the relation of these two statutes to each other. Section 5595 provides that, "The foregoing seventy-three titles embrace the statutes of the United States, general and permanent in their nature, in force on the first day of December, one thousand eight hundred and seventy-three," etc. And the following sections repeal the previous acts. It is plain, that whatever the result, the intent was, in this act, to express without change of sense, in a different form and arrangement, all the general statute law of the United States as it existed on December 1, 1873; to substitute this arrangement and expression for prior acts as of that date; and to adopt that date as the dividing line by which its relation to all other legislation subsequent to December 1, should be determined. In accordance with this intention, section 5601 provides that "the enactment of the said revision is not to affect or repeal any act of congress passed since the first day of December, one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from, or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith."

Thus, by express enactment, the Revised Statutes, for the purpose of determining their relation to other legislation at the same session, are to be regarded as though passed on the first day of December, 1873, and all other acts passed after that date, although in fact

passed before the Revised Statutes, are to be treated and enforced as subsequent statutes, repealing the Revised Statutes so far as they are inconsistent therewith. Under these provisions, the act of June 22, 1874, purporting to amend and supplement the bankrupt act of 1867, must be regarded as passed after the passage of the Revised Statutes, and although referring in terms to the act of 1867, must be construed as referring to the provisions of that act, as carried into and expressed, or in the language of the act: "embraced," in the corresponding sections of the statutes; and as amending and supplementing the provisions of the statutes relating to bankruptcy as therein found expressed. This must be so, for the Revised Statutes expressly repeal the bankrupt act of 1867; and the act of 1874 being construed as subsequent to the Revised Statutes, on any other hypothesis, so far as it is amendatory of the act of 1867, would simply amend, that is to say: change the reading of certain portions of an act already repealed, and no longer in force, without re-enacting it into a law. The result would be, the amendment only of parts of a repealed statute without re-enacting it into a law, while the corresponding provisions of the Revised Statutes would remain in force unchanged, except in those parts expressly repealed by section 21 inconsistent with the amendment, and as to those parts so repealed, there would be no statute at all in force. This clearly could not have been the intention of congress. The amendatory and supplementary act, therefore, must be construed as amending the provisions of the Revised Statutes, corresponding to, and substituted for, the sections of the act of 1867 purported to be amended in the amendatory act; and the other provisions of said act as supplementing the provisions of the Revised Statutes under the title "Bankruptcy." Any other construction would result in nothing but the grossest absurdity. So construed, section 12 of the act of 1874 purporting to amend section 39 of the act of 1867, must be construed as amending sections 5021, 5022 and 5023 of the Revised Statutes.

The decision of the question under consideration, then, must depend upon the construction put upon the Revised Statutes as thus amended. Section 5122 provides that "the provisions of this title shall apply to all moneyed, business or commercial corporations, and joint stock companies." This provision is comprehensive, and embraces every provision of the title "Bankruptcy," except those which are inconsistent with some express or necessarily implied limitation, or which, from the inherent character of corporations, cannot, in the nature of things, be made applicable; as, for example, a corporation cannot, in the nature of things, be arrested or imprisoned. Section 5023 provides that "an adjudication in bankruptcy may be made on the petition of one or more creditors, the aggregate of whose provable debts amounts to at least two hundred and fifty dollars." This is one provision of the title, is general and comprehensive, and is applicable to corporations under the provisions cited from section 5122, unless clearly repugnant to some other provision expressly relating to corporations; and there is no such provision, unless it be found in the clause, "or upon the petition of any creditor of such corporation, or company," in section 5122. Are these two provisions necessarily, or by any reasonable construction, upon a consideration of the whole title, and the general policy indicated in it, repugnant? In my apprehension they are not. It must be borne in mind that the principles upon which the act proceeds, and all the details and specific provisions relating to matters of bankruptcy, are prescribed in the other sections; and that the provisions of section 5122, relating to corporations, are intentionally brief, general, and incomplete, specifically providing merely for inherent differences between corporations and natural persons, and referring to the other provisions of the title for particulars unaffected by such inherent differences. Thus, it was necessary to indicate in what way the corporate will should be manifested in a voluntary petition, as questions might arise upon this point, and did in fact arise under the act as plain as it seems to be, in Re Lady Bryan Co. [Case No. 7,978], and it was accordingly provided that it should be by "petition of any officer of such corporation, or company, duly authorized by a vote of the majority of the corporators at any legal meeting called for the purpose." It was not left to the trustees, then, but the interests of the stockholders were "thus carefully guarded by this provision." Having mentioned by whom the petition should be filed in a case of voluntary bankruptcy, it was natural and proper to indicate the party to file the petition in the correlative case of an involuntary bankruptcy, and it accordingly named as the party "any creditor of such corporation or company." In both cases it indicated the person to apply, without either referring to the amount in which the corporation must be indebted to constitute an "act of bankruptcy," or the amount to which the party must be a creditor to entitle him to petition. These were specified in other provisions made applicable by the first clause of the section, and it was not necessary to repeat them here.

So as the officers of a corporation are not the corporation, and it is sometimes necessary to operate upon them in order to reach the corporation, another provision in the section to meet inherent differences between corporations and natural persons, makes certain enumerated provisions of the title applicable to natural persons, also applicable to the officers of the corporation. So, also, as corporations have no need of homesteads, or other property usually necessary to the subsistence and existence of natural persons, who are debtors, and their families, and as

its stockholders are also usually personally liable for its debts, it is provided in this section that "no allowance or discharge shall be granted to any corporation," and accordingly that "all its property and assets shall be distributed" as "in the case of natural persons." These are the points of difference briefly indicated, and all other provisions not specifically enumerated, are expressly made applicable by the comprehensive introductory words of the section. Suppose section 5023 had read: "An adjudication of bankruptcy, either against a natural person or corporation, may be made on the petition of one or more creditors, the aggregate of whose provable debts amounts to at least two hundred and fifty dollars," section 5122 reading as it does now, "upon the petition of any creditor of such corporation," would these two clauses have been repugnant? Could they not have both stood together, one indicating only the relation of the party to the bankrupt necessary to give him the proper status, and the other the amount of the indebtedness which should be requisite to justify troubling the courts and the parties with the proceeding? Could there be any doubt under such provisions of the statute that the creditor or creditors of a corporation must be creditors to the aggregate amount of two hundred and fifty dollars, to entitle them to an adjudication in bankruptcy against the corporation? The question does not appear to me to admit of argument. The provisions would be construed together, and while one provision would authorize a creditor to petition, the other would require him to be a creditor for the amount of at least two hundred and fifty dollars. But the provisions as they now stand in the Revised Statutes are just as broad and comprehensive. Section 5023 is general and covers every case. The interpolation of the hypothetical phrase, "either against a natural person or a corporation," does not in any degree enlarge the scope of the provision. If the two provisions are not repugnant in the supposed case, they are not so as they are. Besides the provision of section 5023, was a part of section 39, in the act of 1867, which was introduced by the words, "any person," and these provisions had direct reference to the word "person." The provision is, "Any person who, etc., * * * shall be adjudged a bankrupt on the petition of one or more of his creditors, the aggregate of whose debts provable under this act shall amount to at least two hundred and fifty dollars," and section 48 provided that the "word 'person' shall also include 'corporation,'" so that under this provision defining the word "person," as used in the act, the statute did, in fact, read as though written, "Any person or corporation * * * shall be adjudged a bankrupt on the petition of one or more creditors, the aggregate of whose debts provable under this act shall amount to at least two hundred and fifty dollars," exactly, in effect, as I have supposed section 5023 to read in this opinion for the purpose of illustration; and the several provisions of that act must be so read for the purpose of giving a proper construction. So reading it, there can be no doubt that effect can be given to both provisions, and they are not repugnant. But the Revised Statutes only broke this section up into three sections, without any intention in any way to change the sense. Again, if, under section 5122, a creditor can have a corporation adjudged bankrupt without regard to the amount due him, for the same reason, the corporation may be adjudged bankrupt without being indebted to the amount of three hundred dollars, and without committing any act of bankruptcy as defined in the act at all.

The section says, any officer properly authorized may petition, or that a creditor may petition, without saying that the corporation must be indebted to the amount of $300, or in any other amount. It does not say that the mere filing of a petition, either by the corporation, or a creditor, shall constitute an act of bankruptcy on the part of a corporation; nor does it say what shall constitute an act of bankruptcy. We must go elsewhere to find what constitutes an act of bankruptcy on the part of a corporation, or else we must imply, that filing a petition by an authorized officer whether there is any indebtedness or not, or the filing of a petition by a creditor to the amount of a dollar is an act of bankruptcy. If we go back to section 5021, we find that a provable indebtedness exceeding the amount of $300 is an essential element in an act of involuntary bankruptcy; and by section 5014, a like amount of indebtedness is an essential element in an act of voluntary bankruptcy. In the latter case "the filing of such petition" by a person owing the prescribed amount (see first clause) "shall be an act of bankruptcy," (last clause). Unless the provisions of these sections apply, there is nothing prescribing what shall constitute, in either case, an act of bankruptcy on the part of a corporation. If they do apply, then there must be a provable indebtedness to an amount exceeding $300; for that amount of indebtedness is just as much an element in an act of bankruptcy under those sections, as any other element therein mentioned. Again, under section 5023 (so also, section 39 of the act of 1867), an adjudication might be made "on the petition of one or more creditors the aggregate of whose provable debts amounts to at least $250, provided such petition is brought within six months after the act of bankruptcy shall have been committed." This proviso is also omitted in section 5122, and the time within which the petition is to be brought is no more part of the "manner provided in respect to debtors," than is the amount of indebtedness due the petitioning creditors, and we have no greater right to incorporate this proviso into section

5122, than we have the other half of the same sentence relating to the amount of $250. It is all in a single sentence. In the case of a corporation, is there to be no limit as to the time when the proceeding is to be brought? If not, why the distinction? I do not suppose that any one would be bold enough to maintain, that the provisions under consideration would all, or any of them, be inapplicable to partnerships, because in section 5121 the phrase is "or on the petition of any creditor of the parties," without adding the clause to the amount of "at least $250." Yet these particulars are no more included in the provision of the latter part of the section,—"in all other respects the proceedings against partners shall be conducted in the like manner, as if they had been commenced and prosecuted against one person alone," than they are in the similar provision in regard to corporations in the next section. I do not perceive why the same reasoning which would make the limitations inapplicable to corporations would not, also, make them inapplicable to partners. Besides section 5122 embraces joint stock companies, as well as corporations, and these, in law, are only partnerships composed of natural persons. Why should there be any distinctions in these particulars between different kinds of partnerships, or between natural persons acting alone, or in connection with others in different forms of partnerships?

In my judgment, after a careful consideration of the various provisions of the act, the specific provisions of section 5122, so far as they go, are controlling in respect to corporations; but that all other provisions of the title of an additional character omitted to be mentioned in this section not repugnant to any of its express provisions, and not in the nature of things intrinsically inapplicable are made applicable to corporations by the introductory clause of the section. "The provisions of this title shall apply to all moneyed, business or commercial corporations," read in connection with the words of definition in other sections; and that the amount of indebtedness exceeding $300, necessary to constitute an act of bankruptcy; the amount, $250 that must be due to a creditor in order to entitle him to file a petition; and the proviso, as to the time when the petition must be filed in the case of natural persons are all applicable to corporations; that these matters having been provided for by other provisions made applicable by the first clause in section 5122, and other provisions, there was no occasion to repeat them in that section, and they were accordingly omitted, with other omitted particulars. But if one of these provisions is inapplicable to corporations all must be, and one creditor, to no matter how small an amount, may control the matter without regard to the interests of other creditors or stockholders, without any limitation as to time when the proceedings are to be instituted, and in a case where the aggregate indebtedness of the corporation is too insignificant to justify troubling the parties or the courts with the litigation.

Upon the construction adopted, the provisions of the bankrupt act operate uniformly, and are harmonious in all particulars where there are no inherent characteristic differences between corporations and natural persons, and different provisions are made only to meet such differences. This is what we should expect to find in a statute.

If I am right in the construction given to the Revised Statutes unaffected by the amendment of 1874, there can be no further difficulty in the case, for the amendment is clearly as broad and comprehensive as the unamended statute. If wrong, the amendment contains inherent evidence either that congress supposed my construction to be the correct one, and acted upon that view, or else, that it intended the amendment to be broader in its scope, and to include corporations in all its provisions not in the nature of things inapplicable. That the amendment was intended to apply to corporations whatever the proper construction of the former act, to my mind seems clear.

Section 5013 of the Revised Statutes, like section 48 in the act of 1867, provides that, "In this title the word 'creditor' shall include the plural also; * * * the word 'person' shall also include 'corporation.'" The statute has itself defined the word "person," for the purposes of the act, not for some sections only, but wherever it occurs; and that definition includes "corporation." "Creditor" in section 5122 means also creditors, and "person" in 5021, corporation. Under this definition, we are authorized and required to read the words, "any person," in the amendments of 1874, "any person or corporation." Read in connection with the provisions relating to an act of bankruptcy of the character alleged in the petition in this case, omitting the parts inapplicable, the section as amended in 1874 provides as follows: "Any person or corporation residing and owing debts as aforesaid, who, after the passage of this act, * * * being insolvent * * * shall make any payment * * * of money * * * or procure his property to be taken on legal process with intent to give a preference to one or more of his creditors * * * shall be deemed to have committed an act of bankruptcy, and subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable; provided, that such petition is brought within six months after such act of bankruptcy shall have been committed." Reading the section in this way, as we are authorized and required to do, the language of the section is not open to any other construction than that which makes the whole

applicable to corporations as well as to natural persons. The section is unbroken, and is not divided, and cannot be divided so as to make one part applicable to natural persons only. Either the whole section must be applicable to corporations, or no part of it is, and in the latter case, there is no provision which declares what act of a corporation, or that any act constitutes an act of bankruptcy. The word "person" in this amendment is not accidentally or inadvertently, but deliberately, brought within the definition of that word as given in section 5013; for in a subsequent part of the same section, congress, in repeated instances, specifically mentions a class of corporations as being some of the persons embraced in the word "person," as used in the introduction of the section. Thus, "that any person * * * who being a bank or banker * * * has fraudulently stopped payment * * * or who being a bank * * * has stopped or suspended, and not resumed payment * * * or who being a bank * * * shall fail," etc., * * * "shall be deemed to have committed an act of bankruptcy, and subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable." The words "who" and "bank" refer directly to the word "person" as their antecedent, showing that a bank, at least, was intended to be included in the word "person," and by express provisions, that a bank can only be thrown into bankruptcy on the petition of one-fourth in number of its creditors, who represent one-third in amount of its provable debts. That the word "bank," as used, means, or at least includes, incorporated banks, does not seem to admit of discussion. The term is general, without anything to indicate any limitation on its meaning. It includes all banks of whatever character. It is the very word in universal use when a corporation for banking purposes is intended, and rarely, if ever, used in speaking of a natural person, the word "banker" being the more appropriate term, and the one ordinarily used to designate natural persons engaged in banking business. Both terms are used in the statute, showing that congress intended to include every species of banks. The word "bank" was not used in prior statutes, while banker was, which is all that is necessary to designate natural persons acting as bankers. Showing that in this act, at all events, banking corporations were intended to be included. The word is not used for the purpose of extending the meaning of the word "person," but is introduced in defining a particular act of bankruptcy, as though, as a matter of course, a bank was included in the word "person."

It is manifest from this specific recognition of a class of corporations as being some of the persons embraced in the words "any person," in the beginning of this section, that congress intended to use that word in this section in the broad and comprehensive sense indicated by the definition in section 5013; and used in that sense, there is no escaping the conclusion that the subsequent provision relating to the number of petitioning creditors, and the amount of debts that must be represented by them, are expressly made applicable to corporations. And, again, the section provides, that "the provisions of this section shall apply to all cases," not all cases of natural persons, or all cases other than those of corporations, or to some cases—but to "all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as to those commenced hereafter; the court shall, if such allegation as to the number or amount of petitioning creditors" be denied by a debtor, by statement in writing to that effect, require him to file forthwith a full list of his creditors, etc. I am unable to perceive how corporations can, by any reasonable or even possible admissible construction, be excluded from the operation of the clause under consideration. If by expressly defining the terms used so as to include corporations, then by expressly naming a class of corporations as embraced within the terms so used and defined; and immediately in connection therewith employing the comprehensive words, "in all cases," which must include cases against corporations as well as natural persons; and further providing in terms without limitation, that "the provisions of this title shall apply to" corporations, congress does not express an intention to include corporations, it is difficult to see how such an intention could be manifested in any way short of enacting a separate statute relating alone to corporations, which should embrace all the provisions intended to be applicable, without any reference to any other statute or provision relating to natural persons, or other matters.

If I am right in my view of the amendment of 1874, it must prevail, whatever the construction put upon the provisions of previous acts, since it is the last expression of the legislative will, and it repeals all inconsistent provisions wherever found, as well those of section 5122, if those are inconsistent, as of 5021, 5022, and 5023.

In the very able opinion of the district judge, it is said, inadvertently, I think, "the statute provides that a 'person' shall be entitled to a certain allowance out of his property and under certain circumstances to a discharge of his debts. Now, in those

two cases the word 'person' does not include a corporation, because the statute, section 5121, Revised Statutes, expressly provides that no allowance or discharge shall be granted to any corporation," etc. I do not find the word "person" used at all in the statute in the connection here referred to. The "allowance out of his property" is provided for in section 5045 of the Revised Statutes, and section 14 of the act of 1867, and the discharge in Rev. St. § 5114, and section 32 of the act of 1867. In all these cases the word used is "bankrupt," and not "person," so that the argument suggested falls with the erroneous hypothesis. I find no instance in the act where the word "person" would not appropriately include a corporation, as the statute says it shall, except one or two where in the nature of things it could not apply, as where an arrest is provided for; and no instance in which if construed to include a corporation it would, upon any reasonable construction, make it repugnant to any other provision of the statute. If there is any such instance it has escaped my notice.

It is further said, that the definition of the word "person," in section 5013 of the Revised Statutes, is limited to the word "person," as used "in this title;" that the amendment of 1874 is an independent act, which is no part of "this title," and therefore, that it does not embrace the word "person," as used in the Revised Statutes. The title is "Bankruptcy," and in contemplation of the Revised Statutes at the time of their supposed passage, it embraced all the statute law upon the subject of bankruptcy. In the beginning of this opinion, it is held that the amendatory provisions of the act of 1874, for reasons stated, although referring by name and section to the repealed act of 1867, must be construed as amending the corresponding sections of the Revised Statutes. Upon this view, the amendatory provisions fall into the place of the sections of the Revised Statutes amended, as amendments, and thus become a part of the title of the Revised Statutes amended, and are brought within the operation of the defining section 5013. Section 12 of the act of 1874, revises and embodies the entire subject-matter of sections 5021–5023 of the Revised Statutes, and upon well-settled principles of construction takes the place of and repeals all those sections. Besides, section 21 expressly repeals all acts and parts of acts inconsistent with the provisions of the act of 1874. If the amendments do not become a part of the Revised Statutes, as amendments thereto, they simply amend a repealed statute, which is no longer in force, and the corresponding provisions of the Revised Statutes being repealed, also, there is no statute in force under which any adjudication in bankruptcy can be had. In my judgment, the amendatory sections fall into the Revised Statutes and become parts of the title amended.

It seems impossible, by any reasonable construction of the amendment of 1874, to take a bank, though a corporation, out of the operation of the provisions under consideration, yet the creditors of a bank are usually far more numerous and more difficult of ascertainment, especially in the case of banks of issue, than those of any other class of corporations. If banks are not excluded from the operation of the provisions relating to the number of creditors and amount of debts represented necessary to entitle them to file a petition, I can see no possible reason for excluding any other class of corporations, and, in my judgment, none are excluded. No distinction between the different classes of corporations is anywhere indicated. If congress should make any distinction between corporations and natural persons in the particulars in question, we should expect to find some sound and obvious reason for its action. If no sound reason can be found, and the point is doubtful, we ought to conclude that no distinction is intended. No reason has been suggested, and none occurs to me that appears to my mind to be sound. It also appears to me to be a mistaken supposition that a modern corporation is in effect destroyed by an adjudication in bankruptcy, that being stripped of its property it can acquire no more. Such seems not to be the doctrine of the books. Miners' Ditch Co. v. Zellerbach, 37 Cal. 590. If so destroyed, a corporation created by the act of one sovereignty is annihilated by the act of another sovereignty. In many of the United States, perhaps generally, in respect to recently formed moneyed, business and commercial corporations (the class embraced in the bankrupt act), the stockholders are personally liable for the indebtedness of the corporation. The corporation is but an instrument in the hands of the stockholders, and the stockholders themselves, being personally liable, are the ultimate debtors, as well as the parties ultimately enjoying the benefits of the organization. The ultimate effects of an adjudication in bankruptcy against such corporations as to the excess of indebtedness over assets reach natural persons. It may be greatly to the interest not merely of the stockholders, but the great mass of creditors, that there should be no adjudication against the corporation, even though insolvent. It is fair to presume that the stockholders, and three-fourths in number and two-thirds in value of the creditors, will act in such manner as they suppose their common interests dictate, as well in the case of corporations as where the bankrupt and primary debtor is a natural person; and I can perceive no sound reason why a less number than one-fourth in number and one-third in value of the creditors, should control the proceeding against the wishes and interests of the great majority in one case rather than in the other. The corporation, though insolvent, may repair its capital, and the interests of all concerned may require this to be done. It is in fact sometimes done, as the very remarkable recent instance of the Bank of Cali-

fornia, so notorious as to become a part of the public history of the country and of the financial world, shows. The bank stopped payment. Its reputed indebtedness exceeded twenty millions; generally understood to be several millions in excess of its assets. It was therefore largely insolvent. Its capital stock had all been paid up and absorbed. Yet by the forbearance of its creditors and the energy of its stockholders, its capital stock was repaired, as this court had occasion judicially to know, by levying new assessments in pursuance of authority given by the statutes under which it was organized, upon the stock already fully paid up, and its business resumed under such auspices as to give promise of a future no less brilliant than its past. Had it been in the power of a small part of the creditors to have thrown this institution into bankruptcy, and it had been exercised, it would doubtless have severely shaken the finances of the Pacific coast, if not of the whole country, and have proved a great public calamity. So, also, it is understood that after the sweeping public calamity of the Chicago fire, several of our insurance corporations, whose resources had become largely impaired, repaired their capital in a similar way, and continued on in a prosperous career. These striking examples show that, at least under our system of personal responsibility, corporations as well as individuals have strong recuperative powers, and if not otherwise trammeled than natural persons, may in like manner recover from the effects of extraordinary misfortunes. To my mind, these examples afford a strong argument against any good grounds for a distinction between modern moneyed, business and commercial corporations and natural persons in the particulars under consideration. The policy of the amendment on this point may be good or bad (with this the courts have nothing to do); but if good for one, it seems to me to be good for both. I am myself unable to find any solid ground for a distinction in this respect between this class of corporations and natural persons, and I am also unable to find anywhere in the statutes the distinction claimed, or any evidence of an intent to make such a distinction.

The case of the New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 664, has been cited by respondents' counsel as an authority in favor of the views of the district judge, and opposed to the view taken in this opinion, and by Mr. Circuit Judge Dillon in Re Leavenworth Savings Bank [Case No. 8,165]. There is one clause in the opinion of Mr. Justice Clifford in the enumeration of the points of the provisions of section 37 of the act of 1867, which seems at first view to favor the construction which it is cited to sustain. It is as follows: "Second. The petition for involuntary bankruptcy may be made and presented by any creditor without any specifications as to the number of the creditors or the amount of their debts." This, however, was not a point adjudged, nor did the point arise in the case. There was no question in it as to whether in the case of involuntary bankruptcy of a corporation, a single creditor, without regard to the amount due him, is entitled to file a petition. There is nothing in the case to indicate that this point was either argued by counsel or carefully considered by the court. In illustrating the argument upon the point presented, the learned judge refers to other provisions of the act, and among other things recites the several points as specified in section 37. He nowhere says that the provisions of other sections relating to the amount of indebtedness do not apply to corporations, but only that this section is "without any specification as to the number of the creditors, or of the amount of their debts," which is manifestly true, but without saying what the effect on it of other provisions is. It is quite a different question, whether in determining the right of a creditor to petition, this provision, simply stating the relation of the party to the corporation necessary to give him the proper status, a right to an adjudication, or simply designating the party, shall be supplemented by the other provisions providing for the required amount of indebtedness, not inconsistent with the clause, so far as it goes, made applicable by other express provisions, and therefore not necessary to be repeated here. Such casual observations in the course of an argument, even where more in point than in this case, are never regarded by the supreme court, or the judge who makes them, as authoritative. The reports are full of instances where dicta of a far more pertinent and decided character are wholly disregarded. I have attempted to show in the first part of this opinion that the other provisions as to amount being additional and not inconsistent are made applicable by the general comprehensive introductory clause of section 37, and by other defining clauses of the act referred to. And this view seems to me to be sustained also by the other observations of Mr. Justice Clifford immediately preceding and following the clause quoted from his opinion. Besides, the learned judge in that same opinion distinctly lays down the rule of construction. We are not to hunt for repugnances, but rather aim to harmonize the various provisions of the act. And there is certainly no repugnancy between the clause in section 37 which named a creditor as the person who is to petition, and the clause in section 39, which fixes the amount for which he must be a creditor to entitle him to petition; and considering both provisions as applicable, harmonizes best with all the provisions of the act, and with the idea of a uniform system, so far as in the nature of things it can be made uniformly applicable. The learned justice in that case found no difficulty in harmonizing provisions far more distinctly repugnant. But it must be borne in mind that the case in the supreme court arose under the act of 1867, and the observations of the learned

justice were made upon that act as it existed before its amendment. Whatever the proper construction of that act, it does not necessarily control the present act. There seems to be no mistaking the scope of the amendment of 1874, and if found inconsistent with anything in section 5122, or elsewhere in the Revised Statutes, it must prevail, as being the last expression of the legislative will. The case of the New Lamp Chimney Co. v. Ansonia Brass & Copper Co. [supra], was also cited by counsel in the Leavenworth Savings Bank Case, and could not, therefore, have been considered by the learned judge who heard it as inconsistent with the construction put by him upon the amendment in question of 1874.

For these reasons, in addition to those expressed by Mr. Circuit Judge Dillon in the Case of the Leavenworth Savings Bank [supra], I hold that to authorize an involuntary adjudication in bankruptcy against a corporation under the statute as amended in 1874, the petitioning creditors must constitute one-fourth thereof, at least in number, the aggregate of whose debts provable under the act amount to at least one-third of the debts so provable.

There is no allegation in the petition in this case, that the corporation is either a "moneyed, business or commercial corporation," and the character of the corporation can only be inferred from the name and the averment that its place of business is at Portland. The petition would undoubtedly be held bad on demurrer. No objection was taken until the issues formed were about to be submitted to the jury, when the point was raised for the first time in the form of an instruction to the jury asked of the court. It was with hesitation denied, on the ground that it came too late. Whether this ruling was correct or not the petition should be amended in this particular.

The adjudication in bankruptcy and the order striking out the allegations in the petition and corresponding denials of the answer relating to the number of petitioning creditors, and amount of debts represented by them, must be reversed and the case remanded for further proceedings, and it is so ordered.

NOTE. The main question decided in this case having never been determined by the supreme court, those desiring to see the views adverse to those maintained in this opinion, will find them very ably presented in the opinon of Mr. District Judge Deady, in the same case. [Case No. 10,558].

OREGON CENT. MILITARY ROAD CO. (TILTON v.). See Case No. 14,055.

OREGON CENT. R. CO. (JONES v.). See Case No. 7,486.

OREGON CENT. R. CO. (LEWIS v.). See Case No. 8,329.

OREGON CENT. RY. CO. (NEWBY v.). See Cases Nos. 10,144 and 10,145.

OREGON CENT. RY. CO. (NIGHTINGALE v.). See Case No. 10,264.

OREGON CENT. RY. CO. (SAYLES v.). See Case No. 12,423.

Case No. 10,562.

In re OREGON IRON WORKS.

[4 Sawy. 169;[1] 17 N. B. R. 404; 26 Pittsb. Leg. J. 8.]

District Court, D. Oregon. Jan. 18, 1877.

POSSESSION OF A CHATTEL—INJUNCTION.

1. A suit in equity cannot be maintained by an assignee to obtain possession of a vessel alleged to belong to the estate of the bankrupt; the remedy is at law.

2. Neither will an injunction be allowed in such case upon the petition of the assignee to restrain the person in possession of such vessel from removing it beyond the jurisdiction of the court; the remedy is replevin.

Petition by the assignee for a writ of injunction.

John W. Whalley, for assignee.

George H. Durham and Rufus Mallory, for defendant.

DEADY, District Judge. The petition of the assignee in bankruptcy of the Oregon Iron Works alleges that said corporation, at the date of the adjudication in bankruptcy, was the owner of a certain unfinished vessel, known as the Revenue Cutter, and that Captain J. W. White obtained possession of the same wrongfully, and now refuses to deliver the same to said assignee, but threatens to take said vessel without the district and beyond the jurisdiction of this court; that by reason of the great value of said vessel, to wit: $70,000, the assignee is unable to give the requisite bonds to institute replevin for said vessel, and concludes with a prayer for an injunction to restrain said White, his servants, etc., from further interfering with said vessel and withholding the possession of the same from the assignee.

Upon an order to show cause why the prayer of the petition should not be allowed, the defendant answered, denying the allegations of the petition and alleging that said vessel was constructed by the bankrupt under a contract with the United States; that on October 1, 1876, the United States was the owner and in possession of said vessel, subject to the right of the bankrupt to complete the same; that on November 2, said bankrupt suspended work upon said vessel, and thereupon surrendered the same to the United States, and that said United States has been in possession since that date, and is now engaged in completing the same, as it has a right to do under said contract. That the defendant is a captain in the United States revenue marine, and that his possession of said vessel and

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

all his acts in reference thereto are held and done by authority of the United States, and not otherwise.

This is a proceeding in equity in a bankrupt court. It is not required to be as formal and plenary as proceedings ordinarily are in courts of equity. In re Wallace [Case No. 17,094]. But nevertheless the proceeding is substantially a proceeding in equity, and the relief sought must be such as belongs to a court of equity to administer upon the facts of the case.

Briefly, the petitioner claims to be the owner of this vessel and entitled to its possession. The United States, by their agent, the defendant, make the same claim. It is therefore a plain case, if the petition be true, for an action at law to recover the possession. The allegation that the petitioner is unable to give bonds to institute an action of replevin does not give him a right to recover the possession in equity. Neither is it necessary to give bonds in any sum to commence an action of replevin; and it is not even alleged that any such action has been commenced. It might be, as suggested by counsel for defendant, that if the assignee had commenced an action of replevin, and the defendant was about to remove the property from the jurisdiction of the court, and the assignee was unable to obtain the necessary bonds in time to have a provisional delivery of the vessel, and thereby prevent its being carried off, that an injunction would be allowed in aid of the action at law to prevent the removal of the property until the assignee could obtain the necessary bonds to take it.

The cases cited by counsel,—In re People's Mail Steamship Co. [Id. 10,970]; In re Ulrich [Id. 14,328],—as authority for this injunction are not in point. In those cases the property was admitted to be that of the bankrupt, and the persons enjoined were seeking to subject it to the exclusive satisfaction of their debts by means of attachments which the law declared void.

Whether the United States is entitled to remove the vessel from this district to complete it, may be a question. But this relief is not sought upon this ground. As has been said, it is a simple case of an attempt to get the possession of a chattel which the assignee claims to own by a suit in equity rather than the appropriate and ordinary remedy of an action at law.

I have not deemed it necessary to consider whether, upon the state of facts disclosed in the answer, the United States have such possession of the vessel as would prevent a suit being maintained against the defendant White, to restrain him in the use and control of it, or an action at law to recover the possession of it. But it appears probable that they have such a possession as would prevent the iron works or its assignee from interfering with the vessel. It is alleged that the United States took possession in pursuance of the contract for the purpose of completing it, with the consent of the iron works, and is now engaged in so doing. It would seem that this is such a possession as cannot be interfered with by the process of a court, at least, at the suit of the iron works or its assignee, irrespective of the question of who is the legal owner of the property.

The motion for injunction is denied, and the restraining order heretofore allowed vacated.

OREGON S. N. CO. (WALLAMET R. T. CO. v.). See Case No. 17,106.

OREGON STEAMSHIP CO. (KOCH v.). See Case No. 10,572.

O'REILLY (AUSTIN v.). See Cases Nos. 664 and 665.

Case No. 10,563.

O'REILLY v. HOLT et al.

[4 Woods, 645.] [1]

Circuit Court, S. D. Mississippi. May Term, 1877.

CONSTITUTIONAL LAW — TAKING PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION—SALE FOR TAXES WITHOUT NOTICE —DUE PROCESS OF LAW —PURCHASE BY DEPUTY SHERIFF—REDEMPTION —INCUMBRANCER.

1. An act of the legislature of Mississippi, passed November 27, 1875, which levied a uniform tax of 10 cents per acre per annum for levee purposes on all lands in certain counties in the state, and directed, without further notice to the owner, a sale on a specified day of all lands on which the tax had not been paid when due, is not in violation of section 13 of the bill of rights of the constitution of Mississippi, which prohibits the taking of private property for public use without just compensation, or of section 10, which declares that a citizen shall not be deprived of his life, liberty, or property but by due process of law.

2. The fact that the purchaser at a tax sale was the deputy of the sheriff by whom the sale was made, does not render the sale ipso facto void, when it is not shown that the deputy had any part in making the sale, and there is no suggestion of any unfair practice or mala fides on his part in reference thereto.

3. The naked fact that the purchaser at a tax sale is clerk of the chancery court, in whose office the deed, to have effect, must be filed on the day of sale, does not render the sale absolutely void.

4. The owner of land sold for levee taxes under the act mentioned in the first headnote can redeem the same only upon the payment of the purchase money with all subsequent taxes due thereon, and 50 per cent. per annum interest on the whole amount.

5. An incumbrancer who holds a lien upon the undivided two-thirds of lands sold for levee taxes cannot redeem by the payment of two-thirds of the sum necessary to redeem the whole estate.

6. The purchaser of the land at a levee tax sale is entitled, on the redemption of the land by the owner, to all subsequent taxes paid by him,

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

and 50 per cent. per annum interest thereon, although he has paid said taxes in scrip which he acquired at a discount.

[This was a bill in equity by H. E. O'Reilly against John S. Holt and C. S. Jeffards.] The bill was filed by the complainant as assignee in bankruptcy of one Edington, to carry into effect certain decrees rendered by the chancery court of Adams county in favor of Edington for the enforcement of certain liens on lands situate in Issaquena county. Among others, C. S. Jeffards was made defendant, and it was alleged that he claimed to have some interest or lien upon the land against which the decrees of the state court were passed. Jeffards answered setting up that he and one Sloan had, on April 14, 1873, purchased the lands at a sale made for taxes due to the levee board under the act of November 27, 1865; that afterwards Sloan had conveyed all his interest in said lands to him, the said Jeffards, and averring that he had since paid all taxes on said land, amounting to the sum of $2,154.88, and claiming that he had a lien on the lands for the same, and was entitled to have the purchase money and all the taxes refunded, with legal damages and interest, and submitted himself to the protection of the court, and asked that his rights might be respected. The property on which the decrees rested was sold, and the money brought into court, and the only controversy in the case was as to the amount which Jeffards was entitled to receive out of the proceeds of the sale by reason of the facts stated in his answer.

The act under which the lands in question were sold for taxes is the act approved November, 27, 1865, entitled "An act to incorporate the board of levee commissioners for Bolivar, Washington and Issaquena counties, and for other purposes." The fourth section of the act declared that, for the purpose of building and repairing the levees in the counties mentioned in the title of the act, etc., there should be and was thereby levied a uniform tax of 10 cents per annum on each and every acre of land in said counties, except lands held by the state in trust or otherwise, etc., and that the tax should be continued for 12 years, and should be payable annually on or before the 1st day of March in each and every year. The fourteenth section of the act provided that said tax should be a lien until paid on the lands situate in said counties, and should the owner or other person interested in said lands fail to pay the tax at the time it fell due, it should be the duty of the sheriff of the county in which the lands were situate, without further notice, on the second Monday of April, to sell at the door of the court house the lands in default or so much of them as might be necessary to pay the tax required; and when sold, to execute a deed therefor to the purchaser, which deed should vest in the purchaser a full and complete title in fee simple to the lands sold, and should be taken and received in any court of justice as vesting a perfect title in the purchaser, and should be evidence that the title of the owner as well as the claims of all persons interested therein were thenceforward vested in the purchaser, etc. The fifteenth section of the act provided that lands sold by the sheriff as provided in section 14 might be redeemed at any time within two years after the day of sale by the owner, "upon the payment of the purchase money with all subsequent taxes, whether state, county or levee taxes, and 50 per cent. on the whole amount due thereon, and 50 per cent. per annum interest upon the whole amount." The complainant claimed that if Jeffards was entitled to any sum more than the actual taxes paid by him and ordinary interest, he was only entitled to 50 per cent. interest on the levee tax and not on the other taxes. The complainant moreover insisted that so much of the act of November 27, 1875, as directed the sale of lands for taxes without notice, was unconstitutional, and therefore that Jeffards derived no title by the tax sale, and was entitled to no penalty.

W. L. Nugent, for complainant.
E. Jeffards, for defendant.

WOODS, Circuit Judge. In support of the last proposition of complainant, we are referred to the case of Griffin v. Mixon, 38 Miss. 424. The law which in that case was decided to be unconstitutional provided that the lands should not be exposed to sale for taxes due thereon, but that the taxes should be collected by distress and sale of personal property, and that on the first Monday of April in every year the county tax collector should return to the county board of police a list of lands delinquent for nonpayment of taxes; that the list should be examined by the board of police, and a certified copy should be posted on the door of the court house within 10 days after such examination, and that said list, duly certified, should be filed and recorded in the auditor's office, and should vest a title to lands therein returned in the state of Mississippi. This act was declared by a divided court to be unconstitutional, on the ground that it was in violation of the thirteenth section of the bill of rights of the constitution of Mississippi, which prohibited the taking of private property for public use without just compensation being made therefor, and of the tenth section, which declared that a citizen should not be deprived of his life, liberty or property but by due course of law. Although this case has not been directly overruled, yet the present supreme court of this state, in the recent case of Martin v. Dix [52 Miss. 53], not yet reported, have said that they think the views announced in the dissenting of Mr. Justice Handy better supported both upon reason and authority. But the law under which Jeffards purchased differs ma-

terially from the act declared unconstitutional in the case of Griffin v. Mixon. By the former act an accurate and unchangeable assessment was made upon the lands subject to the tax by the legislature itself. The act gave notice to all of the time within which the tax must be paid, and it gave notice to all who failed to pay, that on a day named their lands would be put up for sale. There was no transfer of the title without a sale, of which public notice was given. The act is indeed summary, as all laws for the collection of taxes, to be effectual, must be. But it seems to me that the reasoning of Mr. Justice Handy in the case of Griffin v. Mixon, in support of a more summary law than the one in question, is unanswerable. As this law is not the same as that pronounced unconstitutional in that case by the majority of the court, and as there appears to be a change in the opinion of the supreme court of the state upon the question decided in that case, I feel at liberty to follow my opinion, and to hold that the act of 1865 is not obnoxious to the constitution of the state. But in the case of Daily v. Swope, 47 Miss. 367, the constitutionality of the levee law of 1871 was affirmed by the supreme court. In that case it was agreed between counsel, among other things, that any constitutional question arising upon said levee law, as to want of notice to taxpayers, and want of demand for the tax, and want of provision for adjudication of delinquency under the law, might be heard and determined by the court. The law, in its provisions for amount of tax, and sale, in case of delinquency, was identical with the law in question in this case. And it was objected to the law by Mr. Chalmers, of counsel for defendant in error, on the authority of Griffin v. Mixon, that it was unconstitutional, because there were no steps prescribed, prior to sale, of notice, assessment, correction of assessment, etc. But the court, in an elaborate opinion, held the law to be constitutional, and overruled all objections to it. This case is precisely in point, and as it is the latest adjudication of the highest court of the state upon the construction of the constitution of the state, and as it accords with my own views, I shall follow it and hold the act under which Jeffards purchased to be a valid and constitutional enactment.

It is next claimed that the title of Jeffards is void because Sloan, one of the purchasers at the tax sale, was deputy to the sheriff who made the sale, and Jeffards was clerk of the chancery court, with whom the tax deed, to have any effect, was required to be filed on the day of sale. To support this objection to the sale we are referred to Clute v. Barron, 2 Mich. 192; Morton v. Waring's Heirs, 18 B. Mon. 84, and Everett v. Beebe, 37 Iowa, 452. These cases do not sustain the proposition in support of which they are cited. They only declare that a public officer cannot buy at his own sale. In the case cited from B. Monroe it was held that a purchase made by the deputy register of the land office, of lands sold by his principal, was not absolutely void. The objection to the capacity of Jeffards to buy does not seem to be any better founded. If it were held good, then no recorder of mortgages could ever be the mortgagee in a mortgage deed which was required to be recorded in his own office.

All that is required to make valid a sale to officers having such remote connection with the conduct of the sales as the deputy sheriff and clerk of the chancery court, is that their conduct in reference thereto should be fair and above suspicion. In this case there is not the slightest suggestion that the deputy sheriff had anything whatever to do in conducting the sale, or that his purchase was not a perfectly fair one; nor is there a hint that there was any improper or unfair conduct on the part of Jeffards in filing in his office the deed in question. We think that the claim that the purchase was absolutely void on account of the official status of the purchasers cannot be maintained. I am of opinion, therefore, that the title of Jeffards under the tax sale was good, subject to the complainant's right of redemption.

As the bill in this case was filed within two years of the sale, the complainants are entitled to redeem on the terms prescribed by law. The question is therefore presented, what must the complainants pay Jeffards to entitle them to redeem? The law appears to me to be explicit on this point. The owner shall be entitled to the redemption of said land at any time within two years after the day of sale upon the payment of the purchase money, with all subsequent taxes due thereon, and 50 per cent. per annum interest upon the whole amount. The contention of the complainant is that the 50 per cent. interest is only to be computed on subsequent levee taxes. But the law does not say so and there does not appear to be any warrant for engrafting upon the language of the law the qualification insisted on. By the purchase at the tax sale the purchaser becomes the owner of the land and liable for the payment of all taxes assessed thereon. To enforce prompt payment of the levee taxes, the law says that the land may be redeemed on payment of all subsequent taxes and 50 per cent. interest thereon. This means all and not a part.

The complainant insists that as his lien covers only an undivided two-thirds of the land, he should only be compelled to pay two-thirds of the sum necessary to redeem. But the amount to be paid to redeem does not depend on the interest in the premises of the person proposing to redeem. He may be a mortgagee for an amount very much less than the value of the premises, yet he cannot claim, for that reason, that he should

only pay a proportionate part of the redemption money. The purchaser stands on his title. He is not bound to yield it up unless his claim under the lien is satisfied. He has bought the whole estate in the land, and one tenant in common cannot insist that the estate shall be divided up and he allowed to redeem for his individual share.

I do not think any cross bill is necessary to be filed by Jeffards. Having submitted to the redemption of the land, he is like any other incumbrancer. The court, on a bill to enforce complainant's lien, will direct the order in which the incumbrances shall be paid and ascertain their amount. Nor do I think that the fact that Jeffards paid subsequent taxes in scrip which he purchased at a discount is any concern of the complainant. Jeffards had a right to make payment of the taxes in any lawful way. Redemption can be insisted on by the owner of the land on the payment of the subsequent taxes and 50 per cent. interest thereon, and not on the repayment of what it has cost the purchaser to pay the taxes.

The conclusion I have reached is that the defendant Jeffards is entitled to priority of payment out of the fund, the proceeds of the sale, for the amount of his purchase money and all subsequent taxes of all descriptions, with an annual interest thereon of 50 per cent., calculated up to the time of filing his answer, and 6 per cent. on that amount until the date of the final decree.

Case No. 10,564.

O'REILLY v. MORSE.

[See 15 How. (56 U. S.) 126.]

Case No. 10,565.

O'REILLY v. MORSE.

[See Case No. 9,859.]

Case No. 10,566.

O'REILLY v. SMITH.

[1 MacA. Pat. Cas. 218.]

Circuit Court, District of Columbia. April, 1853.

PATENT INTERFERENCES—EXTENSION OF TIME FOR HEARING—WHEN INTERFERENCE EXISTS—RAILROAD RAILS.

[1. An affidavit in support of a motion for an extension of time for the hearing, on the ground of inability to procure the attendance of witnesses, is entirely insufficient when it does not state the names, competency, or materiality of the witnesses.]

[2. The question of extending the time for the hearing lies within the discretion of the commissioner, which will be presumed to have been soundly exercised.]

[3. A splice-plate extending over three crossties at the joint between railroad rails with a rib along its upper surface at the ends of the rails, held not to interfere with a rail consisting of an upper and under part th[illegible] its whole length, with a rib in the low[illegible]xactly fitting the under side of the upper part, and the two parts to be slid upon each other so as to break joints at the middle, thus forming when laid a continuous double rail.]

[This was an appeal by Patrick O'Reilly from a decision of the commissioner of patents, in an interference, awarding priority to J. Dutton Steele, assignor to Charles E. Smith, in respect to an invention relating to railroad rails.]

Watson & Renwick, for appellant.

MORSELL, Circuit Judge. Patrick O'Reilly filed his application on the 17th of April, 1851 (afterwards patent No. 9,703; see 1 Patent Office Report 1853, p. 188, for diagram). His specification applicable to this issue states in substance that his improvement consists in dividing the ordinary "bridge" rail, or other rail having a flanged base, by a longitudinal division or joint, (parallel, or nearly so, to the top of the flanges and the arch, and to the sides which join the arch and flanges,) into two layers, plates, or half rails of nearly equal thickness and weight. By sliding the upper plate or layer over the under one until the end of one is opposite the middle of the other, and then riveting or otherwise fastening them together in this position, they will reciprocally break joint with and support each other, and thus give greatly increased stiffness and strength to the track. The specification sets forth the advantages of this construction, the saving of metal, in reducing the expense of repairing, and the increased usefulness of the device. He claims as his invention the divided or double-plate rail, as described, composed of a flanged arch or bridge-rail of the usual form, and about half the usual thickness and weight, with another rail of similar external form, thickness and weight, on which it rides, the under side of the arch of the upper rail or rider forming a groove to fit over and rest upon the arch or tongue of the lower rail; the flanges of the upper rail resting upon and fitting those of the under rail, and the spike-holes of the two corresponding, so that the same bolts or spikes will secure them firmly together and to the foundation. The compound rail thus formed and proportioned has a double bridge and a double base, the two portions of which reciprocally support and strengthen each other. He also claims the method described of strengthening the joints of the ordinary bridge-rail while leaving its middle, of adequate strength, by moving a longitudinal section of its inside, equal to about half the weight of the rail, half its length endwise, so as to break joint with the outside; or, again constructing the rail in two parts to correspond in form and position with the two parts of the device before described, whereby the joints of the upper rail are rendered as capable of supporting the load as

its middle, and the whole made stronger, with a given quantity of material, than by any mode of construction before known. The application which was held to show a prior invention of the same improvement, and with which O'Reilly's application interferes, was filed by the said J. Dutton Steele, and was sworn to on the 27th day of July, 1852, by him, (afterwards patent No. 9,704—see 1 Patent Office Report, 1853, p. 188, for diagram). It prays in the usual form that letters-patent may be granted to him. The assignment was made on the 27th of July, 1852, and was recorded in the patent office on the 9th of August, 1852.

Steele in his specification states, in substance, that he has invented certain new and important improvements in rails for railroads, which he terms the "bridge-rail and splice-plates." He says: "The nature of my invention consists in making a rail of two parts, and which is composed of a flanged bridge or V-shaped rail of the usual form, resting on an interior rail or splice-plate of similar external form, the under side of the arch of the exterior rail forming a groove to fit over the arch or tongue of the splice-plate, and the flanges of the one resting upon the flanges of the other, said flanges being fastened together with rivets, as shown in the drawings, or otherwise, as may hereafter be found the most desirable. This rail has a double bridge and double base so far as the interior rail or splice-plate extends." The invention is intended to obviate the yielding of the rail at the joints and the consequent "jumping" of the cars when running at high velocities; and it is intended to be so arranged and proportioned as to make, as nearly as possible, a continuous rail of uniform strength and stiffness, and at the same time to so effectually secure the rails in their places that they will not lose their correct juxtaposition at the joints. It is stated that this end will be attained more economically by using the interior rail simply as a splice-plate, of sufficient length to bear upon three sills or cross-ties directly under and adjacent to the joint of the exterior rail, thus perfectly breaking and securing the joint, and also by making the tongue or arch of the splice-plate solid and of such height as experience may show to be necessary to secure to the rail-tracks uniform stiffness and strength throughout their length. Again, the applicant says: "It is obvious that this form of double rail may be varied from the two herein described and represented without departing from the general principle, and that the under rail may be used simply as a splice-plate, as above described, or it may be extended to the full length of the exterior rail, and made to break joint with it, as may hereafter be found the most desirable, without departing from the general principle here laid down." The specification concludes with the following claim: "What I claim herein, and desire to secure by letters-patent, is the construction of a rail in two parts, and which is composed of a flange-shaped or bridge-rail of usual form, with another rail or splice-plate of similar external form on which it rides—the under side of the arch of the upper rail forming a groove to fit over the arch or tongue of the lower rail or splice-plate, and the flanges of the one overlaying and resting upon the flanges of the other; and the flanges may be riveted together, or the spikes or bolts fastening the rail at large to their bearings may be made to pass through the said flanges, and thus perform the double office of fastening them together and to their bearing; and the interior rail may have a solid or hollow tongue or rib, and it may have a length sufficient to give it a bearing on three sills or cross-ties directly under and adjacent to the joint; or it may be equal in length to the upper or main rail and break-joints with it, as may hereafter be found the most desirable."

On the day this paper-writing bears date it appears that J. Dutton Steele, for the consideration therein stated, assigned all his claim in the invention to Charles E. Smith. On the 9th of August following, the application was filed in the patent office, with the accompanying drawings, but without any models, the box containing which was not opened until the 18th of December following—nearly four months after an interference had been declared, and about two months after the expiration of the time appointed for hearing the issue between the parties, and nearly a month after the decision against the appellant was made. The application being so filed, the interference above alluded to was declared, the parties notified, and the day of hearing appointed for the second Monday in February, 1852; a few days previous to the expiration of which time a motion was made by the counsel for O'Reilly, grounded on his affidavit, to the commissioner, for an enlargement of the time, stating his failure to obtain the attendance of his witnesses within the time appointed, although he had made reasonable efforts to that end. This motion was refused, and the issue was tried on the testimony taken by the appellee, and without any testimony on the part of the appellant. On the 20th of November, 1852, the commissioner, in declaring his opinion, says: "This case came up for hearing on the second Monday of October, 1852, the day appointed for that purpose; and from the testimony then duly on file in the office it is considered that J. Dutton Steele is the prior inventor of the improvements in controversy." From this decision the present appeal was taken. The reasons assigned for the appeal are, first, that the appellee neither filed a model, specification, nor drawing of the invention in the patent office with his application for a patent, and therefore could not have an application pending with which an interfer-

ence with said O'Reilly's could legally exist; second, that they are not the same invention—to show which a very particular comparison is made between the two; third, that appellee's rail and O'Reilly's differ essentially in the form, proportion, and arrangement of their parts, which include every point in which iron rails can differ from each other—the inventions are distinct and independent; fourth, that the commissioner refused to grant an extension of the time for taking of testimony, when by the rules and practice of the patent office he should have done so; fifth, that the commissioner gave a liberal, instead of a strict, construction to Steele's testimony in his own favor, and, further, gave an erroneous construction to the Franklin Institute letter, where he decides that the paragraph respecting the extension of the height of the rib of the splice-plate means the adapting and fitting of it to the under surface of the arch of the rail, as in the case of O'Reilly's rail.

In the first part of the commissioner's report, in answer to the aforegoing reasons, he gives a brief historical account of the proceedings in the case, all of which, so far as they are material, have now been recited. He proceeds to give an analysis of the testimony, showing the grounds upon which he based his action. He finds upon the testimony that Steele made his invention in 1848 of a bridge-rail with splice-plate; that a model (Exhibit "C") was made in the month of September of the same year, from which a model (Exhibit "D") was made under the direction of Steele in the same year, a section of which shows the space at the top; that the first of these models remained in the office of the Philadelphia and Reading Railroad Company, while the other was sent to the Franklin Institute, with a letter, on the 14th of October, 1849, which letter states that the splice-plate may be extended; that the expediency was considered at that time of adopting either a continuous compound bridge-rail or a continuous compound double-base bridge-rail (Exhibit "B"). The commissioner further states that Steele had no interest in the patent; that he had made a proper legal assignment to Charles E. Smith; that O'Reilly introduced no testimony to show priority of invention; that the drawings and Steele's testimony show that the following forms were contemplated by Steele, i. e., the lower rail, solid or hollow, and of varying height, either leaving a space or touching at the top, the extension of this rail or splicing-plate in length, so as to make a continuous break-joint double rail. Only one of these forms—that is, the hollow rib—is claimed by O'Reilly as his invention. The commissioner proceeds to give a more particular answer to the reasons of appeal. He answers to the first that the files of the office, now before the judge, show that the requisitions of the law were complied with. To the second, that the testimony shows that among the various forms proposed by Steele there is one identical with that of O'Reilly's. The fitting of the upper rail closely upon the lower was the first form of Steele's invention, and the other form—not fitting closely—was preferred on account of the greater ease of the manufacture. To the third, that it merely reiterates the second with respect to the part in which the reason states that "O'Reilly has made a new rail, and that Steele has added to the old rail a splice-plate," the commissioner answers "that O'Reilly's new rail is a double rail, and so is Steele's in one of its forms, and there is no difference between them." To the fourth—as to the extension of time—"that the rules and practice of the patent office were strictly adhered to." To the fifth, that Steele had no interest, and therefore that his testimony could not be in his own favor. That the interpretation of the Franklin Institute letter was not wrong, is shown by the first model of Steele, which does closely fit it at the top, and thereby shows his invention. In this letter Steele states not only that the splice-plate may be extended the full length of the rail, and a two-part break-joint rail thus made more economically in its proportions, possibly, than the model now presented, but also that its vertical strength may be increased by increasing the height of the rib. There can be no doubt that under this, at that time, he might have constructed precisely such a rail as O'Reilly's. The substance of the testimony alluded to in the aforegoing report is first, that of Solomon Stout. (Statement of the testimony by the commissioner is omitted.)

The various questions raised by the reasons of appeal made it necessary for me to make a full statement of the case as laid before me by the commissioner, according to law, and upon which the respective parties, on due notice of the time of hearing being given, have offered their arguments in writing, and upon a full and careful examination of all which, I have come to the conclusions which I will now proceed to state:

With respect to the first reason of appeal, the commissioner states that the requisites of the law were complied with. As a decision of this question either way would not affect the opinion upon the merits which will be given in this case, it is not deemed necessary to take further notice of it.

The fourth reason of appeal is because of the refusal to grant a postponement. The affidavit offered to that end is entirely insufficient, in that it does not state the names, competency, or materiality of the witnesses, and, furthermore, the whole subject is within the discretion of the commissioner, and it ought to be presumed that it was soundly exercised.

The fifth reason of appeal is on the subject of Mr. Steele's testimony and the full credit which was given to it. Although Mr. Steele may not be a regular party to this proceeding, or affected by pecuniary interest or ad-

vantage to render him incompetent, yet, from the relation in which he stands to the subject in controversy, he must in the nature of things be supposed to view most favorably the success of Mr. Smith and his side of the question, and to feel no small degree of prejudice towards the other side. The objection will be allowed its due weight when the testimony is considered.

The third reason, and the latter part of the one already partly considered, are upon the subject of the differences between the invention of O'Reilly and that of Smith, assignee of Steele, in which there is a particular comparison made between the two. On this subject I have already stated the commissioner's answer and his illustrations, to show that one of the four forms of Steele's rail is identical with the one for which O'Reilly is applying for a patent in this case. It is supposed that the testimony shows that these rails were made by Steele prior to that invented by O'Reilly.

Being about to consider the force and weight of the testimony, I desire to say that very great deference is certainly due to the learned decisions of the commissioner, made with his discriminating mind and judgment, in discovering, in all their bearings, the analogy, or the want of it, between inventions presented to his view by different inventors; and I shall always, whenever occasion offers, consistently with my duty, most cheerfully render that respect; and it would be with much more hesitation that I bring myself to think there is error in this case, if it had not been a matter in which I supposed the commissioner might have misapprehended some of the legal principles by which the testimony is to be governed and applied. It is certainly true that the great purpose of both parties was to give sufficient strength to the rail at its weakest part—i. e., the joints. Both parties have invented improved means which are supposed to be adequate for the purpose. Are these means substantially the same? That is the first question. It is probable that the specification of Smith, assignee of Steele, is, in some of its terms, broad enough to cover some of the forms of O'Reilly's invention; and it has been argued by counsel that such is the case, and that the identity is already established. This, however, is not conclusive. It is true that the usual oath required by law to the specification has been made—that Mr. Steele was the first inventor, and the commissioner has so decided; but the like oath is attached to the specification of O'Reilly, so that there is oath against oath, and the question must depend entirely upon the evidence taken under the rules and authority of the commissioner.

In order to understand the force and application of the evidence as applicable to O'Reilly's invention, it will be proper to keep that invention immediately under the eye. He claims, as before stated, that his improvement consists of a continuous double-bridge rail. In particularly describing its features, he says the improvement consists in dividing the ordinary bridge, by a longitudinal division into two parts, plates, or layers, of nearly equal thickness and weight, and sliding the upper one over the under one until the end of one is at the middle of the other, in which position they are riveted together, the two parts thus reciprocally breaking joint and supporting each other by a new arrangement and disposition of the same material. The ordinary rail is strengthened by a new and improved disposition of its parts, thus increasing its strength without increasing the quantity of metal employed in its construction, and augmenting its strength and value in the same manner that bars of iron are increased in strength and value by refinement. The rail has no need of extraneous support. The forms, proportions, and arrangement of a common rail are changed without addition, bringing the superabundant strength of the middle to the support of the end of the rail, yet leaving that middle at the highest standard of efficiency. The inventor, in other words, divides the mass of iron sufficient for a common rail into two nearly equal parts; one of these he forms into the outside layer or division of his rail, and the other into the inner part; he brings a portion of the middle to the ends; he increases the width and height of the groove or arch of the bridge-rail by removing half the thickness of the metal from the concave or inside. There are some other features not material here to notice. His construction of the rail involves, of necessity, the close fitting of the top of the under part against the under side of the upper part, because the arch of the upper part rail, being divested of all surplus material throughout, requires the support of the lower rail as much in the middle as at the ends. There are further differences in the saving of material, in construction, and repair in favor of O'Reilly's invention.

The substance of the testimony on the part of the appellee is, that the models C and D were made by the machinist for Mr. Steele—in the year 1848 one of them, and the other in the same or the next year—and that Exhibit "F" was put into one. Mr. Steele himself testifies that the model C was invented by him in September, 1848; that it was a splice-plate, bearing upon three sills, with the rib of the splice-plate equal in height to the interior groove of the rail. The object of the splice-plate is to give the rail increased stiffness at the joint, and to make a track as nearly as practicable of uniform stiffness. In 1848 or 1849 he improved that plan by changing it, as shown in model D; it differs from the first model in the respect that the rib of the splice-rail does not extend up to the top of the groove of the rail; this simplifies the manufacture of the rail and splice; it also differs in having the flanges of the rail and splice-plate riveted together. During the progress of his invention, the

subject of extending the splice-plate to the full length of the rail was considered; but the object being to obtain the best result with the smallest expenditure of money, the splice-plate, extending over only three bearings adjacent to the joint of the rail was preferred. * * * And now, supposing Mr. Steele, in giving his testimony, to have been perfectly indifferent, what is its value, and what effect ought to be given to it, in sustaining this issue on the part of the appellee? In all the various plans and forms which Mr. Steele has thought of or devised, he has never omitted to make the improvement principally, if not wholly, to consist of the splice-plate at the joint of the rails, by means of additional material. To use his own language, "there was added a splice-plate upon three sills, or to be extended over three bearings adjacent to the joint of the rail, with a rib along its upper surface at the ends of the bridge-rail." That, certainly, is the great principle of his invention. Changes in the form of his rail appear from time to time, in the course of maturing his design, to have been made; but under no form has he ever omitted to have the splice-plate as the prominent leading feature. This, then, is the first substantial difference between the two inventions: O'Reilly's invention has no such joints, and, of course, no occasion for a splice-plate, and therefore entirely saves the additional material and expense without increasing the weight or size of the structure.

According to Mr. Steele's construction, with the exception just stated, the whole of the rail is the same as that in common use. The middle and arch of the rail are not changed in material or strength, but are both left as they were before the invention. They must be strong enough of themselves without additional support. I can see nothing to satisfy me that Steele ever invented the two-part rail, or, if he did invent anything of the kind, it did not correspond to any feature in O'Reilly's invention. It would be doing great injustice, I think, to Mr. Steele to suppose that he could, according to his plan, as I understand it, think that the splice-plate might advantageously be extended the whole extent of the rail for the purpose of performing the duty of an under rail; that would be to strengthen a part that had already sufficient strength, if not too much, by adding additional costly material. It is true, he says, in describing one of his forms of rail, that the rib of the splice-plate was equal in height to the interior groove of the rail; but this form of his invention was not devised with any view, or in accordance with any principle conceived by him, to support the arch or crown throughout. It would have proved entirely insufficient for that purpose. Even this in a short time after was changed and abandoned in the progress of perfecting his invention, and the rib of the splice-plate made shorter, so that it did not extend to the top of the groove. Now, these are also radical features entirely different from O'Reilly's invention, for the great matter of O'Reilly's improvement consists in making the rib on the lower part exactly fit the under side of the upper part, and in extending the under part with its rib the whole length of the rail. These are surely features entirely foreign to any that can be found in Mr. Steele's. The rib must exactly fit, crown and sides, or the structure would be crushed. The under side must give full and perfect support to the upper, or the invention is nothing. I think, therefore, it is clear that although Mr. Steele, in the course of maturing his invention, from time to time thought of, considered, and spoke of various other additions or contrivances, yet he abandoned them all, and adopted only the one described in his own words: "But my object being to obtain the best result with the smallest expenditure of money, the splice-plate extending over only three bearings, adjacent to the joint of the rail, was preferred." This is then the only invention with which that of O'Reillys' could be said to interfere in this issue. I am decidedly of opinion, and do so adjudge, that there is no interference in the claims of the said applicants in relation to the matters contained in their respective specifications, and that the said Patrick O'Reilly is entitled to a patent for his said improved invention of rails for railroads, as stated in his specification.

Case No. 10,567.

In re OREM et al. v. HARLEY.

[3 N. B. R. 263 (Quarto, 62); [1] 2 Balt. Law Trans. 943.]

District Court, D. Maryland. 1869.

BANKRUPTCY—PLEADING—SUFFICIENCY OF AVERMENTS—ANSWER—INTENT IN SUSPENDING PAYMENT.

1. Petition filed in involuntary bankruptcy, was signed in the firm name of creditors, and affidavit made thereto by one C., a member of the firm, averring that the defendant, "being a trader, had fraudulently suspended and not resumed payment of his commercial paper within a period of fourteen days." On demurrer, *held*, objection to the sufficiency of averment cannot strictly be raised on demurrer, but should be by answer.

2. The intent of the alleged bankrupt in suspending payment should be alleged as a fact.—Leave granted to answer.

[Cited in Re Butterfield, 6 N. B. R. 259.]

On the 12th of July, 1869, John M. Orem, Son & Co., creditors, filed their petition, praying that the defendant, George W. T. Harley, might be declared bankrupt. The petition proceeded upon two alleged acts of bankruptcy. It embraced the usual formal allegations, and set forth in full the character of the petitioners' claim, which consisted of two promissory notes, one of which matured on the 13th of April, and

[1] [Reprinted from 3 N. B. R. 263 (Quarto, 62), by permission.]

the other on the 6th of June. The petition then went on to charge the specific acts of bankruptcy as follows: First. That within the preceding six months, the said Harley did commit an act of bankruptcy, "in that the said Harley, within the period aforesaid, and within the said district, to wit: on the 13th day of April, A. D. 1869, being a trader, has fraudulently suspended, and has not resumed payment of his commercial paper within the period of fourteen days." A similar act, charged to have been committed on the 6th of June, was alleged in the same language. Second. That within the same period, to wit: on the 2d of April, 1869, being possessed of certain real estate (which is fully described in the petition), the said Harley did make a conveyance of the same to Otho F. Harley, of etc., etc. "And that this deponent is informed and believes that the said deed was made with intent to defraud the creditors of George W. T. Harley." The petition was signed "John M. Orem, Son & Co.," and the affidavit thereto was made by Chase, one of the partners. To this petition the defendant's counsel filed a demurrer, which was argued on the 25th September. The grounds of the demurrer, in regard to the first allegation, were, that the alleged act of bankruptcy was insufficiently set forth—that the general language of the act, as used in the petition, was not sufficient, but that it was necessary to describe, in the allegation, the particular paper, in the payment of which, it was alleged, that the defendant had made default, as well as the circumstances of suspension, so that the court might judge whether or not the papers were commercial papers, and also whether the circumstance of suspension, if proved, as alleged, would amount to a fraudulent stoppage or not; and that the defendant might be informed of the particular paper, in regard to which the suspension was charged, so that he might the better be able in his answer to deny or explain. In regard to the second allegation, the grounds of demurrer were, first, that the intent should have been alleged as a fact, and not stated simply as a matter of information and belief; and, secondly, that even if sufficiently charged, it was not the charge of the "petitioners," but only of "this deponent," and that "this deponent" (Chase), in his individual capacity, was neither a creditor nor a party to the petition, and, therefore, had no standing in court.

The demurrer was sustained as to the second allegation, and overruled as to the first, on the ground that a demurrer was not strictly the proper mode of presenting the question; but, without any expression of opinion upon the points submitted, leave was granted to the defendant, until October 9, to answer the first allegation, or take such other proceedings as seemed fit, whereupon his counsel filed a motion to discharge the rule requiring him to show cause in respect to the said first allegation. This motion was submitted upon the argument already made on the demurrer, and upon it THE COURT reserves its decision.

Wm. Schley and Patrick McLaughlin, for petitioners.

John Ritchie and Albert Ritchie, for defendant.

Case No. 10,568.

ORHANOVICH v. The AMERICA.

[25 Int. Rev. Rec. 306; 14 Phila. 515; 36 Leg. Int. 279; 26 Pittsb. Leg. J. 203.]

District Court, E. D. Pennsylvania. July 8, 1879.

TOWAGE—DUTY OF TUG IN MAKING UP TOW—COLLISION BETWEEN TOWS.

[In making up a tow it is the duty of a tug to consider the character of the vessels, the channels through which they are to pass, and all other matters bearing on their safe transportation; and if the voyage involves the passage through narrow and shallow channels, and the tug, after taking one tow, afterwards attaches to it, by a hawser, another which she knows to be a very bad steerer, she is responsible for a collision resulting therefrom by which the first tow is injured.]

In admiralty.

Henry Flanders and H. G. Ward, for libellant.

J. Warren Coulston, for respondent.

BUTLER, District Judge. The owners of the steam tug America, contracted with the master of the bark Rebecca, to take her from this port to Bombay Hook. They started on the 1st of December, 1877. On reaching the Schuylkill, another bark, the Dudman, was taken on behind the Rebecca. They proceeded down the river in this order, to a point near the channel buoy in the Bight of New Castle, where the Rebecca grounded, and was run into by the Dudman, and seriously injured. The libellant charges the collision to carelessness of the respondent; first, in taking the Dudman along; second, in making up the tow, and third, in managing the tug in the channel where the accident occurred. The respondent was bound to exercise reasonable care for the safe transportation of the bark. If he took another vessel along, as was his right to do, he must determine the order in which the vessels should go, and the manner in which they should be towed. In doing this, he must consider the character of the vessels, the channels through which they are to pass, and all other matters involved in the question of their safe transportation. This being done, he must conduct the tow with such skill and care as are calculated to secure it against accident, under ordinary circumstances: The Margaret, 94 U. S. 499; The Quickstep, 9 Wall. [76 U. S.] 665; The Sweepstakes [Case No. 13,687]. Was there carelessness in taking

the Dudman along? If, as alleged, her steering qualities were so bad as to render her virtually unmanageable in the river, and the respondent was aware of this, there was. That she was a bad steerer, indeed very bad, is abundantly shown. The witnesses agree respecting it. The master of the tug says she "steered badly, sheered all over the river going down, first on one quarter then on the other of the Rebecca;" and the mate of the tug says she "steered wildly going down the river." Captain Wilkins, called by the respondent, says she steered so badly that it required two boats to take her down the Schuylkill; and when the respondent met and took her in tow on this occasion, she was being thus conducted, by the joint efforts of two tugs. That the respondent was aware of her peculiarity in this respect, is equally clear; he had towed her before, and knew she steered badly; he so testifies. It does not appear that he ever towed her in company with another vessel before this occasion, or attempted to do so. And if he had been without such previous knowledge, what he observed in passing down the river should have warned him of the danger of taking such a tow through the narrow, shallow channel, near New Castle. And while a proper regard for the libellant's safety, forbade taking the Dudman along, in my judgment, it especially forbade taking her astern of the libellant's vessel. Without considering the order in which two vessels of unequal draft, with proper steering capacity, should be placed in a tow (about which decided opinions were expressed by the court in The Morton [Case No. 9,864]; The Zouave [Id. 18,221], and The Sweepstakes [supra], though practical seamen, as the evidence here shows, seem to disagree respecting it), I feel no hesitation in saying that to place this unmanageable craft behind, in passing through a narrow, shallow channel, was calculated to produce disaster. The width in the Bight, at places, does not exceed seventy yards, and the depth (with the tide as it was at the time of the accident) is twenty-two feet. The draft of the Rebecca is twenty and a half feet. As obedient to her wheel as she is shown to be, she would respond very tardily when within a foot and a half of the bottom, and finds some difficulty in controlling her course. With the Dudman wildly tugging at her stern she would be helpless, very likely to ground, and be run into by her unwieldy companion. And this is precisely what occurred. The respondent himself says (in the answer filed): "The grounding of the Rebecca was further caused by the bad and reckless steering of the Dudman. The latter vessel, just prior to the Rebecca's sheering eastward, * * * having taken a sheer to the westward, which caused the Rebecca to disobey her wheel and sheer eastward." The Rebecca being thus grounded and run into by the Dudman, who should not have been there, and especially in the position she occupied, the respondent must answer for the consequences, unless, indeed, the Rebecca was also in fault. The respondent says she was; that the collision would not have occurred but for the order given by her pilot to starboard the Dudman's helm, the moment before. At this time, the Dudman was forty to sixty fathoms back, to westward. Her sheer in that direction was broken. The master of the tug says: "About the time the Rebecca grounded, the Dudman's sheer westward was broken." The pilot of the Rebecca says the same. The tide was running down, and the wind coming from the west or northwest. The pilot says: "The Dudman was coming right at us when I told them to starboard their helm; * * * and if she had minded her wheel she would have gone clear of us to leeward." The evidence would not justify a conclusion that the order was erroneous; that without it the Dudman would have kept off to windward. Her course at all times was uncertain, and where she would have gone without the order no one can tell. It seems quite as probable she would have struck the Rebecca as that she would not. But if this were otherwise, the result would be the same. An erroneous order given when in peril would not stand in the libellant's way. That the Rebecca was then in peril is clear. The pilot (more capable than all others of judging), believed so; and in consequence gave the order. The respondent having created the peril, could not take advantage of an error made in the effort to escape. The Zouave [supra].

[NOTE. A reference was made to a commissioner, to whose report exceptions were filed. This court confirmed the commissioner's report, and entered a decree for libelant in accordance therewith. Case No. 11,619a. An appeal was then taken to the circuit court, where the decree of the district court was affirmed. 4 Fed. 337.]

ORIANA, The. See Cases Nos. 1,148 and 1,150.

Case No. 10,569.

The ORIENT.

[10 Ben. 620; 14 Am. Law Rev. 84.][1]

District Court, S. D. New York. Nov. 8, 1879.

PRIORITIES—SEAMEN'S WAGES—COLLISION—FOREIGN VESSEL.

1. The wages of seamen have a priority over a claim for collision against the proceeds of their

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 14 Am. Law Rev. 84, contains only a partial report.]

vessel, whether such wages were earned prior or subsequent to the collision.

See The Pride of the Ocean, 7 Fed. 247.

[Cited in The Adolph, 7 Fed. 505. Approved in The Samuel J. Christian, 16 Fed. 797. Cited in The Young America, 30 Fed. 795; The Amos D. Carver, 35 Fed. 667, 669; The Daisy Day, 40 Fed. 539. Cited contra in The F. H. Stanwood, 49 Fed. 581.]

2. Whether the same rule would be applied in the case of a foreign vessel, quære.

3. But, if it would, a vessel owned in New Jersey is not such a foreign vessel as to call for the application of any different rule.

In admiralty.

R. L. Niles and F. A. Wilcox, for libellants.

E. D. McCarthy and W. Mynderse, for intervenors.

CHOATE, District Judge. This is a suit for seamen's wages, and after default of the owners of the steamer and a decree in favor of the libellants but before the sale of the vessel, the insurers on the hull of a canal-boat which was totally lost by a collision with the Orient while the canal-boat was in tow of another steamer, applied by petition for leave to intervene for their interest and to have the decree opened and to be allowed to defend. They claim that the Orient is responsible for the collision on the ground of negligence; that the value of the Orient is not sufficient to pay in full the seamen and the claims for damage caused by the collision, and that in such a case the lien of the party injured has a preference over the lien of the seamen. The petitioners have paid the loss and are subrogated to the rights of the owner of the canal-boat. Another libel is pending in this district against the Orient, filed by the master of the canal-boat on behalf of himself and the owners of the cargo, and is now prosecuted on behalf of the underwriters on the cargo. The petitioners have been allowed to file an answer to the libel of the seamen, denying that the amounts claimed are due to them. This question has, however, been now heard and the wages are shown to be due to the libellants as follows: Willetts, $47.50; Collins, $94.84; Murphy, $94.84; Leather, $33.81; Bills, $50; Schreier, $50, in all $370.99. The collision happened September 25th, and the vessel was seized by the marshal on process from this court October 11, 1879. The wages due were earned partly before and partly after the collision.

The petitioners have an interest, which, if they have a prior lien to the seamen, would require that the proceeds of the vessel be kept in the registry of the court until the rights of the parties shall be determined. They now ask this relief in case the wages shall be found due. Several foreign decisions are cited to sustain this claim. The first is the case of The Benares, 7 Notes of Cas. (Supp.) 50. This was an action for damages against the Benares by collision in which bail had been given for the ship and also for the freight. And the question arose, on a motion that the bail should pay the amount of the freight into the registry, whether the amount, to be paid in under the English act limiting the liability of the owners, was the gross freight or the net freight. The owners claimed that they should deduct from the freight all the expenses of the voyage, which was to India and back to England, including the whole amount of seamen's wages. And it was held that the statute intended by "freight due or to grow due for and during the voyage" the entire freight; that this expression could not be construed to mean the freight, less those expenses usually paid out of it or for the payment of which there was a lien on the freight. There was no claim of seamen here competing with the claim of the party injured by the collision, but simply a claim of the owners who had paid wages to deduct them from the freight which had been attached. The question which would be the superior lien did not arise in the case, and the opinion of Dr. Lushington seems not to touch that question. There is not even a dictum in the case adverse to the seamen's lien for wages in such a case, as I understand the decision. The case of The Linda Flor, Swab. 309, is the only other reported English case cited. It was a suit for mariners' wages against a Portuguese ship, and the claim was opposed by a party who had obtained a decree against the vessel in a cause of damage, the proceeds being insufficient to meet all the claims. Dr. Lushington held that in such a case, there being no evidence that the foreign owners were insolvent, the injured party who had obtained a decree should be paid out of the fund in preference to the seaman. He applied to the case the equitable doctrine which governs cases of marshalling assets between competing claimants, that a party who has two funds to resort to shall, as against a party having only one of those funds to resort to, be remitted to the fund to which the other party cannot resort. And as the seamen could resort to the personal liability of the owners in their own country, which was assumed by the court to afford no practical remedy of any actual value to the other claimant, they should be compelled to do so; that in such a case to permit the seamen to reduce the only fund to which the injured party could resort would be merely to benefit the owners and relieve them from a part of the liability which the law imposed on them for the injury inflicted by them. I think this is the point of the decision. The learned judge indeed adds that "it is not to be forgotten that in all these cases of damage, or nearly all, the cause of the damage is the misconduct of some of the persons composing the crew." I do not understand the de-

cision to rest in any considerable degree on this last suggestion. On the contrary, this seems to be thrown in merely as a suggestion, showing that in many cases no real injustice will probably be done by the application to a case like that before the court of the equitable doctrine of marshalling assets. The case is by no means an authority that, upon the sole ground of punishment for misconduct or retaliation, the seamen of the offending ship forfeit any of the rights which the maritime law gives them against their own vessel for their wages. Nor is this case an authority for the position that English seamen would, as against English parties suing in an English court for damage by collision, be remitted to their personal remedy against their English owners. The principle of marshalling assets would seem not to go so far. The important fact assumed by the court as existing, that the party injured would stand no chance of obtaining redress in a foreign court for any balance due to him of the owner's liability, would not exist in such a case. It could not be assumed that in an English court the party injured would not receive full justice against the owners equally with the seamen, and in such a case they would not be subjected to the expense, delay and uncertainty of a resort to a foreign tribunal, perhaps in a half-civilized country, whose law might be wholly inadequate for their relief. Dr. Lushington says, in that case, "In case of a foreign ship doing damage and proceeded against in a foreign country, the injured party has no means of redress save by proceeding against the ship herself, which I apprehend is one of the most cogent reasons for all our proceedings in rem." The only other English case cited is The Chimæra, unreported, but stated in The Linda Flor to be precisely like that case. It must be assumed, therefore, that it was the case of foreign seamen competing with English parties who had a claim for damages by collision. The case of The Duna, 13 Ir. Jur. 358, was the case of a Russian ship proceeded against in the Irish admiralty court. It was like the case of The Linda Flor and is decided on the authority of that case. In the case of The Enterprise [Case No. 4,498], the same rule was applied as against British seamen, on the ground that the law of Great Britain controlled the case. And Judge Lowell there says: "I believe no admiralty court of the United States has decided the general question of the order of priority of these liens." The equitable doctrine of marshalling assets undoubtedly prevails in admiralty courts and will be applied where its application will do no injustice. Thus even in a case of seamen's wages where there are two funds to which they can resort, as the ship and the freight, each equally available and equally certain, they may for the benefit of other parties having only a claim on the ship, be decreed to be paid out of the freight. The Sailor Prince [Case No. 12,219]. Perhaps the application of this doctrine as made in the cases of The Linda Flor and The Duna would, as against foreign seamen, be held in this country a reasonable application of that doctrine, although it remits the seamen to a remedy far less certain and expeditious than their remedy against the ship. But whether the same rule would obtain here it is unnecessary to inquire, because, as it seems to me, the principle of those cases, so far as it is a principle of the marshalling of assets, does not apply to the present case. This steam-tug was registered in New Jersey. Her owner lives in the district of New Jersey. It cannot be said that the injured party will be practically without redress there. Throughout the United States the courts are open to him as freely and with equal chance of justice as to the seamen. New York and New Jersey do not stand in this respect in relation to each other as did England and Portugal or Ireland and Russia. In the case of foreign seamen the question how far a court of admiralty shall take jurisdiction of their suit for wages, is a matter of discretion, and this being so the court is bound to look in the exercise of that discretion to the rights and interests of all other parties; and this might justify these English decisions as the rule to be applied here in the case of a foreign ship presenting the like equitable considerations for remitting the seamen to their home tribunals.

The later editions of Abbott on Shipping give some countenance to the idea that these English cases have established the rule independently of the nationality of the ship, that a lien for damage by collision takes precedence of the lien for wages, on "considerations of public policy to prevent careless navigation." Abb. Shipp. (11th Ed.) p. 621. As no other authority is cited for this proposition than the cases above referred to, I think the point cannot be deemed established by authority. Indeed, in the same work (page 633), it is admitted that "the priority of the lien for damage over liens ex contractu is not expressly declared in any of the foreign maritime codes, or discussed by the commentators upon them." The learned author then adds, "But it seems to result from the unqualified terms in which the liability of the owner of the wrong-doing vessel to the extent of the value of it, is every where laid down." With deference to the great authority of Lord Tenterden on a question of this character, I think it must be said that these dicta go far beyond any decided case. And I fail to see how the rule of the maritime law, limiting the liability of ship-owners, and especially how the statutory limitation of that liability in England and the United States, affects the question. The primary and apparently the only purpose of

these statutes, was to limit the liability of owners and not to impair the rights of any other party; and if, in consequence of other claims against the ship or freight, the injured party cannot get satisfaction out of the primary fund, that is, the ship and freight, to the extent of the statutory limit, or the owner cannot, by reason of such other claim and incumbrance thereon, surrender the thing against which the injured party has a remedy in rem in such condition as to satisfy that limited liability, I see no reason why, in cases of domestic ships, at least, the injured party should not, for the unsatisfied balance, be remitted to his personal remedy against the owner. Against this dictum I set the authority of the same author in the earlier editions of his work on Shipping. 4th Am. from 5th Lond. Ed. p. 484. "In proceeding against the ship in specie, if the value thereof be insufficient to discharge all the claims upon it, the seaman's claim for his wages is preferred before all other charges, for the same reason that the last bottomry bond is preferred to those of an earlier date. The labor of the seaman, having brought the ship to the destined port, has furnished to all other persons the means of asserting their claims upon it, which otherwise they could not have had." This doctrine seems to be well supported by authority and to be applicable as well to claims for collision as to other claims, unless this policy of retaliation or retribution for the wrong done by the ship is also a rule of the maritime law. That doctrine seems to me inconsistent with the uniform policy declared by courts of admiralty in respect to seamen's wages and to have no foundation. It is true that for misconduct towards their own ship seamen are punished by the forfeiture or diminution of wages in some cases, but both in England and the United States this species of punishment is carefully regulated by statute and strictly guarded against abuse, and these regulations have never extended to any case of misconduct except towards the seamen's own ship and her officers. To hold all the seamen of the offending ship liable to punishment by a partial or entire forfeiture of their rights would be a wholesale condemnation of innocent and guilty alike, and not in accordance with the probable facts of the case or with natural justice; and I see no such equity of the injured party, and no such controlling policy to prevent careless navigation, as to require this. Depriving seamen of their lien and remitting them to their personal action is a partial deprivation of their rights. It is in the nature of a forfeiture or punishment. The remedy to which they would be remitted is neither so certain nor so expeditious, and the rule contended for, if applied, does seriously impair the rights of seamen not shown to be personally guilty of any wrong.

By an amendment of their answer these petitioners have charged personal negligence against some of the libellants as an additional ground for giving the petitioners a priority of payment. This raises the question whether such a charge of negligence is a bar to the enforcement of the seamen's lien for wages as against the injured party. I think not. It would be in the nature of a partial or qualified set off. If these petitioners have any claim against the seamen the courts are open to them. Seamen's wages are by statute, upon reasons of public policy, scrupulously guarded against attachment and claims by way of set off. While no statute governs this particular claim, it is enough that there is no precedent for it, and that it is contrary to the general policy of the law, which secures to seamen summary and certain relief for their wages. And I am not willing to set a precedent for the trial in a case of seamen's wages of the merits of a collision suit. If this defence is good, then whenever the offending ship is not of value sufficient to respond in damages and the owners do not care to defend and are of doubtful solvency, the whole burden of defending the collision suit will be thrown on the seamen, a burden which they are ill prepared and in most cases would be wholly unable to bear. The alternative of the injured party seeking his redress in the courts against the seamen, if they are personally liable, seems to me more in accordance with justice and the general policy of the maritime law.

A manuscript opinion of Judge Giles, of the Maryland district, rendered in a case apparently similar to the present, makes a distinction between the wages earned after the collision and those earned before the collision, as to the former giving them a preference to the lien for damage by collision and as to the latter giving priority to the claim for damages. No authorities are cited. It may be presumed that the decision proceeded on the cases above referred to. For the reasons above stated I am unable to concur in that decision so far as it postpones the claims of the seamen.

Decree for the libellants, with costs.

Case No. 10,569a.

The ORIENTAL.

[2 Flip. 6; 23 Int. Rev. Rec. 26; 4 N. Y. Wkly. Dig. 70; 9 Chi. Leg. News, 134; 5 Am. Law Rec. 628; 1 Cin. Law Bul. 373.] [1]

District Court, N. D. Ohio. Dec., 1876.

ADMIRALTY—SETTING ASIDE DECREE AT SUBSEQUENT TERM.

[Cited in Allen v. Wilson, 21 Fed. 884, to the point that in admiralty the court will not, on mere motion, at a subsequent term, set aside a decree made at the hearing.]

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 4 N. Y. Wkly. Dig. 70, contains only a partial report.]

[This was a libel in admiralty by Charles N. Russell and others against the schooner Oriental. A decree was entered in favor of the libellants, and the cause is now heard on a motion to have that decree set aside on the ground of surprise.]

Newberry, Pond & Brown, for motion.

Ingersoll & Williamson and Willey, Terrell & Sherman, contra.

WALKER, District Judge. At the January term, 1876, of this court (on 23d February), this came on for trial on the issue, the respondents and claimants or their proctors not being present, the libellant demanding a trial, the same was had and a decree entered for the libellant. Notice of appeal was entered by order of the court on behalf of claimants and respondents. No appeal was taken. Afterward, at the April term, 1876, of this court, to wit: On the 4th day of May, the claimants and respondents filed a motion to set aside the decree, for the reason that the hearing upon which the same was rendered, and its rendition was a surprise upon the respondents and proctors in the cause. This cause was commenced on the 3d day of October, A. D. 1870; the claim of the respondents and their answer were filed on the 21st day of November, A. D. 1870, and had been continued from term to term until the term at which it was tried. Numerous affidavits are filed in support of the motion, and also affidavits against it. It appears in substance from the affidavits of the respondents, that their proctors resided at Detroit, and those of the libellants at Cleveland. That Moore and Griffin, who reside at Detroit, as proctors for the libellants, had served notice upon respondent's proctors to take depositions at Detroit in 1873 and in 1874; that depositions were taken under that notice by Moore and Griffin; that ever since this cause was commenced the proctors of the respondent had the constant assurance from Mr. Moore, one of the firm, that notice would be given them of the trial of the causes and that reliance was placed upon that assurance, and no such notice was ever given. It also appears that Moore and Griffin were only employed to take the testimony at Detroit, and were not present at the trial or knew of it, that trial being conducted by the proctors of record at Cleveland. Affidavits were also presented by libellants, tending to show notice of intent to demand trial at the January term; and others on behalf of respondents denying any notice. No allegations are made of any fraud practiced by libellants or their proctors, except the failure of Moore to give notice to respondents' proctors of intent to demand a hearing, nor does it appear that the proctors of record at Cleveland had any knowledge of the arrangement with Moore as stated.

But the view I take of the motion makes it unnecessary to consider the affidavits on either side. The motion is made after the term at which the trial was had and decree entered. Can a decree be thus set aside at a subsequent term of the court? Or should a motion for that purpose be considered when not filed at the term? There are numerous authorities for setting aside decrees pro confesso in chancery obtained by fraud at a subsequent term, but only on petition filed in regular form for that purpose, and on which evidence can be taken in the regular way to establish the fraud. But I find no case in admiralty where a decree on a hearing was set aside on motion at a subsequent term. By general admiralty rules 29 and 40, it is provided that the court may, in its discretion, upon the motion of the defendant, and payment of costs, rescind a decree in any suit in which on account of his contumacy and default the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered. In an early case,—The Illinois [Case No. 7,003],—Judge Wilkins, of the Eastern district of Michigan, refused to set aside a decree after the lapse of ten days, in a case where the decree had been entered up in the absence of the respondent or his proctor, who was at the time engaged in trying a case in one of the country circuits, holding that he had no power to do so after the lapse of ten days. This rule was adopted in the case of Northrup v. Gregory [Id. 10,327], by Judge Longyear, of the same district, holding that a motion to open a decree in admiralty entered by default must be made within ten days after the entry of the decree. These decisions, in a recent case decided by Judge Brown,—Thompson v. Carson [Id. 13,948],—of the same district, were cited and approved by him. The general rule is that after the adjournment of the term, courts have no power to change their judgment, or decree on a mere motion. Other machinery has been devised in the law to correct errors at subsequent terms which must be used for that purpose. This motion, not having been filed until after the adjournment of the January term, cannot therefore be granted and must be overruled.

[NOTE. The appeal taken in this case was dismissed as not having been taken in time. Case No. 10,570.]

Case No. 10,570.

The ORIENTAL.

[2 Flip. 37;[1] 23 Int. Rev. Rec. 216; 9 Chi. Leg. News, 321; 2 Cin. Law Bul. 140.]

Circuit Court, N. D. Ohio. May 31, 1877.

APPEAL IN ADMIRALTY FROM DISTRICT TO CIRCUIT COURT—WITHIN WHAT TIME TO BE TAKEN.

1. The provisions of section 635, Rev. St. U. S., relative to appeals within one year from the

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

time of entering the judgment, order or decree appealed from, do not apply to appeals from decrees in admiralty.

2. Appeals in admiralty should be taken to the term of the circuit court next succeeding the term of the district court at which the decree was rendered.

[In admiralty. In this case a decree was entered in favor of the libellants, Charles N. Russell and others, in the district court. At a subsequent term of the court the claimants moved to set aside the decree on the ground of surprise. This motion was overruled. Case No. 10,569a. The case is now heard on appeal.]

Ingersoll & Williamson and Willey, Terrell & Sherman, for the motion.

Newberry, Pond & Brown and Mix, Noble & White, against the motion.

SWAYNE, Circuit Justice. This is a motion to dismiss an appeal in admiralty, upon the ground that the appeal was not taken in time. In other words, that it was not taken to the term of the circuit court next succeeding the term of the district court at which the decree was rendered.

The decree was rendered by the district court at the January term, to-wit: on the 23d of February, 1876, and that term closed on the first Monday in April, 1876. The then next term of the circuit court began on the first Tuesday in April, 1876. The appeal was taken January 12, 1877, to the April term, 1877, of the circuit court. That is, to the fourth term, and not to the first term, there being three intervening terms. The statutes in this connection, which it is necessary to consider, are, first, the act of 1789, § 21 [1 Stat. 83], which is as follows:

"From final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court to be held in such district."

Under that provision it has been held that appeals from the district court in such cases were properly entered at the term of the circuit court begun next after the entry of the decree of the district court, although the term of the district court, during which the decree was entered, had not been ended when the term of the circuit court was begun. In U. S. v. Certain Hogsheads of Molasses [Case No. 14,766], it was held further, that if an appeal be not taken to the term of the circuit court held next after the term of the district court at which the decree was entered, the right to appeal is lost, and that ends the case, so far as the question of appeal is concerned. U. S. v. The Glamorgan [Id. 15,214].

The next act to be considered—as it regards the question under consideration—is the act of 1803, § 2 [2 Stat. 244], the language of which is more comprehensive than in the act of 1789. That act is confined expressly to decrees of admiralty. The language of the act of 1803 is: "From all final judgments or decrees in any of the district courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars" (reducing the amount of three hundred dollars, required in the act of 1789, to the sum of fifty dollars), "shall be allowed to the circuit court next to be holden in the district where such final judgment or judgments, decree or decrees, may be rendered," etc.

Under this provision it was held, also, in Montgomery v. Henry, 1 Dall. [1 U. S.] 50; Norton v. Rich [Case No. 10,352]; and U. S. v. Haynes [Id. 15,335],—that the appeal must be taken to the next term of the circuit court succeeding the term of the district court, during which the decree was rendered, and that it cannot be taken subsequently. It will be observed—a matter to which I have adverted already—that the language of the second section of the act of 1803 is much larger than the corresponding language in the act of 1789.

Yet it has been held by the supreme court of the United States, that notwithstanding the generality of the terms in this act, it made no alteration in the law of 1789 as it respects appeals to the circuit court, except in reducing the sum or matter in controversy to fifty dollars, on which such appeals may be allowed. The words, "All final judgments or decrees," refer to judgments or decrees in causes of admiralty and maritime jurisdiction, and in such causes only has this act authorized an appeal from the district court to the circuit court. U. S. v. Nourse, 6 Pet. [31 U. S.] 496; U. S. v. Haynes [supra]; and Montgomery v. Henry, 1 Dall. [1 U. S.] 50.

So stood the law of the United States, and such were the adjudications from the passage of the first judiciary act of 1789 on the subject, till the passage of the act of June 1, 1872 [17 Stat. 196]. The second section of that act, or so much of it as is necessary to be considered in this connection, and which, it is claimed, abrogates or repeals the provision, which has been read, of the act of 1803, which was a reenactment—as before stated—of the provision on that subject of the act of 1789, and substitutes, as it is claimed, one year for the time prescribed by those acts for the taking of appeals in admiralty from the district court to the circuit court, after regulating appeals from the circuit court to the supreme court of the United States, proceeds as follows:

"No judgment, decree, or order of a district court, rendered after this act shall take effect, shall be reviewed by a circuit court of the United States, upon like pro-

cess or appeal, unless the process is sued out, or the appeal taken within one year after the entry of the judgment, decree, or order, sought to be reviewed. Provided, that where a party entitled to prosecute a writ of error, or to take an appeal, is an infant, or non compos mentis, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken within the period above designated, after the entry of the judgment, decree, or order, exclusive of the time of such disability."

Now, to see the proposition which is presented in its true light, it is necessary to recur to the provision already adverted to in the act of 1789, and in the act of 1803, upon this subject, and then to consider the change which it is claimed this act of 1872 makes in the pre-existing law as to the time within which appeals in admiralty from the district court to the circuit court are proper to be made.

As before remarked, the act of 1789 required such appeals to be taken to the next term of the circuit court. That provision remained untouched from 1789 to 1803, and then, although the language employed is broader, yet according to the interpretation given to it by the supreme court in [U. S. v. Nourse] 6 Pet. [31 U. S.] 496, the act of 1803 simply re-enacted, without any change, the provision on that subject of the judiciary act of 1789.

That provision remained in force from 1789 to 1872. This is unquestionably so. It has not been controverted in the argument which has been submitted to this court.

It is claimed that by this act of 1872, in the first place, the time to appeal in the class of cases to which the one under consideration belongs, was extended to the period of one year.

No matter how small, or what the circumstances of the case may be, a party, instead of being required by way of hastening the progress of the case to its final determination, as was required by the previous laws, might rest perfectly quiet for the period of one year.

In the next place, it is equally clear, in the event of that interpretation being adopted, that in the event the party entitled to an appeal were "an infant, or non compos mentis, or imprisoned, such appeal might be taken within the periods designated after the entry of the judgment, exclusive of the term of such disability." That is to say, if there were a devolution of the right of appeal upon an infant in the progress of the litigation, or if an infant were a party ab origine and entitled to an appeal, or a person non compos mentis were entitled to an appeal in any way, or a person imprisoned; the infant, it is obvious, under that construction of the statute, would be entitled to twenty-one years, besides the year allowed to a person under no disability, less the day of his birth, and if a person entitled to an appeal should be insane and continue so for fifty or sixty years, upon being restored to sanity, no matter when, he might take an appeal, and so, too, the imprisoned. This would be the necessary consequence of that construction of the intendment.

Now, as adverse to the proposition contended for, independent of these considerations, it is to be remarked, that this provision of the act of 1872, does not repeal the provision in question of the act of 1803. There is no language in the act—nothing explicit—to that effect. If there is any such repeal, it is a repeal by implication, and the rule of law is, that where a repeal by implication is claimed, the conflict and repugnancy between the earlier and later statutes—the later working such alleged repeal—must be so clear and palpable and so irreconcilable, as to leave no room for a reasonable doubt, that it was the intendment of the legislative mind in enacting the latter law to repeal the former. I am of the opinion that this is not such a conflict and that this case is not within that character. But this act of 1872 was itself repealed by the Revised Statutes of the United States. It contained substantially both the provision in question of the re-enacting act of 1803, and also of the act of 1872, which is relied upon to have wrought the effect here insisted.

In turning to the provisions of the Revised Statutes in this connection, they will be found as follows: Section 631. "From all final decrees of a district court in causes of equity or of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, an appeal shall be allowed to the circuit court next to be held in such district, and such circuit court is required to receive, hear and determine such appeal."

Here for the first time equity cases, to be appealed from the district court to the circuit court, are placed upon the same footing with decrees in admiralty, and that is the only departure in this act from the act of 1803, otherwise the language is substantially the same. And it is a well settled rule of interpretation (see 2 Hill, 702; 24 Wend. 47) that where a prior act is abrogated by a later one, and the prior one is re-enacted by the later one, unless there be a very material change in the language, such as to exclude the reasonable construction that the subsequent act was intended merely to be put in substitution for or take the place of the prior act, it is to be held still to be substantially the same law. That rule applies here. For all the purposes of this case, this second section of the act of 1872 must be simply a re-enactment of the provision upon the same subject of the act of 1803.

Further, in this connection, the meaning of the terms, "an appeal shall be allowed to the circuit court next to be held in such district," has been settled by repeated adjudications. As that language was found in the act of 1789 and also in the act of 1803, they must

necessarily be held on authority as well as reason to have the same meaning.

Then here is this provision in the Revised Statutes, clear and explicit, viewed from any standpoint, and in any light, leaving no room for doubt, that congress by this act required as it had required by the act of 1789, and again by the act of 1803, that appeals in this class of causes—that is, appeals in admiralty from the district court to the circuit court—must be taken to the next term of the circuit court after the rendition of the decree in the district court, or an appeal cannot be taken at all.

It is held that having enacted that long continued provision in accordance with the long continued policy of the legislation of congress upon the subject, the legislature that enacted these Revised Statutes in a body, by a subsequent provision abrogated and annulled that provision in toto. That is the contention upon the other side; and that is founded upon the re-enactment into these Revised Statutes by congress of the provision, which has been remarked upon already, of the act of 1872, and which is found in section 635.

"No judgment, decree, or order of a district court shall be reviewed by a circuit court, on writ of error or appeal, unless the writ of error is sued out, or the appeal is taken within one year after the entry of such judgment, decree or order."

The same line of argument applies here that applied to this provision of the act of 1872, before its re-enactment into these Revised Statutes, and what has been said upon this subject already need not be repeated.

But there are some further remarks proper to be made beside the points and considerations that there is no express repeal, no express purpose by this provision to change that provision. It has prevailed from 1789 down to the enactment of the act of 1872, if that act made the change contended for. Here are these two sections found in their proximity, one to the other.

It seems to me in the light of all these considerations, without going over the ground that has been gone over already, viewing the subject in the light of the adjudications and rules upon the point of repeals by implication, that it is entirely incredible that congress should have meant by section 635 to repeal section 631, so far as the time for appeal is concerned, and that section contains nothing else. I say it is incredible that congress ever enacted one provision by section 631, and on the same page could have intended to enact a repealing provision—repealing by implication, section 631. The considerations which have been adverted to, and which I will not consume time by repeating, it seems to me, fully sustain this rule and exclude any other conclusion upon the points here under consideration.

But it is said that the language is, "no judgment, decree, or order of a district court" and that this term, "decree," necessarily includes decrees in admiralty, and the inference follows, if this be so, that there is a repeal by implication to the extent contended.

Firstly, I have to remark, that it is a canon of statutory construction, asserted many times in the best considered adjudications that the intent of the legislature—if it can be ascertained—constitutes the law; and in connection with that proposition, that a thing may be within the letter of the law clearly and not within its meaning, and that a thing may be without the letter of the law and yet within its meaning, and in either case the intent thus established constitutes the law; and judicial determinations to this effect are very numerous. A very well considered case upon this subject is to be found in Slater v. Cave, 3 Ohio St. 80.

Now under that view of the subject, if it were necessary I should hold that the word "decree" here, has no meaning, and that it would be the duty of the court to exclude it from consideration and to consider it inadvertently inserted as having no effect in fixing the construction of the language found in this statute. And again, see the case of U. S. v. Nourse, 6 Pet. [31 U. S. 470], which has been adverted to. The act of 1803 went in comprehensiveness beyond the act of 1789 in this: that the act of 1789 was confined in terms to decrees in admiralty. The act of 1803 uses the language, "all judgments or decrees," and yet the supreme court of the United States in the case mentioned had no hesitation in saying that the act of 1803—notwithstanding this difference—was intended to be confined by the law-making power to decrees in admiralty alone. That no judgment, technically as such, and no decrees, technically as such, was intended to be embraced in that language, except simply decrees in admiralty.

On the authority of that case, as well as other numerous adjudications, if it were necessary, I should have no hesitation in holding in the light of the entire context of these several provisions, that it was the intent of the legislature not to extend the time within which appeals in admiralty should be taken, but that having fixed the rule upon that subject, then out of abundant caution it was the intent of the legislature to provide that all other judgments or orders of the district court, or decrees, if there could be any such besides decrees in admiralty, and in equity should be prosecuted within one year from the time of the entry of the decree, and should not be prosecuted after that time.

It has been said with very great force of argument, and I confess that for the moment I was very much impressed by the suggestion, that it is a canon of interpretation, that if it be possible to do so, every word and phrase in the statute shall be taken. Such is to be presumed to be the intention of the legislature.

This may be the rule on the subject of re-

peals by implication. If the legislature had intended to make so improvident and material a change under the circumstances, it can very well be taken that in the act of 1872 a repeal of the provision in question, of the act of 1803, would have been expressly made, and that section 631, which was a re-enactment of the act of 1803, would not be found in these Revised Statutes. But it is by no means to be admitted that this latter canon of interpretation may not be applied here consistently with the maintenance of integrity to both of these provisions—631 and 635. There follows section 631, before reaching 635, this provision, "Final judgments of a district court in civil actions where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error."

Now, as regards such final judgments, there is no limitation as to the time in which they may be reviewed, so far as I am advised, except by this one year limitation in section 635. That section declares, "No judgment, decree, or order of a district court." There is material, so far as judgments are concerned, upon which this limitation can operate. Then, as it regards orders, that term is not necessarily to be considered here, but it is obvious it will occur to any one on a moment's reflection, that there may be a very great variety in the earliest proceedings which may be taken up for review. I need not remark further upon that subject. An order is not always applicable to a decree in admiralty. That, therefore, does not touch the point here under consideration. There is no difficulty, then, in giving this section 635 full operation as to judgments or orders without interfering in any way with provision 631.

Now, as to decrees. It has been said that there is no decree which can be rendered by a district court, except a decree in admiralty and a decree in certain causes in equity, and that, therefore, according to the contention which has been insisted upon, this limitation of one year applies necessarily to decrees in admiralty and decrees in equity. That, we think, is a mistaken view of the fact. I have not had the time to examine this point as thoroughly as I should have desired, if time had been allowed me.

There were, during the war, provisions in force, under which the property of rebels was forfeited, and many decrees to that effect were entered, but the act is no longer in force. There is the case of U. S. v. Miller, which I have not had time to examine, but which I recollect perfectly well. In that case a decree of forfeiture was entered. So in the case of U. S. v. Conrad, a large amount of his real estate was confiscated under the statutory provisions of the United States, touching the property of acting rebels against the government, and a decree of forfeiture was entered at New Orleans by the district court. It was brought to the supreme court of the United States [20 Wall. (87 U. S.) 92], as was the case of U. S. v. Miller [11 Wall. (78 U. S.) 268], and the decrees in both cases were reversed, but they were decrees in forfeiture, and not a decree in admiralty, or a decree in equity.

Now it is sufficient in this connection to remark generally, and without going into detail, that the subsisting revenue laws, both as they regard customs duties and as they regard internal revenue duties, so to speak, provide proceedings for forfeitures, and would not be, in the judgment of this court, a misnomer; on the contrary, as I understand the law, it would be in accordance with the settled principles of law to term the final adjudication of the court a "decree," upon the subject of forfeiture, against the respondent or against the libellant, dismissing the libel or information, as the case may be.

Now, in further illustration of that particular view of the subject, I advert to rule 22 of the supreme court of the United States, established for the government of the inferior courts of the United States in their action in this class of cases. That rule is as follows: "All informations and libels of information, upon seizure for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is. The information, or libel of information, shall also propound, in distinct articles, the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause, at the return day of the process, why the forfeiture shall not be decreed."

It is not necessary to advert to any particular legal statutory provision denouncing forfeitures in the various cases to which these provisions have been extended; it is sufficient to remark generally that they are very numerous.

I have already remarked, and repeat, that it would be no misnomer; on the contrary, it is sanctioned by the language of the rule, and it is in accordance with the settled principles of law on the subject, to hold that the final judgment of the district court in most, if not in all, cases of forfeiture would be properly characterized by terming it a "decree," the jurisdiction being limited to the district court. Now apply that reasoning to the language of this section, 635, premise—

First—Section 631 has explicitly required an appeal to be taken to the next term of the circuit court after it was rendered, as was required in the act of 1789, and of 1803 and 1872, and as required in section 631 of this act.

Further, "no judgment, decree or order." The decrees to which this language refers, or what is meant by the use of that epithet, may well be held to be decrees other than decrees in admiralty and in equity—decrees in the class of causes provided for and contemplated by the rule which has just been read. Now that harmonizes the two sections. It avoids the absurdity, or the improbability, perhaps, would express the idea more accurately, that this provision which unquestionably appears from 1789 to 1872, was intended to be abrogated, and the long period that might intervene in consequence of the disabilities prescribed in that section, should be imported into our admiralty system of jurisprudence of the United States. It cannot be done in the manner in which it is insisted upon it has been done. It would be held to have been done inconsistently with any sound or reasonable construction, either upon the ground of authority, reason or principle, all of which I know are adverse, and in my judgment conclusive against the proposition contended for. The motion to dismiss must therefore prevail, and the appeal is dismissed.

ORIENTAL, The. See Case No. 10,569a.

ORIENTAL, The (CROSBY v.). See Case No. 3,424a.

ORIENTAL, The (RUSSELL v.). See Case No. 10,569a.

ORIENT MUT. INS. CO. v. The DOLPHIN. See Cases Nos. 3,973 and 3,974.

Case No. 10,571.

The ORIFLAMME.

[1 Sawy. 176.] [1]

District Court, D. Oregon. May 16, 1870. [2]

CARRIER MAY SHOW THAT PACKAGE WAS SECRETLY DEFECTIVE—BURDEN OF PROOF.

1. Although the bill of lading states that a package was received in good order, the carrier may, nevertheless, show that it was secretly defective or insufficient.

2. The burden of proof is upon the carrier to show that a package receipted for in good order, was in fact secretly defective or insufficient; and unless he does so he is liable for the contents in case of loss.

In admiralty.

David Friedenrich, for libellants.

John H. Mitchell, for defendants.

DEADY, District Judge. This suit was commenced on November 6, 1860, to recover $400 damages for the non-delivery of certain high-proof spirits, shipped on the Oriflamme at San Francisco for the port of Portland. From the evidence, it appears that the libellants, on October 29, 1869, at San Francisco, shipped on the Oriflamme, to be delivered at Portland, two pipes of spirits, 90 per cent. proof. One of the pipes was delivered in good order. The other was found on the wharf at Portland about an hour after it had been discharged from the ship, by the drayman of the libellants, lying on its side, and leaking around its chine at one end, so as to drop freely from the lower side of the chine upon the wharf. The drayman informed the libellants of the condition the pipe was in, and one of the latter went down to the wharf with the former, and finding the pipe leaking as above stated, set it up on end, when it stopped leaking. Thereupon the libellant called the attention of the freight clerk, purser and wharfinger to the condition of the pipe, and it was arranged or agreed between the libellant and clerk and purser that the pipe should be taken to the store of the former and the amount of the loss ascertained, with a view to making a reclamation for the loss. The pipe contained 125 gallons, or what was equal to $237^{50}/_{100}$ gallons of proof spirits. At the store the contents remaining were pumped out and it was found that 91 gallons, or what was equal to $172^{90}/_{100}$ gallons of proof spirits were lost. The purser accompanied the pipe to the store and the bill for the leakage was immediately presented to him by the libellant Hillburg, but he declined to pay it, without giving any reason for not doing so.

A number of witnesses were examined on each side, as to the condition and sufficiency of the pipe, including two of the libellants, and the master, freight clerk and purser of the ship. In addition, the court, with the counsel, for the parties, examined the pipe. By the bill of lading it is admitted that this and a similar pipe were "shipped in apparent good order." The word "apparent" does not change the legal effect of the bill of lading. The receipt of the goods and giving a bill of lading therefor is prima facie evidence that they were in good order, without an explicit statement to that effect; but in any case, the admission is limited to the external or apparent condition of the package, so far as the same is open to ordinary observation. Therefore, if a loss occurs, the carrier is not precluded from showing that it proceeded from some latent cause or secret defect in the package. But under the circumstances, the burden of proof is upon the carrier, to show that the goods were not in fact in good order, and that, therefore, he is not responsible for the loss.

The pipe in question is about four feet six inches long and near three feet in diameter

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

[2] [Affirmed by circuit court; case unreported.]

at the bilge, and is evidently a second-hand one. The quarter and bilge hoops have been driven up nearly an inch, as is shown by the rust marks left upon the staves. But this only indicates that the pipe has been in use long enough to rust the hoops on the inside, and that thereby they became enlarged and loosened and required to be driven up. The staves are oak, a full inch thick, and in a sound condition. No worm holes or other defects can be seen in the pipe, and no witness testifies to having discovered any. There are two hoops at each chine. The leakage all occurred at one chine of the pipe, and the hoops at that chine had been driven or forced outwardly about a quarter of an inch for at least one half of the circumference of the pipe.

From the testimony of the officers of the ship, it appears that the pipe was rolled from the wharf on to the deck at San Francisco and then slung with ropes into the lower hold, and stowed fore and aft on a "bed," or pieces of wood laid "athwart ships," but whether there was only a single piece of wood or dunnage under each end of the pipe or more, does not appear. On top of the pipe there were stowed case goods for about five or six feet in depth. The leaking condition of the pipe was not noticed by the officers until after it was discharged at Portland, but the first officer testifies that he stowed it, that its position was not changed during the voyage, and that he noticed the deck was wet where it laid.

Bolles, the master, testified that he examined the pipe on the wharf at Portland, and that there was putty or clay packed around the chine of the head where the leak occurred, and painted over, and that the motion of the ship had started this putty or clay out and caused the leak. This is the only witness for the claimant that attempts to account for the leak in this way, but my own inspection of the pipe concurs with the testimony of the other witnesses, that there was no putty or clay, or anything of the kind, in the chine of the pipe. The freight clerk did say that in San Francisco, when he was receiving the two pipes on the wharf, he "thought once that one of the heads was cracked and covered up with mud or putty and painted over." But which head it was, and of which pipe, and whether he thinks so still, he does not testify. As he receipted for both pipes in good order, it is not to be presumed that he then thought that either head of either pipe was cracked and covered up with mud or putty.

Wormser, of Wormser Bros., of San Francisco, testified that they shipped these two pipes to libellants, and that they were full and in good condition. That they purchased them of the California Commercial & Manufacturing Company and had had them in their possession about a month, during which time they never leaked.

Bottler, a cooper called by claimant, testified that he had examined the pipe at request of one of the officers of the ship, and that he "thought the staves rather light for such a large cask, and in his opinion this was the cause of the leakage."

Hulery, a cooper called by the libellants, testified that on November 4, he examined the pipe in question, at the request of the claimants, and that it was sufficient to carry high proof spirits. That the pipe had been stowed with only two bearings, each about half way between the bilge and the chine. and that the weight of the pipe and the freight upon it had pressed the staves in at this point, where it lay upon the dunnage, and thus opened them at the chine which caused the leak; and that a pipe of this size should be stowed so as to have four bearings. He also stated that the chine hoops, at the end where the leak occurred, were not up to their place by one fourth of an inch.

The loss of the spirits is established beyond controversy, and the bill of lading shows that apparently the pipe was in good order—was a proper and sufficient vessel in which to ship the spirits. This makes a prima facie case upon which the libellants are entitled to a decree, unless the claimant overcomes it by proof to the contrary. It is not sufficient that the evidence should raise a doubt as to the sufficiency of the cask, it must establish the fact that it was not in good order. Otherwise the admission in the bill of lading must be considered as true.

The evidence before the court does not, in my judgment, establish that the pipe was insufficient in any particular, but rather the contrary. The loss must be presumed to have occurred from the negligence or unskillfulness of the carrier or his employees. It is not necessary to determine how it was done, although it is highly probable that it occurred as suggested by the witness Hulery. And here I must remark, that it does not speak very well for the diligence and care of those having charge of this package, that it should have been discharged upon the wharf and left to lie there on the bilge with the contents dripping out at the head, until it was found and set up by one of the libellants and his drayman.

Consequence, in this connection, is sought to be given to the clause in the bill of lading, whereby it is agreed that the claimant "is not accountable for leakage or breakage arising from improper or defective packages or casks." But this provision does not alter the law or affect this case. The claimant would not be liable for a loss "arising from improper or defective packages or casks" whether this clause was in the bill of lading or not. The question here is, did the leakage occur because the pipe which contained the spirits was an improper one or defective? The burden of proof is upon the claimant, to show that the loss arose from the insufficiency of the cask.

The only direct evidence in the case against the sufficiency of the cask is the expression of Bottler, that he "thought the staves were too thin for such a large cask." No reason is given for this opinion, nor did the witness attempt to state how thick the staves should be. Thick and thin are relative terms and have no particular signification unless used with reference to some admitted or established standard of thickness or thinness. Of course, upon this point I make no account of the story of the putty or mud in the chine, as that is evidently a mistake. Hulery, who impressed me with his fairness and intelligence, thought the cask a sufficient one, and stated that it was usual to ship high proof spirits to this port in such casks. Upon this question of the strength of the staves some weight ought to be given to the fact that the manufacturers in San Francisco put these spirits in this cask in the course of their business, and that the wholesale dealers shipped them in this condition, to their customers in Portland, after the pipe had been in their possession and under their eye for a month. The thickness of the staves was a matter within ordinary observation, and both the manufacturers and dealers must be presumed to have deemed the pipe sufficient in that respect.

In The Live Yankee [Case No. 8,409], the case turned upon the question, whether the shipping of the staves in the head of a wine cask whereby the contents leaked out, was the result of an insufficient or defective cask, or ill handling, or stowage by the carrier. The casks were receipted for in good order. The court decreed for the libellants, and said: "What caused the shifting of the staves, and whether the head was of proper material and workmanship to support the ordinary handling and pressure of such a voyage, may admit of difference of opinion. The respondents have not shown that there was any secret defect or insufficiency about the cask to cause this leak. By their receipt they acknowledged, that the cask was in good order when they received it. * * * Unless, then, this injury or slipping of the stave was the necessary or probable result of the insufficiency of the workmanship or material of the cask or some part of it, the libellants are entitled to recover."

So in the case at bar; the claimants having failed to show that the leakage and loss were the necessary or probable result of the insufficiency of the pipe from lack of strength, decay, or other defects, the legitimate and only conclusion is, that it occurred through the fault of the carrier, and the libellants must therefore recover.

The loss was 91 gallons, which reduced to proof spirits gives 172 90-100 gallons. This was worth at this port at the time of the non-delivery $1.50 per gallon in coin, which reduced to currency at 88 cents on the dollar makes the loss $294.71. Add to this six months interest at the legal rate ($14.73) and the sum is $309.44 for which the libellants must have a decree, with costs and expenses of suit.

[On appeal to the circuit court, the decree of this court was affirmed. Case unreported.]

Case No. 10,572.

The ORIFLAMME.

[3 Sawy. 397;[1] 2 Am. Law T. Rep. (N. S.) 381; 7 Chi. Leg. News, 347; 2 Cent. Law J. 473; 2 Int. Rev. Rec. 237.]

District Court, D. Oregon. June 30, 1875.

CARRIERS OF PASSENGERS — PASSENGER ENTITLED TO BERTH — STEERAGE PASSENGER — FREIGHT IN STEERAGE — DISFIGUREMENT OF PERSON — DAMAGES FOR.

1. Common carriers of passengers are bound to use extraordinary care and diligence, and are excused only by reason of force or pure accident.

2. An undertaking to carry a passenger in the steerage of a steamship from San Francisco to Portland includes the furnishing of such passenger with a berth, unless there is a fair understanding to the contrary.

3. A steerage passenger is entitled to the use of the steerage room to walk about or sit down in during the voyage, without the risk or inconvenience of freight therein; but if freight is stowed therein it is at the risk of the carrier, and it is his duty so to stow and secure it that no harm will be caused to the passengers by it; nor can the carrier impose any arbitrary regulation upon the passengers with a view of diminishing such risk—such as to remain in their berths during the whole voyage, or any unusual portion of it.

4. Where a number of boxes of tin were stowed in the after part of the steerage, so as to make a pile six feet in length, three feet in width, and from five to eight feet in height, without any means of preventing the top tiers from sliding off on the floor in case of rough weather; and a steerage passenger sat down by the side of said pile, and was injured by the rolling of the ship causing some of the boxes to fall upon her: *held*, that the stowing of the tin in the manner in which it was done was gross negligence, and the carrier was liable to the passenger in damages for the injury.

5. Disfigurement of the person caused by such an injury is a proper subject of damages, but in estimating them it is proper to consider the condition and circumstances of the party disfigured.

[Cited in Heddles v. Chicago & N. W. Ry. Co., 77 Wis. 231, 46 N. W. 115.]

In admiralty.

John W. Whalley and M. W. Fechheimer, for libellants.

Joseph N. Dolph, for claimant.

DEADY, District Judge. This suit is brought by the libellant, Ernestine Koch, to recover $3000 damages for injuries to her person, caused by the negligence of the respondent and claimant, the Oregon Steamship Company, while engaged in transporting her in the steerage of the steamship Oriflamme, from San Francisco to Portland. It is substantially alleged in the libel, that a number of boxes of tin were so negli-

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

gently and insecurely stowed in the steerage, that the rolling of the ship caused some of them to be thrown on the libellant, whereby she was greatly injured and disfigured.

The respondent admits the contract to carry the libellant, and that she was slightly injured during the voyage, but alleges that the boxes of tin were securely stowed in the steerage; that the libellant was furnished with a berth and directed to remain in it while crossing the San Francisco bar and during rough weather; but that the libellant left her berth and negligently sat down by said pile of tin, upon some packages of baggage belonging to the steerage passengers, when the motion of the ship caused said packages to roll from under her, and "she was thereby thrown upon the floor of the steerage and one of said packages of baggage was rolled against the libellant, and she was thereby or by being precipitated against the standard, supporting the berths, slightly bruised."

In addition to the libellant, ten witnesses from among the steerage passengers, were examined on her behalf as to circumstances of the alleged injury. They were all Germans, but had no particular acquaintance or relation with the libellant, and so far as appeared, testified fairly and without prejudice.

For the respondent three witnesses were examined in relation to such circumstances, namely, the steerage steward, the porter and the second mate. All these witnesses belong to the ship, and testify under circumstances calculated to induce them to speak as favorably for the respondent as possible. Particularly is this the case with the mate, who is responsible for the manner in which the tin was stowed, and the steerage steward, whose duty it was to provide the libellant with a berth, if possible. The steward's testimony is not consistent with itself, and is in direct conflict on material points with that of other witnesses, who appear to be credible. He states that the pile of tin was not more than eighteen inches high, and that he gave libellant a berth, which she declined to occupy. The second mate says the pile was from twenty-two and a half to twenty-five inches high, and contained four tiers of boxes. The porter's testimony is silent as to the height of the pile prior to the accident. The men who stowed the tin, under the direction of the mate, were not called by the respondent, nor their absence accounted for. Neither was the chief steward, although he appears to have been in the steerage, assisting in taking care of the libellant immediately after the accident.

The libellant and six of the steerage passengers swear positively that the pile was upwards of five feet high, and the others state the circumstances concerning the casualty, which strongly tends to prove the truth of this statement. For instance, if the pile of tin was only eighteen inches or two feet high, it is impossible that these passengers could have found the libellant on the floor, with some of the boxes of tin on top of her, as they testify they did, unless the ship had turned upside down.

I find the facts to be as follows: The libellant, a respectable German servant girl, of nineteen years of age, on March 20, 1875, at San Francisco, while emigrating from Germany to Oregon, took passage on the respondent's steamship—the Oriflamme—for this port. The family with which she lived in Germany were cabin passengers on the same vessel, and had procured her a steerage ticket for fifteen dollars.

The libellant could not speak English, and the steward in charge of the steerage could not speak German. Several of the passengers appear to have been without berths or sleeping accommodations of any kind. No berth was assigned to the libellant, nor was there any vacant one which she might have occupied, except a lower one, which was in an unfit condition.

In the afterpart of the steerage a number of boxes of tin, weighing about one hundred pounds each, were stowed against the bulkhead, dividing it from the freight-room, making a pile of about six feet across the vessel, three feet fore and aft, and from five to eight feet high. The pile was somewhat in a pyramidal form—sloping back toward the bulkhead and center from the lower tiers or base. Cleats were put around the base of the pile, to keep it from shifting bodily, but there were no means taken to keep the upper tiers in their place, or from slipping off the pile. Around the base of the pile was stowed a number of carpet-sacks, hand-trunks and bundles belonging to the steerage passengers.

The ship left the dock between ten and eleven o'clock a. m., and the libellant, at the suggestion of some of the Germans in the steerage, placed her carpet-sack at the end of the pile on the starboard side of the ship, and sat down on it. Somewhere about one o'clock of the same day, between the San Francisco bar and Point Reyes, and about five or six miles north of the bar, while the vessel was going at usual speed, with a heavy swell on her side, she rolled so far over to starboard, that several of the boxes of tin slipped off the top of the pile, and struck the libellant on her head and right shoulder and threw her forward on her face. Some of the passengers immediately ran to her assistance, when they found her stunned or fainted away, while the carpet-sacks, hand-trunks and boxes of tin were lying around her, and some of the latter on her body and legs. They immediately removed the boxes and drew her from among them. Word of the accident was at once sent on deck, and the steerage steward and the porter—the latter of whom could

speak German—came down and took charge of the girl. Her face was covered with blood from a contused cut to the bone, on the forehead, over the right eye, and about one inch in length. Her right shoulder and arm were badly bruised as were also her legs—and particularly one of her ankles. After cleansing her face and binding up the wound on her forehead, they placed her in a berth in the steerage, where she remained without any other care or attention, so far as appears, until the next day, when she was removed to the lower or servant's cabin in the after part of the vessel, and placed in a berth, where she remained until she reached Portland and left the vessel.

The medical experts are of the opinion that the bone was not injured by the wound on the forehead, although it may have been. It is not yet healed. For some reason, not satisfactorily explained by the testimony, the wound does not heal, and still suppurates. At times the libellant suffers severe pain in the head on account of it, and cannot do labor which requires her to exert herself by lifting or stooping. Still, it is not probable that any permanent injury will result from the wound. But she received a very severe shock of the brain, and came very near losing her life. The scar resulting from the wound will be permanent, and somewhat disfigure the libellant. It will be about three-quarters of an inch in length, one-third of an inch in greatest width and irregular in outline. The arm and lower limbs are recovered from the bruises.

The libellant does not appear to have been visited by the master of the ship after the accident, or to have received any medical attendance, or special care or nursing. She was lying in the berth on her back, probably in a partially comatose or delirious state, most of the time, until she reached Portland. During this time, she was visited occasionally by the stewardess and porter, but took no food or nourishment, and did not change her clothing. She was able to walk when removed from the steerage to the lower cabin, with the assistance of a person on either side, and walked to a house near by when she left the ship at Portland; but she was confined to her bed for some days afterward, during much of which time she had fever and was delirious. Within two weeks after her arrival in Portland, she went into service in a family in the city, where she still remains, but is not yet able to do a woman's work on account of her head.

Upon this state of facts, there can be no doubt as to the liability of the respondent. In Shear. & R. Neg. § 266, the rule in regard to carriers of passengers is laid down as follows: "Out of special regard for human life, and acting upon the presumption that every man who commits his person to the charge of others expects from them a higher degree of care for his bodily safety than they would bestow upon the preservation of his property, the law very wisely exacts from a carrier of passengers for hire the utmost care and skill which prudent men are accustomed to use under similar circumstances."

There does not appear to have been any special contract that the libellant was to be furnished with a berth during the voyage, nor has it been shown that there is any statute of the United States applicable to the subject. For although, on this occasion, the Oriflamme sailed from a "port in the United States," to a port "on a tributary of the Pacific Ocean," and is therefore within the letter of section 4265 of the Revised Statutes, I cannot think she was within the spirit of it or within the contemplation of congress when the act was enacted. Still, I think the undertaking to carry a passenger, either in the steerage or cabin, between the ports of San Francisco and Portland, ought to be construed to include the furnishing of such passengers with a berth, unless there was a fair understanding beforehand that the passenger was to make the voyage without it; and this is particularly so in the case of a female passenger traveling alone. The want of a statute of the United States imposing a penalty upon the carrier for not furnishing berths upon this route, does not affect the question of whether he is bound to do so by his undertaking or not. Such an omission only proves that congress has not yet seen proper to secure the performance of the contract of the carrier in this respect, by the imposition of a penalty for non-performance. And this seems to have been the theory of the matter upon which the answer of the respondent was framed, for, as has been stated, it is therein alleged that the libellant was furnished a berth.

There was then, negligence upon the part of the ship in not furnishing the libellant a berth. But it does not necessarily follow that this negligence was the cause of the injury received by the libellant. It might have happened, as it did, even if the libellant had been furnished with a berth; for she was not bound to stay in it. She had a right to be up and about in the steerage, if she was able and so inclined, and it was the duty of the respondent to keep the steerage-room a safe place for her to walk about or sit down in, so far as the utmost care and skill of a cautious, prudent person would provide under like circumstances.

Ordinarily, the steerage passengers are entitled to the use of the steerage-room, free from the risk or inconvenience of freight therein. Cases may arise in which the passengers are so few in number in proportion to the size of the room, that there can be no objection to some portion of it being used as a freight-room. But in such case,

the carrier takes the risk, and it is his duty to so stow and secure such freight that the passengers will not be injured by it; nor can he require them to obey any arbitrary regulation with a view of diminishing such risk—for instance, to remain in their berths during the whole voyage or any unusual portion of it.

It is not satisfactorily shown what number of steerage passengers were on board the Oriflamme on this voyage. The steerage steward says he thinks there was sixty or seventy of them. Nor is there any evidence as to the size of the steerage-room. But under any circumstances the stowing of this tin in the steerage, in the manner in which it was done, was gross negligence on the part of the respondent. It was the direct cause of the injury received by the libellant, without any fault or contributory negligence on her part. She had a perfect right to sit down by the side of the pile, unless she knew it was dangerous or was duly warned to avoid it. But she was not so warned, nor can it be claimed under the circumstances that she was aware or had good reason to know of the danger. Apparently it was the most convenient and secure place in the room, of which she could avail herself, to sit or lie down and be out of the way of the crowd, to whom she was a stranger.

The libellant claims $3000 damages for the injuries received and expenses incurred on account of them. For everything beyond the actual expense and loss of time incurred on account of the injury, the damages can only be estimated in a general way. In making this estimate regard must be had to the condition in life and the circumstances of the parties. Hanson v. Fowle [Case No. 6,042]. The respondent is a corporation, engaged in transporting passengers and freight between this port and San Francisco. It is the owner of the steamship Oriflamme, but of what other property, if any, does not appear. The libellant, as has been stated, is a servant girl, an immigrant from Germany, and about nineteen years of age.

I find that she is entitled to recover for expenses of her sickness and injury to her clothing, $100; for the loss of time and labor on account of the injury, $100; for the expense of employing counsel to maintain this suit to recover the damages to which she is entitled, $300; for the physical and mental pain and suffering caused by the injury and treatment of the libellant while on board the vessel after the accident, $1000; and, for the permanent disfigurement of the libellant's face from the wound on the forehead, $500. It may be that the sum of $500 is an insufficient compensation for such a blemish upon the personal appearance of the libellant. But it does not appear that the scar will affect her personal appearance, so as to make her presence offensive or painful to others. For this reason it is not likely to interfere with or prevent her from obtaining employment in her calling and sphere of life. It will in no way affect her ability to labor and earn her living. In manners and appearance, she is a plain girl, moving in an humble walk in life, and not like many others, dependent upon her beauty for her dowry or support.

Still the scar will be a permanent disfigurement of her person, for which she is entitled to some compensation. Karr v. Parks, 44 Cal. 49. In this country, at least, it is still open to every woman, however poor or humble, to obtain a secure and independent position in the community by marriage. In that matter, which is said to be the chief end of her existence, personal appearance, comeliness—is a consideration of comparative importance in the case of every daughter of Eve.

Let a decree be entered for the libellant for the sum of $2000 in lawful currency of the United States and the costs of suit.

ORIFLAMME, The. See Case No. 10,572.

Case No. 10,573.

The ORIOLE.

[Olc. 67.][1]

District Court, S. D. New York. Nov., 1844.

ADMIRALTY—LIBELLANT'S RIGHT TO DISCONTINUE PROCEEDINGS—COSTS—INQUIRY INTO DAMAGES AT INSTANCE OF CLAIMANT.

1. A libellant has the right, at any stage of the cause, voluntarily to discontinue the same; and the only penalty to which he can legally be subjected is, the payment of the costs of the proceedings.

[Cited in The Confiscation Cases, 7 Wall. (74 U. S.) 458.]

2. The court will not, upon a summary application of a claimant, inquire into damages caused him by an unfounded arrest of his ship.

3. Nor will it assume power to coerce parties into issues not raised in the pleadings filed in the cause.

In admiralty.

BETTS, District Judge. A motion is made on the part of the claimant to compel the libellant to file additional stipulations in the cause, and that the court award out of such securities an adequate indemnity to the claimant for the wrongful and injurious prosecution of this action. A libel was filed upon a bottomry bond, purporting to have been executed by the master of the brig, in a foreign port; and she was arrested thereon on or about the 7th of February last. On the 6th of March, the libellant caused to be entered on the rule book in court an order discontinuing the suit, and directing the

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[1] [Reported by Edward R. Olcott, Esq.]

vessel to be discharged from arrest. Notice of such discontinuance and discharge was served the same day by the proctor of the libellant on the proctor of the claimant, with an offer to pay the claimant's costs, as soon as they should be taxed. This offer, the proctor deposes, he has been and is now ready to fulfil, but that the costs have never been taxed or presented by the proctor of the claimant.

The claimant insists that the libellant cannot voluntarily withdraw from the court of admiralty after a proceeding in rem, and that the court will retain the cause until full justice can be rendered the claimant for the unfounded and illegal attachment of his property, and determine the amount of damage sustained by him in being deprived of the possession and employment of the brig by means of the arrest. It is argued, that there is a fundamental difference in this respect between the functions of an admiralty court, and those of courts of law or equity. In the latter it is not denied that the prosecuting party may relinquish his suit at any stage of it, and withdraw from court at his own option, and without other liability to his adversary than the payment of taxable costs which have accrued up to the time of the discontinuance. 1 Tidd. Prac. 628; Grah. Prac. 494; 1 Cow. 47. No authority is produced establishing the distinction claimed in respect to admiralty suits, and I do not discover any principle upon which it can be maintained. The immunity of the respective parties, pendente lite, in respect to the subject matter of the suit and the expenses of the action, may be secured with more promptitude and efficiency in a maritime court than at law; but the jurisdiction exercised before either tribunal, in that behalf, springs from a common principle, and is directed to the same end. The stipulations in the one case are exacted, enlarged or modified by the summary action of the court, but only for the same object that security for costs are coerced in the other, that the successful litigant may be assured of the costs that may be ultimately awarded him.

When a litigation is urged through all its stages, and the final decree in an admiralty court dismisses the libel, discharges the respondent from arrest, and restores the property seized, nothing is adjudged affirmatively to the successful claimant other than his costs and expenses. So, if the action is defeated at the instance of the respondent at any point of its progress, or at its inception, because of informality or insufficiency of its processes, the decree still is simply that the property be restored, or the respondent freed from arrest, and that the libellant or his stipulators pay the costs specifically named, or those to be taxed, according to the standing rates of the court. And upon what reason can a different principle be introduced and enforced, when the actor comes into court and voluntarily desists from further pursuing his demand? No doctrine of the law is indicated which would render his liability, in such a case, greater than if he had persisted in an unfounded suit, so long as a standing in court was allowed him. In the latter case, it is clear the decree against him is for nothing beyond a fair indemnity for expenses in the name of costs, and is never enlarged to a peremptory detention of the promovent in court, to abide a trial upon counter-claims preferred against him by the adverse party, and it seems to me that such is the limit of the remedy against him in this behalf, when he relinquishes and abandons his action without bringing it to the judgment of the court. Moreover, what would be the method or modus operandi employed by the court in exercising the jurisdiction invoked in this case?

The claimant alleges, as one gravamen, that by the arrest of his vessel he has lost the profits and advantage of a charter-party agreed for. How is the fact to be ascertained by this court, and if established, on what mode of proceeding is the amount of damages to be determined? The court would not act in these independent matters summarily, or on the depositions of the demandant, and it would have no power to coerce both parties into issues and litigations not embraced in the action instituted. Costs are not a constituent element of an action. They never become a point of issue and contestation on trial. They did not even exist at common law as incidents of a suit, but are creatures of statute, or else in those tribunals possessing power to deal with the claims of suitors ex conscientia, together with their legal rights, are employed as a means of measuring out justice between litigants in relation to expenditures caused by the litigation. Kneass v. Schuylkill Bank [Case No. 7,876]. Admiralty, which uses a freer discretion than chancery in this particular, although, as a general rule, it gives costs to the party prevailing in the action, will still modify, divide or withhold them in correspondence with the intrinsic justice of the cause, irrespective of the ultimate judgment on the issues. The Partridge, 1 Hagg. Adm. 81; 1 Hagg. Ecc. 210; Read v. Harris, 3 Dall. [3 U. S.] 34; Penhallow v. Doane, Betts, Adm. 120. But I find no recognised usages in these courts sanctioning the notion that a libellant can be restrained from withdrawing his suit, and be, by the power of the court, converted into a defendant, and be proceeded against in that capacity for the adjustment of such a demand against him on the part of the respondent.

The motion must be denied.

Case No. 10,574.

The ORIOLE.

[1 Spr. 31.] [1]

District Court, D. Massachusetts. July, 1842.

CONDITIONAL SALE OF VESSEL—POSSESSION—FAILURE OF CONDITION.

1. Where there is a contract for the sale of the vessel and the purchaser is to have a title upon the performance of a condition at a future day, and in the meantime to have possession, if the condition be not performed, the original owner is entitled to the possession.

2. In a suit for such possession it is not necessary to go into all the equities, but only to ascertain the legal title.

In admiralty.

R. H. Dana, Jr., for libellant.

B. F. Hallett, for respondent.

SPRAGUE, District Judge. This is a suit brought by Albert H. Brown, for the possession of the schooner Oriole, to which Ezra C. Andrews sets up an adverse claim. Prior to the 2d November, 1841, Brown was the undoubted owner of this vessel. On that day he entered into an indenture with Andrews with reference to the sale of her, in which Andrews bound himself to do certain acts. Upon the construction of this instrument, and the acts of the parties under it, depends the decision of this cause.

It is contended for the respondent, that this instrument was an absolute sale. This is denied by the libellant, for whom it is also contended that a bill of sale is necessary in admiralty to pass property in a ship. The common law courts of this state have gone far toward holding that the entire property in a vessel may pass without a bill of sale, but courts of admiralty have required it. I need not, however, give an opinion on that point, as this instrument clearly was not intended to convey the absolute property. There are no words of conveyance. Its fair interpretation is, that Andrews should do certain things, upon the performance of which he was to have the legal title, which, in the mean time, was to remain in Brown, as his security.

The legal property then being in Brown, the question arises, has Andrews a special right of possession? I agree with the respondent's counsel, that under this contract he had. But how long was it to last, and how was it to be terminated? His possession was for the purposes of performing his contract, and upon the performance Andrews was to have the legal title added to his possession. Upon the breach of any of the conditions, Brown could divest Andrews of the possession. The next question then, is, has there been a breach of the conditions? (The judge then went through the different conditions, and decided that some of them had been broken.) This was sufficient, especially after notice, to determine the right of possession, without going into the question, as to the other conditions. Brown had therefore a right to resume the possession. I express no opinion as to the forfeiture of the part of the purchase-money paid by the respondent, or the equities between the parties, of which there are many, and which induced me to step somewhat aside, perhaps, from what is expected of the court, in requesting that the whole matter might be referred. But these equities cannot come in to control the present case in admiralty, and must be settled elsewhere.

In the case of The Warrior, 2 Dod. 288, cited at the bar, the court held that there was so much doubt as to the legal title, that it could not decree possession, and refused to interfere. In this case I cannot say that there is such doubt in my mind as to the title, as should induce a court of admiralty to refuse its aid.

Decree of possession to the libellant, with costs.

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

Case No. 10,575.

The ORION.

[4 Wkly. Law Gaz. 327.]

District Court, S. D. New York. Oct., 1859.

SLAVE TRADE—EVIDENCE TO SUPPORT CONDEMNATION.

[A decree condemning a vessel for being engaged in the slave trade is supported by evidence that she was captured at the mouth of the Congo river carrying less than a half cargo of miscellaneous goods apparently selected with a view to traffic in slaves, or to be used as provisions for them, which cargo was excessively and wrongly invoiced at New York where the vessel was chartered at an excessive rate, and where the entire crew was changed on the day of sailing, and that the claimant could give no adequate explanation for the use of the large quantity of water casks and coppers carried.]

[This was a libel of information filed against the bark Orion charged with being engaged in the slave trade.]

HALL, District Judge. The libel of information in the case alleges the seizure of the Orion, her tackle, apparel, furniture and lading, on the 21st April, 1856, on the high seas, on the western coast of Africa, near the mouth of the Congo river, by the United States sloop-of-war Marion, commander, Thomas W. Brent; that said bark was therefore, to wit, on the 20th day of January, 1859, equipped, loaded, or otherwise prepared by a citizen of the United States, at a port of New York, for the purpose of carrying on a trade or traffic, in slaves to some foreign kingdom, or for the purpose of procuring from some foreign kingdom, place or country, inhabitants thereof, to be transported to some foreign country to be sold or disposed of as slaves, contrary to the act of congress, approved March 22, 1794 [1 Stat. 347], entitled "An act to pro-

hibit the carrying on of the slave-trade from the United States to any foreign place or country." The libel also makes similar allegations in regard to the vessel being fitted, equipped, loaded and prepared at New York, for the purpose of procuring negroes, mulattoes or persons of color from some foreign country, to be transported to some port or place to be held, sold, or otherwise disposed of as slaves, or to be held to service or labor contrary to the act of congress, approved April 30, 1818 [3 Stat. 450], and entitled "An act in addition to an act to prohibit the introduction (importation) of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, 1808, and to repeal certain parts of the same.

The bark is claimed by H. S. Vining, and the lading by J. DeMiranda, by the agent, T. P. Canhao, and the question in the case is whether the vessel was fitted out and prepared for the slave-trade in the port of New York, as alleged in the libel. This question depends in this case wholly upon circumstantial evidence. Indeed, it must in all cases of this kind depend, mainly upon that kind of testimony, unless the vessel has actually taken slaves on board. The bark is a vessel of about 450 tons burden, built in 1846. A charter party found among her papers, executed by Vining to Miranda, bearing date Jan. 6, 1859, shows that she was chartered for a voyage to the west coast of Africa and back to New York, for the sum of $850 per calendar month. A bill of lading found on board, dated 19th January, 1859, appears to show the shipment, by Miranda, of a miscellaneous or assorted cargo, consigned to Frisbad Pinto Canhao, and to be delivered at "Porta da Leubo and a market," and the goods, etc., so shipped are invoiced in an invoice signed by Miranda at $14,442.14, including commissions and charges. They were, however, appraised, by appraisers, agreed to by the parties and appointed by the court at $5,923.11. A very small portion of the provisions, etc., might have been consumed by the crew. This was a small cargo, the officer of the navy who searched her, and was sent home in her as one of the officers in charge after her seizure, stating she had from one-third to one-half a cargo, and the manifest presented at the custom-house stating that a portion of the 163 casks on board were filled with sea water for ballast.

On the 20th of January, 1859, she was registered anew in the name of Vining as the sole owner, as on a change of owners—John E. Hannah being the master named in the register. On the same 20th January, 1859, the crew-list and manifest were sworn to at the custom-house by Hannah as master, the crew named being the same as appeared upon shipping articles by which the crew agreed to render themselves on board at 11 a. m. of that day. A copy of the shipping articles, which was certified by the collector on the same 20th January, 1859, is produced, annexed to which is a certificate of John Edwards, notary public, dated the same 20th January, 1859, certifying that twelve of such crew (being the whole crew, with the exception of the mate) left the Orion at the port of New York during the interlapse of clearing and sailing, and that twelve others were shipped in their stead. Ten of these last named twelve seem to have signed the shipping articles by their marks, and opposite to the names of the three others signed to the same articles is entered the word "deserted." The bark, though a small vessel, had two decks—the spar deck and a half between deck—a second deck commencing aft and coming forward to the main hatch, and another commencing forward and running back to the forecastle hatch, while between these half decks there are beams running across the vessel three or four feet apart, on which plank could be laid to complete this deck, throughout the vessel. On these half decks no cargo was stowed.

In the vessel, invoiced and manifested as part of the cargo, was found about 17,000 feet of lumber, which could have been used to complete the deck; 163 casks, most of them apparently intended for water-casks, and averaging over 130 gallons each, and invoiced at 34,540 gallons; 150 buckets, without handles; 200 barrels navy bread; 46 tierces containing about 29,000 pounds of inferior rice; 12 cases containing 240 muskets; about 300 feet in length of hoop iron, not on manifest or bill of lading, not in the invoice; a large quantity of medicines, consisting of Epsom salts, cantharides plaster, simple cereate, and powdered mustard. Also, a half barrel of flax-seed, a quantity of fire-wood, and about a ton of coal, two copper boilers, or stills, holding some 60 gallons each, a quantity of beef, pork, and beans, and about 100 bottles of disinfecting fluid, or chloride of soda in solution. Besides these, the cargo was made up principally of cheap shirtings and sheetings, cheap stripes and drills, cheap prints, cotton handkerchiefs, very cheap earthenware, including large quantities of bowls and soup plates, 24,000 gallons of rum, over 50 dozen of spear-point knives, &c. The vessel sailed from New-York direct to the mouth of the Congo river, and soon after the arrival there, was boarded by the officers of a British vessel of war, and detained for a time as suspected of being intended for or engaged in the slave-trade; and the master, as appears by the log-book, there proposed to abandon the vessel as a prize to this British cruiser. This was opposed by the mate and crew, who declared that they were not conscious of having done anything illegal, and that if it were necessary to give up the ship, they would prefer being given up to a ship of their own nation. The mate

then sought the Marion, and the Orion was searched, and sent home for condemnation.

The counsel of the claimants contend that the articles found on board are proper articles of legal trade, and that the proofs are not sufficient to warrant the condemnation. It is true that they might be articles of legal trade, but all the circumstances are suspicious. The almost entire change of crew on the 20th of January; the character of the cargo, apparently selected with a view to the traffic of slaves, or to be used as provisions for them; the extraordinary quantity of water-casks under cover of their being intended for palm-oil, though the vessel was apparently seeking a part of the country where the trade is not in palm oil; the antecedents of the supercargo sent with the vessel, who was a Portuguese, who by his own account, had had previous experience both on the coast of Africa and at Rio Janeiro; the sailing of this small vessel under a charter-party at $850 per month with but one-third or one-half of the cargo; and other circumstances convince us she was intended and fitted out for the slave-trade. The ordering of the casks of Vining, the owner, though shipped as part of the cargo owned by Miranda, the charterer, is, perhaps, not a fact of much significance, but the copper boilers which were tinned inside, and were certainly well calculated for use as the coppers of a slave vessel, is quite significant. It is true they were ordered to be made under the names of rum-stills and caps, but there does not appear to be much, or indeed any reason to suppose they were intended for any such purpose. For that purpose worms were necessary to be added, and as none were ordered with them, the manufacturer called Miranda's attention to the fact, and was told by Miranda that he had the worms for them. No worms were shipped with them, no evidence was given that there were any owned by Miranda, and I cannot but think that the calling of these boilers rumstills, and having them made in the form of a French still, and the statement to the manufacturer that he had the worms for them, was only intended to cover up the real motive in procuring them.

The exculpatory evidence is not of much weight, unless credit is given to the testimony of Canhao, the supercargo, who put in, as agent, the claim of Miranda for the cargo, and whose deposition was read upon the hearing. The deposition of the mate, if entirely reliable, is not of much importance, as Canhao was undoubtedly the person to whom the real object of the voyage was best known, and probably Canhao and the master were the only persons who knew that the vessel was intended to be employed in the slave-trade, if such was the fact. Canhao's testimony is not, in my judgment, to be relied upon. If he had been produced and examined and cross-examined in court, I might have received a different impression, but I do not think his testimony is sufficient to exonerate the vessel, and cargo, especially as Vining and Miranda, each of whom was a competent witness in respect to the property claimed by the other, have not been produced or offered as witnesses, and Miranda did not demur to the answer put in in his behalf by Canhao.

I am of the opinion, therefore, that there must be a decree of condemnation with costs.

ORION STEAM NAV. CO. (ENGLISH v.).
See Cases Nos. 4,490 and 4,490a.

Case No. 10,576.

The ORIZABA.

[1 Deady, 196.][1]

District Court, D. Oregon. Nov., 1866.

In admiralty.

Joseph N. Dolph, for libellant.

William M. Strong, for claimant.

DEADY, District Judge. The circumstances of this case are similar to those of The Pacific [Case No. 10,645]. Practically, they were argued and submitted together, and the same order is made in this as in that.

Case No. 10,577.

ORME v. CLARKE et al.

[1 Hayw. & H. 114.][2]

Circuit Court, District of Columbia. Dec. 1, 1842.

TO APPOINT A TRUSTEE.

On the death of trustees in a deed of trust leaving infant heirs, the court, on application of the owner of the property conveyed in trust, will order the guardian of said heirs, duly appointed, to execute a deed releasing to the said owner the property so conveyed.

The complainant is the owner of a lot in the city of Washington, District of Columbia, and conveyed in trust the said lot to Edward Ingle and Seth I. Todd to secure the payment of a sum of money. The debt was paid, and he prays that a trustee be appointed to release the trust. He states that Edward Ingle, one of the trustees, died and left Seth I. Todd, the survivor, who also died, leaving infant heirs.

Joseph S. Clarke, the cestui que trust, certified to the payment of the debt.

I. B. H. Smith, for complainant.

P. R. Fendall, for defendants.

THE COURT decreed as follows: This cause coming on to be heard by consent of parties on the bill and exhibits of the complainant, and the answers of Joseph S. Clarke, and of Ellen G. Todd and Thomas G. Todd,

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

[2] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

by their guardian, Thomas H. Gillis, for that purpose duly appointed under authority of a commission issuing out of this court, and in due form executed and returned, and the same having been heard and considered, it is this first day of December, 1842, by the court ordered and decreed, that all the right, title, interest and estate of the said defendants, and all of them, in and to the piece and parcel of land * * * be conveyed and released to the said William C. Orme, his heirs and assigns, and for that purpose that William Ward be, and is hereby appointed guardian of said infant defendants, to execute, acknowledge and deliver as such guardian a sufficient deed therefor, and in default of such conveyance being duly executed on or before the first Monday in January, 1843, that this decree be recorded among the said records of Washington county, to operate as a conveyance according to the act of assembly of Maryland in such case made and provided.

Case No. 10,578.

ORME v. PRATT.

[4 Cranch, C. C. 124.] [1]

Circuit Court, District of Columbia. Dec. Term, 1830.

NEW TRIAL—JUROR RELATED TO PLAINTIFF.

The court will not grant a new trial because one of the jurors was brother-in-law of the plaintiff.

[Cited in Brewer v. Jacobs, 22 Fed. 239.]

Assumpsit. Verdict for plaintiff, $99.75.

C. Cox, for plaintiff.

Motion by R. S. Coxe, for defendant [Thomas G. Pratt], for a new trial, because one of the jurors was brother-in-law of the plaintiff [Jeremiah Orme], a fact not known to the defendant, who was not personally present at the trial, nor to his counsel. The motion was supported by affidavits of the fact. The other eleven jurors made affidavit that the jury was unanimous in their verdict, immediately after their retirement, and that the other juror did not say or do any thing to influence the verdict.

Motion overruled.

ORME (REINHART v.). See Case No. 11,682.

ORME (STETTINIUS v.). See Case No. 13,-386.

Case No. 10,579.

ORMSBEE v. WOOD.

[3 Fish. Pat. Cas. 372.] [2]

Circuit Court, S. D. New York. Jan., 1868.

PATENTS—CONSTRUCTION OF CLAIM—INFRINGEMENT.

The invention described in the letters patent granted to Albert S. Southworth, April 10, 1855, reissued September 25, 1860, consists in bringing successively into the field of the lens of a camera, the different portions of a single plate, or several smaller plates.

This was a bill in equity filed [by Marcus Ormsbee against John Wood] to restrain the defendant from infringing letters patent for a "plate holder for cameras," granted to Albert S. Southworth, April 10, 1855, [No. 12,700], reissued September 25, 1860 [No. 1,049], assigned to Simon Wing and complainant December 8, 1860. On the same day, the exclusive right for the state of New York, was conveyed by Wing to complainant. The invention is fully described in the case of Wing v. Richardson [Case No. 17,869].

W. J. A. Fuller, for complainant.

N. Appleton, for defendant.

BLATCHFORD, District Judge. This is a final hearing on pleadings and proofs on a bill filed upon letters patent reissued to Albert S. Southworth, of Boston, Massachusetts, September 25, 1860, for a "plate holder for cameras." The original patent was issued to Southworth as inventor, April 10, 1855. The reissued patent was assigned by Southworth to Simon Wing and the plaintiff, December 8, 1860, and on the same day Wing conveyed to the plaintiff the exclusive right under the same for the city of New York. The alleged infringement took place in the city of New York. The invention covers what is commonly known in the photographic art as the multiplying camera or plate holder. Before this invention, it was customary to use a separate plate for each impression; the plate being removed from the camera and replaced by another when several impressions of the same objects were to be taken. This invention consists in bringing successively into the field of the lens of the camera the different portions of a single plate, or several smaller plates. This is done by a peculiar arrangement of a frame in which the plate holder is permitted to slide, the position of the plate holder being definitely indicated to the operator so that he can quickly and accurately adjust the plate or plates. The claim of the reissued patent is: "Bringing the different portions of a single plate, or several smaller plates, successively into the field of the lens of the camera, substantially in the manner and for the purpose specified."

Various defenses are set up in the answer of the defendant, but no testimony has been taken to sustain them; they are substantially the same defenses that were set up in the suit in equity of Wing v. Richardson [Case No. 17,869], decided in the circuit court of the United States for the district of Massachusetts, in June, 1865, by Mr. Justice Clifford, which was a bill founded on the same reissued patent. In that case it was decided: 1. That the pat-

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

[2] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

entee invented the improvement claimed. 2. That the reissued patent was for the same invention as that described in the original patent. 3. That the defense of abandonment was not proved. 4. That the patent was not open to objections as patenting a principle or result. 5. That the patentee was the first inventor of the improvement.

The infringement in the present case is proved.

There must be a decree for a perpetual injunction in accordance with the prayer of the bill, and for a reference to a master to take and state an account of the profits derived by the defendant from the infringement.

[For other cases involving this patent, see Wing v. Schoonmaker, Case No. 17,870; Wing v. Richardson, Id. 17,869; Wing v. Anthony, 106 U. S. 142, 1 Sup. Ct. 93; Wing v. Warren, Case No. 17,871.]

Case No. 10,580.

ORMSBY v. TINGEY.

[2 Cranch, C. C. 128.][1]

Circuit Court, District of Columbia. Dec. Term, 1816.

EVIDENCE—COPY FROM RECORDS—DEED OF PERSONAL PROPERTY.

A copy, from the records, of a deed of personal property, which derives no validity from being recorded, is not competent evidence.

Assumpsit, against the defendant, as indorser of T. Craven's note.

Mr. Jones, for plaintiff, offered to read, in evidence, a copy from the record of a deed of personal property, from Craven to Tingey, in trust, to secure Tingey; the property to remain in the possession of Craven until Tingey should be liable, &c. The deed was not recorded within twenty days, as required by Act Md. 1729, c. 8, § 5.

THE COURT decided that, inasmuch as the deed could not obtain validity by being recorded after the twenty days, a copy from the record was not competent evidence.

ORMSBY (UNITED STATES v.). See Case No. 15,969.

Case No. 10,581.

In re ORNE.

[1 Ben. 361;[2] Bankr. Reg. Supp. 13; 1 N. B. R. 57; 6 Int. Rev. Rec. 84; 14 Pittsb. Leg. J. 613.]

District Court, S. D. New York. Sept. 2, 1867.

AMOUNT OF DEBT—INTEREST—COUNTER CLAIM.

1. Where, at an adjourned meeting of creditors, the bankrupt objected to the proof of a debt of a creditor, and requested the register to allow the creditor to vote for assignee, only in respect of a portion of his claim, because (1) interest was included to make up the amount, and (2) part of the claim was on a draft given on a purchase of lumber by the bankrupt, which was never delivered by the creditor, so that the consideration of the draft entirely failed, and the bankrupt was also entitled to damages, which should be set off against the rest of the creditor's claim, and his debt should only be allowed for the remainder; and where the bankrupt offered himself as a witness to prove his allegations, but the register refused to hear his evidence or to reduce the amount of the claim, and certified the question to the court: *Held*, that, under the provisions of the nineteenth section of the bankruptcy act [of 1867 (14 Stat. 525)], if a debt is due from the bankrupt, so as to bear interest, before the adjudication in bankruptcy, the amount of the debt to be proved is to be ascertained, by adding the interest until the day of the adjudication; and that, if the debt becomes due and payable, without interest, after the adjudication, its amount is to be ascertained by taking off interest from the day of adjudication until the day it will become payable.

[Cited in Re Haake, Case No. 5,883.]

2. The register erred in refusing to receive evidence that the consideration for the draft had entirely failed.

3. As the claim on the draft was contested, the register ought, before going further, to investigate the question raised as to the consideration, with a view of postponing the proof of the claim if necessary, as required by the twenty-second section.

4. The claim for damages on the contract for the purchase of lumber, ought to have been stated in the bankrupt's schedule of property.

5. That claim, being unliquidated, cannot be applied as a set off against any part of the creditor's claim, and must be wholly disregarded in the proceedings for the choice of an assignee. Whether, if put into the shape of a debt against the creditor, it would fall within the purview of section 20 of the act, quere.

In this case, at an adjourned meeting of the creditors of the bankrupt [Freeman Orne], held August 27th, 1867, for the proof of debts and the choice of an assignee, objections were raised by the bankrupt to a proof of debt by Benjamin Pope & Co. The proof was filed with the register, August 7th, 1867, the amount of the claim being $11,512.34, and the consideration an account current for goods, a check, and a draft, and interest on the three items. The bankrupt requested the register to strike out of the amount of the claim all but $2,000, which is the amount of the debt set out in the schedules filed with the bankrupt's petition, as due to Benjamin Pope & Co., and to admit that firm to the right to vote for an assignee only to the amount of $2,000. The grounds assigned for this request, were as follows: (1) That, upon the face of the claim, as stated, there was included interest upon the claim to the amount of $1,798.18, which interest was added to the debt to make up the amount proved, and that interest on a matured debt cannot be included in the amount proved against a bankrupt's estate; (2) that the draft, for the amount of $6,706.29, which formed a part of the claim, was given for the purchase of lumber contracted to be de-

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

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

livered by the creditors to the bankrupt; that the lumber was not delivered in pursuance of the contract, nor accepted by the bankrupt, that thus the consideration of the draft had entirely failed; and that, by reason of the failure of the creditors to fulfil the contract, the bankrupt was entitled to damages, which set off against that portion of the claim which was in open account, would reduce the indebtedness of the bankrupt to Pope & Co. to $2,000. The bankrupt offered to show these facts by his own examination, under oath, and claimed that the creditors should be allowed to prove their claim only to the amount of $2,000, or that the register should, under section twenty-three of the bankruptcy act, postpone proof of the claim until the assignee should be chosen. The register refused to strike out the claim and reduce it as requested, or to admit Pope & Co. to vote for an assignee only to the amount of $2,000 of the claim proved. Thereupon, the register, at the request of the bankrupt, adjourned the question into court for decision, and certified the foregoing statement. The register stated, in his certificate, that, in his opinion, the proof of debt was sufficient to place Pope & Co. on the list of voters for assignee, to the full amount claimed, and that the question as to whether the firm was entitled to interest on the full amount of the claims could properly come up on a future occasion and in another manner. The register also reported, that the claim of Pope & Co. was not stated in Schedule A to the debtor's petition, at its full amount, with a statement in Schedule B, of the amount of the set-off claimed, as directed by the notes of instruction on form 3 in Schedule A, established by the supreme court, but was set out as $2,000 "for merchandise."

BLATCHFORD, District Judge. In regard to the interest on the items of the claim, included in the amount proved, I do not understand that the bankrupt claims that the items do not properly carry interest, or that interest would not be recoverable on the principal sums of the items, if the claims were to be put in suit against the bankrupt. The claim merely is, that interest on a matured debt cannot be included in the amount proved against the bankrupt's estate. The nineteenth section of the bankruptcy act provides, "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt." Under this provision when a debt is in existence at the time of the adjudication of bankruptcy, but is not payable until afterwards, and the debt is one not bearing interest or not running with interest, that is, is one on which, when it becomes payable, there will be payable merely the amount of the debt, without an additional sum for interest, in such case, the debt may be proved for the amount of its worth or value at the time of the adjudication of bankruptcy, which worth or value is to be arrived at, by deducting from the amount of the debt the amount of the interest on it, from the time of the adjudication of the bankruptcy until the time it becomes payable. The time of the adjudication of bankruptcy is taken, by the statute, as the decisive time. The debt must exist at that time or it cannot be proved. If it is created afterwards it cannot be proved. If it exists then, but is not payable till afterwards, and is not a debt running with interest, that is, if, for instance, it is a promissory note for so many dollars, given before the adjudication of bankruptcy, but not maturing till afterwards, then a rebate must be made from its amount, of the interest on that amount, from the time of the adjudication of bankruptcy to the time of the maturity of the note. It is equally clear that, where the debt is one, not only in existence at the time of the adjudication of bankruptcy, but payable before that time, and running with interest, by its terms or character, so that the obligation of the debtor in regard to the debt will not be wholly discharged without payment of such interest as well as the principal, the statute intends that the debt shall be proved for the amount of the principal and of the interest thereon to the time of the adjudication of bankruptcy. In the present case, as the items composing the claim were all of them due and payable by the bankrupt at the time of the adjudication of bankruptcy, and, as interest was running on all of them at that time, it was proper for the creditors to include, in the amount proved, interest to that time. Interest was included to August 7th, 1867. Whether that was the time of the adjudication of bankruptcy is not stated in the certificate. If, inadvertently, the interest has been computed for a wrong period, the register has, in the proof of debt, the means of correcting the error, and should allow the interest for the proper period. By taking the time of the adjudication of bankruptcy as the time for stating the then present worth or value of the various debts proved, equal and exact justice is done to all creditors whose debts exist at that time, although they may have been or may be payable at various times, and may carry different rates of interest.

The objection taken by the bankrupt in regard to the draft for $6,706.29, consists of two branches: (1) A claim that the consideration of the draft has entirely failed, and, consequently, that nothing is due on the draft; (2) a claim that Pope & Co. are indebted to the bankrupt in an unliquidated sum of money, for damages for breach of contract, and that such sum must be set off

against that portion of the claim of Pope & Co. which is in open account.

As regards the first branch, the twenty-third section provides that, "when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity or of the rights of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen." The sixth rule of this court provides that, "if the register entertains doubts of the validity of any claim, or of the right of a creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone proof of the claim until the assignee is chosen." The twenty-second section of the act provides, that "the court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering, or who has made, proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake." Under the fourth section of the act, and the fifth rule of the general orders in bankruptcy, the register has power to take this evidence, in regard to a debt or claim proved or sought to be proved. Now, in this case, it appears that the bankrupt offered himself for examination, to show that the consideration of the draft had entirely failed; and I understand, from the certificate, that the register refused to receive evidence on the question of the failure of the consideration of the draft. In this the register erred. The purport of the twenty-third section is, that it is the duty of the register, when he entertains doubts of the validity of a claim or of the right of a creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, to postpone the proof of the claim until the assignee is chosen. When a question is raised as to the validity of a claim, and evidence is offered in regard to it, it is impossible for the register to come to a proper conclusion as to whether proof of the claim should be postponed, without hearing the evidence offered, and then, if necessary, going on to exercise the power of investigation conferred by the twenty-second section. The register ought, therefore, before proceeding further in the case, to investigate the question raised as to the consideration of the draft, and not allow the draft as a debt, merely because the creditor has sworn to it, if evidence is offered to impugn it.

In regard to the claim for damages set up and claimed as a set-off against the open account, it ought, according to form three, in Schedule A to the petition, to have been stated in the bankrupt's schedule of property. The claim is an asset of the bankrupt, of which the assignee, when appointed, will take cognizance, and it is not a claim which can, at this stage of the proceedings, be used by way of set-off against any part of the claims of Pope & Co. It is a wholly unliquidated claim, and its amount cannot now be arrived at. When it is put into the shape of a debt against Pope & Co., it may perhaps, then fall within the purview of section 20 of the act, which provides, "that, in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid." It is a claim which must be wholly disregarded in the proceedings for the choice of an assignee.

[This case was subsequently heard upon the question of the right of the register to order an amendment to the bankrupt's schedule. Case No. 10,582.]

Case No. 10,582.

In re ORNE.

[1 Ben. 420;[1] 1 N. B. R. 79; Bankr. Reg. Supp. 18; 6 Int. Rev. Rec. 116.]

District Court, S. D. New York. Sept. 23, 1867.

BANKRUPTCY — DUTY OF REGISTER — AMENDMENT OF SCHEDULES—ABBREVIATIONS—NOTES AND JUDGMENTS.

1. Registers in bankruptcy are charged with the general supervision and care of cases referred to them.

2. If, at any stage of proceedings before him, a register determines that a bankrupt's schedules are insufficient, he may of his own motion order them to be amended.

[Cited in Re Clark, Case No. 2,808.]

3. Where the register makes an order that a bankrupt's schedule be amended, the order ought to specify particularly the respects in which it is to be amended.

[Cited in Re Heller, Case No. 6,339.]

4. It is necessary for a bankrupt to state in his schedules, whether or not any note has been given, or any judgment rendered, for every debt, and whether or not any person is liable with the debtor, as a partner or joint contractor.

[Cited in Re Heller, Case No. 6,339.]

5. What is a sufficient statement of those facts is a matter of discretion with the register.

6. The use of dots or contractions, in the schedules, to indicate a repetition of words previously used, is forbidden by rule 14 of the general orders in bankruptcy.

[In the matter of Freeman Orne, a bankrupt. This case was first heard upon proof of debt of Pope & Co., and as to certain offsets to the same claimed by the bankrupt. See Case No. 10,581.]

BLATCHFORD, District Judge. In this case, the petition of the debtor, with sched-

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

ules attached, was filed on the 27th of June. On the 29th of June, the register certified the papers to be correct, and adjudged the petitioner a bankrupt, and a warrant was issued to the marshal, returnable August 7th. On that day a meeting of creditors was held, which was adjourned from time to time, until the 4th of September, when an assignee was appointed. In schedule A to the petition, there was no averment whether the bankrupt contracted the debts set forth individually, or as copartner. In many cases, it was stated in such schedule that judgment had been obtained, by merely inserting the word "judgment" in the last column of schedule A, No. 3; and in many cases in that form there was no statement affirmatively or negatively, as to judgments or notes. In the same form there was used, in many cases, the contraction "do. do.," or the reference (" " " "), as applied to language and words used before and above such marks.

When the proofs of debt came to be made and filed, it was found that in two cases (both on the debtor's schedules A) the proof was against the bankrupt jointly with other persons, his partners. This was the first knowledge the register had of any partnership of the bankrupt.

In view of this fact of partnership, and the contractions and references referred to above, the register made an order, on the 7th of September, as follows: "It appearing in the course of proceeding, in this entitled matter, that the schedules heretofore filed by the petitioner, and upon which an adjudication of bankruptcy was made, are incorrect and deficient, and do not meet the requirements of the law, it is ordered that the said Freeman Orne make and file a properly verified statement of his unsecured debts, which shall be as an amendment to schedule A, No. 3, heretofore filed, which amendment to the said schedule shall set forth fully the various facts rendered necessary by the requirements of the law, as shown in the notes of instruction and headings ordered for use in said schedule A, No. 3, by the rules of the supreme court, and that such amendments shall be made and filed, on or before the 14th day of September, A. D. 1867."

On the 14th of September, the bankrupt appeared and objected to the order, as one which the register had no power to make, and prayed that five several points, as an appeal from the action of the register, might be certified to the judge for his decision.

1. Whether the register, after an adjudication of bankruptcy, and accepting the surrender of the bankrupt, and issuing a warrant, and the holding of the first meeting of creditors, and the choice or appointment of an assignee, can, of his own motion, and not upon the motion of the assignee, or of some creditor who has proved his claim, order an amendment of the bankrupt's schedule of creditors, theretofore filed by him, to be made by the bankrupt.

In regard to this question, the register states, that he is clearly of the opinion that the register can, of his own motion, order such amendments; that rule 5, of the supreme court, specifies "ordering amendments," as one of the acts the registers may perform, under the orders of the court referring cases to them, and that he ought to do so from the fact that otherwise (the certificate of correctness by the register being considered conclusive) oversights could not be corrected, nor could a condition of facts arising in the course of proceedings, be taken notice of, as in this case.

The register is correct in this view. By section thirty-two of the act [of 1867 (14 Stat. 532)], the court is forbidden to grant a discharge to the bankrupt, unless it appears to the court that he has, in all things, conformed to his duty under the act; and the form of discharge prescribed by that section contains a recital that the bankrupt "appears to have conformed to all the requirements of law in that behalf." Where a case has been conducted before a register, as all cases are required to be by the act, it is impossible for the court to determine whether the bankrupt has conformed to all the requirements of the act, unless the register first makes an examination as to that question, and certifies the result to the court. It is a necessary incident of the provision of the act, that the bankrupt must conform to all its requirements before he can have a discharge, that the court, and the register, acting as the court, when a case is referred to him, should have the power at all times to require the bankrupt to conform to the requirements of the act. An error, whenever discovered, must be corrected, no matter what proceedings have theretofore taken place. The 33d rule of the general orders in bankruptcy shows, that when a debtor "omits to state in the schedules annexed to his petition any of the facts required to be stated, concerning his debts or his property," the court, or the register acting as the court, is "to determine whether to admit the schedules as sufficient, or to require the debtor to make further efforts to complete the same, according to the requirements of the law." This determination may be made by the register, of his own motion, and at any stage of the proceedings, and, if he determines that the schedules are insufficient, he may order them to be amended.

2. Whether it is necessary and requisite to a compliance with the requirements of the law, as shown in the notes of instruction and headings to schedule A, No. 3, when no note has been given by the bankrupt, or no judgment has been obtained against him, for or on account of the debt stated, in addition to stating what is the consideration of the debt, to state that no note has been given, or no judgment has been rendered by or against the bankrupt; and, also, in case the bankrupt be solely liable for the debt, whether it is necessary to state thereunder that no person

is liable with him as copartner or joint contractor.

In regard to this question, the register states, that he thinks the supreme court intended, by the headings and notes of instruction referred to, that the fact of the existence of a judgment or a note, &c., should be affirmed or negatived, and not be left to implication or suggestion.

I think that it is necessary to state, in the schedules, whether or not any note has been given, or any judgment has been rendered, and, also, whether or not any person is liable with the debtor, as copartner or joint contractor. What shall be considered a sufficient form of statement in those respects, is necessarily a matter allowing of some latitude of discretion on the part of the register.

3. Whether the said order (if the register, under the circumstances, has power to make it) should not specify, particularly, the respects in which the schedules are, in the opinion of the register, defective, and in which the schedules should, in the judgment of the register, be amended.

In regard to this question, the register says, that he considers an order that the schedules conform to the notes of instruction and headings of the blanks and forms, sufficiently specific to guide the attorney or bankrupt in making amendments, assuming ordinary care and intelligence on the part of practitioners.

I think that the order ought to specify, particularly, the respects in which the schedules are, in the opinion of the register, defective, and in which they should, in his judgment, be amended.

4. Whether, under rule 14 of the supreme court, which requires that "all petitions, and the schedules filed therewith, shall be printed or written out plainly, and without abbreviation or interlineation, except where such abbreviation or interlineation may be for the purpose of reference," it is permissible to refer to an above written word or statement, as follows:

Name.	Residence.
A. B.	New York City.
C. D.	" " "

using the customary marks (" ") to refer to the above written words.

In regard to this question the register states that he thinks the rule precludes the use of dots to indicate anything necessary to be stated. I concur with the register.

5. It is supposed that one of the defects and errors in the schedule referred to in the order, as appearing in the course of proceedings in the matter of Orne, is the omission in stating the debt scheduled as William H. Earle's, to state that the bankrupt was jointly liable with any other person. It appeared, by the proof of debt offered by the said creditor, that the debt exists as a judgment against two other persons jointly with the bankrupt, and another defect or omission appeared by the fact that, at the first meeting, a creditor whose name was not on the schedule filed by the bankrupt, appeared and made proof of a claim against the estate of the bankrupt; and the question is submitted whether, upon the facts, the bankrupt can be ordered, upon the motion of the register, after the adjournment of the first meeting of creditors, to amend the schedules annexed to his petition to conform to the facts.

In regard to this question, the register says that the facts are not fully stated; that the proof of debt, in the case of Earle, averred that the persons against whom, jointly with the bankrupt, the judgment was obtained, were copartners with the bankrupt; and that, in the opinion of the register, he should have full power to order, on his own motion, necessary amendments, to make the schedules show all facts connected with debts, or else he should have no power so to do.

I am of the opinion that the bankrupt can be ordered, on the motion of the register, after the adjournment of the first meeting of creditors, to amend the schedules annexed to his petition, to conform to the facts.

The register states, in his certificate, that he is of the opinion that the registers are charged with the general supervision and care of cases referred to them, without regard to the fact whether creditors or assignees or bankrupts move for amendments, or any other action. I concur with the register in this view.

Case No. 10,583.

ORNE v. TOWNSEND.

[4 Mason, 541.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1827.

PLEADING IN ADMIRALTY—CERTAINTY AND ACCURACY OF LIBEL FOR WAGES — FORFEITURE—DESERTION — DISPROVAL OF LOG BOOK — MISCONDUCT—DISCHARGE IN FOREIGN PORT—ONUS PROBANDI.

1. In a libel for wages, the allegations of the hiring, voyage, &c., should be drawn accurately and with reasonable certainty, otherwise it may be excepted to. The most correct course is, to state the facts, &c., in distinct articles, which is the usual course in admiralty proceedings.

[Cited in Pettingill v. Dinsmore, Case No. 11,045; New Jersey Steam Nav. Co. v. Merchant's Bank, 6 How. (47 U. S.) 434.]

2. No facts of misbehavior, or other cause of forfeiture of wages, are admissible at the hearing, unless the answer distinctly propounds them, and puts them in issue.

[Cited in The Elizabeth Frith, Case No. 4,361.]

3. If the log book states a desertion, it may be repelled by proof of the falsity of the entry, or its being made by mistake.

[Cited in The Sarah Jane, Case No. 12,348.]

4. Habitual drunkenness, if it goes to establish general incapacity to perform duty, is a ground of forfeiture of wages; otherwise it goes only to diminish compensation for the voyage.

[Cited in Smith v. Treat, Case No. 13,117; The Cornelia Amsden, Id. 3,234.]

5. But no fact of this nature is examinable at the hearing, unless averred and put in issue by the owner.

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

6. Where misconduct is relied on to defeat the claim of wages it should be stated, with reasonable certainty as to time, place, circumstances, and degree.

7. A refusal to do duty, at a moment of high excitement from punishment inflicted on the party, if not followed by obstinate perseverance, is not a forfeiture of wages.

8. The mate is entitled to command in the absence of the master, and if a seaman be wrongfully dismissed by him, the owners are liable therefor, as the act of their agent.

9. Under what circumstances a dismissal of a seaman from duty may be justifiable.

[Cited in Smith v. Treat, Case No. 13,117; The Cornelia Amsden, Id. 3,234.]

10. Where an American seaman is discharged by the master in a foreign port, he may recover, in a libel for wages, the three months' advance, authorized by the act of congress of 1803, c. 62 [2 Story's Laws, 883; 2 Stat. 203, c. 9], if the same be not paid to the consul abroad, to be distributed according to the act.

[Cited in Wells v. Meldrum, Case No. 17,402; Pratt v. Thomas, Id. 11,377; Dustin v. Murray, Id. 4,201.]

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

11. The onus probandi is on the master to show, that the advance was paid.

12. It is no objection to the recovery of the three months' advance, that the name of the seaman is omitted as an American citizen, in the list of the crew, certified from the collector's office, under the act of 1796, c. 36, § 4 [1 Stat. 477], if he is named as an American citizen on the master's list of the crew.

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

This was an appeal from the sentence of the district court, in a case for mariner's wages. The suit was brought by a libel in personam against the appellant [Joshua Orne], who was master of the ship. The allegations of the libel state, that the libellant [Jacob Townsend], on or about the first day of February last, shipped on board the ship Aeronaut, then lying at Boston, as steward, on a voyage from thence to the West Indies, and thence to Europe, and thence back again to Boston, at the rate of thirteen dollars wages per month; that he sailed on the voyage; that the ship first went to Havana, and from thence to Matanzas, and from thence to Hamburg, where about the 28th of June last he was discharged, and turned on shore, without his wages being paid, or the three months' advance wages, required by law, being paid to the American consul at that port; that he was sent home by the consul in another ship; and that the Aeronaut has since returned home. The grievance alleged is, that the master still refuses to pay the wages and advance. And to obtain these is the object of the suit.

Mr. Dunlap, for libellant.
Orne & Jarvis, for respondent.

STORY, Circuit Justice (after stating the facts). The description of the voyage, in the shipping paper, differs in terms, though not in substance, from that in the libel. But there is no dispute between the parties, that the actual voyage was performed in the manner stated in the libel, and that the rate of wages, and time of shipment, are truly stated. The defence turns upon other considerations, to which I shall immediately advert. I wish, however, to state a few words on the proper form of the libel and answer, in cases of this nature, since they are often drawn with too little precision and accuracy to put the points neatly, or clearly, before the court. The true course, even in the case of a summary petition, like the present, and a fortiori in formal proceedings, is to allege the material facts in distinct articles in the libel, with as much exactness and attention to times and circumstances, as in a formal declaration at law. If the state of the evidence should require, in a later stage of the proceedings, some amendments to avoid a variance, leave may generally be obtained, upon a timely application, to reform the libel accordingly. The answer should, in like manner, distinctly admit, or deny, facts stated in the different articles; for it is otherwise open to exceptions for incompleteness or inaccuracy; and if it rely upon any new matter by way of defence, that matter should be stated with clearness and certainty, so that the points at issue between the parties may be immediately seen. Now, both the libel and answer, in this case, are open to observation from their deficiency in some of these particulars. I impute not the slightest blame to the learned counsel engaged in this cause, for these irregularities; because I am sensible they find an ample apology in the practice, which has so long prevailed in this district as almost to give them a sanction, and which the comity of the bar, and the general indulgence of the court, has hitherto not made it very important to bring back to the true principles of admiralty pleadings. But the learned counsel, from their own experience, must be as sensible as the court, of the advantages of a strict and accurate practice; and I trust it is not too much to ask their future assistance, to aid the court in overcoming the present inconveniences. I might illustrate these remarks by adverting to the fact, that the answer puts in issue the citizenship of the libellant, though it is nowhere asserted in the libel, and is certainly material to establish the right of the three months' advance wages, which are payable by law to the consul upon a discharge of seamen in a foreign port. On the other hand, the answer does not either admit or deny the time of shipment, the rate of wages, the performance of the voyage, or the return of the ship home, as alleged in the libel. It seems to rely upon the desertion of the libellant at Hamburg, as a defence; and yet the fact is not directly, or even by necessary implication, averred; and if relied on, it ought to have been set forth with all due form of time, and place, and circumstances. It further sets up disobedience of orders, and refusal to do duty, as a defence; and yet neither of these facts is stated except in a

very general form, without any accompaniments of time, or place, or occasion. Yet these, if not of the essence of the allegations, are of great importance, by enabling the parties to point their evidence, and the court to weigh the extent of the offence, and the sufficiency of the proofs.

The defence, so far as the answer relies upon the fact of desertion, has been abandoned at the argument, and with great propriety. It is not so stated in the pleadings, as to be made available in point of law; and if it were otherwise, it is not established in evidence. It is true, that the mate, on the 11th of June, made an entry in the log book, that the steward had deserted. But if this entry were, in any just sense, true at the time it was made, of which some doubts might, upon the evidence, occur to any mind of ordinary candour; still it is perfectly clear, that there was in fact no desertion; but a compulsive absence from the ship, occasioned by an arrest of the local police, winked at, even if it was not procured, by the instigation of that officer. The master indeed incurred no blame, for he was absent from the ship at the period, and seems not to have been put in possession of the proper information. But it was certainly the duty of the mate to have corrected his original entry, from his subsequent knowledge of the actual cause of the steward's absence, and not to have left the most offensive construction to be put upon it, even to the extent of a forfeiture of all the previously earned wages. The omission so to do, if it does not argue some disingenuousness, is matter of just reproof, as a gross omission of duty.

Another ground of defence, relied on at the argument, is the imputation of habitual drunkenness. This is a vice, which can never receive countenance from any maritime court, and is of such rankness and injurious tendency, both as to discipline and service on ship board, that it usually calls for the animadversion of the court, and not unfrequently is followed by punishment in the shape of diminished compensation and wages. Where it is habitual and gross, it may indeed be visited with a total forfeiture of wages; but where it is only occasional, or leaves much meritorious service behind, it is thought quite sufficient to recover, in damages, the amount of the actual or presumed loss, resulting from such a violation of the mariner's contract, and imperfect performance of duty. The maritime law is, in this, as in many other cases, founded on an indulgent consideration of human temptations and infirmities. It is not insensible to the perils and the hardships, the fatigues and the excitements, incident to the sea service; and it allows much for the habitual thoughtlessness, irregularity, and impetuosity, which, with much gallantry and humanity, is mixed up in the character of seamen. It deals out its forfeitures, therefore, with a sparing hand, and aims to arrive at just and equitable results, not by enforcing rigid and harsh rules, but by moderating compensation as well as punishment, so as to apportion each to the nature and extent of the offence. It has been truly said, that drunkenness, however reprehensible in a common mariner, is far more unjustifiable in a steward, who is placed in an office of considerable confidence and responsibility. The court ought to watch his case with a more scrupulous caution, than in ordinary cases. But there must be in his case, as well as in that of others, some allowance made for occasional impropriety; and the temptation to undue indulgence is felt much more, as an apology, in port, than at sea. The evidence, from the log book, exhibits but few instances of this sort, by the libellant, while at sea. Those which occurred were principally in port. But it cannot be disguised, that the evidence aliunde lays a pretty strong foundation for the belief, that in him it was an habitual and debasing propensity, though not to the extent of disabling him from his general duty on board. Under these circumstances it might have operated to diminish his compensation, if it had been put in issue by the answer. But not being relied on there, it is, in a legal sense, withdrawn from the consideration of the court. And for the same reason, the charge of embezzlement of the ship's small stores, may be passed over without further observation.

Another ground of defence, asserted in the answer, is, "that the said Townsend (the steward) was guilty of great misconduct, unfaithfulness, and disobedience, and that, a long time before his thus leaving the ship, he refused absolutely and altogether to perform any duty, and thereby compelled this respondent to procure another steward in said Townsend's place, and to order him forward to the forecastle." This is the whole charge, conceived in very general terms, and, with a single exception, pointing to no particulars. Such as it is, however, it is of a grave cast, and ought to be established in proof, before it can be successfully urged as a ground of judgment. Now, the proofs do not present any such general and sweeping defaults, even supposing, that any allegation, in such general terms, could be deemed to put the matter in issue. The whole stress of the evidence goes to a denial of duty on a single occasion; and we shall presently see, how far the circumstances justify such an inflamed statement. The facts are, that, on the 11th of June (the day already alluded to), the master was on shore, and the mate, being left in the sole command, undertook to flog the steward, with very considerable severity, on account of his being, at that time, negligent of his duty and intoxicated. In this state of things, the mate ordered him to go immediately to his duty, which the steward, then smarting under his recent flagellation, and the stupefying effects of liquor, refused, in the presence of the crew,

alleging the fact of punishment, as his excuse. The mate, nothing loath, caused him to be put immediately in irons, by way of increased punishment, and directed his clothes to be transferred from the cabin to the forecastle, assuming in this way the right to displace him. He was afterwards seen in the long boat, and was taken away by the police boat in the manner already adverted to, and detained three days. At the end of that time he returned on board again by order of the American consul. When the master came on board, the mate stated (as he deposes) the facts to him, and the master then said, the steward might remain on board, as he had been sent by the consul; but he should do no further duty on board, and should be separated from the rest of the crew. Under this order he remained on board for ten days without doing any duty, never having been required so to do. At the end of this period, and while the master was on shore, the steward obtained the leave of the mate to go on shore, and to leave no doubt, as to the mate's intentions, he was permitted to take his clothes, the mate delivered up to him his protection, and gave him the sum of three dollars. The brig sailed on her homeward voyage the next day, and no attempt was made by the steward to return on board, and the master made no inquiries for him on shore, there having been another steward engaged for the voyage in his stead.

Such is a brief outline of the material facts; and it is scarcely necessary to say, that it does not come up to the strong averments of the answer. The denial of duty, on the occasion alluded to, was under the pains of severe chastisement, and was followed up by more decisive punishment. To say the least of it, the steward returned on board for duty, as soon as he reasonably might, and his subsequent non-performance of duty was dispensed with in the most absolute manner. His repentance was signified by his return, and it was the duty of the master, under such circumstances, either to have received him on board to perform such duty as he might, or to have procured a discharge of him, under the sanction of the American consul. Neither course was adopted, and the master must now bear the legal consequences, arising from his listening, with too much confidence, to the suggestions of the mate. It is certainly not just to expect the court to inflict another punishment by a forfeiture of wages, for an offence already sufficiently punished by personal chastisement, following the very corpus delicti.

Then, it is said, that, here, there was no discharge of the steward, by the master. And the answer "denies, that he was ever discharged from said ship by this respondent, or by his orders or authority; but avers, that if he was discharged by any one, that it was against this respondent's express directions and orders." Now, assuming the fact to be so, it is difficult to see, how it can change the legal posture of the case. In the absence of the master, the mate is entrusted with the care of the ship, and the government and management of the crew. His acts, during this period, are considered as constructively the acts of the master pro hac vice. It may be very rash for him to exercise such an authority as a discharge of a refractory, or drunken seaman, and he may incur responsibleness, as well to his owners, as to the public, for such conduct. But I am not prepared to say, that he is absolutely incompetent to such a function. And cases may be put, such as cases of a mutiny, in which a strong necessity might arise for a peremptory exercise of such an authority. At all events, it is a sufficient excuse for the seaman, that he is so discharged, until a demand is made for his return on board, which cannot be pretended in this case. But there is not the slightest proof, that the master ever disapproved of the act of the mate. He did in effect discharge him from all duty, as steward, on board, during the ten days, and manifestly deemed him no longer one of the crew, but a mere disabled seaman, to be returned home under the authority of the consul, pursuant to the laws for the relief of distressed and destitute seamen in foreign countries. Act 1803, c. 62, § 4 [2 Story's Laws, 1883; 2 Stat. 203, c. 9]. Under such circumstances, it is difficult to say, that the steward was not, in a legal view, discharged by the master himself, at least so far as he was competent to do it without the consent of the former, and also of the consul. It appears to the court, therefore, that the discharge, such as it was, was sufficient to entitle the steward to his wages, and that his leaving the brig was not unjustifiable, or a cause of forfeiture.

Then, how stands the case as to the advance wages, consequent upon such a voluntary discharge. I need not say, that the law expects every court to guard, with a vigilant eye, any attempt to evade the salutary provisions for the protection of American seamen from improper discharges in foreign ports. A recent statute has punished, criminally, the malicious forcing of a seaman on shore in a foreign port. Act of 1825, c. 276, § 10 [3 Story, Laws, 2001; 4 Stat. 117, c. 65],—Ingersoll, Dig. (Ed. 1825) 511. Act 1803, c. 62, § 3 [c. 9], provides, that "when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master, &c., to produce to the consul, &c., the list of the ship's company, certified as aforesaid (i. e. by the collector), and to pay to such consul, &c., for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months' pay over and above the wages, which may then be due to such seaman or mariner, two thirds

thereof to be paid by such consul, &c., to each seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other remaining third to be retained for the purpose of creating a fund for the payment of the passages of seamen or mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen, who may be destitute, and may be in such foreign port." This court has repeatedly held, that if the three months' pay be not given to the consul, according to this provision, it is recoverable by the seaman in his libel, if he is brought within the purview of the act, two thirds for his own use, and the remaining third to be retained by the court for the use of the United States, and paid over accordingly. The act having given the sum as wages, it is recoverable as such; and thus a great source of vexatious evasion of duty is dried up.

Now, what are the objections to the recovery in the present case? First, it is said, here was no discharge. But that has been already sufficiently answered; and the discharge must be deemed to be by the consent of the steward. There is no pretence to say that the advance wages were paid to the consul. His certificate, given to the steward upon his return home in another ship, states the contrary; and if it were otherwise, the onus probandi lies on the master. Then it is said, that the steward is not certified by the collector to be an American seaman, upon the custom-house documents. All that Act 1803, c. 62 [c. 9], requires, is, "that the master shall deliver to the collector a list, containing the names, places of birth and residence, and description of the persons who compose his ship's company, to which list the oath or affirmation of the captain shall be annexed, that the said list contains the names of his crew, together with the places of their birth and residence, as far as he can ascertain them, and the collector shall deliver him a certified copy thereof." This is the list, to which the third section of the act, already recited, refers; and upon the list of the crew of the Aeronaut, sworn to by the master, and certified by the collector, for this voyage, the steward's name is borne as a citizen of the United States, born at New York, and resident at Boston. It stands, then, within the strictest text of the act. The objection has its origin in another and distinct certificate on the back of the list, in which the collector certifies, that certain of the crew, naming them (but omitting the steward's name), have produced proof, that they are citizens of the United States. But this certificate is for another purpose, and is in conformity with Act 1796, c. 36, § 4, for the relief and protection of American seamen, which authorizes the collectors to grant certificates of citizenship upon due proofs before them. There are other acts, and particularly Act 1813, c. 40 (184) [2 Story, Laws, 1302; 2 Stat. 809], which requires the approval of the collector of the list of the crew, and Act 1817, c. 28 (204) [3 Story, Laws, 1622; 3 Stat. 351], which, for certain purposes, requires two thirds and three fourths of the crews of ships to be citizens of the United States. It is sufficient to say, that these acts have not changed the legal construction of the terms of Act 1783, c. 12, but are only cumulative for other purposes. It is sufficient, for the purposes of that act, that the discharged seaman is designated on the list as an American citizen, to entitle him to the advance. In the present case, the direct testimony of witnesses has established the truth of the description of the steward in the list of the crew. There is then no controversy, that he is really entitled to the protection of the act.

Upon the whole, my judgment is, that the decree of the district court ought to be affirmed, and it is affirmed accordingly, with costs.

Case No. 10,584.

ORNER v. SAUNDERS.

[3 Dill. 284;[1] 1 N. Y. Wkly. Dig. 383; 2 Cent. Law J. 772; 22 Int. Rev. Rec. 48.]

Circuit Court, W. D. Missouri. Nov. Term, 1875.

REMOVAL OF SUITS—ACT OF MARCH 3, 1875—ACTION ON OFFICIAL BOND OF DEPUTY INTERNAL REVENUE COLLECTOR IS A SUIT "ARISING UNDER THE LAWS OF THE UNITED STATES."

An action by the collector of internal revenue against the deputy collector on his official bond, may be removed from the state court into the federal court, under the act of March 3, 1875 [18 Stat. 470].

On motion to remand cause to the state court. The plaintiff was the collector of internal revenue for one of the districts of Missouri, and appointed the defendant his deputy. The defendant gave the bond which the plaintiff by the act of congress was authorized to require and accept. This action, brought in May, 1875, is upon this official bond, and alleges various breaches of the same. The plaintiff in due time, before answer filed, applied to remove the cause into this court under the act of March 3d, 1875, as one "arising under the constitution and laws of the United States." The removal was ordered, and the defendant now moves to remand the cause.

Philips & Vest, for motion.

Mack J. Leaming and Crittenden & Cockrell, contra.

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

DILLON, Circuit Judge. We have no doubt that the cause was properly removed.

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

It is one arising under the laws of the United States. Rev. St. § 3148; Act March 3, 1875, §§ 1-3; Act Feb. 8, 1875, § 12 (18 Stat. 309); Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 739. Indeed, this last act gives this court original jurisdiction of such actions, concurrent with the state courts.

Motion denied.

Case No. 10,585.

The ORONO.

UNITED STATES v. The FRANKLIN.

UNITED STATES v. The AMPHITRITE.

[1 Gall. 137.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

NON-INTERCOURSE ACT — REVIVAL BY PROCLAMATION—REPEAL OF EMBARGO ACTS.

1. The president's proclamation of the 9th of August, 1809, was without legal operation, and did not revive the non-intercourse act of March 1, 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 528, c. 24].

[Followed in The Wasp, Case No. 17,249.]

2. By the nineteenth section of Act March 1, 1809, c. 91, and the second section of Act June 28, 1809, c. 9 [2 Stat. 550], the embargo acts were as to future cases repealed.

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

In admiralty.

G. Blake, for the United States.

Wm. Prescott, for claimant.

STORY, Circuit Justice. The facts of the case appear to be these: The schooner sailed from Saco, in the district of Maine, on the 2d of January, 1810, during the existence of the act of March 1, 1809, c. 91 [c. 24], and an act of June 28, 1809, c. 9. The vessel was cleared out for Cayenne in the West Indies, and bond was given pursuant to the third section of the latter act. By stress of weather, she was compelled to put into Demerara, where her cargo was sold on credit, and from various impediments, the principal part was not taken on board until after the 1st day of May, 1810, on which day the act of 1st of March, 1809, expired. See Act June 28, 1809, c. 9, § 1. It appears, that four or five hogsheads of rum and molasses had been taken on board previous to that time. The information alleges (1) that the schooner departed from the port of Saco, and proceeded to the port of Demerara, contrary to the third section of the act of January 9, 1808, c. 8; (2) that after the 28th of May, 1809, to wit, on the 25th April, 1810, the goods aforesaid were taken on board at said Demerara, contrary to the fifth section of the act of March 1, 1809, c. 91.

As to the first count, it is clearly without foundation; for by the operation of the nineteenth section of the act of March 1, 1809, and the second section of the act of June 28, 1809, the embargo laws were, after the 28th of June, 1809, as to all future cases, repealed. As to the second count, its validity, in point of law, depends upon the legal effect of the proclamation of the president of the United States, of 9th August, 1809. By the 11th sect. of the act of 1st March, 1809, the president was authorized, in case of a revocation of the decrees or orders of Great Britain and France, which violated our neutral commerce, to declare the same by proclamation; after which proclamation, the trade of the United States might be renewed with the nation revoking its decrees, notwithstanding the provisions of that act. It has been contended by the attorney for the United States, that this proclamation being founded on a mistake of fact, had no legal effect, and was merely void. Whether it was so founded in mistake, is not for the court to determine. It does not belong to the court to superintend the acts of the executive, nor to decide on circumstances left to his sole discretion. So far as applies to courts of justice, the president's proclamation, being founded on the law, is to be considered as duly and properly issued, and of course as completely suspending the act of 1st March, 1809, as to Great Britain and her dependencies. If further proof of the correctness of this opinion were necessary, it would be found in the express recognition of this proclamation in Act June 28, 1809.

The next question is, whether the proclamation of the president of the United States, of 9th August, 1809, revived the act of March 1, 1809, against Great Britain and her dependencies? for if it did not, then clearly the Orono has been guilty of no offence. I take it to be an incontestable principle, that the president has no common law prerogative to interdict commercial intercourse with any nation; or revive any act, whose operation has expired. His authority for this purpose must be derived from some positive law; and when that is once found to exist, the court have nothing to do with the manner and circumstances under which it is exercised. The only law produced for this purpose is the eleventh section of the act of March 1, 1809, and first and third sections of Act June 28, 1809, which refer to the former provision. Now, the eleventh section contains no authority whatsoever to enable the president to revive that act, when once it had been suspended, as to either nation. The authority given is exclusively confined to the revocation of the act. For the executive department of the government, this court entertain the most entire respect; and amidst the multiplicity of cares in that department, it may, without any violation of decorum, be presumed, that sometimes there may be an inaccurate construction of a law. It is our duty to expound the laws as we find them in the records of state; and we cannot, when called upon by the citizens

[1] [Reported by John Gallison, Esq.]

of the country, refuse our opinion, however it may differ from that of very great authorities. I do not perceive any reasonable ground to imply an authority in the president to revive this act, and I must therefore, with whatever reluctance, pronounce it to have been, as to this purpose, invalid.

I affirm the decree of the district court, and certify reasonable cause of seizure. As the case of U. S. v. The Franklin [Case No. 15,160] stands on the same principles, I also affirm that decree, and certify as above. So also the case of U. S. v. The Amphitrite [Id. 14,444].

OROZIMBO, The (MITCHELL v.). See Case No. 9,667.

ORPHAN BOY, The (MERCANTILE INS. CO. v.). See Case No. 9,431.

ORPHEUS, The (LEWIS v.). See Case No. 8,330.

ORPHEUS, The (YOUNG v.). See Case No. 18,169.

Case No. 10,586.

ORR v. The ACHSAH.

District Court, E. D. Pennsylvania. Dec. 17, 1849.

ADMIRALTY JURISDICTION—FOREIGN VESSEL—CONSULAR PROTESTS—DISCHARGE OF SEAMEN.

1. Where the voyage of a foreign vessel is broken up, and the seamen are discharged in an American port, the district court will entertain jurisdiction of a libel in rem for their wages.

2. The protest of a foreign consul will not prevent the district court from taking jurisdiction of the case.

[Cited in McAfee v. The Creole, Case No. 8,655.]

[Decided by KANE, District Judge. An opinion was filed December 17, 1849, but it is not now accessible at the clerk's office. The above statement of the points determined was taken from 1 Brightly, Fed. Dig. 14,166.]

Case No. 10,587.

ORR v. BADGER.

[1 Brun. Col. Cas. 536;[1] 7 Law Rep. 465; 12 Hunt, Mer. Mag. 177.]

Circuit Court, D. Massachusetts. Oct. Term, 1844.

INJUNCTION—GRANTING AND DISSOLUTION OF—INFRINGEMENT OF PATENT — TEMPORARY INJUNCTION — WHEN GRANTED — VERDICT IN SUIT AT LAW—GROUND FOR INJUNCTION.

1. The granting or dissolving of an injunction before a hearing, in the case of an alleged infringement of a patent, depends on the sound discretion of the court.

2. Where a party has enjoyed the benefit of his patent for a number of years, by the sale of licenses to use his invention, without his right being disputed, it is good ground for granting him an injunction till the hearing against any one who infringes, although the originality of his invention may be questioned, and even made to appear doubtful, by the affidavits for the defendant.

3. If a patentee has obtained a verdict in a suit at law against a person infringing his patent, it is sufficient ground for granting him an injunction till the hearing against another person infringing.

[Cited in Woodworth v. Hall, Case No. 18,016.]

This was a bill in equity, brought to restrain the defendant, a stove-maker in Boston, from making air-tight stoves, for which a patent had been granted to the late Isaac Orr. The suit was brought before Dr. Orr's death, and an injunction was granted at the commencement of the suit, after the usual notice to the defendant, he making no opposition. After Orr's death the suit was revived by the administratrix on his estate, his widow [Matilda K. Orr], and the defendant having filed his answer, in which he denied the originality of Orr's invention, and alleged that the same sort of stoves had been made by a number of persons, whom he named, before Orr's patent issued moved to dissolve the injunction. The motion was heard before Sprague, J., and a considerable number of affidavits were read on both sides. The material facts which appeared by the evidence in the case were as follows: January 20, 1836, Dr. Orr took out his original patent for the air-tight stove [re-issued November 12, 1842, No. 48], and for a number of years after he received considerable sums on account of his right, which was not disputed. In the year 1841 he brought a suit against William C. Hunneman & Sons, for violating his patent. At the trial of this case, at the October term, 1842, Judge Story considered the specifications so defective in form that he would not sustain the action. Orr immediately surrendered his patent, filed an amended specification, and took out a new patent. He then brought a new suit against Hunneman & Sons for a new infringement. Before this suit came to trial Hunneman & Sons agreed to give Orr judgment for five dollars damages and costs, and a verdict was taken for that sum, and judgment entered accordingly. Hunneman & Sons subsequently paid the amount of the judgment. The plaintiff produced a number of affidavits of stove dealers and others to show that they regarded Orr's invention as new, and that they were in circumstances in which they must have known if any such stove had been in common use previously. The defendant, on the other hand, produced a number of affidavits of persons, who swore that they had made and seen stoves precisely like Orr's many years before his patent was issued; but most of them did not allege that they had seen or made any such stoves within thirteen years, or until Orr's patent was issued. Some of the defendant's witnesses, however, swore there was no difference between Orr's stoves and the common sheet-iron stoves, but admit-

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

ted that Orr had taught the best way of using these stoves. The case occupied three days in the hearing.

Fletcher & Sewall, for plaintiff.
Bartlett & Whiting, for defendant.

SPRAGUE, District Judge. This is a motion to dissolve an injunction regularly granted in the case. The case presented by the plaintiff is one of irreparable mischief; for though the remedy at law against persons infringing on a patent is in theory perfect, yet in practice it is not adequate. If the injunction be dissolved, other dealers will manufacture without license; and if the patent be good, the plaintiff will have no sufficient remedy. The continuance or dissolution of an injunction is entirely within the sound discretion of the court. If the court consider the right of the patentee doubtful, it is not simply on that ground required to dissolve the injunction. Other circumstances must be considered.

The evidence to support the plaintiff's right are: (1) The issuing of the patent. (2) The quiet enjoyment under it for several years. (3) The judgment at law against Hunneman & Sons. (4) The affidavits of persons qualified to know, who regard the invention as new. It is to be observed that the defendant's answer does not deny the plaintiff's right of the defendant's own personal knowledge. The case, therefore, falls within the principle laid down in Poor v. Carlton [Case No. 11,272]. In regard to the evidence to be derived from the letters patent. Formerly patents were issued as a matter of course to all who applied. Now, no patent is issued without an examination of skillful persons into the specification and the subject of the claim. Under these circumstances the issuing of the letters patent affords more evidence of the originality of the invention than where they were only supported by the oath of the patentee. Besides this, Dr. Orr was in quiet enjoyment of the benefit of his invention for several years under the original patent, and received considerable sums of money. This is prima facie evidence of the right. If the public submit to his claim for a reasonable time, it raises a presumption of right. This presumption is not changed in consequence of the original patent being surrendered on account of its informality. The original patent was not void. It was efficacious for some purposes. It preserved the right of the patentee, which would have been lost had he permitted his stoves to be made without taking out his patent. The patentee was not a wrong-doer, as has been suggested by defendant's counsel, in the claim he made. The evidence of the right afforded by the acquiescense of the public is just as great as if the first specification had been formal.

It is contended by the defendant's counsel that the verdict and judgment in the case against Hunneman being between other parties can have no effect on him, and that no injunctions issue in England in consequence of such a judgment. But in Kay v. Marshall, 1 Mylne & C. 373, an injunction was granted in favor of a patentee on the strength of a verdict against other parties alleged in the bill, and the submission of various persons to the patentee. What I have stated presents a strong case for the plaintiffs. It is true there are strong affidavits on behalf of the defendant to show that the invention was not new; stronger in some points of view than those for the plaintiff. For while the testimony for the defendant is affirmative as to facts within the personal knowledge of his witnesses, that for the plaintiff is merely negative that his witnesses never saw or heard of such stoves before the patent was issued, evidence which is perfectly consistent with that of the witnesses on the other side that they had seen such stoves at an earlier period.

Some remarks, however, occur in regard to the defendant's affidavits. They may be divided into two classes. The first class which speak of having made or seen stoves exactly like Orr's, say that it is from thirteen to twenty years since they saw or made them. Now, as Orr's claim is for a combination of particulars, it seems not unlikely that here is a defect of memory in supposing they had seen all the particulars combined together in one stove so long ago, when in fact they were all to be found only separately in several. It certainly seems highly improbable that if such stoves had ever been in use they would have gone entirely out of use, as is supposed they did before Dr. Orr's patent revived them. And though it is said by the defendant's witnesses that Dr. Orr only taught the mode of using the stoves, yet it certainly is a matter of surprise if the stoves were made exactly like this, the mode of using them should never have occurred to anybody.

Another class of very respectable witnesses for the defendant think these stoves have been in common use for fifty years. Yet it seems highly improbable that a patent should have been applied for in regard to a stove already in common use; that it should have been suffered to pass by the examiners; that it should have been acquiesced in by the public; and that a verdict and judgment should have been permitted by the defendants, who had a real controversy with the patentee. One other circumstance is worthy of remark. No stove like Orr's, made before his patent, has been produced. If such exist they might be found. One witness has stated that he saw such a one at Bangor. If it had been produced it would have been far more satisfactory to the court.

The only effect of the defendant's affi-

davits is to render the final success of the plaintiff doubtful. But, as already said, that alone is not sufficient to dissolve the injunction, under the circumstances which exist, to sustain the plaintiff's right, quiet possession for a reasonable period, a judgment in his favor, and the irreparable injury which he would suffer by such a course.

The injunction therefore ought not to be dissolved.

NOTE. Injunction for Infringement of Patent. Where a person has long enjoyed undisputed right to an invention, he is on that ground entitled to an injunction, till the hearing, against one who infringes such patent. See Orr v. Littlefield [Case No. 10,590]; Woodworth v. Hall [Id. 18,016], citing above case.

[For other cases involving this patent, see Cases Nos. 10,590 and 10,591.]

ORR (BASSETT v.). See Case No. 1,095.

ORR (BEANE v.). See Case No. 1,176.

Case No. 10,588.

ORR v. INGLE.

[2 Cranch, C. C. 193.] [1]

Circuit Court, District of Columbia. Dec. Term, 1819.

REPLEVIN—SURETY — CORPORATION TAXES—PROPERTY DISTRAINED BY COLLECTOR OF CITY TAXES.

1. Quaere, whether a replevin-bond is sufficient with one surety.

[Cited in Haller v. Beall, Case No. 5,957.]

2. Whether the law of Maryland respecting replevins for property distrained for public dues or taxes, is applicable to replevins for property distrained for corporation taxes.

3. Whether property distrained for city taxes by a city collector is in the custody of the law, and thereby protected against replevins.

This was a replevin [by Benjamin G. Orr against William Ingle] for a negro man slave and two horses, distrained by the defendant, who was collector for the 3d ward in the city of Washington, for taxes imposed by a by-law of the corporation, under the power, given by the charter, to lay and collect taxes.

Upon the return of the writ, Mr. Law, for defendant, moved the court to quash it; 1st. Because there was only one surety in the replevin bond. 2d. Because the property was distrained for public dues and taxes, within the meaning of Acts Md. 1785, c. 34, and 1793, c. 53, forbidding replevin for property distrained for public dues and taxes except in certain cases. 3d. Because the property distrained was in the custody of the law.

1. The English statute of 13 Edw. I. c. 2 (Westm. II), which was in force in Maryland, requires the sheriff to take "pledges," and the statute of 11 Geo. II. c. 19, § 23, requires two sureties in replevin of distress for rent, and the practice has always been both in England and in Maryland, to require two sureties. And the twelfth section of the Acts Md. 1790, c. 53, says: "Provided always that before any clerk shall issue a writ of replevin, in virtue of this act, the plaintiff or plaintiffs shall enter into bond, with two sufficient sureties, in double the value of the property to be replevied, in the same manner as in other cases of replevin."

2. The taxes due to an incorporated city are as much public dues, as the county or state taxes in Maryland; and there is the same reason for the law here as there. The plaintiff should have applied to a justice of the peace and obtained his order according to Act 1790, c. 53, before he took out his writ of replevin. In Maryland it has been decided that that act applies as well to county taxes as to state taxes; and if it is applicable to county taxes there is no reason why it should not be equally so to town or city taxes.

3. A distress for taxes is in the nature of an execution; and is so considered by Acts Md. 1785, c. 34, which says: "Whereas the clerks of the county courts, in several of the counties of this state, have issued writs of replevin in cases where property hath been taken in execution for public dues and taxes, whereby the collection of the said public dues and taxes hath been much impeded to the great injury of the state and individuals. Be it enacted, &c., that in every case of money, or other thing, due the public for satisfaction of which there shall be any distress or execution of property by any officer or person authorized by law so to do, no writ of replevin shall issue, or be maintainable in law." Here distress and execution are put on the same footing and the goods seized under either, by a public officer officially are equally in the custody of the law, and therefore cannot be lawfully replevied. "Public dues or taxes," means any taxes authorized by public law.

Mr. Jones, contra. 1. There is no general law which requires two sureties; but if there were, an additional surety can now be given.

2. Taxes due to the corporation are not public dues—they are not due to the public. The public, in the Maryland law, is the great public; the sovereignty of the state. In this district, the public is the United States—the sovereign authority.

THE COURT (nem. con.) quashed the replevin, without stating on what particular ground.

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

Case No. 10,589.

ORR v. LACY.

[4 McLean, 243.] [1]

Circuit Court, D. Michigan. June Term, 1847.

BILLS AND NOTES SENT FOR COLLECTION—BLANK INDORSEMENT — PROTEST OF FOREIGN BILL — SURPLUSAGE—NOTARY'S SEAL—LAW MERCHANT AND CIVIL LAW — PURCHASE OF BILL AT DISCOUNT—USURY.

1. Words of surplusage, not descriptive of the bill, but of the place where it is payable, is no variance.

2. When notes or bills are sent for collection, they are, generally, indorsed in blank, so as to enable the holder to fill up an assignment to himself. Under this, he may bring a suit in his own name.

[Cited in Bank of America v. Senior, 11 R. I. 377.]

3. A foreign bill of exchange must be regularly protested, after a demand and refusal of payment.

4. A seal of a notary may be an impression made by the seal on paper, without wax or any other tenaceous substance.

[Cited in Re Phillips, Case No. 11,098; The Gallego, 30 Fed. 274.]

5. The seal of the notary is recognized in all countries where the law merchant prevails.

6. A seal is not required by the civil law.

7. Where evidence has been given, as to notice, the court will refer the matter to the jury, stating, as matter of law, what is a sufficient notice.

8. There is no usury in charging exchange on a bill drawn in Indiana, payable in New York.

9. A purchase of a bill at any discount or premium, not done to cover usury, is not usurious.

10. The notes of a Western specie paying bank are less valuable, generally, than the notes of Eastern banks, and this may be covered by a contract, without usury.

[Cited in Town of Danville v. Sutherlin, 20 Grat. (Va.) 567.]

11. The notes, it is alleged, were signed and indorsed in Michigan, but as they were negotiated at the bank in Indiana, the court *held* that, that was the place of contract.

[Cited in Buchanan v. Drovers' Nat. Bank, 5 C. C. A. 83, 55 Fed. 227.]

At law.

Joy & Porter, for plaintiff.
Romeyn & Dana, for defendants.

OPINION OF THE COURT. This action is brought on a bill of exchange, dated the 21st of September, 1840, for $3,842, payable six months after date, by Elijah Lacy, payable to the order of David Lacy, at the City Bank, New York City, which was accepted, but not paid. The jury being sworn, this bill was offered in evidence. A. Rogers, a notary public, was called to prove a demand of payment on the bill, protest for non-payment, and notice to the drawer and indorser. The objections stated on this point will be noticed at a subsequent stage of the proceeding; it being agreed that all exceptions may be taken at that time.

An objection is made to the admission of this bill, that it is not accurately described in the declaration. The declaration states the bill to be "payable, at the City Bank, New York City, in the state of New York." The only variance is, that the bill on its face was payable at the City Bank, New York City. And the declaration, after so describing the bill, adds "in the state of New York." Now, this is an additional fact stated, not as descriptive of the bill, but after stating that it was "payable at the City Bank, in New York City," "in the state of New York," is added. That is, the City Bank and the city of New York are in the state of New York. The declaration would have been good without this, as "New York City" is as well known as "the state of New York," but it is given as describing the state in which New York City is situated, and not as descriptive of the bill. There is no variance between the declaration and the bill which can exclude it from being received as evidence.

As by arrangement the questions of law were to be raised in the form of instructions to the jury, the instructions asked will be considered.

1. That it is not competent for a mere agent to maintain an action on a negotiable note, or bill of exchange, in his hands, though it be with the consent of his principal. And if the jury believe that the bill of exchange in controversy belonged, at the time of the institution of this suit, to the State Bank of Indiana, and that the plaintiff sues merely as its agent, then he is not entitled to recover. In answer to this, the fact may be admitted, that Joseph Orr sues as the agent of the bank. This is an ordinary transaction, not only with banks, but with all holders of bills, when it becomes necessary to send them to banks or other agents for collection. They are indorsed in blank, and this gives authority to the agent, not only to receive and receipt for the money, but to bring a suit in his own name, on the bill. There was a blank indorsement on the bill before us, and that is now filled up in the name of Orr, the plaintiff. This is, at least, prima facie evidence of a legal right to sue, and it is not controverted by evidence. This question can only become important, as regards the jurisdiction of the court, or set-offs. The suit is prosecuted with the assent of the bank, and, in fact, by it, in the name of the plaintiff.

2. That the defendant in this case, by drawing the bill of exchange in dispute did not assume an absolute, but a conditional liability, that after it was accepted, his liability and obligation were not to pay it at maturity if the acceptor did not pay it, but only to pay in case the bill should be legally presented for payment, and then in the event of a refusal or neglect to pay by the acceptor, that it should be regularly protested, and due notice given to him of the dishonor.

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

That presentment for payment at maturity, and, at the proper place, demand of payment, refusal or neglect to pay, legal protest and due notice of these facts to the drawer, must all concur, before he can be held liable. This instruction was given as asked.

3. "That this being a foreign bill of exchange, in order to charge the drawer, it is necessary that it should have been regularly protested by a notary public." And it is contended that there is no evidence of Mr. Rogers having been a notary public. He swears that he was one on the 25th of March, 1841, but this bill was dishonored on the 24th. The court answer this by saying, that the principle in the instruction is correct; and they also say that the notarial seal is evidence of the character and authority of the notary.

4. "That in order to charge this defendant a regular protest must be produced, and that the paper attached to the bill of exchange in this case is not a sufficient and regular protest, not being under the seal of the notary." In support of this, it is argued, "that a seal is required by the law merchant. Story, Bills, 277; Chit. Bills, 455. The seal must be on wax at common law. 4 Kent, Comm. 453. In this state, it is conceded that it may be a scroll or device, but not by an impression on paper. Laws 1840, p. 167, § 8. In New York, by statute, public officers and courts may seal by an impression upon paper. 2 Rev. St. p. 404, § 61; 4 Kent, Comm. 453. The question then is, Will such an impression by a notary be recognized as a good sealing of the protest under the present law? But admit that a proper impression made in New York, may be a good one, a distinct and an important question arises, where is the evidence that this is the seal of the notary, or that Rogers was in fact a notary? To test this we ask the court to charge as follows: 'That there is no evidence before the jury that the paper attached to the bill of exchange, read in this case, is the protest of the bill of exchange by a notary.' And it is argued that, although a paper impression may be good in New York, still it does not follow that it proves itself in another state, for the law of evidence lex fori. 2 Hill, 227; Story, Confl. Laws, 634."

The court refuse the fourth and fifth instructions. The sufficiency of the notice, when the facts are not disputed, is a question of law. Story, Bills, 390. The notary swears that he made a demand for payment at the bank, at the maturity of the bill—that he regularly protested it for non-payment, and gave notice on the 25th of March, 1841. A seal is not required by the civil law, but it has been required by the common law from its earliest history. In 2 Rev. St. N. Y. 75: "Seals of courts and officers are authorized to be made by a direct impression on paper." Judge Cowen says, "that the seal under this statute has no force beyond our own territory." If this be correct, it can be correct only in a very limited sense. In New York the common law form is adhered to, the impression must be made on wax, or some tenaceous substance; and under this rule the courts may not consider a scroll as a seal on private writings, but in regard to judicial records and public documents, the seal would be recognized as valid, if applied as required by the law of the state where it is used. The notarial seal proves itself in all countries where the law merchant prevails, and it is only necessary that it should conform to the law of the place where the notary acts. An impression upon the paper is as good as upon wax, or any tenaceous substance. An impression on the parchment or paper, with an intent to make a seal, is good at common law. Chancellor Kent says (4 Kent, Comm. 852, note a): "In public and notarial instruments, the seal or impression is usually made on the paper, and with such force as to give tenacity to the impression, and to leave the character of the seal upon it."

5. A notary is a commercial officer. His seal is an authentication of his acts, more generally acknowledged throughout the commercial world than that of any other officer. And this is sanctioned under the law merchant, which is a part of the common law, and is essential to commercial transactions.

6. That even if the bill had been regularly presented and protested, and the evidence of the protest is sufficient, the plaintiff is not entitled to recover, unless the jury believe that the defendant was duly and legally notified of the dishonor of the paper. The court will give this instruction, with the remark, that the notary having made the demand, and protest was required in regard to the notice to deposit it in the New York postoffice, directed to the residence of the party notified.

7. That there is no legal and sufficient evidence of such notice. The court refuse this instruction, and say to the jury, if they believe the facts sworn to by the notary, there was legal notice.

8. That in order to charge the defendant, it is necessary that they should believe from the evidence that the notice sent to the drawer, by express terms, or by natural or necessary implication from the language used, contained in substance a true description of the bill, an assertion of due presentment and dishonor, and that the holder or some other person, looked to the drawer for indemnity and reimbursement. In answer to this, the court will say, that the notice must have been sufficient to apprize the drawer of the bill in question, that it was not paid, though demand for payment was made, and that the holder will look to him for payment.

9. That the State Bank of Indiana, by its charter, had no right on a loan of money, or discount of a note or bill, to take more

than six per cent. per annum, and that if there was on the discount of either of the original bills of exchange an illegal interest, and a corrupt agreement on the part of the bank, to take more than the legal rate of interest, and such was actually taken or contracted for, and the amount thereof included in the present bill, and that it was given for the same, then the latter can not be collected from this defendant. (1) Under this head it is argued, that a willful violation of the charter of the bank, renders the contract void, irrespective of the general usury laws. [Bank of U. S. v. Owens] 2 Pet. [27 U. S.] 527; [Bank of U. S. v. Waggoner] 9 Pet. [34 U. S.] 400, and many other cases settle this point. (2) That if the original transaction was illegal and usurious, the renewed security is so. Walker v. Bank of Washington, 3 How. [44 U. S.] 71; [Moncure v. Dermott] 13 Pet. [38 U. S.] 345. (3) The instruction as prayed for, does not make the mere loaning of depreciated bills per se, an act of usury, or violation of the charter, but leaves it as a question of fact for the jury, and is, therefore, directly within the case of the Bank of U. S. v. Waggoner, 9 Pet. [34 U. S.] 400. We contend to the jury, that there are strong circumstances to show the usury in this case. That it consisted in paying out depreciated bank notes, and in requiring the paper to be payable in New York.

In answer, the court gave the ninth instruction. And they remarked to the jury, the usury set up having been pleaded, may be insisted on by the defendant. The consideration of the bill now before us, it is considered, was usurious. That consideration consisted in two previous bills. One was a draft on Elijah Lacy, drawn by O. P. Lacy, for three thousand dollars, on the order of William B. Beason, five months after date, and which was dated 1st February, 1840. The other bill by the same parties, was dated the 14th of April, 1840, for two hundred dollars, payable in ninety days. These bills having been protested for non-payment, were returned to the bank. At the time they were negotiated at the bank, it paid specie, and continued to do so until July, 1840. The interest was charged upon the above bills, and five per cent. damages allowed in such cases by the Michigan statute. A payment of fifteen hundred dollars was made on the bills, and the bill of exchange now in controversy was given for the balance still due. The charter of the bank prohibits it from taking more than six per cent. interest. Now, to constitute usury, there must be a loan made, corruptly, for more than the legal rate of interest, and with the intention of evading the law. If depreciated notes are loaned as money, it may be a circumstance connected with others, to show a corrupt intent. But the Bank of Indiana paid specie at the time, and its notes, though less valuable than Eastern paper, can not be considered as depreciated paper, so long as an application at the bank would convert them into specie. It is said that at the time the first bills were given, a bill on New York was worth from seven to ten per cent. more than the paper of the bank. This refers to bills payable at sight; there has been no evidence as to the value of bills on New York payable on time. One of the original bills was payable in five months, the other in three. From the course of trade, exchange is generally in favor of the East and against the West. In buying such bills, banks generally incur some risk. The exchange varies, and the payment may not be made punctually. The present case illustrates this fact. Such a transaction being bona fide, is never usurious. Banks deal in bills of exchange, a purchase of a bill, at any price, is not usurious. But if such purchase is made as a cover to the transaction, it may be usurious. The usual course is, to draw Eastern bills and ship produce to meet them. Such a transaction is not usurious. In the language of the supreme court in [Bank of U. S. v. Waggoner] 9 Pet. [34 U. S.] 399, "there must be an intention, knowingly, to contract for, or to take usurious interest, for if neither party intend it, but act bona fide and innocently, the law will not infer a corrupt agreement." In the same case, the court says, "if the contract was fairly made by the parties, making the contract intended, to exchange credits for the accommodation of Owens; that the Bank of Kentucky was solvent, and able to pay its debts by coercion, then the contract was not void for usury, nor contrary to the charter of the bank, notwithstanding the party knew that the Bank of Kentucky did not pay specie for its notes without coercion, and that those notes were in exchange at a depreciation of from thirty-three to forty per cent. below par."

10. "That if the original bills of exchange were legal and untainted, yet if on the renewal of them more than legal interest was unlawfully stipulated for and included in the paper taken on renewal, then such paper is void." This instruction was given by the court.

11. "That if the jury find, that the first bills were drawn, accepted and indorsed in Michigan, and that the parties all resided there at the time and since then, the law of that state fixes the damages chargeable to the drawer, upon their dishonor, and if they find that in the renewal of the paper the agent of the holder, with the assent of his principal, intentionally exacted more than three per cent. as damages on the protested paper, and included such amount in the bill taken on renewal, and that the present bill, now in dispute, was intentionally drawn so as to cover damages of more than three per cent., besides expenses, then the defendant is not liable upon it, and the verdict must be for him."

12. That if the renewed paper were in other respects legal, yet, if in addition to the full amount due on the former bills, with damages, expenses and interest, the jury believe that the State Bank required of Obed P. Lacy, and he agreed thereto, as a condition of renewal and extension, that he should make the paper taken on renewal, payable in New York, and that exchange on New York was worth a premium to the bank, and such condition was imposed, with a view to secure to the bank, at the expense of the debtor, more than legal interest, or a profit in addition to the rate of interest fixed by its charter; and that the present bill was made and delivered in pursuance of such agreement, then they are to find for the defendant.

The instructions have been drawn out to an unreasonable length, and have presented the same views under somewhat different modifications. As to the eleventh instruction, it is refused, as also the last one. It is immaterial where the parties resided, the bills were negotiated at the bank in Indiana. Until the bank discounted them they were of no validity, as they were bills for discount, and not for any other purpose. The state where the contract was negotiated, must regulate the damages on protest, and they were rightly calculated under the Indiana law. No additional remarks need be made in regard to exchange.

Under the instructions of the court the jury found a verdict for the plaintiff. Judgment.

Case No. 10,590.

ORR v. LITTLEFIELD et al.

[1 Woodb. & M. 13;[1] 8 Law Rep. 314; 2 Robb, Pat. Cas. 323.]

Circuit Court, D. New Hampshire. Oct. Term, 1845.

PATENTS—PROVISIONAL INJUNCTION BEFORE HEARING — UNDISTURBED POSSESSION AND USER OF PATENT RIGHT — OTHER RECOVERIES FOR INFRINGING SAME PATENT—ANSWER.

1. In a suit in equity for the violation of a patent right, an injunction will not be granted before a hearing upon the merits, merely upon proof that the complainant has obtained a patent.

[Cited in Woodworth v. Rogers, Case No. 18,-018.]

2. But proof of undisturbed possession and user of the patent right, for a reasonable length of time, by the complainant, is ground for granting an injunction.

[Cited in Hovey v. Stevens, Case No. 6,745; Pierpont v. Fowle, Id. 11,152; Orr v. Merrill, Id. 10,591; Woodworth v. Rogers, Id. 18,018; Foster v. Moore, Id. 4,978; Hussey v. Whitely, Id. 6,950; Sargent v. Seagrave, Id. 12,365; Hockholzer v. Eager, Id. 6,556; White v. Heath, 10 Fed. 293.]

3. It is also ground for granting an injunction, that the complainant has prosecuted other persons for violations of the same patent, and recovered judgment against them; and it makes no difference that such judgment was rendered by agreement of parties, where there was no collusion, or under a specification of this patent, which has been surrendered as defective, and a new one taken out.

[Cited in Potter v. Holland, Case No. 11,330; Orr v. Merrill, Id. 10,591; Woodworth v. Hall, Id. 18,016; Platt v. McClure, Id. 11,218; McWilliams Manuf'g Co. v. Blundell, 11 Fed. 422.]

4. An injunction will not be dissolved, as a matter of course, on the coming in of the answer, denying the equity of the bill, if the complainant has adduced auxiliary evidence of his right, as in the present case.

[Cited in Hussey v. Whitely, Case No. 6,950; Woodworth v. Rogers, Id. 18,018.]

[Cited in Conover v. Ruckman, 34 N. J. (Eq.) 297.]

This was a bill in equity. It alleged, that before the 20th of January, 1836, Isaac Orr, whom the complainant [Matilda K. Orr] represented, was the inventor of a new improvement in stoves, called the air-tight stove, and on that day obtained a patent therefor. But the specification being made out inaccurately, he caused the patent, on the 12th of November, 1842, to be cancelled, and a new one to be issued [No. 48]. It further averred that the patent was valuable during his life, which terminated in 1844, and had since yielded large sums to her as administratrix. The bill contained further averments as to the violation of the patent by Hunneman & Son, and a recovery of damages in a suit at law therefor, in October, 1843; and that the respondents [James Littlefield and others] had not respected her rights under the patent, but made and sold stoves like those described in his specification; and hence the bill prayed, among other things, for an injunction to restrain the respondents from making or selling any more air-tight stoves, during the residue of the time the patent has to run. The case was heard before Woodbury, J., at Portsmouth, on the 13th of October, when the complainant moved for an injunction, in conformity to the prayer of the bill. In support of this motion, she offered in evidence the patent, which appeared to have been issued, cancelled and re-issued, as stated in the bill; and which claimed the invention to be a new combination of particulars in a stove for heating rooms. She next offered copies of a case in which Isaac Orr recovered damages against Hunneman & Son, for a violation of this patent in October, 1846. She next gave in evidence another recovery of damages and costs against Ira Hazelton, for breach of this patent in May, 1845; and the issue of an injunction in her bill against Badger, for another breach, in October, 1844. After that, she read the affidavits of nine persons, showing, that Isaac Orr received about five thousand dollars for licenses and plates to use his stove, the three years previous to his death, and the complainant a like sum since; that the combinations in Orr's stove were new and useful; that his right was unquestioned till the stoves

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

came into general use; and that all using them since, as well as before, had paid when required, except the persons before named and the respondents, who had made and sold stoves similar to them, and refused to pay for the right now, though in 1844 they had purchased some of the plates, which were given as evidence of license. On the part of the respondents, evidence was then offered that the judgment against Hunneman & Son was rendered on a verdict, taken by agreement of the parties, but without any proof of collusion or fraud. They showed, further, that the judgment against Hazelton was on a default by agreement; and offered the affidavits of four witnesses, stating that the invention of the complainant's intestate was not new, but had been used previously to the original issue of his patent.

S. E. Sewall and Hackett, for complainant.
Mr. Hatch, for respondents.

WOODBURY, Circuit Justice. This motion for an injunction is in accordance with a special prayer in the bill; and hence it is properly asked for. Schermehorn v. L'Espenasse [Case No. 12,454]; 2 Story, Eq. Jur. 156. The subject-matter of the bill is, also, one in which it is usual and fit for the court to interpose by this remedy, and on a proper state of facts before a final decision is had on the merits; because every stove sold is an injury if the patent is valid, and without such a remedy,—the supposed offence being constantly repeated,—the causes of action and the multiplicity of suits would probably become much extended, and relief, in that way, prove very defective. Harmer v. Plane, 14 Ves. 130; Livingston v. Van Ingen, 9 Johns. 507, 570; [Osborn v. Bank of U. S.] 9 Wheat. [22 U. S.] 738, 845; Poor v. Carleton [Case No. 11,272]. An injunction, in such a case, proves to be useful as a bill of peace. On the contrary, however, such injunctions are a check on the business of respondents; and interferences subjecting others to a loss before a full trial between the same parties, are not always to be justified. In what cases, then, should injunctions issue? It is not enough that a party has taken out a patent, and thus obtained a public grant, and the sanction or opinion of the patent office in favor of his right, though that opinion, since the laws were passed requiring some examination into the originality and utility of inventions, possesses more weight. But the complainant must furnish some further evidence of a probable right; and though it need not be conclusive evidence,—else additional hearing on the bill would thus be anticipated and superseded,—yet it must be something stronger than the mere issue, however careful and public, of the patent, conferring an exclusive right; as, in doing that, there is no opposing party, no notice, no long public use, no trial with any one of his rights. The kind of additional evidence is this. If the patentee, after the procurement of his patent, conferring an exclusive right, proceeds to put that right into exercise or use for some years, without its being disturbed, that circumstance strengthens much the probability that the patent is good, and renders it so likely, as alone often to justify the issue of an injunction in aid of it. Ogle v. Ege [Id. 10,462]; 2 Story, Eq. Jur. 210; Drew. Inj. 222; Phil. Pat. 462. After that it becomes a question of public policy no less than private justice, whether such a grant of a right, exercised and in possession so long, ought not to be protected, until avoided by a full hearing and trial. Harmer v. Plane, 14 Ves. 130. In this case, the evidence is plenary and uncontradicted as to the use and sale of this patent by the inventor and his representative for several years, publicly and without dispute. Computing from the original grant, the time is over nine years, and since the re-issue of the letters patent it is nearly three. I concur in the opinion delivered by Judge Sprague in Orr v. Badger [Case No. 10,587], that the time to be regarded under this view is what has elapsed since the original issue or grant. In Hill v. Thompson, 3 Mer. 622, the time was only three years from the first grant. In Ogle v. Ege [supra], it was but six years. And though in some cases reported, it had been thirteen, and in others twenty years (14 Ves. 130), yet it is believed, that seldom has a court refused an injunction in applications like this, on account of the shortness of time after the grant, however brief, if long enough to permit articles or machines to be constructed by the patentee in conformity to his claim, and to be sold publicly and repeatedly, and they have been so sold and used under the patent without dispute. Here the sales were extensive and profitable from 1836 downwards, and the right as well as the possession does not appear to have been contested till 1842. In Hill v. Thompson, 3 Mer. 622, 624, it is true that the court dissolved an injunction, when only about one year had elapsed since any work had been completed under the patent, and only two years since the specification was filed, the chancellor calling it a patent "but of yesterday;" but, he added, that he would not dissolve it, if an "exclusive possession of some duration" had followed; though an answer had been put in denying all equity, and doubts existed as to the validity of the patent; and no sales under it were proved in that case. So though the patent had been issued thirteen years, and the evidence is doubtful as to acquiescence in the possession or use, an injunction may be refused. Collard v. Allison, 4 Mylne & C. 487. But in the present case, the acquiescence appears to have been for several years universal.

Another species of evidence, beside the issue of the patent itself, and long use and possession under it, so as to render it probable the patent is good, and to justify an injunction, is the fact, that if the patent becomes

disputed, the patentee prosecutes for a violation of his rights, and recovers. Same authorities; Kay v. Marshall, 1 Mylne & C. 373. This goes upon the ground, that he does not sleep over his claims or interests, so as to mislead others, and that, whenever the validity of his claim has been tried, he has sustained it as if good. But such a recovery is not regarded as binding the final rights of the parties in the bill, because the action was not between them; though when the judgment is rendered without collusion or fraud, it furnishes to the world some strong as well as public assurance, that the patent is a good one. In this view of the evidence of this character in the present action, it is not contradicted, nor impaired at all, by the judgments having been given on verdicts and defaults under agreements. Such judgments, when, as is admitted here, not collusive, are as strong, if not stronger evidence of the patentee's rights, than they would have been, if the claim was so doubtful as to be sent to a jury for decision, rather than to be so little doubtful as to be admitted or agreed to after being legally examined. Both of these circumstances, therefore, possession and judgments, unite in support of an injunction in the present case.

The only answer to the motion as made out on these grounds, is, the evidence offered by affidavits on the part of the respondents, tending to cast doubt on the originality of the invention of the patentee. I say, tending to this, because some of the affidavits, at least, do not distinctly show that the persons making them intended to assert that the whole of any one of the combination of particulars contained in Dr. Orr's claim in his specification, had been used before his patent issued; because, they are counteracted by other testimony, from the witnesses of the complainants, more explicit and in larger number; and because, in this preliminary inquiry, where the evidence is taken without the presence or cross-examination of the opposite party, it would be unsafe to settle and decide against the validity of the patent, when a full and formal trial of it is not contemplated till further progress is made in the case. All that is required in this stage, is, the presumption before named, that the title is good. This presumption is stronger here than usual, as it arises from the issue of the patent and an enjoyment and possession of it undisturbed for several years, beside the two recoveries against those charged with violating it.

After these, other persons can, to be sure, contest the validity of the patent, when prosecuted either in equity or at law; but it is hardly competent for them to deprive the complainant of her right, thus acquired to an injunction, or, in other words, to be protected in so long a use and possession, till her rights are disproved after a full hearing; surely it is not reasonable to permit it when the affidavits of the respondents to invalidate or cast a shade over her right are met by that which is stronger, independent of the long possession, judgments and presumptions before mentioned. But another objection has been urged in argument. When an answer to the bill denies all equity in it, the respondents contend that an injunction would be dissolved, and hence it ought not to be imposed, if the respondent denies equity by affidavit. This may be correct, in respect to injunctions termed common, as there affidavits and counter affidavits are inadmissible (Eden, 326, 117); yet in these, the denial must be very positive and clear (Ward v. Van Bokkelen, 1 Paige, 100; Noble v. Wilson, Id. 164). But the position cannot be correct in the case of injunctions called special, like the present one, and where facts and counter evidence show the case to be different from what is disclosed in the affidavits or an answer of the respondents alone. No usage or cases are found where the injunctions are dissolved, as a matter of course on such answers, if the complainant has adduced auxiliary presumptions in favor of his right like those in the present instance. On the contrary the cases are numerous where the whole is regarded as still within the sound discretion of the court whether to issue the injunction or refuse it; or if issued, to dissolve or retain it. 3 Mer. 622, 624; 2 Johns. Ch. 202; Poor v. Carleton [Case No. 11,272]; Livingston v. Van Ingen, 9 Johns. 507, 570; Rodgers v. Rodgers, 1 Paige, 426. And where the complainant has made out not merely a grant of the patent, but possession and use and sale under it for some time undisturbed, and beside this a recovery against other persons using it, the courts have invariably held that such a strong color of title shall not be deprived of the benefit of an injunction, till a full trial on the merits counteracts or annuls it. In several cases, where the equities of the bill were even denied, and in others, where strong doubts were raised whether the patent could in the end be sustained as valid, the courts decided, that injunctions should issue under such circumstances as have before been stated in favor of the plaintiff, till an answer or final hearing; or, if before issued, should not be dissolved till the final trial, and then cease, or be made perpetual, as the result might render just. The chancellor in Roberts v. Anderson, 2 Johns. Ch. 202, cites 2 Ves. 19, Wyatt, Prac. Reg. 236, Boulton v. Bull, 3 Ves. 140, Universities of Oxford & Cambridge v. Richardson, 6 Ves. 689, 705, Harmer v. Plane, 14 Ves. 130, and Hill v. Thompson, 3 Mer. 622, 624.

But if this injunction leads to serious injury in suspending works, the court can require security, if desired, of the complainant, to indemnify for it, if the patent is avoided, or can make orders to expedite a final hearing and decision. 4 Paige, 447; 2 Paige, 116. So the defendants can have security given for costs, especially as the plaintiffs live out of the state. Let the injunction issue till after a final hearing; and as the defendants re-

quest it, security be filed by the plaintiffs for costs in thirty days. Injunction granted.

[For other cases involving this patent, see Cases Nos. 10,589 and 10,591.]

Case No. 10,591.

ORR v. MERRILL.

[1 Woodb. & M. 376; [1] 2 Robb, Pat. Cas. 331.]

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

PATENTS — INJUNCTION — DISSOLUTION — ANSWER DENYING VALIDITY OF PATENT—SUFFICIENCY—ISSUE AT LAW.

1. Where a bill in chancery asks for an injunction against the use of a patent stove, and for an account of sales, and on proof of former recoveries of others and long possession, an injunction had been granted, the court will not dissolve it merely on an answer denying the validity of the patent; but will, if requested, direct an issue to be tried at law on that point, or, if not requested, continue the injunction and dissolve it at the next term, if in the mean time a suit at law is not brought to test the title.

2. An answer is sufficient for this purpose, though it do not set out the names of the persons, who used the stove patented, or knew it before the patentee did, nor the names of the places where it was used or known.

3. But the answer at law should set them out, and so should the answer and notice on which in chancery an issue is asked to be formed and tried at law.

[Cited in Root v. Lake Shore & M. S. R. Co., 105 U. S. 206.]

This was a bill in chancery, filed the 9th of September, 1845, charging the defendant [William Merrill] with selling Orr's patent air-tight stoves, without a license from the complainant [Matilda K. Orr, administratrix of Isaac Orr]. She was averred to be the owner of said patent procured by her husband, and to have supported her right to it and the validity thereof in several former trials, and to have been for some years in the possession and sale of it. The bill prayed an injunction against farther sales, and an account of prior ones, and a disclosure of certain facts in reply to several interrogatories. On a notice to the respondent, and a failure to appear, an injunction issued September 17th, 1845, which the respondent now moves to have dissolved. In the meantime, November 27th, 1845, the respondent had filed an answer, in which he denied generally the originality of the patent claimed by the plaintiff, and also the use of it by the respondent, though admitting he made other but different air-tight stoves, and stated his inability therefore to exhibit any account as asked for. The complainant filed exceptions to the answer. 1st. That the denial of the originality of the plaintiff's patent does not specify the names of the persons who before invented or used it, nor the names of the places where it was used or known, before the invention of the plaintiff's patent. 2d. That it is imperfect and deficient in other respects. But these it is not material to detail, in the view of the subject taken by the court.

Fox, for plaintiff.
Wells, for respondent.

WOODBURY, Circuit Justice. It is proper in this case to look at the answer and exceptions, before deciding on the motion to dissolve the injunction. The answer, if it was intended to form an issue to try the validity of the patent, because not original, ought probably to contain more allegations, and set out the names of places and persons, where and by whom, a like stove had before been used. Story, Eq. Pl. § 852. For in a trial of such a question at law the act of congress is peremptory, that such notices shall be given in writing; and it would not do in equity to place a patentee on a ground less favorable than he is placed in a trial at law. But the answer here is sufficient for another purpose, and that for which it was probably filed. It shows, that the defendant denies, and wishes to have tried in a proper way, the validity of the plaintiff's patent, and also denies his own use of it, if it turn out on a trial to be valid.

But where is that trial to be had? Not usually by this court in chancery, nor often in issues sent from here to the law side of the court to be settled by a jury, unless requested by the respondent. But when it is to be done in the last mode in any case, on request or otherwise, it would be proper under those issues to have all the specific notices given by the defendant in detail of persons and places connected with the former use of it. Here, however, no such request being preferred by either side, the trial of the validity of the patent could be had most properly in a new action brought at law, and there, in such a defence as this answer discloses, all the notices must be set out which the plaintiff claims to have done, before he is allowed to be driven to trial on the merits. Phil. Pat. p. 392, and cases there cited.

Again, bills brought in equity for injunctions are usually instituted after the title of the patent has been established at law against the defendant, or some other person using it; and the expectation is, that the only questions agitated will be as to the amount to be accounted for, and the restrictions for the future, and not the validity of the right. But if the right is put in question by the defendant, and an injunction has been already granted, it may be dissolved, if not proper to be retained, and the plaintiff referred to a court of law to try the validity of the patent there. Or the injunction may be retained as proper till the validity of the patent is settled between them, if it appears as here, that the plaintiff has supported the validity of the patent in other trials, and been some time in the use and possession of

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

it. See Orr v. Littlefield [Case No. 10,590]. That question can be settled by an issue framed and sent to a jury, under this bill, and to the law side of the court, when desired by the respondent, or by a new action brought at law for damages. See cases in Pierpont v. Fowle [Id. 11,152].

A common injunction is dissolved on an answer denying title, &c., but a special one is not, unless the denial is justified by something else, or the claim is strengthened by some evidence. See all the cases and decisions noticed in Poor v. Carleton [Case No. 11,-272]. In special injunctions, a motion to dissolve depends on the sound discretion of the court, after affidavits as to merits, if required, and on the nature of the case. Id. Here, the answer is full enough and direct enough to show that the defendant denies the validity of the patent, so as to render a trial necessary; but till sustained by the result of such a trial in favor of the defendant, this naked denial is not sufficient to overcome the former recoveries and long possession of the plaintiff in favor of retaining the injunction that has before been granted. Perfect justice, however, can be enforced for both parties, as no desire is expressed to form an issue here on the matters in dispute to be tried by a jury. We can direct, as we do, that the plaintiff must institute a suit at law before the next term, to try the validity of her patent with the defendant, and his use of it or not, if valid, else the injunction will then be dissolved. But sufficient cause does not seem to be now shown to render the dissolution of it proper at this time. Motion refused.

[Patent granted to J. Orr Jan. 20, 1836, was reissued Nov. 12, 1842 (No. 48). For other cases involving this patent, see Orr v. Badger, Case No. 10,587; Orr v. Littlefield, Id. 10,590.]

ORR (RATHBONE v.). See Case No. 11,585.

ORR (THORP v.). See Case No. 14,006.

ORTEGA (UNITED STATES v.). See Cases Nos. 15,970 and 15,971.

ORVIS (McDONALD v.). See Case No. 8,764.

Case No. 10,592.

In re OSAGE VALLEY & S. K. R. CO.
[9 N. B. R. 281;[1] 1 Cent. Law J. 33.]

District Court, W. D. Missouri. 1873.

BANKRUPTCY—SET-OFF AGAINST CREDITOR'S CLAIM.

Where the alleged bankrupt has counter claims against the petitioning creditor of such a nature as are provable in bankruptcy, and the amount so provable will reduce the petitioning creditor's claim below two hundred and fifty dollars, the petition will be dismissed.

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

The facts of the case and the nature of the pleadings on which the opinion was pronounced are sufficiently stated therein. (1) In suits and proceeding instituted in, or transferred to, the federal courts, the same defenses, set-offs and counter claims may be interposed as could be if they were brought and tried in the state tribunals. West v. Aurora City, 6 Wall. [73 U. S.] 139; Partridge v. Insurance Co., 15 Wall. [82 U. S.] 573. (2) Petitioner must have a debt, provable under the bankrupt law, of two hundred and fifty dollars after allowing all just credits, set-offs and counter claims. In re Ouimette [Case No. 10,622]; In re Cornwall [Id. 3,250]; Bump, Bank. (6th Ed.) 47, 48. (3) Unliquidated damages are proper subject of counter claim under the laws of the state of Missouri, where the suit is on contract, and the damages also arise from the breach of contract. Hay v. Short, 49 Mo. 139; Gordon v. Bruner, Id. 570; Davidson v. Remington, 12 How. Prac. 310; Gage v. Angell, 8 How. Prac. 335; Lemon v. Trull, 13 How. Prac. 248; Jones v. Moore, 42 Mo. 413.

I. N. Litton and Ewing & Smith, for petitioner.

Johnson & Botsford and McMillan Bros., for debtor.

KREKEL, District Judge. The Pacific Railroad files its petition to have the Osage Valley & Southern Kansas Railroad declared bankrupt, and after setting out formal requirements, alleges that its demand originates in the violations of the conditions of a lease made by the Osage Valley & Southern Kansas Railroad on the 10th day of September, 1868, for thirty years, of its Boonville and Tipton road, to the petitioner; that by a provision of said lease it was to have the use and possession of its Boonville depot and grounds, of which it has been deprived by judgment in favor of an adverse claimant, and had damages and costs to pay; that by another provision of said lease, the Osage Valley & Southern Kansas Railroad was to fence the one-half of said railroad in two, and the whole thereof within five, years from the date of the lease, which it failed to do, and for which failure damages are also claimed. The acts of bankruptcy are charged to be the suffering and procuring of its property to be taken on legal process with intent to give a preference, and with intent to defeat and delay the operation of the bankrupt law [of 1867 (14 Stat. 517)]. To this petition the Osage Valley & Southern Kansas Railroad files an answer denying the acts of bankruptcy, and, further, that the Pacific Railroad is a creditor, or has a demand against it. As a defense to the claim of petitioner, the Osage Valley & Southern Kansas Railroad sets up and claims damages growing out of obligations assumed and undertaken on the part of the Pacific Company in the lease aforesaid, and asks that such damages may be allowed as a set-off and counter claim, averring that on a settlement of their demands, the Pacific Railroad will be indebted to the Osage Valley

[1] [Reprinted from 9 N. B. R. 281.]

& Southern Kansas Railroad. The attorneys for the Pacific Railroad file their motion to strike out so much of defendant's answer as refers to unliquidated damages. This motion raises the question: is the claim for unliquidated damages available as a set-off or counter claim? This question must be solved by the provisions of the bankrupt act; for whatever force may be given to the act of congress of June 1st, 1872 [17 Stat. 196], providing for the assimilating of the practice and pleadings of federal courts to that of the state courts, neither that act nor the bankrupt law has done away with the distinction between law and equity, although the bankrupt act, as we shall presently see, seems in some of its enactments to disregard it. Authority for this may be found in the constitutional grant of power to congress "to establish uniform laws on the subject of bankruptcy throughout the United States."

This grant, so far as limitations are concerned, leaves it for the national legislature to enact whatever provisions of law it may deem best to accomplish the constitutional object. The first section of the bankrupt act constitutes the district courts of the United States courts of bankruptcy, and confers on them original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are thereby authorized "to hear and adjudicate upon the same, according to the provisions of this act, providing that the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy." The jurisdictional grants, however ample, need not come in conflict with the maintaining of the distinction between law and equity; yet when we come to the provisions of the second section of the act, giving the circuit courts of the United States a general superintendence and jurisdiction of all cases and questions arising under it, and providing that they "may, upon bill, petition or other proper process of any party aggrieved, hear and determine the cases as a court of equity," it would appear that congress, by these provisions, sought to meet a peculiar class of cases, having their origin in the bankrupt act, in which law and equity were blended. But the jurisdiction to hear and determine the matters in controversy does not exclusively depend on the construction given to the provision in the sections cited. The last clause of the nineteenth section of the act under consideration, provides that "if any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, * * * the court may cause such damages to be assessed in such a mode as it may deem best; and the sum so assessed may be proven against the estate." Thus it is seen that, by direct provision, unliquidated damages, growing out of any contract or promise, when assessed, are provable debts, and, being provable debts, under the view of the court, may be set up by way of defense to show that no debt or demand is due to petitioner entitling it to have defendant declared a bankrupt.

It is said that the damages must be assessed before they become a provable debt and, before they can be made available as a counter claim. While this is true, the mode of assessing is left to the court, "as it may deem best." In the settlement of a bankrupt's estate, the court would undoubtedly direct the assessment of unliquidated damages before allowing it to be proven; but this practically amounts to nothing more or less than an inquiry as to the amount. As this court may, by allowing the answer to stand, make this its mode for assessing defendant's damages consistent with the provisions of law, it will not order the defendant out of court with its claims, which, if sustained, may dispose of the case. While this view of the law would allow petitions in bankruptcy to be brought on claims for unliquidated damages growing out of contracts or promises, it must be left for the courts to determine whether they will, in the first instance, deem an assessment by way of inquiry, on creditor's petition, a mode deemed best to assess unliquidated damages. Of this the court entertains serious doubts, and declares itself free to act when a case shall be presented. The question on the motion under consideration is, shall a claim for unliquidated damages be made available as a defense, to show that defendants are not indebted to petitioners, and hence that the latter have no standing in court? Petitioner must have a claim, after all just credits, exceeding the amount of two hundred and fifty dollars, to entitle it to raise the inquiry as to the facts of bankruptcy and solvency of the defendant. That the prima facie case made by the petition, proofs and exhibits upon which the order to show cause issued, may be rebutted, is well settled by the almost daily practice of this court, as well as adjudicated cases.

That part of the motion to strike out defendant's answer covered by this opinion is overruled.

Case No. 10,593.

OSBORN v. McBRIDE.

[3 Sawy. 590;[1] 16 N. B. R. 22.]

District Court, D. California. April 5, 1876.

FIRM PROPERTY SOLD ON JUDGMENTS AND EXECUTIONS AGAINST THE PARTNERS SEPARATELY.

Where judgments had been obtained before the commencement of proceedings in bankruptcy against each of two partners in trade by a separate creditor of each, and the firm property had been sold under executions issued on the separate judgments, and purchased by an agent of the plaintiff in the separate suits: *Held*, that nei-

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

ther he nor his assignee was entitled to hold the property as against the assignee in bankruptcy of the firm.

[Cited in Crane v. Morrison, Case No. 3,355; Re Sauthoff, Id. 12,380.]

[This was a suit by R. F. Osborn against H. E. McBride.]

S. P. Hall, for complainant.

J. W. Winans, for defendant.

HOFFMAN, District Judge. The facts as admitted by the parties at the return of the rule to show cause are as follows: On the ninth day of October, 1875, Isaac Pollard and Alexander A. Cook filed their petition praying to be adjudged bankrupts individually and as a firm, and on the same day were so adjudged. On the fifth day of October, three days previously to the commencement of the proceedings in bankruptcy, judgments were obtained against Pollard and Cook, respectively, in two several suits instituted against them by a separate creditor of each. The interest of each in certain leasehold property described in the bill was levied on by the sheriff, and subsequently sold under the several executions. The sale took place subsequently to the proceedings in bankruptcy. No order enjoining the sale had been obtained.

The plaintiff in each of the suits was the same person. The property was bid in by his agent. The interest of Pollard was sold for $252.14, and that of Cook for $127.70. The execution against Pollard was for $207 with interest and costs. That against Cook was for $85.65 with interest and costs. Certificates of sale were duly issued to the purchaser at the execution. These certificates are alleged to have been subsequently assigned to one J. S. Lutz, a bona fide purchaser for value, and without notice of any irregularity or invalidity in the sales. They were subsequently assigned to the defendant who, the bill avers, has since collected rents of the sub-tenants, and has sued one of them who declines to pay.

The complainant avers that the leasehold property thus sold was the property of the firm and constitutes a part of the joint assets. I do not deem it necessary at this stage of the proceedings to consider the question how far the right of a judgment creditor to sell property of the debtor, levied on before the commencement of proceedings in bankruptcy, is affected by the fact that such proceedings have been instituted, and the title of the bankrupt divested before the sale is actually made. I will assume that the purchaser, at the execution, acquired all the right and title which each of the judgment debtors separately had in the property sold. And that the present defendant has succeeded to those rights. But if the property levied on was firm assets, what was the interest of each partner, which his separate creditors could levy on and apply to the satisfaction of their claims? Evidently his interest in the firm, i. e., his share of the surplus that might remain after all the partnership debts were paid. Mr. Collyer, in his work on Partnership, states, as undoubted law, that where the separate creditor of one partner has taken partnership property in execution for his separate debt, the other partners may file their bill against the separate creditor, the debtor partner and the sheriff, praying a general account of the partnership and payment of what is due to them, and that the creditor and sheriff may be enjoined from proceeding under the execution and selling the stock and effects; and a court of equity will give relief accordingly. Section 831. And the same relief is given in favor of the assignees in bankruptcy. 15 Ves. 599; 4 Ves. 396.

In Moody v. Payne, 2 Johns. Ch. 548, Mr. Ch. Kent refused to enjoin an execution and sale until the partnership accounts were taken and liquidated, on the ground of the absence of precedents. But Mr. J. Story considers this an insufficient reason for denying the injunction, and Mr. Ch. Kent admits in his Commentaries (volume 3, p. 65, 5th Ed., in note) that the more fit and suitable rule of practice would seem to be to have the adjustment of the partnership accounts precede the sale.

In Douglas v. Winslow, 20 Me. 92, 93, Mr. Justice Weston, speaking of the right of a separate creditor to attach the interest of one partner in the goods of the firm, says, "This right has been repeatedly exercised and has never been defeated so far as the cases have come to our knowledge, unless in behalf of partnership creditors." So in Tappan v. Blaisdell, 5 N. H. 193, it is said by Richardson, C. J., to be "well settled that partnership property cannot be holden to pay the separate debt of an individual partner until all the partnership debts are paid. All that can be taken is the interest of the debtor in the firm—not the partnership effects themselves, but the right of the partner to a share of the surplus that may remain after all the debts are paid."

In Vermont the partnership creditors are in equity preferred to separate creditors, out of the partnership assets of an insolvent firm, notwithstanding the separate creditors have first attached those assets. Washburn v. Bank of Bellow Falls, 19 Vt. 278; Bardwell v. Perry, Id. 292.

Mr. Ch. Kent states the rule to be "that partnership effects cannot be taken by attachment or sold on execution to satisfy a creditor of one of the partners only, except it be to the extent of the interest of such separate partner in the effects of the settlement of all accounts. The sale is made subject to the partnership debts, and is, in effect, only a sale of the undefined surplus interest of the partner defendant, after the partnership debts are paid." He adds in a note, "the doctrine of moieties is now exploded, and the creditors under execution or process of foreign attachment, or assignees of a partner

or purchasers at sheriffs' sales, can take only the interest of the debtor in the partnership funds, subject to the accounts of the partnership. That interest, and not the partnership effects is sold, and that interest is merely the share found to belong to the debtor upon an adjustment in equity of the partnership accounts." See Story, Partn. §§ 261, 262. Gow, Partn. § 365, says, "The levy under the execution transfers no part of the joint property. It merely gives the right to an account."

I do not understand that these general and, indeed, elementary principles are denied. But it is contended that the purchaser at the executions, or his assignee, may now hold the partnership property bought by him freed from the claims of the joint creditors, because the interest of both parties has been levied on and purchased by him, and this accounting is not now asked for by either partner. No authority is cited for this position. The rights to be protected are those of the joint creditors; and perhaps those of the separate creditors might be involved if the plaintiff in the two suits against the individual partners is allowed to appropriate all the joint assets. The bankrupt act [of 1867 (14 Stat. 517)] explicitly directs that the joint assets shall be first applied to the payment of joint debts, and the separate assets to the payment of separate debts. The right thus given to these classes of creditors, respectively, is absolute, and must be enforced by the court. It is conferred by law, and is not evolved out of, or through the equity of the partners, which is by some supposed to be the only foundation of the analogous rule of the court of chancery. The sale on execution of either or both the partners' interest in the joint assets in satisfaction of a separate debt gave to the purchaser, as we have seen, only an interest in the assets which might remain after the payment of the partnership debts. The fact that he purchased the interest of two of the partners sold on separate executions, can have no effect to enlarge the interest of either acquired on the separate sale of that interest. He took merely a right to an account, and can now hold the partnership assets only subject to that account, and in entire subordination to the claims of the joint creditors. If, upon the settlement of the joint estate, any surplus should result in favor of either of the partners, it will belong to the purchaser of the interest of that partner, provided the judgment be valid and not obnoxious to any objection under the bankruptcy act. This is all the interest which the sheriff could sell, or has pretended to sell, and all the purchaser could acquire.

In the case of Menagh v. Whitwell, 52 N. Y. 149, the question presented in this case was elaborately examined. It was there held, upon reasons which admit of no answer, that when a partner sells his interest to a stranger, or it is sold upon execution against him, his right to have the partnership debts paid, and his liability therefor discharged out of the property, are not divested by the sale. And this right is not affected by the fact that the separate interests of all the partners are thus disposed of. It was further held, that partnership debts have, in equity, an inherent priority of claim to be discharged out of the partnership property, and as between a firm and its creditors, the title of the former to the joint property is not divested by any separate transfers to strangers by either one or all of the partners in payment of their individual debts, or by proceedings against them separately with reference to their individual interests; and when there has been no transfer by the firm, and the property remains in specie, and capable of being levied upon, it may be followed in the hands of those claiming by virtue of such transfers or proceedings, and may be levied on by a judgment creditor of the firm. I consider this authority decisive.

The question whether the leasehold property was firm assets will of course remain open to contestation. Premises used by partners for the purpose of carrying on their trade prima facie form part of the partnership property. Featherstonhaugh v. Fenwick, 17 Ves. 308. But this presumption may be rebutted. Until this question can be determined, and an account taken if the property be found to be firm assets, the injunction against the defendant must be retained Perhaps the more regular course would be to appoint a receiver to collect the rents pendente lite. But I see no objection to permitting them to be collected by the assignee, to be held by him as a distinct and separate fund, and to be accounted for to the defendant if the property should not be found to be firm assets, and the judgments and levies prove to be regular and valid, or if, after liquidating the partnership accounts, any surplus should result in favor of either partner individually. In the meantime, he should be enjoined from parting with the certificates, and collecting or attempting to collect the rents.

Case No. 10,594.

OSBORN v. MICHIGAN AIR LINE R. CO. et al.

[2 Flip. 503; 25 Int. Rev. Rec. 250; 8 Reporter, 296; 11 Chi. Leg. News, 367; 4 Cin. Law Bul. 553.][1]

Circuit Court, E. D. Michigan. Aug., 1879.

JURISDICTION — BILL TO IMPEACH FOR FRAUD — AVERMENTS NECESSARY—WHEN PARTY HAVING AN INTEREST MAY INTERVENE.

1. In a proper case a decree may be impeached collaterally in another court; but where a bill is brought to set aside and declare void a decree rendered in this court, whether on the ground of fraud or otherwise, this court being the one in which the decree was rendered, is the

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 4 Cin. Law Bul. 553, contains only a partial report.]

only tribunal which can properly take cognizance of such a bill.

2. It has been frequently ruled in the courts of the United States that a person, having an interest though not a party to the suit, may intervene to assert his rights without reference to the citizenship of the parties.

3. Where a court has jurisdiction of a suit brought to impeach a former decree for fraud, if the decree has been carried into execution, the party complaining of the former decree may be put into the situation in which he would have been if the decree had not been executed.

[This was a bill in equity by Rufus Osborn against the Michigan Air Line Railroad Company and others to set aside a decree alleged to have been secured by fraud in a suit brought to foreclose a mortgage against the railroad. Heard on demurrer.]

Alfred Russell, for complainant.
Meddaugh & Pond, for defendants.

WITHEY, District Judge. Complainant was a stockholder in the Michigan Air Line Railroad in 1873, when suit was commenced in this court to foreclose a mortgage made by that corporation to secure bonded indebtedness. Scammon, a trustee, was plaintiff, and the corporation and others defendants. The railroad corporation, by its directors, appeared and answered, and proofs were taken. At the hearing, in January, 1875, a decree was entered against the company for $265,000, and for a sale of its road. The sale took place in June of last year, defendant Young being the purchaser at $25,000. In November following, the road was reorganized by Young and his associates, under the name of the Michigan Air Line Railway Company, with a capital of $300,000.

The bill now before the court was filed in October, 1877, by the complainant in his own behalf, and of all other stockholders who might come in under his bill, for the purpose of impeaching the decree for fraud and collusion on the part of plaintiff and officers of the defendant railroad company in that suit. The particular fraud is stated to be a fraudulent agreement, signed and introduced at the hearing, admitting the indebtedness which was decreed. The prayer is that the decree be declared fraudulent and void, and that the sale be set aside. Other matters are stated in the bill not necessary to refer to, except that it is stated, as an excuse for delay in bringing this bill, that complainant was ignorant of the foreclosure suit, and did not discover the fraud until after the decree had been executed, from which time he had been diligent, etc. It should further be said that the bill alleges notice of the alleged fraud to the purchaser under the foreclosure sale, to those who are connected with him in the new corporation, and to the corporation itself. It also appears by the bill that complainant is a citizen of Michigan, and that both the defendant corporations named in the suit are Michigan corporations, and were citizens of the same state as complainant.

Demurrers were interposed, under which several questions have been presented for consideration. The most important is jurisdictional, growing out of the citizenship of the parties referred to. The fact that complainant and necessary defendants are citizens of the same state will defeat jurisdiction in this court in any case depending upon the terms of the act of congress defining the original jurisdiction of the circuit courts of the United States. In other words, if this is purely an original bill, then jurisdiction exists only when the plaintiff and necessary defendants are citizens of different states. Again, if this is purely a bill of review, there is no jurisdiction, inasmuch as more than two years elapsed after the decree was rendered before this bill was filed; and for this reason all matters that point to errors in the decree are improperly presented by this bill.

I entertain the opinion that the question whether this bill can be entertained is not dependent upon the citizenship of the parties; and, also, that this is neither purely an original bill, nor a bill purely of review. It is believed to partake of the nature of an original bill, having for its object the review of the proceedings in the original cause, in order to ascertain whether the decree therein should be impeached for fraud alleged to have been practiced by the parties in obtaining it. Story, Eq. Pl. § 426. If no other court can entertain a bill or suit, brought for the purpose of impeaching such decree for fraud, then this bill is necessarily brought here, and may, therefore, be said to be the outgrowth of the original suit—an incident of it—from jurisdiction over which flows the jurisdiction to entertain this bill, without reference to the citizenship of the parties.

It is not doubted that in a proper case the decree sought to be impeached by this bill could be impeached collaterally for fraud in another court; but it is believed that no other tribunal can properly take jurisdiction of a suit brought for the purpose of declaring such decree void, whether for fraud or otherwise. The circuit courts of the United States, and the courts of the state, are essentially, as to each other, foreign forums. Neither can entertain a suit brought for the purpose of declaring fraudulent and void a judgment or decree of the other, precisely as neither can entertain a suit brought for the purpose of declaring fraudulent and void a judgment or decree of the court of king's bench of England. The judgment in Amory v. Amory [Case No. 333] is not believed to conflict with the views expressed.

It has been frequently ruled in the courts of the United States, as was shown by cases cited upon argument, that a person having an interest, though not a party to the suit, may intervene to assert his rights, without reference to the citizenship of the parties. Freeman v. Howe, 24 How. [65 U. S.] 460; Buck v. Colbath, 3 Wall. [70 U. S.] 345; Jones v. Andrews, 10 Wall. [77 U. S.] 333; Christ-

mas v. Russell, 14 Wall. [81 U. S.] 82; [Kearney v. Denn] 15 Wall. [82 U. S.] 195; French v. Hay, 22 Wall. [89 U. S.] 252; Campbell v. Railroad Co. [Case No. 2,366]. See, also, Forbes v. Railroad Co. [Id. 4,926].

But it was claimed that when the decree has been executed, no such auxiliary or incidental proceedings can be held. It does not appear to me that there should be any such limitation. No cases are found supporting that view; indeed, no case like the present has been found or cited.

Certain it is, where a court has jurisdiction of a suit brought to impeach a former decree for fraud, if the decree has been carried into execution, the party complaining of the former decree may be put into the situation in which he would have been if the decree had not been executed. 6 Mitf. & T. Eq. Pl. p. 186; Adams, Eq. (Am. Ed.) 832; Story, Eq. Pl. § 426.

What the effect would be if the purchaser at the sale in execution of such decree had no knowledge of the fraud, there is no occasion to decide, in view of the averment of this bill that there was notice. See Shelton v. Tiffin, 6 How. [47 U. S.] 183–186, as to when a purchaser is protected.

Without further discussion, the objection taken on the ground of want of jurisdiction is overruled. The question is not clear from doubt, but this is my judgment.

In conclusion, the bill is regarded in other respects substantially defective in making a case for relief. It is not only singularly vague and uncertain in its statements, but lacks essential averments to make a case for the relief prayed. These defects were pointed out by counsel for defendants, and will not now be repeated. I have thought possibly complainant might obviate all the objections to which his bill is obnoxious by amendments, and for that reason have indicated that upon a proper bill the court would entertain jurisdiction. The demurrers are sustained for the reason stated. Leave, however, is given to complainant to amend his bill within thirty days, if he shall be advised that a case for relief can be presented. Costs are to the respective demurrants, including the usual solicitor's fees to each.

Case No. 10,595.

OSBORN v. NICHOLSON et al.

[1 Dill. 219; 13 Int. Rev. Rec. 106; 6 Am. Law Rev. 572.][1]

Circuit Court, E. D. Arkansas. 1870.[2]

SLAVE CONTRACTS — EFFECT THEREON OF RECENT AMENDMENTS TO THE CONSTITUTION.

1. The institution of slavery under the constitution of the United States, was purely local in its character, and confined to the several states where it existed, and was the creature of positive law, and this is true of all its incidents.

2. The constitution of the United States did not regard slaves as property, but as persons; and it did not establish slavery or give any sanction to it, save in the single respect of the return of fugitives from service.

3. A remedy on a contract which is against sound morals, natural justice, and right, may exist by virtue of the positive law under which the contract was made; but such remedy can only be enforced so long as that law remains in effect. As such remedy derives all its support from the statute, it cannot for any purpose survive its repeal.

[Cited in Buckner v. Street, Case No. 2,098.]

4. The new constitution of Arkansas, declaring that "all contracts for the sale and purchase of slaves were null and void," is not in conflict with the clause of the constitution of the United States prohibiting any state from passing any law impairing the obligation of contracts, which clause does not operate so as to perpetuate the institution of slavery or any of its incidents, these being matters over which the states had unlimited control.

5. The thirteenth amendment to the constitution of the United States ipso facto destroyed the institution of slavery and all of its incidents, and put an end to all remedies growing out of sales of slaves.

6. In view of the thirteenth and fourteenth amendments to the constitution of the United States, a remedy on a contract for the sale of slaves is contrary to the spirit of their provisions, against public policy, and cannot be maintained.

[Cited in Buckner v. Street, Case No. 2,098.]

On the 28th of March, 1861, the defendant [Young A. G. Nicholson] executed to the plaintiff [Henry T. Osborn] his promissory note for $1,300, and at the same time the plaintiff executed to the defendant a bill of sale in these words: "For the consideration of thirteen hundred dollars, I hereby transfer all the right, title and interest I have to a negro boy named Albert, aged about twenty-three years. I warrant said negro to be sound in body and mind, and a slave for life. I also warrant title to said boy clear and perfect." The consideration for the note was the negro boy mentioned in the bill of sale, and this suit is founded on this note. To the plea setting up these facts, and the subsequent emancipation of the slave by the abolishment of slavery the plaintiff has demurred, and the question is thus raised whether the plaintiff can recover on a promissory note the sole consideration for which was a slave.

Garland & Nash, for plaintiff.
Watkins & Rose, for defendant.

CALDWELL, District Judge. On the part of the plaintiff it is claimed that at the date of this contract, slaves were property; that they were so recognized by the constitution of the United States, and the constitution and laws of this state, where the contract was entered into, and that the subsequent abolition of slavery by the thirteenth amendment of the constitution of the United States and the provisions of section fourteen, article fifteen of the constitution of this state, could

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 6 Am. Law Rev. 572, contains only a partial report.]
[2] [Reversed in 13 Wall. (80 U. S.) 654.]

not affect the vested rights of the plaintiff under the former law.

This is believed to be a full and fair statement of the grounds upon which the right of recovery is rested in this class of cases. It is assumed that there was not when this contract was entered into, and is not now, as to contracts entered into before slavery was abolished, any distinction between a contract the consideration for which was slaves, and a contract made upon any other consideration.

This is the fatal vice in the argument of those who maintain the continued validity of these contracts. The general rules they lay down with reference to vested rights and the effect of a repeal of a statute upon transactions already concluded, may be sound law, and furnish a rule of decision in cases where they apply, but like most general rules of law, they are subject to exceptions and qualifications. And that they have no application to the extent claimed to this case, can be demonstrated by a chain of authorities that no court is at liberty to disregard.

It is obvious that this question cannot be determined without an inquiry into the nature and incidents of slavery, and the relation which the national government sustained, and now sustains to that institution. That slavery is against the law of God and the law of nature, that slaves were regarded as persons and not property by the constitution of the United States, that it was only within the slave states they were regarded as property, that this status was stamped upon them by the local laws of those states and limited to their territorial operation, and that those laws, though expressed in the form of written constitutions and statutes, had in their origin no higher or better sanction than brute force, and were constantly held, even by the courts that enforced them, to be contrary to natural right are propositions established by the judgments of courts and opinions of jurists, whose judgments and opinions must be held to be conclusive upon every court having a decent respect for judicial precedent and authority.

I had supposed that no one denied that these propositions were sound law, but their soundness having been questioned by some judges who maintain that it is still obligatory on the courts to afford a remedy to the slave trader on his slave contracts, a brief reference to the authorities supporting them would seem to be called for.

In 1771, a slave named Somerset was taken by his master from Virginia, then a British colony, to England, and on the refusal of the slave to return with his master to Virginia, he was sent on board of a ship to be carried to Jamaica and sold as a slave. A habeas corpus was granted against the captain of the ship to bring up the body of Somerset, who was in his possession, in irons, and show the cause of his detention. The case was heard before the king's bench, and in giving the opinion of the court, Lord Mansfield said: "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law. * * * It is so odious that nothing can support it but positive law." And the court held that the relation of master and slave would not be recognized in any country where slavery did not exist, and that the moment a slave got beyond the operation of the local law which condemned him to slavery, he was free. This decision, pronounced a century ago, has remained the law of England. It was re-affirmed with emphasis in 1824, by the court of queen's bench.

A British merchant residing in Florida, when it was a Spanish province, and slavery existed there, owned certain slaves, who escaped and went on board a British vessel lying off the coast of Florida. The master of the slaves pursued them and demanded their return from the officer in the immediate command of the vessel. That officer refused to return the slaves, or to compel them to leave the ship, and the owner afterwards brought suit against him in England for the value of the slaves. Holroyd, J., in the course of his opinion, says: "Now it appears from the facts of the case, that the plaintiff had no right in these persons except in their character of slaves, for they were not serving him under any contract, and according to the principles of the English law, such a right cannot be considered as warranted by the general law of nature. I am of opinion that according to the principles of the English law, the right to slaves, even in the country where such rights are recognized by law, must be considered as founded not upon the law of nature, but upon the particular law of that country." And in the same case, Chief Justice Best says: "The moment they put their feet on board of a British man-of-war, not lying within the waters of East Florida (where undoubtedly the laws of the country would prevail) those persons who before had been slaves, were free."

It was urged in this case that the plaintiff was a British subject, that the slaves carried off by the defendant were property according to the law prevailing in Florida, and that though slavery might not exist in England, the comity of nations required that the courts of that country should afford him redress for the loss of his property. In answer to this claim, the same learned judge says: "The plaintiff, therefore, must recover here upon what is called the comitas inter communitates, but it is a maxim that that cannot prevail in any case where it violates the law of our country, the law of nature, or the law of God." And the court, holding that slavery was contrary to the law of nature and the law of God, the defendant had judgment. Forbes v. Cockburn, 2 Barn. & C. 448, 9 E. C. L. 199.

In Phillimore's International Law, a work of undoubted authority, it is said: "There is a kind of property which it is equally unlaw-

ful for states as for individuals to possess—property in men. A being endowed with will, intellect, passion, and conscience, cannot be acquired and alienated, bought and sold by his fellow beings like an inanimate, or an unreflecting and irresponsible thing. The Christian world has slowly but irrevocably arrived at the attainment of this great truth, and its sound has at last gone out into all lands, and its voice into the ends of the world. By general practice, by treaties, by the laws and ordinances of enlightened states, as well as by the immutable laws of eternal justice, it is now indelibly branded as a legal as well as a natural crime." Again he says: "If the movable property of the subjects of a state finds its way within the limits and jurisdiction of a foreign state, it may be claimed, and must be restored to the lawful owners. In parts of the American continent, slaves are unhappily by municipal law, considered as chattels or movable property; a slave escapes, or arrives in this country where slavery is illegal, he is claimed by his master,—must he be restored? Unquestionably not; upon what grounds? Upon the grounds that the status of slavery is contrary both to good morals and to fundamental policy." 1 Phillim. Int. Law, 242, 316, et seq.

The doctrine established by the English cases, is also the law of France. 1 Phillim. Int. Law, 258, 341. And it has been recognized by the courts of this country to its fullest extent.

In the case of Rankin v. Lydia, Judge Mills, speaking for the court of appeals of Kentucky, says: "In deciding the question (of slavery), we disclaim the influence of the general principles of liberty, which we all admit, and conceive it ought to be decided by the law as it is, and not as it ought to be. Slavery is sanctioned by the laws of this state, and the right to hold slaves under our municipal regulations is unquestionable. But we view this as a right existing by positive law, of a municipal character, without foundation in the law of nature, or the unwritten and common law." 2 A. K. Marsh. 468.

In the case of The Antelope, 10 Wheat. [23 U. S.] 12, Chief Justice Marshall says: "That it (slavery) is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labor, is generally admitted, and that no other person can rightfully deprive him of those fruits and appropriate them against his will, seems to be the necessary result of the admission."

In Dred Scott v. Sandford, 19 How. [60 U. S.] 624, Mr. Justice Curtis says: "Slavery being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but it is inferable from the constitution, and has been explicitly declared by this court. The constitution refers to slaves as 'persons held to service in one state, under the laws thereof.'" Nothing can more clearly describe a status created by municipal law.

In Prigg v. Pennsylvania, 10 Pet. [35 U. S.] 611, this court said: "The state of slavery is deemed to be a mere municipal regulation founded on, and limited to, the range of territorial law." And in the same case, Mr. Justice McLean says: "The civil law throughout the continent of Europe, it is believed, without an exception, is that slavery can exist only within the territory where it is established; and that if a slave escapes, or is carried beyond such territory, his master cannot reclaim him, unless by virtue of some express stipulation." Id. 634. And the same learned judge, in speaking of the relation which the national government bore to slavery in the states, says: "Slavery is emphatically a state institution." And in answer to the suggestion that section nine of the state constitution that provides "that the migration or transportation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by congress prior to the year 1808," was a constitutional recognition of the nationality of slavery, he says: "The provision shows clearly that congress considered slavery a state institution, to be continued and regulated by its individual sovereignty, and to conciliate that interest the slave trade was continued twenty years, not as a general measure, but for the 'benefit of such states as shall think proper to encourage it.'" Two years before the expiration of the time allowed for the continuation of the slave trade had expired, Mr. Jefferson, in his message to congress, used this language: "I congratulate you, fellow citizens, on the approach of a period at which you may interpose your authority, constitutionally, to withdraw the citizens of the United States from all participation in the violation of human rights, which has been so long continued on the unoffending inhabitants of Africa, and which the morality, the reputation and the best interests of the country have long been eager to proscribe. Although no law you can pass can take the prohibitory effect until the first day of the year 1808, yet the intervening period is not too long to prevent by timely notice, expeditions which cannot be completed before that day." [Message of President Jefferson to the Ninth Congress, 1806.] [3]

And no sooner had the right reserved by the slave states to continue this infamous traffic expired, than congress passed an act declaring the slave trade piracy, to be punished with death. And it was only by virtue of the third section of article 4 of the constitution of the United States, that fugitive slaves could be apprehended in the free states and returned to their masters.

And this provision of the constitution was

[3] [From 13 Int. Rev. Rec. 107.]

limited strictly to the case of a person "escaping," and hence the courts uniformly held that if a master voluntarily permitted his slave to go into a free state, or attempted to travel with his slave through a free state, the slave was a free man the moment he entered the free state. Com. v. Aves, 18 Pick. 193; Lemmon v. People, 26 Barb. 270; People v. Lemmon, 5 Sandf. 681, 20 N. Y. 562; Dred Scott v. Sandford [supra], opinions of Justices McLean and Curtis, and cases there cited; Jones v. Van Zandt [Case No. 7,501]; Forsyth v. Nash, 4 Mart. (La.) 385; Ex parte Simmons [Case No. 12,863].

That slavery existed in the states independent of the constitution, must be admitted, but that that instrument gave any sanction to slave contracts, or that slavery derived any support from that instrument, save in the single particular already mentioned, is not true; and that it was contrary to the genius and spirit of our institutions and the fundamental principle upon which our government was founded, will scarcely be denied.

We know that the states might destroy property in slaves, without compensation, by repealing the laws by which slavery was established, and we have seen that the right of property in slaves was lost the moment they were taken beyond the territorial operation of the laws that made them such. Now this was not, and is not, the case with any other species of property. No state could deprive its citizens of the right of property in their horses and cattle, without making compensation, and no state can deny to citizens of other states the right to bring such property, or any other species of property, with them, into such state. Crossing state lines does not affect the title to movable property of any kind. This right of every citizen to dwell in or pass through any state in the union, with his movable property, is guaranteed by the constitution of the United States, and exists by the law of nations. But no such right obtained by the constitution of the United States, or the law of nations, with reference to slaves.

The right to movable property, and the rights growing out of contracts in reference to such property, are recognized and upheld by the common law of nations. But this code of universal obligation, securing to the owner his movable property in every state, and securing to all the rights growing out of contracts in reference to such property, has no application to slavery, and the rights growing out of it.

The comity of states and nations does not demand the enforcement of slave contracts any more than it demands the recognition of the claim of the master to his slave, and the law of nations, and the common law, deny all remedy on contracts and rights claimed by virtue of the slave code, in courts of free states. Forbes v. Cochrane, 2 Barn. & C. 448; Story, Confl. Laws, §§ 96, 242, 244, 259; Greenwood v. Curtis, 6 Mass. 361, opinion of Judge Sedgwick; Sedg. St. & Const. Law, 72, 73, 88, and note.

A contract growing out of the sale of slaves depends for its force and validity on the laws of the state where it is made, and to be performed. In this respect it is not different from other contracts, but here the analogy ceases.

A slave contract may be valid by the laws of the state where it is made, and while those laws continue it may be enforced, but there is no obligation resting on any free state to afford a remedy on such contracts. Nor was any such obligation imposed on the free states by the constitution of the United States. In Com. v. Aves, supra, there is an obiter dictum to the contrary. But this dictum is referred to by Judge Story, in note 5 to section 259, of his Conflict of Laws, in language that does not indicate approval; and it is in conflict with the text of that author, and the learned opinion of Judge Sedgwick in Greenwood v. Curtis, 6 Mass. 361, and, see opinion of Justice Nelson [Dred Scott v. Sandford] 19 How. [60 U. S.] 459 et seq.

The constitutional inhibition against state laws impairing the obligation of contracts is not limited in its operation to laws impairing the obligation of contracts, made and to be performed within the state. The law of the contract,—the obligation of the contract,—remains the same, and will be the same everywhere and will be the same in every tribunal. But it does not follow that the constitution compels this state to enforce every species of contracts made in foreign states or other states of this Union, or in this state.

Neither the national nor the state courts will enforce contracts against good morals, or against religion, or against public right, nor contracts opposed to our national policy or national institutions. Such contracts will be deemed nullities by the courts of this country, although they may be deemed valid by the laws of the place where they are made. Story, Confl. Laws, §§ 244, 259, 326–328, 336, 337.

"The law of the place where the thing happens does not always prevail. In many countries a contract may be maintained by a courtesan for the price of her prostitution, and one may suppose an action to be brought here upon such a contract, which arose in such a country, but that would never be allowed in this country." Robinson v. Bland, 2 Burrows, 1084.

Now slavery contained in itself all the worst social evils, and the sale of female slaves for purposes of prostitution was only one of its many revolting features. Will any one be so bold as to affirm that a slave contract entered into in a foreign country, and valid by the laws of that country, would now be enforced by the courts of this country, either state or national? And if not,

why not? Obviously because such a contract is against sound morals, and natural right, and opposed to the constitution and policy of our government. Now is there any thing in our constitution and policy to-day by which the domestic slave trader is put in any better position before the courts of the country than the foreign slave trader would occupy?

It is said slavery was once lawful in some of the states of of the Union, and was tolerated by the constitution of the United States. Granted. But it has been abolished by the constitution of the United States, and of the several states, and that abolishment has been followed up by acts for the enfranchisement of the former slaves, and other legislation that indelibly stamp slavery and all contracts and rights based on the slave code as illegal and void.

In Lemmon v. People, 20 N. Y. 562, it was argued that the state of New York had once tolerated slavery, and that a simple abolishment of that institution by the state ought not to be held or construed to preclude a citizen of a slave state from passing through that state with his slaves. In answer to this argument the court says: "It cannot affect the question that at some time in her history, she has tolerated slavery. Without regard to time or circumstances, the state may at her will change the civil condition of her inhabitants, and her domestic policy, and proscribe and prohibit that which before had existed. Id. 617."

It is the status, the unjust and the unnatural relation which the policy of the state aims to suppress, and her policy fails, at least in part, if the status be upheld at all. Id. 630. If the slave code be now upheld and enforced for any purpose whatever; save as to matters "commenced, prosecuted, and concluded," whilst it was in force, do we not give effect to a policy opposed to the letter of our constitution and laws, and to their spirit and avowed policy? By the comity of nations we shall be forced to open our courts to the foreign, if we open them to the domestic, slave trader. We can open them to neither. In Greenwood v. Curtis, supra, Judge Sedgwick says: "If the contract on which a remedy is sought be unrighteous or immoral, either in its consideration or its stipulations, judgment must be rendered for the defendant, unless the court be concluded by positive authority operating in favor of the plaintiff." And this positive authority in such cases must be in force at the time the plaintiff seeks his judgment.

The plaintiff in this case is seeking to enforce in this court a contract growing out of the sale of slaves, after slavery has been abolished by the constitution of the United States, the slave code repealed, and such transactions made infamous and criminal by the laws of the land. It was only by virtue of the slave code of the state, that the plaintiff ever could have maintained an action in any court on this contract. The common law would afford him no remedy, and the statute giving the remedy; having been repealed by article 13 of amendments, of the constitution of the United States, he is without remedy.

In Key v. Goodwin, 4 Moore & P. 341, 351, Lord Chief Justice Tindal said: "I take the effect of a repealing statute to be to obliterate it as completely from the records of parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded whilst it was an existing law." In Surtees v. Ellison, 9 Barn. & C. 752, Lord Chief Justice Tenterden said: "It has long been established that when an act of parliament is repealed it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule, and we must not destroy that by indulging in conjecture as to the intention of the legislature. We are therefore to look at the statute, 6 Geo. IV. c. 16, as if it were the first that had ever been passed on the subject of bankruptcy." And in Dwar. St. 676, the rule is laid down in these words: "When an act of parliament is repealed, it must be considered, except as to those transactions passed and closed, as if it never existed." In Butler v. Palmer, 1 Hill, 324, 332, Mr. Justice Cowen, after quoting approvingly the rule laid down by Lord Chief Justice Tindal, in Key v. Goodwin, says: "It will be perceived that the rule laid down in this and several other cases, has no respect whatever to the circumstances that the repealed statute was either of a criminal or of a jurisdictional character. Nor is it perceived why in case of a civil right an exception is not just as practicable in favor of a jurisdiction given to enforce the right, as of the right itself." And see opinion of Justice Miller, in Steamship Co. v. Joliffe, 2 Wall. [69 U. S.] 163, and cases there cited.

While a remedy on a contract against sound morals and natural justice and right, may be given by the force of a positive law, under which it was made, and though an action may be maintained on such a contract while such law remains in force, no remedy can be given on such a contract after the repeal of the statute giving the same, and by virtue of which alone the contract ever had any validity.

The rule here laid down does not conflict with the doctrine of the supreme court in Steamship Co. v. Joliffe, supra. The distinction is between things lawful or indifferent, and things unlawful and immoral. Contracts authorized by a statute which are in themselves lawful, or at most indifferent, and which the parties might have lawfully entered into at common law, independent of the statute, and on which the common law would have afforded a remedy, may be en-

forced after the repeal of the statute under which they were made.

The common law in such cases affords a remedy. But if a statute recognizes the validity of, and gives a remedy to enforce, a contract which by the common consent of the whole civilized world is regarded as a violation of the law of God and the rights of man, the repeal of such a statute takes away all remedy on such contract.

It cannot be enforced under the statute because the statute is repealed, and the common law will not afford a remedy on such a contract. "It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate by improper influences, the integrity of our social or political institutions." Marshall v. Baltimore & O. R. Co., 16 How. [57 U. S.] 314, 334.

In Jones v. Van Zandt [Case No. 7,501], which was an action brought to recover the penalty given by the fugitive slave law, of 1793 [1 Stat. 302], for harboring and concealing a runaway slave, Mr. Justice McLean says: "It is clear the plaintiff has no common law right of action for the injury complained of. He must look exclusively to the constitution and act of congress for redress."

And where a penalty accrued under the same act, and suit was brought therefor, and was pending when that act was repealed, by the act of 16th September, 1850 [9 Stat. 462], the supreme court said: "As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject matter." Norris v. Crocker, 13 How. [54 U. S.] 429.

In Kauffman v. Oliver, 10 Barr. [10 Pa. St.] 514, it was held that no action could be maintained at common law for harboring runaway slaves, or for aiding them to escape from their owners. And trover would not lie at common law for a negro slave, because by the common law it was said one man could not have a property in another, for men were not the subject of property.—2 Kent, Comm. 283 et seq.

The law on this subject is forcibly and succinctly stated by Judge Curtis in his opinion in Dred Scott v. Sandford, 19 How. [60 U. S.] 625, in these words: "And not only must the status of slavery be created and measured by municipal law, but the rights, powers, and obligations which grow out of that status must be defined, protected, and enforced by such laws."

The rule here laid down is stated with great clearness by Justice Nelson, in Kimbro v. Colgate [Case No. 7,778]. By virtue of the fourth and fifth sections of the act of March 3, 1863, [12 Stat. 765], there accrued to the plaintiff a right of action to recover back certain sums of money paid by him to the defendant. After the money was paid and the right of action had accrued, the act giving the remedy was repealed. This was not an action for a penalty or forfeiture. To bring his case within the saving clause of the repealing statute, the plaintiff contended that it was a "proceeding to recover a sum of money in the nature of a penalty or forfeiture." In answer to this, the learned judge says: "I cannot, however, so regard it. The cause of action as stated in the declaration, is predicated upon a right to recover a sum of money paid by the plaintiff to the defendants; and for aught I see indebitatus assumpsit for money paid, would have been as appropriatea remedy as the special count to which the defendants have demurred." And on the point of the effect of the repeal of the statute, he says: "As the money was paid under a contract made in violation of law, there is no ground for the recovery of it back, upon the principles of common law; and, as the statute which gave the remedy has been repealed, the cause of action and the suit must, upon established principles, fall with the repeal."

Nor must it be forgotten that the repealing statute in this instance emanates from the highest power known in our form of government, and is part of the organic law of that government. Hence there can be no question of the constitutional power of repeal, and no objection urged, that the right did not reside with the power that effected the repeal to annihilate slavery and all its incidents, and all rights and obligations growing out of it.

The plaintiff's action must fail on another ground. The rule that a contract made and to be performed in a certain country derives its character and obligation from the laws of that country, is not better settled than that such contract may be dissolved by the laws of that country. And but for the limitation on the powers of the states in this respect, the states of the Union would have possessed the power to dissolve all contracts made and to be performed within their jurisdiction. But the limitation on the states in respect to this power is not absolute and universal in its application. States may pass insolvent laws under, and by virtue of which the obligation of contracts subsequently entered into and to be performed in such states, may be discharged.

And it is now the settled law that states may prescribe and declare by their laws prospectively, what shall be the obligation of all contracts made within them. The contracts designed to be protected by the clause of the constitution in question, are, "contracts by which perfect rights—certain, definite, fixed private rights of property—are vested," and not those rights growing out of measures or institutions adopted, undertaken, or affected by the body politic, or state government for the benefit of all, and which from the very necessity of the case, and by common consent, are to be varied, discontinued, or created, as the public good shall require. In

such matters, this court has said that the extreme of abuse "would appear to exist in the arraignment of their control over officers and subordinates, in the regulation of their internal and exclusive polity, and over the modes and extent in which that polity should be varied to meet the exigencies of their peculiar condition. Such an abuse would prevent all action in the state governments, or refer the modes and details of their action to the tribunals and authorities of the federal government. These surely could never have been the legitimate purposes of the federal constitution." And it was held that the legislature might abridge the term of an officer without any conflict with the constitution of the United States. Butler v. Pennsylvania, 10 How. [51 U. S.] 416. So that it is far from being true that states are bound in all cases to enforce contracts made within them, according to the literal terms of such contracts.

And now let us inquire whether the constitution of the United States takes from a state the power to determine at any time the force and validity to be given to slave contracts made and to be performed in such state. Obviously if it shall be found on investigation that the constitution of the United States treated slaves as persons and not as property, and left the institution and traffic in slaves and all rights growing out of that traffic to the states themselves, giving no sanction to anything connected with the institution, excepting so far and so long as the states themselves gave that sanction, then such contracts and rights based on, or growing out of that institution, may be discharged by state laws, the same as though there was no inhibition on the states to pass laws impairing the obligation of contracts.

The power of congress to regulate commerce with foreign nations and among the several states, and with the Indian tribes (section 8, art. 1) is plenary and exclusive. This power extends to the carrying of persons as passengers, and to every species of property that may lawfully become the subject of traffic and commerce among men.

In 1832, the state of Mississippi adopted a constitution which prohibited the introduction of slaves into that "state as merchandise, or for sale."

In Groves v. Slaughter, 15 Pet. [40 U. S.] 449, it was contended by Mr. Webster that this provision of the constitution of Mississippi was in conflict with that provision of the constitution of the United States which confers on congress the power to regulate commerce between the states. And in his argument of that case he says: "The constitution recognizes slaves as property. The court is called upon to say that the state of Mississippi may prohibit the transportation into that state of any particular article. The court will be obliged to find out something in the introduction of slaves, different from trading in other property." And he contended that if the state of Mississippi could prohibit the introduction of slave property within her limits, Massachusetts might prohibit the introduction into that state, of cotton raised in Mississippi. Mark the answer given to this argument. Mr. Justice McLean speaking for a majority of the court says: "By the laws of certain states, slaves are treated as property, and the constitution of Mississippi prohibits their being brought into that state by citizens of other states, for sale, or as merchandise. Merchandise is a comprehensive term, and may include every article of traffic, whether foreign or domestic, which is properly embraced by a commercial regulation. But if slaves are considered in some of the states as merchandise, that cannot divest them of the leading and controlling quality of persons, by which they are designated in the constitution. The character of property is given them by the local law. * * * Could Ohio, in her constitution, have prohibited the introduction into the state of the cotton of the South, or the manufactured articles of the North? If a state may exercise this power it may establish a non-intercourse with other states. This, no one will pretend, is within the power of a state. Such a measure would be repugnant to the constitution, and it would strike at the foundation of the Union. * * * But whilst Ohio could not proscribe the productions of the South, nor the fabrics of the North, no one doubts its power to prohibit slavery. * * * The power over slavery belongs to the states respectively. It is local in its character, and in its effects; and the transfer or sale of slaves cannot be separated from this power. It is, indeed, an essential part of it. Each state has a right to protect itself against the avarice and intrusion of the slave dealer; to guard its citizens against the inconveniences and dangers of a slave population." And Chief Justice Taney in the same case, says: "In my judgment the power over the subject (slavery) is exclusively with the several states."

The grant of power to congress to regulate commerce between states, extends to every species of property that may lawfully become the subject of traffic and commerce, and the grant is plenary and exclusive. Now if slave property was excepted from the operation of this power, on the ground that the power over that subject was exclusively with the several states, upon what principle of logic or rule of construction can it be claimed that the constitution of the United States throws its protecting shield over the slave dealer, and the contracts growing out of that traffic? Is not the grant of power to congress to regulate commerce between the states as full and absolute as the prohibition to the states to pass laws impairing the obligation of contracts? and if slave property is not embraced in the one case, neither are slave contracts embraced in the other; but both alike, are matters of state regulation.

In Jones v. Van Zandt, supra, Justice McLean says: "The constitution treats slaves as persons." The view of Mr. Madison, "who thought it wrong to admit in the constitution the idea that there could be property in men," seems to have been carried out in that most important instrument.

"In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the constitution." Justice McLean, in Dred Scott v. Sandford, 19 How. [60 U. S.] 537. In the same case, Mr. Justice Nelson says: "Except in cases where the power is restrained by the constitution of the United States, the law of the state is supreme over the subject of slavery within its jurisdiction. * * * Whether, therefore, the state of Missouri will recognize or give effect to the laws of Illinois, within her territories, on the subject of slavery, is a question for her to determine. Nor is there any constitutional power in this government that can rightfully control her." Id. 459.

And this doctrine was carried to a great length in this case, as we shall see. Dr. Emerson, while the owner of Dred Scott, took him from Missouri to Wisconsin, where he at once became a free man, and was lawfully married, and children were there born of that marriage. Afterwards Scott was brought back within the state of Missouri, and the supreme court of that state, and a majority of the judges of the supreme court of the United States held that, under this state of facts, Scott was not entitled to his freedom, on the ground that slavery was purely a matter of state regulation, and that one state was not bound to give effect to the laws of another state, as to slavery, and that there was no constitutional power in the government of the United States to control a state in this regard. The effect of this holding was to dissolve a lawful marriage, and bastardize the legitimate issue of that marriage.

Against this result Justice Curtis protested with great energy. He said: "And I go further: in my opinion, a law of the state of Missouri, which should thus annul a marriage lawfully contracted by these parties, while resident in Wisconsin, not in fraud of any law of Missouri, or of any right of Dr. Emerson, who consented thereto, would be a law impairing the obligation of a contract, and within the prohibition of the constitution of the United States. * * * And the law does not enable Dr. Emerson, or any one claiming under him, to assert a title to married persons, as slaves, and thus destroy the obligation of the contract of marriage, and bastardize their issue, and reduce them to slavery." Id. 600, 601. But a majority of the court maintained that the right of the state of Missouri over the subject of slavery within her borders was supreme, thus in effect, holding that this right was paramount to the obligations of a marriage contract.

Now if this power of the states over the institution of slavery was so absolute and uncontrollable as to authorize them to destroy the obligation of the most sacred contract known in civil society, in the interest of slavery, it would be strange indeed, if they did not possess the power to annul slave contracts in the interests of freedom, humanity, and morality. It is a pleasing reflection to know that the law laid down in this celebrated case, and which was believed by many to be at variance with the rights of freedom, can now be quoted in support of, and is a full authority for, the "rights of the states" to abolish slavery, and obliterate all contracts relating to it.

These authorities abundantly establish the proposition that slavery was a local, and not a national institution, that the states possessed plenary powers over the whole subject, and all rights and obligations growing out of it—that it might be introduced or excluded, established or abolished, the introduction and sale of slaves from other slave states encouraged or prohibited, and the constitution of the United States had no bearing on the institution, and gave no validity to the traffic in slaves, or obligations growing out of that traffic, nor in any other manner recognized it, save in the single matter of returning these who should escape into free states. The fugitive slave law was passed to carry into effect this provision of the constitution, and with the passage of that act the constitutional power of the national government in the interest of slavery, or any right growing out of it, was exhausted.

This state in the exercise of her undoubted rights over the institution of slavery, and all its incidents, has by her constitution abolished the institution, and declared that "all contracts for the sale and purchase of slaves are null and void." Const. Ark. art. 15, § 14. This is the end of the plaintiff's case. Both parties to this contract must be held to have entered into it with the full knowledge of the plenary powers of the state over the subject matter of the contract.

In reference to contracts of sale, bills of sale, mortgages, and notes given for slaves, there was an implied condition attached to all such contracts, that the laws of the state that gave the right might also dissolve it. This was implied as fully as it is implied that the obligation of contract made and to be performed within a state may be discharged under the operation of an insolvent law of that state in force at the date of making such contract. Take the case of a mortgage upon slaves, and there were many, at the time slavery was abolished. A mortgage is a contract, and of as high an obligation as any other contract. Now what becomes of the obligation of such a contract after the state in which the mortgaged slaves were found abolished slavery?

Does the prohibition against impairing the obligation of contracts extend to such a case? Is the mortgage still valid and binding, and are the slaves embraced in it excepted from the operation of the constitutional provision abolishing slavery? It must be so, if that clause of the constitution was intended to protect and uphold, despite the action of the states, contracts and rights growing out of slavery. Again, take the case of a contract for the hire of slaves, or a contract for the sale and delivery of slaves at a future time, or a note, payable in slaves. What becomes of the obligation of the contract in all these cases? Obviously it is impaired, and if the position assumed is a sound one, the act of the state in abolishing slavery—as to the slaves embraced in such contracts—must be held unconstitutional and void, because the direct and inevitable effect of it would be in the cases supposed, to impair the obligation of contracts. Yet we know no such consideration would be admitted to control or limit the right of a state to deal with this institution.

It must not be forgotten that this question must be determined under the constitution of the United States, as it stands now. What are its provisions? "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Const. Amend. art. 13, § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Id. art. 14, § 1.

Now, with such provisions in the constitution of a republic where every human being is free, would it not be a strange anomaly if there existed in that constitution a principle that would coerce the states to open their courts to the slave-dealer, and let him recover therein the fruits of his barbarous traffic? No such principle ever did exist in reference to such cases, but if there had been, it would have been repealed and superseded by the thirteenth and fourteenth amendments above quoted. These amendments are of paramount authority.

In Johnson v. Tompkins [Case No. 7,416], Mr. Justice Baldwin, after quoting the language of the constitution, that "This constitution and the laws which shall be made in pursuance thereof shall be the supreme law of the land," says, "An amendment to the constitution is of still higher authority, for it has the effect of controlling and repealing the express provisions of the constitution itself."

These amendments are the work of the sovereign people of the United States. There are no technical rules to obstruct or prevent their full operation presently on all persons, matters, and things within their scope. Obligation of contracts and vested rights, based on slavery, cannot be set up to impede or restrain their operation. And no one can escape from their operation by the cry of the "constitution as it was."

A court can only reply, that under the constitution as it is, slavery and slave contracts are outlawed, and that no clause of that instrument protects or upholds either. If the vicious principle contended for ever did lurk in the clause of the constitution relied upon, it has been extracted therefrom by these amendments.

While the prohibition on the states to pass laws impairing the obligation of contracts may not be restricted in its operation to contracts recognized to be of universal obligation, it is clear that it was never intended to sanction slavery, or operate to restrict or embarrass the powers of the states over that institution and its incidents. We have seen that its application to slave contracts would result in a prohibition upon the states from emancipating all slaves, when and so long as such slaves were held under mortgage, or other lien, arising out of a contract. For in a mortgage, the pledge of the property is the very essence of the contract, and the right to subject the property pledged to the payment of the mortgaged debt, is the obligation of that contract. More than half of the slaves of the south were thus pledged at all times, and if this clause can be invoked to uphold slave contracts, there never was a time when it might not have been successfully appealed to by the states to stay emancipation.

It may be hazardous to except any species of contract from the operation of that provision. I grant that it is; but it must be construed in the light of all other provisions of that instrument, and made to harmonize with them, and when so construed it cannot be held to be a prop to slavery and a shield to slave-traders. The fear expressed that this construction will tend to weaken the benign influence of this clause over the erratic and sometimes unjust action of states in their attempts to relieve themselves, or their citizens, from the obligation of their contracts, is not well founded. Slavery was emphatically sui generis, and the most astute lawyer will be unable to find its analogy under our constitution.

Let us next inquire as to the legal effect of these amendments on slave contracts, viewed independently of state enactments. These amendments were the result of the exercise by the people of the United States of their own proper and acknowledged sovereignty, for the purpose of restoring the

slaves to their natural rights, and conforming the institutions and laws of the republic and of the several states to the immutable laws of eternal justice, and making the fact conform to the theory upon which our form of government is based.

By these amendments a living force and vitality were imparted to the words of the declaration of independence, "that all men are created equal;" and to that clause of article 5 of the constitution of the United States, which declares that, "No person shall be * * * deprived of life, liberty, and property without due process of law."

The effect of these amendments cannot be limited to the mere severance of the legal relation of master and slave. They are far-reaching in their results. Under them the former slave is now a citizen, possessing and enjoying all the rights of other citizens of the republic. Can any one doubt that it was the object and purpose of these amendments to strike down slavery and all its incidents, and all rights of action based upon it?

Could it have been intended that free citizens should still be the subject matter of litigation in the courts of justice, as chattels? In the case before the court, as in most other cases of the sale of slaves, there is a warranty that the slave is sound in mind and body. If this court takes jurisdiction of this case, the defendant has a right to set up a breach of that warranty as a defense, and this court, in the trial of such an issue, must inquire into the mental and physical condition of a citizen of the republic, with a view of ascertaining his value as a chattel. And it may chance that the subject of this inquiry is a juror or officer of the court, and indeed it might occur that the judge on the bench would be the subject of such an inquiry. The mind revolts at the trial of such an issue. It would be giving full force and effect to one of the most obnoxious features of the slave code. It would be placing the free man, who may be the subject matter of such a suit, in an attitude before the court and the country that no free government will permit, jealous of the rights and honor of its citizens, and whose policy is to instil into their minds a love of country and its free institutions. The government that would permit its free citizens to be thus degraded in the interest of slavery and slave-traders, would be unworthy of the name of a free republic.

The courts are daily in the habit of denying a remedy on contracts because they are against public policy. In such cases the good of the community at large is taken to be of more importance than the claim of the individual, and the latter must perish when it conflicts with the common welfare of society, in which that of the claimant is likewise involved. The courts, under such conditions, are often compelled to arbitrate between these opposing claims, without any distinct and articulate legislative rule; they must of their own knowledge decide whether public policy in the given case is materially affected, and give their judgment accordingly. In this case, however, the court is not under the necessity of resorting to its own knowledge of the tendency of the act in question. The thirteenth amendment carries with itself the denunciation of slavery in every form; and that as plainly as if the mischief to be remedied thereby had been expressly recited, and the tendency of slavery openly denounced. We may safely say that all the reasonable premises of the amendment are embraced by implication in its language; that it does in the same manner declare that slavery is unjust, and not for the best interest of the nation. As there is no exception, slavery is condemned in all its features. It is well known that among these, the sale of slaves, with the consequent breaking up of families, was considered as amongst the most odious. Is it possible, therefore, to hold that this, of the whole institution, alone survives the general destruction, and that the courts are still to guard this relic of a condemned system by adjusting the balance of justice between the buyer and seller under such painful and exasperating circumstances?—and this, when the evil policy of slavery, in all its parts and functions, has been so authoritatively declared? Whether this remedy were once good, by positive law, is no longer a pertinent question, when all the surroundings have been so changed as to have changed the fundamental law of the United States, and of every state where slavery was once tolerated. Public policy does necessarily change with the change of the conditions of society, which is no more an objection to this branch of the law than it is to any other. The law is not a set of dead rules, incapable of expansion or growth to meet the altered needs of society. The courts must pass on these questions as on practical affairs of life, vital in the actual present; and the courts will not stultify themselves by declining to adjudicate in reference to these, and to these alone; as was properly held in the great case of Egerton v. Earl Brownlow, 4 H. L. Cas. 1, 144, 196, 229, et seq. That a change in the fundamental law and policy of the government does necessarily operate to destroy the obligation of contracts and rights of action depending for their validity and enforcement on a law and policy inconsistent and incompatible with the last declared will of the sovereign power, has been expressly decided. While the state of Texas was a part of the territory of the republic of Mexico, that government granted certain lands in the state of Texas, and one of the conditions of the grant was, that the grantee should pay a certain sum to aid in the erection and maintenance of Roman Catholic churches, and the support of the clergy of that church who administered therein, the ceremonies of their religion; and this sum

was a charge upon the lands, and a burden that every grantee, by the terms of his grant, bound himself and his grantees to pay and discharge. The object and policy of the Mexican government in imposing this condition was to insure the support and maintenance of the Roman Catholic Church which was in some measure the established religion of the state.

Subsequently the state of Texas became an independent republic, but neither the constitution nor any law of the republic declared the condition in these grants void. But the constitution of the republic did declare that no religion should be established by law, and that every man should be free to worship God according to the dictates of his own conscience.

The question of the continued validity of the conditions in these grants came before the supreme court of Texas, and that court held the condition "was discharged by force of change of the governments effected by the revolution of 1836, and the principle of religious liberty incorporated into the organic law of the republic, by which freedom of conscience was secured, and religion was emancipated from the authority." Wheeler v. Moody, 9 Tex. 372, 376, and cases there cited. In the case cited there was no express declaration of the sovereign power that the condition in these grants should be void; the beneficiary was still in existence, and the conditions could as well be complied with under the one government as the other, but the court held that to enforce its performance would be giving force and effect to a principle opposed to the spirit and policy of the fundamental law, on the subject of religion.

The fundamental ground on which emancipation proceeded was, that the right of the slave to his freedom was paramount to the claim of his master to treat him as property; that slavery was founded in force and violence, and contrary to natural right; that no vested right of property or action could arise out of a relation thus created, and which was an ever new and active violation of the law of nature, and the inalienable rights of man, every moment that it subsisted.

The last clause of section 4, of article 14, declares that "neither the United States, nor any state, shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims, shall be held illegal and void."

This clause was not inserted to discharge the United States and the several states from any legal obligation to pay for slaves emancipated, for no such obligation had been incurred. It is a limitation on the discretionary power of the legislative departments of both governments to appropriate money for such purpose, independently of any legal obligation, and to prevent the agitation and disturbance that would result from leaving the question in that situation. The very language of the constitution itself is conclusive on the question.

The language is not that such claims shall not be paid, but that such claims "shall be held illegal and void." No court is at liberty to hold that a claim is just and legal that the constitution of the United States brands as "illegal and void." It is true this clause of the constitution does not in express words include the case of a claim by one citizen against another for the value of an emancipated slave; but the spirit of the constitution is to be respected no less than its letter.

And who can doubt that any claim for a slave, whether growing out of contract or otherwise, is within the spirit of this provision? If a claim against the United States for a slave emancipated by that government is illegal and void, how can the claim of one citizen against another for that same slave be held legal and valid? The constitution takes from A. slaves he purchased from B., and in answer to A.'s claim to be compensated for their value, says to him, "Your claim to these slaves was founded in force and violence, and their right to freedom was paramount to your right to treat them as property; your claim for compensation is, therefore, illegal and void."

Now, when B. claims from A. the price of these slaves, it is claimed that the same constitution says to him, "B.'s claim against you for these same slaves is legal and valid, and you must pay it." Such an interpretation would do violence to the whole spirit of the constitution, and it would be giving the high sanction of the constitution of the United States to a code of justice not much less a violation of right, reason, and justice than the slave code itself.

The clause in question is based on the broad principle that there shall be no further recognition by the national government or the states of the idea that there could lawfully be property in man. And this principle cuts its way through all vested rights and obligation of contracts based on slave codes, and operates with full force on claims and demands of every character originating in the idea that human beings were property, and the lawful subject of traffic.

This construction is in harmony with the spirit of our institutions, and is the necessary and logical result of the grounds upon which slavery was abolished without compensation to the slave owners. Let judgment be entered for the defendants on the demurrer.

The principles here announced are also conclusive of the case of Holmes v. Sevier [not reported], pending on the chancery side of this court, in which the same judgment is rendered.

Judgment for defendants.

[This case was carried by writ of error to the supreme court, where the judgment of this court was reversed. 13 Wall. (80 U. S.) 654.]

OSBORNE v. NICHOLSON. See Case No. 10,595.

Case No. 10,596.

OSBORNE v. BENSON et al.

[5 Mason, 157.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1828.

MORTGAGES—TAKING NEGOTIABLE NOTES FOR THE DEBT—ASSIGNMENT OF MORTGAGE.

Where a mortgage had been given to one partner to secure a debt of a firm, and after the failure of the firm, and an assignment of the debt, one of the partners entered into an arrangement with the debtor, without the consent of the assignees, by which he took negotiable notes for the debt payable on time, and afterwards he assigned the mortgage to the other partner, who was not party to the arrangement; it was *held*, that the mortgage was not extinguished.

Writ of entry sur intrusion brought by the demandant [Daniel Osborne], as administrator of David Osborne, deceased, upon a mortgage, and counting on the seizin of the intestate, David Osborne, in fee and in mortgage, and an intrusion by the tenants [Joshua Benson and Eliza Benson, his wife] after his death. Plea, the general issue. At the trial, it appeared in evidence, that one David Dean, was entitled to $^1/_{54}$th part of the demanded premises, as heir of one Jeremiah Bumstead, who died seized of the estate, intestate. Dean, on the 31st of January, 1823, executed a mortgage to J. B. Osborne (who was in partnership with the intestate, David Osborne, under the firm of D. & J. B. Osborne,) of his share in Bumstead's estate, and purporting to be for the security of $500, payable in one year after Bumstead's estate was settled. A note dated the preceding day (the 30th of January), for the same sum, payable to J. B. Osborne, at the same time was also executed, and delivered, with the mortgage, to J. B. Osborne. On the 28th of July, 1823, J. B. Osborne assigned the same mortgage to the intestate, David Osborne. The tenants claimed the premises under a subsequent deed from David Dean to the tenant, Eliza Benson (then Eliza Griffen), dated the 16th of August, 1824, and purporting to be a conveyance, in consideration of 450 dollars, of all Dean's share in Bumstead's estate. The defence was, that nothing was due under the mortgage from Dean to Osborne, and that the same was fully extinguished, or satisfied. The facts were somewhat complicated. But the material facts were these. The mortgage to J. B. Osborne was given upon a contract, entered into by Osborne, that the firm should deliver to Dean, or his order, goods in Boston, to the amount of $500, suitable for the Penobscot market and trade at Prospect, of such qualities and sorts, &c. as Dean, or his agent, should request, on the credit stated in the mortgage. A similar note and mortgage was executed to J. B. Osborne, at the same time, by one Daniel F. Weeks and his wife (who was also an heir in like degree as Bumstead), for a similar consideration. J. B. Osborne gave to Dean and Weeks, severally, a note in his own name, promising to deliver goods to them severally to the amount of $500, as above mentioned. Upon the next day (the 1st of February), these notes were given up by the parties, and by consent, a single note was given by J. B. Osborne to deliver to Dean alone, or his administrator, goods to the amount of $1000. On the same day, Dean wrote on the same note an order on J. B. Osborne, for a delivery of the goods to Weeks, and to charge them in account with Dean. In the same month (February), the firm of D. & J. B. Osborne delivered goods, under the order, to Weeks, to the amount of $903.88; and upon a settlement of accounts with Dean, on the 25th of April 1823, it appeared, that the amount then due from him to the firm of the Osbornes was $1009.97. At that time the Osbornes had failed, and the account against Dean had been assigned to their assignees; but the mortgages, and notes accompanying the same, from Dean and Weeks to J. B. Osborne had not been assigned (though intended to have been), and have never since been formally assigned to their assignees. The settlement of the account between J. B. Osborne and Dean took place at the house of Osborne; and with a view to prevent Dean's being then broken up in business, it was agreed between them, that Dean should give two negotiable notes for the amount to Osborne, one for $509.97, payable in nine months, and one for $500 payable in twelve months. Nothing was said, at the time, between them, as to giving up the mortgages, or notes accompanying the same, and they were retained by J. B. Osborne. The new notes were given accordingly by Dean, and the account receipted by Osborne in the name of the firm. The assignees had no knowledge of, and were not parties or assenting to, this arrangement. Some time afterwards a demand was made upon J. B. Osborne to deliver up one or other of the sets of notes, but he declined doing any thing about it. The settlement and division of the estate of Bumstead was made in the probate office for Suffolk county on the 12th of September, 1825.

Upon these facts, Mr. Parker, for the tenants, contended, that the original mortgages to J. B. Osborne were extinguished and satisfied by the taking of the negotiable notes, under the arrangement on the 25th of April, 1823, between Osborne and Dean; and that, consequently, the subsequent assignment by Os-

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

borne, to the intestate of the demandant, in July, 1823, passed nothing.

Mr. Bartlett, for the demandant, contended, è contra, that there was no such extinguishment, or satisfaction under the circumstances.

STORY, Circuit Justice. My opinion is, that upon the facts, as argued, there has been no extinguishment or satisfaction of the mortgage sued on. If the goods delivered were in compliance with the original contract, entered into between Dean and J. B. Osborne, and on account of the mortgage, (which as a matter of fact must be left to the jury,) then the mortgage is a valid security upon an executed consideration. If the goods were not so delivered, then J. B. Osborne is still liable on his contract, and the mortgage is valid, as founded upon an executory contract, still subsisting and binding between the parties. In the latter view, the giving of the new notes would be wholly immaterial, since they would be in payment for other goods. But the presumption is so strong, that the goods were furnished under the original contract, that it seems difficult to resist it. Taking the fact to be so, how can the new negotiable notes operate as an extinguishment of the debt on account? That debt, at the time when these notes were given, had been assigned to assignees by the partners, to whom it was due. The assignees were ignorant of and not parties to the arrangement, by which they were received. Dean knew of the failure and assignment, and consequently knew, that J. B. Osborne had no longer any authority to extinguish, or receive payment of the debt, or to receive negotiable notes for it. These notes were, therefore, given without consideration. The mortgage given to J. B. Osborne was undoubtedly given in trust for the benefit of the partners, and not for J. B. Osborne alone. Indeed, it does not appear, that it was the intention of the parties to the arrangement itself, that the mortgage should be extinguished; or that it should no longer be a security for the debt. The inference from the acts of the parties is the other way; for it was not cancelled or surrendered. They may have intended only to substitute a definite time for the payment of the debts for an indefinite time; a certain, for an uncertain credit; a protection of Dean from suit for nine and twelve months; and that the mortgage should still stand security for the debt. I will leave the facts to the jury, if the counsel wishes it; but supposing the facts to be, as I have assumed them to be, I am of opinion, that there was no extinguishment of the mortgage in point of law.

The counsel for the tenants then consented, that the latter should be defaulted, which was done accordingly.

Case No. 10,597.

OSBORNE v. BROOKLYN CITY R. CO.

[5 Blatchf. 366.][1]

Circuit Court, E. D. New York. Dec. 5, 1866.

JURISDICTION—CITIZENSHIP—ACQUIRING TITLE FOR THE PURPOSE OF SUIT — STREET RAILWAYS — DAMAGE TO ABUTTING LANDOWNER—INDIVIDUAL ACTION.

1. Where a plaintiff has otherwise a right to sue, by virtue of his citizenship, in a court of the United States, it is no objection to the jurisdiction of the court, that he acquired the title on which he sues for the purpose of enabling him to bring the suit.

[Cited in Foote v. Hancock, Case No. 4,911; Blackburn v. Selma, M. & M. R. Co., Id. 1,467; McCall v. Town of Hancock, 10 Fed. 8.]

2. A person who is not the owner of the fee of the land in a street in a city, over which the track of a horse railroad is about to be laid, but is only an abutting proprietor, owning up to the line of the street, must show special damage sustained, or likely to be sustained, by him, differing in kind from that affecting every other lot-owner on the street, in order to support an individual action by himself to restrain the laying of such track.

[Cited in Van Bokelen v. Brooklyn City R. Co., Case No. 16,830. Applied in Currier v. West Side Elevated Patent Ry. Co., Id. 3,493. Cited in Lorie v. North Chicago City Ry. Co., 32 Fed. 271.]

[Cited in brief in Neitzey v. Baltimore & P. R. Co., 5 D. C. 39.]

In equity. This was a motion to dissolve a provisional injunction. The bill averred that the plaintiff [John H. Osborne] was the owner in the fee of certain lots on Greene avenue, a public street in the city of Brooklyn, and was also owner in fee of the portion of that avenue which extended from the front of his lots to the centre of the street, subject only to the public easement; that the defendants were about laying a city railroad track through said avenue and upon the land of the plaintiff therein, without making compensation to him or other lot-owners; that the laying of such track was without the consent of the majority of the lot-owners and without authority in law; that such use of the street would greatly injure and depreciate the lots upon it; and that the aid of this court, by its writ of injunction, was necessary to prevent irreparable injury. Upon this bill, a temporary injunction was granted restraining the defendants from laying any such track in Greene avenue, with liberty to the defendants to move, on the same or additional papers, to dissolve it. This motion was made on additional papers.

William M. Evarts, John C. Dimmick, and John C. Perry, for plaintiff.

Henry C. Murphy, Grenville T. Jenks, and Charles H. Glover, for defendants.

BENEDICT, District Judge. This case, in its present posture, raises questions different

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

from those discussed upon the motion for the injunction. The additional papers now read show that the plaintiff derives title to the lots described in the bill from one of the parties to an action lately pending in the supreme court of the state to obtain the same relief here sought, and that the deeds to the plaintiff were executed on the day after a similar injunction was dissolved by the supreme court in that action, and but three or four days previous to the filing of the bill in this court. These deeds, with the others produced, also show that the land conveyed to the plaintiff does not extend to the centre of Greene avenue, but terminates at the side of the street, and, consequently, that the plaintiff is not the owner in fee, or otherwise, of any portion of the land composing Greene avenue, but is simply an abutting proprietor.

Upon these facts, it is insisted on behalf of the defendants, that the motive for the conveyance of the lots to the plaintiff was, manifestly, to transfer to the national courts a controversy commenced in the state court, and that, under such circumstances, this court, notwithstanding the discontinuance of the suit in the state court, should decline to exercise jurisdiction. This objection to the proceedings of the plaintiff is not well taken. The deeds show a legal title conveyed to the plaintiff for a valuable consideration, and it is conceded that he is a citizen of New Jersey. This gives the court jurisdiction. "The jurisdiction flows from the citizenship of the parties. The right to recover flows from the sufficiency of the title, and that is a matter purposely to be discussed upon the trial of the merits." Story, J., in Briggs v. French [Case No. 1,871]. So long as an actual conveyance has been made, it matters not what may have been the motive which led to it; and the national courts do not decline jurisdiction, although it be conceded that the plaintiff has taken title for the purpose of enabling resort to be had to those courts. This precise point was so decided by the supreme court in Smith v. Kernochen, 7 How. [48 U. S.] 198.

But it is further insisted, that, inasmuch as the plaintiff is not shown to be the owner in fee of any land in the avenue and over which the railroad is to run, he cannot maintain the action in the absence of proof of special damage. Such is unquestionably the law. Assuming that the defendants have no legal authority whatever to lay down their track in Greene avenue, their position is that of parties about to erect a public nuisance, which affects the right of every person entitled to use Greene avenue as a street, that is to say of the whole community. They do not propose to enter upon any land of the plaintiff's and the damage occasioned by the road to the plaintiff will not be different, in kind or degree, from that sustained by every other lot-owner upon the avenue. It is damage resulting from the depreciation of the value of lots abutting on the street by reason of a railroad running through it, in front of, but not over, the plaintiff's land. Now, it is well settled, that damage sustained alike by all the individuals of a large class furnishes no foundation for an action on the part of a single individual of the class. Lansing v. Smith, 8 Cow. 146; Davis v. Mayor, etc., 14 N. Y. 506. It was incumbent, therefore, on the plaintiff to show some special damage sustained, or likely to be sustained, by him, differing in kind from that sustained by the neighborhood, to entitle him to ask the interference of the court in his behalf. No such damage is pretended to exist, and its absence is fatal to the plaintiff on this motion.

The question so much discussed, upon the motion for the injunction, whether the grant of the right to lay down and use a railroad track in a public street, for the purpose of transporting passengers about a city in horse cars, is a new burden upon the land on which the rails are laid, for which compensation must be made, appears now to be out of the case, and its discussion is unnecessary here.

For the reasons stated, we are clearly of the opinion that the motion should be granted, and the injunction be dissolved.

OSBORNE (SEYMOUR v.). See Case No. 12,-688.

Case No. 10,598.

OSBORNE et al. v. SHRIEVE et al.

[3 Mason, 391.] [1]

Circuit Court, D. Rhode Island. June Term, 1824.

ESTATE TAIL—REMAINDER.

A. devised an estate to his son "I. S. and to his male heir" (in the singular) "and to his heirs and assigns for ever; but if it should so be, that I. S. should depart this life, leaving no male heir lawfully begotten of his body as aforesaid," then to the testator's grandson W. O. in fee. *Held*, that I. S. took an estate tail with remainder over to W. O. on the indefinite failure of the issue of I. S.

[Cited in Buxton v. Uxbridge, 51 Mass. (10 Metc.) 92; Malcolm v. Malcolm, 57 Mass. (3 Cush.) 482. Cited in brief in Brownell v. Brownell, 10 R. I. 510–512; Andrews v. Lowthrop, 17 R. I. 60, 20 Atl. 97.]

Ejectment. The case came on upon a statement of facts agreed by the parties as follows: It is agreed that the plaintiffs [Willard Osborne and others] are the heirs at law of Weaver Osborne, the grandson of the testator William Shrieve; and to whom the testator devised the premises demanded in manner as set forth in said testator's will; that the defendants [Nancy Shrieve and others] are in possession of the premises demanded, devised as aforesaid, and claimed by the plaintiffs under said devise; that on the 14th of January, 1772, the testator was

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

seized and possessed in his own right in fee simple of the demanded premises, and that on said day he made his last will and testament, and executed the same in due form of law; that he died seized and possessed in his own right as aforesaid of said demanded premises; that afterwards, to wit, on the 9th of May, 1772, said will was duly proved and approved, and that the annexed copy thereof is a true copy of the original. It is agreed, that John Shrieve, the son of the testator, named as devisee in said will, had at the date of said will a son, and only one son then living, lawfully begotten, and who survived the testator, but died in the life time of his father; that after and upon the death of the testator the said John Shrieve entered upon and took possession of the said demanded premises under the said will; that afterwards, to wit, on the ——, said John Shrieve instituted proceedings for suffering a common recovery of the demanded premises to his use, which proceedings were such as are detailed in the record thereof, a copy of which is hereto annexed, which it is agreed is a true copy of the record. It is agreed, that said John Shrieve died on or about the —— day of July, 1823, leaving no son living at his death; that the said Weaver Osborne died on or about the —— day of ——, and previous to the death of said John Shrieve; and that the plaintiffs are his, the said Weaver Osborne's heirs at law. It is agreed, that the devise in said will, under which arises the controversy between the parties, is in the words following, to wit: "Item, I give and bequeath unto my well beloved son, John Shrieve, and to his heir male lawfully begotten of his body, and to his heirs and assigns for ever, all my homestead farm, with all and singular the houses, buildings, fences, orcharding, woods, ways, watering privileges, and appurtenances thereto belonging, reserving for a term, what is before reserved, and for the use before mentioned, to him by said son John Shrieve, and to his male heir lawfully begotten of his body as aforesaid, and to him, his heirs, and assigns for ever; but if it should so be that my son John Shrieve shall depart this life leaving no male heir lawfully begotten of his body as aforesaid, then the abovesaid homestead, with all the privileges and appurtenances to the same belonging, shall descend to be my grandson Weaver Osborne's heirs and assigns for ever." It is agreed, that the said John Shrieve, on the 5th day of April, 1808, made his last will and testament, and therein devised the disputed premises to his wife Anna Shrieve (one of the defendants) for life, then to John B. Mumford for life, then in fee to Benjamin the son of said John B., but if the said Benjamin should die in the lifetime of his father without legal issue, then to all the male children of said John B. in fee; and that said will on the first September, 1823, was duly proved and approved; a copy of which will is hereto annexed and agreed to be a true copy. It is agreed that the said Anna Shrieve one of the defendants is in possession of the premises under the devise to her in said last will and testament of the said John Shrieve, that John Grinnel, the other defendant, is tenant under said Anna Shrieve.

Robbins & Searle, for plaintiff.
Hunter & Hazard, for defendants.

STORY, Circuit Justice. This cause has been very elaborately argued. I have examined all the authorities cited at the bar, and beyond them my own researches have not been inconsiderable. The result of my own judgment, upon the fullest deliberation, I will now endeavour to give in as summary a manner as I can.

The terms of the devise are, "I give and bequeath unto my well beloved son John Shrieve and to his male heir lawfully begotten of his body, and to his heirs and assigns for ever, all my homestead farm &c. to him my said son John Shrieve and to his heir male lawfully begotten of his body as aforesaid, and to him, his heirs and assigns for ever. But if it should so be, that my said son John Shrieve shall depart this life, leaving no male heir lawfully begotten of his body as aforesaid, then the abovesaid homestead with all the privileges &c. shall descend to be my grandson Weaver Osborne's, his heirs and assigns for ever." The controversy is between certain devisees claiming under John Shrieve, and the heirs at law of Weaver Osborne; and the question is, what estate John Shrieve took in the premises by the above devise of his father. If he took an estate for life with remainder to his male heir in fee tail, with remainder over to Weaver Osborne in fee, then in the events, which have happened, the plaintiffs are entitled to recover. If, on the other hand, John Shrieve took an estate tail, then by the recovery suffered by him that estate was docked, and the remainder over in fee to Weaver Osborne was thereby extinguished, and the defendants are entitled to judgment.

My opinion is, that John Shrieve took under the devise an estate in fee tail male, and that Weaver Osborne took a remainder in fee upon the indefinite failure of the issue of John Shrieve. My reasons for this opinion are shortly these. The first clause in the devise gives the premises to "John Shrieve and his male heir" (in the singular). If it had stopped here, it would have given a clear fee tail male to John Shrieve. The case of White v. Collins, Comyn, 289, and Dubber v. Trollope, 2 Amb. 453, are directly in point. In the latter case, which was stronger than the present, the devise was to T. T. for life, and after to his first heir male; and it was held a fee tail male in T. T. Lord Chief Justice Eyre delivered the opinion of the court in a most elaborate argument, in

which he examined all the authorities and established, that the words clearly gave an estate in fee tail male; and this judgment was afterwards affirmed upon a writ of error. It is therefore of very high authority. But the clause does not stop here (i. e. "to John Shrieve and his male heir") but the words are added "and to his heirs and assigns." If the devise had stopped here, then, I conceive, that it would have given an estate for life to John Shrieve, and an estate in fee to his male heir as a purchaser. In short, "male heir" could not be, under such circumstances, words of limitation, but words of purchase. This appears to me to be clear by the authority of Archer's Case, 1 Rep. [Coke] 66; Loddington v. Kime, 1 Salk. 224; Long v. Laming, 2 Burrows, 1100, 1110; and many other cases. See Blackburn v. Stables, 2 Ves. & B. 371. I pass over the next words as a mere repetition, in the nature of an habendum. But the subsequent clause of the will controls the inference deducible from these words, and limits their signification, so as to show, that the testator intended a fee tail male in John Shrieve, and nothing in his male heir as a purchaser. It is, "but if it should so be that my son John Shrieve shall depart this life, leaving no male heir lawfully begotten, &c. &c. then the abovesaid homestead &c. shall descend to be my grandson William Osborne's, &c."

In the first place, it is clear from this clause, that the testator did not intend the devise to be solely to the son of John Shrieve, then born, in fee, under the description of "heir male," as descriptio personæ, for the estate is intended for the benefit of any person whatsoever, who should be the heir male of John Shrieve. It is not to pass over to Weaver Osborne so long as there shall be any heir male of John Shrieve living. In the next place, the intention is as clear that, upon the failure of issue male, the estate should go to Weaver Osborne. The language of the clause cannot be construed to restrict the failure of issue male to the death of the testator, for that would be a construction against the general current of authority. Words of this nature have never been held, in a devise of freehold estate, to import any thing but an indefinite failure of issue. If then the estate were to be construed a fee simple in the heir male of John Shrieve, it would entirely defeat the devise over to Weaver Osborne, for as an executory devise it would be too remote. The testator's intention would, in another respect, be also defeated. He obviously intended the devise for the benefit of the heirs male so long as there should be any; but if the first heir male could take a fee simple, it would be alienable by him, and the descent of the estate, even if he retained it, would not be in the line of his heirs male, but of his heirs generally. So that to effectuate the purposes of the testator, it is necessary to construe the present devise a fee tail in John Shrieve, which will carry the estate in succession to his heirs male, with a remainder over, upon the indefinite failure of issue, to Weaver Osborne. This conclusion is not in the slightest degree impugned by the consideration, that the words are "heir male" instead of "heirs male," for the former, as the cases above cited abundantly show, may be construed words of limitation, as well as the latter. See Fearne, Rem. (Butler's Ed.) 150, 160, 178, 179; Harg. Note, Co. Litt. 8b, note 45; Blackburn v. Stables, 2 Ves. & B. 367, 371; Wright v. Pearson, 1 Eden, 119, 128. Even the words "issue" and "issue male," which are more usually words of purchase, have often received in the like connection an interpretation, as words of limitation. Roe v. Grew, 2 Wils. 322; Frank v. Stovin, 3 East, 548; Denn v. Puckey, 5 Term R. 299; Doe v. Applin, 4 Term R. 82; Doe v. Collis, Id. 294; Backhouse v. Wells, 1 Eq. Cas. Abr. 184, pl. 27; King v. Burchell, 1 Eden, 424, 432, and note 433.

If the case then were entirely new, I should not hesitate to give the construction to the devise, which I have already intimated, as the only one, which will effectuate the general intention of the testator. But the question hardly appears to me to be open. Where a rule has long prevailed in the construction of devises, or courts of law in a series of adjudications upon the import of mixed clauses, like the present, have adopted a uniform interpretation, a departure from them cannot but have a tendency to shake titles, and deliver the subject over to interminable doubts. The case of Goodright v. Pullyn, 2 Ld. Raym. 1437, is very strongly in point. There the devise was to A. for his life, and after the decease of the said A. unto the heirs male of the body of the said A. lawfully begotten, and his heirs for ever; but if the said A. should happen to die without such heir male (in the singular), then to B. for life, and after his death to the use of the heirs male of the body of the said B. lawfully issuing, and his heirs for ever. It was held, that A. took an estate in fee tail, notwithstanding the express limitation of a life estate to him, and the clause to the heirs male of A. and his heirs for ever, and the explanatory clause, if he should die without heir male (in the singular). Wright v. Pearson, 1 Eden, 119, 1 Amb. 358,—see Fearne, Rem. (Butler's Ed.) 126,—is to the same effect. There, the devise was to A. for life, remainder to trustees to support contingent remainders, remainder to the use of the heirs male of A. lawfully to be begotten and their heirs; provided that in case A. should die without leaving any issue male of his body living at his death, then and in such case the premises to be subjected to the payment of two legacies of £100 each, &c. and for default of such issue male of A. then to the use of all and every his (the testator's) five grand children, or

such of them as should be living at the time of the failure of the issue male of A., to take as tenants in common &c. Upon very full argument Lord Keeper Henley held, that A. took an estate tail. Then came Denn v. Shenton, Cowp. 410, where the devise was to A. and the heirs of his body lawfully to be begotten, and their heirs for ever; but in case A. should die without leaving issue of his body, then to B. and his heirs for ever. Lord Mansfield and the other judges held, that A. took a fee tail. Alpass v. Watkins, 8 Term R. 516, and Morris v. Ward, therein cited, proceed upon the same principles, and are quite as cogent and decisive upon the construction of such devises. The case of King v. Burchell, 1 Eden, 424, 1 Amb. 379; 4 Term R. 296, note,—see Fearne, Rem. (Butler's Ed.) 163, 180, 183,—is stronger, for there the devise was to A. for life, and after the determination of that estate to the issue male of A. lawfully begotten and to his and their heirs, share and share alike, and for want of such issue, then the issue female of A. lawfully begotten to her and her heirs, share and share alike, if more than one; and for want of such issue, then to B. in fee. Here the word "issue" was used, which has been often construed a word of purchase, and more readily yields to that construction than "heir," or "heirs"; and the words "to his and their heirs," were added; and yet the court held, that A. took fee tail. Roe v. Grew, 2 Wils. 322, is of a similar import, and this case was recognized and followed in Frank v. Stovin, 3 East, 548. I am not aware of any case, which shakes the inferences justly deducible from these cases, or controls the full weight of their authority. Doe v. Jesson, 5 Maule & S. 95, looks the most the other way; but that is distinguishable, and has been reversed in the house of lords, 2 Bligh, 1. Believing, therefore, that in so doing I shall follow the plain direction of the authorities, and carry the general intention of the testator into effect, I hold, that John Shrieve took an estate tail, and that therefore judgment ought to be entered for the tenants. Judgment accordingly.

Case No. 10,599.

OSBORNE v. UNITED STATES.

[16 Int. Rev. Rec. 141; 4 Leg. Gaz. 343.]

Circuit Court, E. D. Pennsylvania. Oct. 19, 1872.[1]

INTERNAL REVENUE—DISTILLER'S BOND—APPROVAL THOUGH NOT IN ACCORDANCE WITH LAW.

By section 7 of the act of congress of July 20, 1868 [15 Stat. 127], imposing taxes on distilled spirits, etc., it is required that every distiller shall execute a bond with sureties. By section 8 of said act, no bond shall be approved where there are liens against the lot of ground upon which the distillery is situated, unless priority of liens is released. The decedent, the defendant below, became surety on a bond, there being such liens in existence not released. The assessor, contrary to the said act of congress, approved the bond. Upon a default, suit was brought against the surety, and a verdict was obtained against him. Upon a plea and demurrer, the district court *held*: that notwithstanding the bond was approved contrary to the act of congress, the defendant was still liable upon it. After argument, the court affirmed the decision of the district court.

[Cited in U. S. v. Hosmer, Case No. 15,394.]

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

[This was an action by Ann Osborne, administratrix of Joseph Osborne, upon a distiller's bond.]

McKENNAN, Circuit Judge. The points in issue are set forth in the argument on behalf of Ann Osborne, administratrix of Joseph Osborne, plaintiff in error:

Argument: "By section 7 of 'An act imposing taxes on distilled spirits and tobacco, and for other purposes,' approved July 20, 1868 (15 Stat. 127), it is provided: 'That every distiller shall, on filing his notice of intention to continue or commence business with the assessor, before proceeding with such business, after the passage of this act, and on the 1st of May of each succeeding year, make and execute a bond in form prescribed by the commissioner of internal revenue, with at least two sureties, to be approved by the assessor of the district. The penal sum of said bond shall not be less than double the amount of tax on the spirits distilled in his distillery during a period of fifteen days, but in no case shall such bond be for a less sum than $5,000. The condition of the bond shall be, that the principal shall faithfully comply with all the provisions of law; . . . that he will not suffer the lot or tract of land on which the distillery stands or any part thereof, or any of the distilling apparatus, to be encumbered by mortgage, judgment, or other lien during the time in which he shall carry on said business.'

"By section 8 of the same act it is provided: 'That no bond of a distiller shall be approved unless he is the owner in fee, unencumbered by any mortgage, judgment, or other lien, of the lot or tract of land on which the distillery is situated, or unless he files with the assessor, in connection with his notice, the written consent of the . . judgment creditor or other person having a lien thereof, . . expressly stipulating that the lien of the United States for taxes and penalties shall have priority of such . . judgment or other encumbrance.'

"Under the foregoing sections, the commissioner of internal revenue prescribed the form of bond, and on August 3, 1868, by series 4, number 7, issued certain regulations and instructions, which, quoad hoc, are in these words: 'Every distiller . . before commencing . . must make and execute a bond in form 30 . . with at least

[1] [Affirmed in 19 Wall. (86 U. S.) 577.]

two sureties, to be approved by the assessor. . . Under 8 no distiller's bond can be approved unless (the distiller) file in connection with his notice . . the written consent of the owner of . . any judgment creditor, or other person having a lien thereon, . . expressly stipulating that the lien of the United States for taxes and penalties shall have priority. . . This instrument must be duly acknowledged and executed with all the formalities required in the conveyances of real estate, and must be duly recorded before the same is filed with the assessor. As the question to the title to the real estate is material, the assessor should require of the distiller a properly certified statement or search of title . . be executed to him, and full evidence as to what if any liens or encumbrances exist thereon. . . No assessor will (section 17) approve the bond of any distiller until all the requirements of law and the regulations . . have been complied with.' 8 Int. Rev. Rec. 58.

"The section in the latter part of the regulations referred to is in haec verba: 'Section 17 (131). . . No assessor shall approve the bond of any distiller until all the requirements of the law and all regulations made by the commissioner of internal revenue in relation to distillers in pursuance hereof shall have been complied with.'

"With these in force, the decedent, on May 17, 1870, executed a distiller's bond as surety, there being, at that time liens thereon. Until these were removed or the stipulations contained in the act and referred to in the regulations of the commissioner of internal revenue given, it was believed by him that the bond could not be approved; and without an approval, his principal could not lawfully commence distillation. Notwithstanding these express prohibitions, the assessor allowed distillation, and the distiller became indebted to the United States, as appears by the verdict, $3,923.80—an amount easily collectible by distraint on and sale of the distillery if the priority of lien had been required by the assessor in accordance with law.

"On suit being brought for this, the defendant pleaded, inter alia, as follows (pages 10 and 11 of record): '(1) And the said defendant saith, that the said plaintiffs should be barred from prosecuting said claim; because she says, that pursuant to the act under which said writing obligatory was delivered, the same was to create no liability on the part of the said Joseph Osborne, unless the lot or tract of land on which the distillery was situate, was subject to the lien of the tax accruing for distilled spirits, prior to any other lien. And that the said defendant saith, at the delivery of said writing obligatory, there were liens against the distillery and the lot or tract of land whereon the same was erected, in the district court in and for the city and county of Philadelphia, as follows: "Charles E. Derby et al., S. 69, 178, M. L. D., $1,874.67; J. L. Waterman et al., D. 69, 142, M. L. D., $2,059.11; James Jones et al., D. 69, 2529 (judg.), $4,000.00." And the said defendant saith, that the said plaintiffs permitted the said Samuel McMullin, without the consent of the said defendant, to distil spirits in said distillery, without previously having the owners of said liens to stipulate that the lien of said plaintiffs for taxes and penalties should have priority thereto. And the said defendant saith that the said distillery, and lot or tract of ground upon which the same is erected, was sufficient to secure the indebtedness in said declaration set forth, if the same had priority to the liens aforesaid, but was otherwise insufficient. And this the defendant is ready to verify.' The plaintiffs admitted the truth of the plea by their demurrer, and this was sustained by a judgment in their favor.

"Under the foregoing it would seem to be clear that no liability could accrue on the bond until the distiller could lawfully distil; and it is equally clear that he could not commence distillation until the lien of the tax was prior. If the assessor allows otherwise, his illegal act could not create liability on behalf of decedent, but rather fix a liability on his own bond. This is a case of a bond directed by statute, and in that event alone it shall be approved. Its analogy is found in bonds not executed according to statute, on which no right of action accrues. Bradley v. Com., 31 Pa. St. 522. The want of priority on the bond in question is as material as the want of a second surety on the administration bond in the case cited."

After argument, decision of the district court affirmed.

[This judgment was affirmed by the supreme court, where it was carried on writ of error. 19 Wall. (86 U. S.) 577.]

Case No. 10,600.

OSCANYAN v. WINCHESTER REPEATING ARMS CO.

[15 Blachf. 79; 17 Am. Law Reg. (N. S.) 626; 13 Am. Law Rev. 161.] [1]

Circuit Court, S. D. New York. July 16, 1878.[2]

CONTRACTS—VOID AS AGAINST PUBLIC POLICY—PLEA OF THE GENERAL ISSUE.

1. R., an agent of the Turkish government, came to the United States to buy fire-arms for that government. O., the consul-general for that government, in New York, procured from R. orders for W. to make such fire-arms, and W. agreed to pay O. a commission on the amount of such orders. W. furnished the fire-arms. O. then sued W. to recover the amount of the commission: *Held*, that the agreement was void, because against public policy, and that no action upon it would lie.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 13 Am. Law Rev. 161, contains only a partial report.]

[2] [Affirmed in 103 U. S. 261.]

2. The agreement was a purchase and sale of the official influence of O.

3. Such a defence can be set up under a plea of the general issue.

[Action at law by Christopher Oscanyan against the Winchester Repeating Arms Company.]

Theodore W. Dwight, Richard O'Gorman, and Herman H. Shook, for plaintiff.

Francis N. Bangs and Edmund R. Robinson, for defendant.

SHIPMAN, District Judge. This is an action of assumpsit to recover from the defendant $136,000, the same being commissions which, it is alleged, the defendant agreed to pay to the plaintiff for his services in effecting the sale of fire-arms to the Turkish government, amounting in all to $1,360,000. The plaintiff's counsel, in his opening statement to the jury, has stated the facts upon which he relies, and which facts, it is conceded, the plaintiff offers to prove and claims to be true. Assuming that such facts are true, the defendant moves, according to the practice in this circuit, for a verdict for the defendant, or for a dismissal of the suit, upon the ground that the plaintiff has no legal and valid cause of action, upon his own showing.

The facts which, for the purpose of the decision, it is necessary to recite, are as follows: The plaintiff is an Armenian Turk, who has long resided in this country, and is a person of education, ability and literary accomplishments. In the years 1869 and 1870, he was consul-general for the Ottoman government in the city of New York. The office had no fixed salary, but the incumbent had the right to receive certain fees for clearances of Turkish vessels, or vessels bound for Turkey. The duties of the office are not stated, except so far as can be inferred from the title. It is certain, however, that the plaintiff was in some sort the representative of the Turkish government in this city, and was an acknowledged official of that empire. In 1869, the Turkish government sent Rustan Bey to this country to purchase arms and ammunition, or to examine various arms, and to report upon and recommend those which he should approve, to the proper authorities in Turkey. Rustan Bey did not speak the English language, but was acquainted with French. He was an old acquaintance of the plaintiff, and, while in this city, made the plaintiff's office his headquarters. As the plaintiff was well versed in the English language, all the business pertaining to the selection of arms was transacted by Rustan Bey through the plaintiff. The defendant was and is a corporation established in Connecticut, for the manufacture of fire-arms, of which corporation Mr. O. F. Winchester was, at the time of these transactions, the president. In 1870, the plaintiff and Mr. Winchester met each other at the store of Schuyler, Hartley and Graham, when Mr. Winchester sought an introduction to the plaintiff, through one of the members of their firm, and asked the plaintiff to call Rustan Bey's attention to the defendant's repeating rifle. The plaintiff replied that he had a commission on all business or sales which were effected through his instrumentality. Winchester replied: "We will make that right, and agree upon the amount," or words to that effect. The weapon was exhibited by Mr. Oscanyan to Rustan Bey, who did not like it. The plaintiff afterwards informed Mr. Winchester of this fact, but said that he thought he could induce Rustan Bey to include the Winchester arm among other samples which he was to forward to Turkey. This was done. In January, 1870, Rustan Bey received instructions from the sultan to examine and report upon the Spencer rifle, an arm which had been manufactured in this country. The reason for giving this order was, that the sultan had heard that a quantity of these guns were owned by, and were to be sold by, the United States government. The plaintiff thereupon used all his influence (which is represented to have been great) with Rustan Bey to have the Spencer gun discarded, and also used all his influence to have Rustan Bey examine the Winchester gun. The Turkish officer still did not like the arm; but, finally, the plaintiff succeeded in obtaining from him an order for 1,000 guns. This order Rustan Bey gave in order to please the plaintiff, who, he knew, was getting a commission, and furthermore, in his report, condemned the Spencer gun. Mr. Winchester and the plaintiff subsequently met, and Mr. Winchester was informed that the plaintiff had succeeded in getting the Spencer gun to be condemned, to which Winchester replied: "Why did you do that? I could have furnished you commissions upon sale of that gun." The plaintiff replied: "Why, the Turkish government could have bought of the United States government." The Turkish government thereafter invited proposals for the sale of 20,000 Winchester rifles, and ordered fresh samples. Mr. Winchester was informed by the plaintiff of this direction, and that he had got an order for 20,000 guns, and could get an order for 100,000 more. In this conversation, Winchester was also informed of an objection which the Turkish government made to the spring of the magazine, and was urged to meet and overcome the objection. At the same interview the plaintiff asked Winchester to put their agreement, in regard to commissions, in writing, which was done. The agreement, which was dated March 4th, 1870, is in the following words: "New Haven, Conn., March 4th, 1870. Oscanyan, Ottoman Consul-General—My Dear Sir: In accordance with my promise, I now proceed to put in writing the agreement or promise I made to you, namely: I hereby promise to pay to you a commission of ten per cent. upon all sales of arms

of our company made to or by you to the Ottoman government, provided only that such sale is made at prices and upon terms that shall first have our approbation, or be authorized by me. I am, very truly, yours, O. F. Winchester, Pres. W. R. Arms Co." Subsequently, Mr. Winchester informed the plaintiff how the objection in regard to the spring could be avoided, and that it was in fact without foundation. On March 5th, 1870, (Rustan Bey having forwarded his report to the Turkish government,) a fresh box of samples was sent to Harid Pasha, the Turkish minister of ordnance at Constantinople. This box arrived at Constantinople April 18th, 1870, and was taken to the palace of the sultan, who issued his order that 20,000 guns should be purchased, subject to trial of the samples. Harid Pasha received the order, and informed the sultan that no trial could be made, as no cartridges had been sent. These had not been shipped on account of a statute of the United States which prohibited shipping ammunition on ocean steamers. This information was returned to this country, and Winchester endeavored to overcome the difficulty by telegraphing that he would send cartridges from Berne, Switzerland, where he had a factory or depot of supplies. The cartridges were not in fact sent. Rustan Bey became excited, as he had condemned the Spencer gun through the plaintiff's influence, and he feared a reprimand from the Turkish government. The plaintiff endeavored to appease him, and went to Winchester, who then said that there were no cartridges in Berne. The plaintiff returned to Rustan Bey, who became enraged, and said that he never liked Winchester's looks, but was mollified by Oscanyan. Finally, it was agreed, at the plaintiff's suggestion, that cartridges should be sent to Turkey in a sailing vessel. They were furnished by the defendant and were so sent. The trial was had in Constantinople on July 3d, 1870, with a favorable result. Many facts were stated in regard to an attempted revocation by the defendant of the contract with the plaintiff, and the attempts of a Boston firm to make sales of the defendant's arm to the Turkish government, and to obtain commissions from the defendant, all which are unimportant in the aspect of the case which is presented by this motion. On November 9th, 1870, a written contract was entered into by the defendant with the Turkish government, for arms to the amount of $530,000; and, on August 19th, 1871, another contract was entered into for the purchase of arms from the defendant to the amount of $840,000. The plaintiff claims that the procuring cause of these contracts was the recommendation of Rustan Bey, which recommendation was obtained from him through the influence of the plaintiff. The defendant's counsel now moves for a verdict, upon the ground that the alleged contract with the plaintiff for the payment of commissions to him upon sales made to the government of which he was an officer and trusted adviser, by the exercise and through the means of his great influence with the purchasing agent of that government, is void, as being a contract which is corrupt in itself, and which is prohibited by morality and public policy.

The character of the services which the plaintiff rendered, and the source or cause of their efficiency in obtaining for this arm the favor of Rustan Bey and the large orders of the Turkish government, has been so boldly and clearly stated by the plaintiff's counsel, that the case is freed from all disguise. The contract between the plaintiff and the defendant was a purchase and sale of the plaintiff's official influence as an officer of the Turkish government, and as the manager of the business transactions of Rustan Bey with American manufacturers, and a purchase and sale of the personal influence of the plaintiff over Rustan Bey, who was a stranger to our language and upon our soil, and the transaction was an active and controlling exercise of the influence, for the benefit of the defendant, in causing the rejection of arms, the purchase of which it was supposed would not enure to the defendant's benefit, and in causing the purchase of the defendant's arms by the Turkish government. The plaintiff states, through his counsel, that he caused the rejection of the Spencer rifle, which the sultan was disposed to look upon with favor, because the plaintiff supposed that the purchase of this arm would be of no pecuniary benefit to the defendant, and that he caused the purchase of the Winchester rifle to an immense amount, because he was thereby hoping to earn large commissions, and because such a purchase would enure greatly to the benefit of the defendant. The benefits which would enure to the government of which he was the commercial representative in this city, do not seem to have entered into the considerations which influenced his mind. It is true that the plaintiff was not the purchasing agent of the Turkish government, but he was its agent and one upon whom the purchasing agent relied. He was a public officer of the government of Turkey. In delivering the opinion of the supreme court, in Trist v. Child, 21 Wall. [88 U. S.] 441, Mr. Justice Swayne remarks: "The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated, in the discharge of their duties, solely by considerations of right, justice and the public good. They are never to descend to a lower plane." I am not aware that Turkey has laid down any different rule for the guidance of the persons whom it has charged with the exercise of public trusts upon foreign soil.

It is virtually conceded, that, if such a contract had been entered into by an official of the United States, in regard to commissions upon the sale of supplies which might be ef-

fected through his influence or exertions with our own government, whether that official was the purchasing agent or not, such a contract would be against public policy. The concession of the counsel is also found in the opinion in Tool Company v. Norris, 2 Wall. [69 U. S.] 45, in which Mr. Justice Field says: "All agreements for pecuniary considerations to control the business operations of the government, * * * are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country." But it is said that this is the law to be observed by public officers in this country, and to be administered by the courts of this country, and it does not follow that it is a rule which is to be enforced by our courts upon foreign officers, in regard to their dealings with foreign governments. The principle to which I have adverted, in regard to contracts for the use of official influence, is not found in a local statute; it is not peculiar to this country; it is a principle of morality and of public policy enforced in all countries which have a thoroughly organized system of law, and there is no presumption that it is contrary to the law of Turkey.

Again, the contract was entered into in this city, by a resident of this city, with a citizen of Connecticut. "Matters bearing upon the execution, the interpretation and the validity of a contract, are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance." Scudder v. Union Nat. Bank, 91 U. S. 406. Furthermore, it is sought to be enforced in our courts. Not only is it true that such a contract is against public policy, but its enforcement by a court of justice is against public policy. Quoting again from the opinion of Mr. Justice Swayne in Trist v. Child: "It is a rule of the common law, of universal application, that, when a contract, express or implied, is tainted with either of the vices last named," (i. e., because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals), "as to the consideration, or the thing to be done, no alleged right, founded upon it, can be enforced in a court of justice."

It is not material that the plaintiff was permitted to enter into mercantile business by his government, nor is it material that his office was not a salaried one, nor that Rustan Bey was aware that the plaintiff was acting in the expectation of commissions. Rustan Bey was not authorized to condone any acts of the plaintiff. Neither do I think it important that the Turkish government was aware that the plaintiff was in the receipt of commissions, for, as has been said, the courts of this country are not organized to enforce contracts which are repugnant to the principles upon which courts are founded.

It is strongly urged by the plaintiff, that, since the passage of the act known as the practice act, approved June 1, 1872 (17 Stat. 197), and embodied in sections 914, 915, and 916 of the Revised Statutes of the United States, the pleadings in civil causes, in the circuit and district courts, must conform as near as may be to the pleadings existing at the time, in like causes in the courts of record of the state within which such circuit or district court is held, and that, by the Code of Procedure of the state of New York, the answer must set out specifically the grounds of defence which are relied upon, and that illegality of consideration must be specially set forth, and that the alleged invalidity of this contract is exclusively a matter of defence, and, if neglected or waived by the defendant, is not to be regarded by this court. The plea in this case, being the general issue, was filed at the October term, 1874. Prior to the act of June 1st, 1872, the common law system of process and pleading existed in this court, and immediately thereafter, as a matter of fact, the system was not substantially and materially changed. Common law declarations were filed, and, if no objection was made thereto, the pleadings thereafter were conducted under the established common law rules. No authoritative decision was rendered discountenancing such system of pleading until the case of Lewis v. Gould [Case No. 8,324], decided in December, 1875. The present case was originally brought in a state court, and was commenced by a complaint. After it was removed to this court a new declaration in assumpsit was filed, in accordance with the existing usage, and the plea of the general issue was also filed. In the case of Lewis v. Gould [supra], it was held, that "the common law forms of pleading are no longer necessary in the United States courts within the state of New York, nor are they admissible, except as they may be deemed to be substantially a compliance with the requirements of the Code of Procedure of the state as to pleadings;" and in Bills v. New Orleans, etc., R. Co. [Case No. 1,409], it was also held, that when a complaint had been put in in the state court and the action had been removed to this court, no further pleading on the part of the plaintiff was necessary. At common law, prior to the new English rules, passed about the year 1833, the defendant could, under the general issue, in an action of assumpsit, safely rely upon the defence that the contract which was sued upon was illegal in its inception. 1 Chit. Pl. 476, 477; Gould, Pl. 330, 332; Steph. Pl. 162, note; Young v. Black, 7 Cranch [11 U. S.] 565; Craig v. Missouri, 4 Pet. [29 U. S.] 410; Andrews v. Pond, 13 Pet. [38 U. S.] 65; Wilt v. Ogden, 13 Johns. 56; Edson v. Weston, 7 Cow. 278; Young v. Rummell, 2 Hill, 478. If, under the decision of Lewis v. Gould, it

should now be held that the general issue was inadmissible, or, if admissible, did not permit the special matter of defence which is relied upon, yet the defendant, having pleaded without objection, under a system which was recognized as proper at the time when the plea was filed, should have the right to amend his plea, so as to have the benefit of a defence which goes to the merits, and is not merely technical in its character.

But, the question in regard to the disposition of this case does not depend upon rules of pleading. The plaintiff, in his opening statement, stated the facts which he claimed to be true, and upon which he should rely. It is not suggested that they were not stated truthfully. These facts satisfy me that the contract was contra bonos mores. Such an objection it is not possible for the defendant to waive. If he undertakes to waive or to disregard it, the duty of the court is still imperative, not to enforce a contract which the law regards as injurious to public morals and against public policy. Courts are not open for the enforcement of such contracts, and will not lend assistance for the recovery of claims founded thereon; and it is immaterial whether the defendant has or has not formally taken the objection. The defence is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, ex dolo malo non oritur actio, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation, in the most solemn form, to waive the objection, would be tainted with the vice of the original contract, and void for the same reason. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." Coppell v. Hall, 7 Wall. [74 U. S.] 542.

Recurring now to the character of the contract, there is no conflict in regard to the important facts. Upon a given and ascertained state of facts, the validity or invalidity of a contract is a question of law. There is nothing for the jury to pass upon. Upon the validity of this contract, I do not think that there is a discrepancy between the law as expounded by the court of appeals of New York and by the United States supreme court. The cases of Lyon v. Mitchell [36 N. Y. 235, 682] and Cummins v. Barculo [4 Keyes (N. Y.) 514] are very far from validating such an agreement as is here sued upon.

In view of the decision in Tool Co. v. Norris, 2 Wall. [69 U. S.] 45, it is not important to ascertain what the precise duties of Mr. Oscanyan, as consul-general, were. By virtue of his office, and by virtue of his position as an officer of the Turkish government here, and through his acquaintance with Rustan Bey, the plaintiff held close and confidential relations with that gentleman. He had an influence over him, and was trusted and esteemed by him. The plaintiff is now seeking to obtain payment for the exercise of his influence over a purchasing agent, which resulted in procuring a contract to furnish supplies to the government of which both were officers at the time of such contract. An agreement to pay for such services being void, the plaintiff has no cause of action, and the motion of the defendant is granted.

[This cause was carried by writ of error to the supreme court, where the judgment of this court was affirmed. 103 U. S. 261.]

Case No. 10,601.

The OSCEOLA.

[Blatchf. Pr. Cas. 150.] [1]

District Court, S. D. New York. April, 1862.

PRIZE—VESSEL TAKEN BY UNITED STATES AT APPRAISED VALUE.

Vessel condemned as enemy property, having been appraised by a naval survey, and appropriated, at that valuation, to the use of the United States at the place of capture. Appraised value ordered to be distributed.

In admiralty.

BETTS, District Judge. The above sloop sailed from New Orleans, under a license and pass from the Confederate States custom-house at that port, and under the rebel flag, about the 7th of December, 1861, and was captured on the 11th of that month, off Cat Island, in the Mississippi Sound, by the United States steamer New London. She was a fishing smack, and was appraised by a naval survey under the orders of the United States flag-officer at that post, and was retained, at that valuation, in possession of the captors, and appropriated to the use of the United States. The company of the captured vessel were sent to this port and examined as witnesses in preparatorio. The owner of the vessel resided in New Orleans. The master and crew knew that New Orleans was under blockade when they sailed from that port. She was to have returned to New Orleans with her catchings of fish. No appearance or claim is entered by any one in behalf of the vessel or her tackle or cargo. It was in the fair discretion of the commanding officer to retain the prize in possession of the government. Upon the proofs it is adjudged that the vessel, her tackle, &c., be condemned to forfeiture as enemy property, and that the valuation thereof be deposited in the registry of the court for distribution.

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

Case No. 10,602.

The OSCEOLA.

[Olc. 450.] [1]

District Court, S. D. New York. July, 1846.

SEAMEN'S WAGES — FAILURE TO PRODUCE ARTICLES — EVIDENCE OF CONTENTS—EXCUSE—CONTRADICTION BY PAROL —DESERTION—COMPETENCY OF WITNESSES.

1. In a suit upon shipping articles by a seaman to recover wages for a voyage, if the articles are not produced by the master or owner at the trial, after due requirement by the seaman, his statement of the contents thereof, when disputed, will be prima facie evidence of the same.

2. But a call for the articles at the time of trial is not a sufficient requirement, unless it be made to appear they are then in presence of the court, or directly within the control of the master or owner.

3. Quere, if the statement of the mariner is proof of any more than the master is bound by section 1 of Act July 20, 1790 [1 Stat. 131], to insert in the articles to wit, "a declaration of the voyage, or voyages, term or terms of time, for which the seaman or mariner shall be shipped"?

4. If a seaman ships under articles at Boston, in December, 1842, and at New-Orleans in March, 1843, and leaves the ship at Bordeaux, in June, 1843, and in his libel filed against the vessel in this court for wages on those voyages, he prays "the shipping articles may be produced by the master or owner," that is not such notice or requirement as will render his statement proof of their contents.

5. When a witness is examined de bene esse out of court in an admiralty cause, by the claimants, and is cross-examined by the libellants, who reads the cross-examination in support of his action, he cannot then except to the competency of the witness, because interested in the cause, and excludes his testimony given in chief for the claimants.

6. The claimants, on proving a reasonable excuse for not producing the shipping articles on trial, may contradict by parol evidence the statement of their contents by the mariner.

7. The statement of the seaman is incompetent evidence to prove services rendered by him on board the vessel under the shipping articles.

8. Quere, whether Act July 20, 1840, § 1, art. 2 [1 Stat. 394], does not modify section 6 of Act July 20, 1790, in respect to the duty of the master or owner to produce shipping articles, by causing them now to be deposited in the custom-house at the port where the shipment takes place?

9. A seaman, who alleges in his libel for wages that he executed shipping articles for the voyage, cannot claim the right to leave the vessel at his option, and that the agreement is void under the act of 1840, because the shipping articles are not produced on the trial.

10. The sale by a part owner (who is also master) of his interest in a vessel before suit brought, and a release to him by his co-owners of all liability to them, because of any recovery of wages against them or their vessel, render him a competent witness in such action against the vessel.

[11. Cited in The John Martin, Case No. 7,-357, and in Welcome v. The Yosemite, 18 Fed. 384, to the point that the statutory evidence is necessary to convict a seaman of a desertion, which carries a forfeiture of wages, when not shown to be willful and with intention not to return to the vessel. The desertion punished as an offense by the maritime law is defined in the same terms and established by the same process as it was prior to the act of July 20, 1790.]

[1] [Reported by Edward R. Olcott, Esq.]

On the 19th of March, 1846, William Frances, a colored seaman, filed a libel against the brig, in which he charges, that in the month of December, 1843, he shipped on board her at Boston, for a voyage thence to New-Orleans, thence to Bordeaux in France, and thence back to the United States, Morgan being her master. That he shipped as cook and steward, at $16 per month. That he signed shipping articles, containing his contract for the voyage, and prays that the articles be produced in court. That on the 20th of December, 1843, the libellant entered on board the vessel and into her service, and that the vessel sailed with a cargo from Boston to Demarara, and thence to New-Orleans, where she arrived safely and delivered the cargo, and that the libellant continued on board in service of the vessel until April 10, 1844, when he was taken out of her and confined in prison at New-Orleans for one month, when he was returned again on board; and then, at the request of the master, signed articles "for the balance of the voyage, at $18 per month." That the vessel, on the first of May thereafter, sailed from New-Orleans for Bordeaux, and arrived at that port with the libellant on board, July 20, 1844, where the master illegally discharged him from the vessel without paying the wages due him. He further alleges that the master detained his clothes in the ship, worth $80, and refused to deliver them up to him, and he was out of employment at Bordeaux, until September 1, 1844, and was in the service of the vessel eight months and ten days. The libel charges obscurely that the master agreed when he shipped the libellant not to take him to New-Orleans. He claims for wages due, $126 06, and $80, the value of his clothes. The libel prays an answer, but does not demand it under oath.

The answer was filed May 23, 1846, in the name of the owners of the brig, by their agent or attorney in fact. It alleges that Bennett Morgan was master of the brig, and on the 18th of December, 1842 (and not 1843), the libellant shipped on her as cook at $14 per month, from Boston to Demarara, and one or more ports in the West Indies, and back to a port of discharge in the United States, and admits he signed shipping articles for the voyage, which they are ready to produce as they may be required. They aver that he received one month's wages in advance; that the vessel sailed from Boston December 31, 1842, to Demarara and delivered her cargo; thence to St. Thomas, in ballast, and thence to New-Orleans, in ballast, where she arrived March 10, 1843, and where the voyage ended. That the libellant was put in prison there, without the authority or consent of the master, and was paid

his wages in full about the 14th of March, and gave a receipt in writing therefor; and about the same day he shipped as cook, and signed articles at the wages of $18 per month, for a new voyage to Bilboa, thence to one or more ports in Europe, and back to a port of discharge in the United States. That the vessel arrived at Bilboa and delivered her cargo, where $14 80 was paid the libellant, and she proceeded with him to Bordeaux, where she arrived June 5, 1843. On the 27th of the same month, as the brig was getting under way on her return voyage, the libellant deserted from her and took all his clothes ashore, and did not leave her with the assent or knowledge of the master or other officers of the brig, nor did he leave any clothes or property of his own with the brig. The answer denies that the master agreed to discharge the libellant if the vessel was about to proceed to New-Orleans, or that any balance of wages was due him. The libellant called upon the claimants to produce the shipping articles at the trial, and rested his case without offering any evidence of a previous service of notice on the master or vessel to produce the articles on the trial. He afterwards read the cross-examination of the master of the brig, whose testimony had been taken on the part of the claimants; and when the libellant offered to put in evidence the direct examination of the witness in the deposition, the libellant objected to the testimony, as inadmissible, alleging that the master was part owner of the vessel.

The whole deposition was admitted by the court. It was taken before a commissioner under the provisions of the act of congress, on the 6th of April, 1846. The witness testified that he was part owner of the vessel when the libellant shipped on board, but had sold and conveyed his interest to the claimants before this suit was commenced. He also produced a release to him from the claimants of all liabilities to them on account of any recovery which should be had in this action by the libellant. The evidence of the master supported the averments of the answer. He also stated, on his examination, that he had neither set of shipping articles in his possession. He supposed the original one was in the custom-house at Boston, but did not know where the certified copies were. He testified that when the vessel arrived in New-Orleans, March 9, 1843, and he found he must give bonds in $500 not to leave the libellant there, and that the libellant must also be put in prison until the departure of the vessel, he gave him the choice of being then discharged and shipping in another vessel, for a Northern port, or to remain in prison until the brig was ready to sail. The libellant elected to be discharged, and that the witness then paid his wages in full, and took his receipt therefor. All the jail fees were also paid by the consignee of the vessel. That two or three days after, the libellant shipped on the voyage as stated in the answer, to Bilboa, &c., at $18 per month. That one month's wages were paid him in advance, and all the residue were paid at Bordeaux; and that at the last place the libellant ran away from, and deserted the vessel, as she was leaving the port for New-Orleans; and that the vessel was detained twenty-four hours in Bordeaux in consequence, and that nothing was due him from the vessel. He had never promised the libellant not to return with him to New-Orleans.

A. Nash, for libellant.

E. Burr and E. C. Benedict, for claimants.

BETTS, District Judge. The libellant, in the first instance, introduced no testimony on the hearing, but relied upon his own statement of his case in the libel, accompanied with a verbal call upon the claimants in court to produce the shipping articles. The deposition of the master of the vessel had been taken de bene esse, on the part of the claimants, pursuant to the thirtieth section of the judiciary act of September 24, 1789 [1 Stat. 73], and he had been cross-examined on the part of the libellant. The advocates of the libellant claimed the right to read that cross-examination from the deposition on file in court, and excepted to the admissibility of the direct examination of the witness, because he was part owner of the brig, and interested in the case; and also, because the shipping contract being in writing, parol evidence of its contents could not be given by the claimants. To obviate any objection to the witness because of his interest in the case, a formal release, executed and delivered to him by the claimants in court, was given in evidence, which discharged him from all liabilities to them because of any recovery that may be had against them in favor of the libellant for wages earned on the voyages in question, or for any property belonging to him left on board the brig; and they also relied upon his testimony in the deposition that he had sold and conveyed, before this action was brought, all his interest in the brig, to the claimants. The exceptions are insufficient to exclude the evidence on either ground.

The libellant cannot select a portion of the testimony of the master and make it evidence for himself, and then exclude the residue which is favorable to the claimants, because of the legal incompetency of the master to be a witness in the cause. A party who calls a witness to testify to the merits of a cause renders him a competent witness for the opposite party; and his entire testimony is thus necessarily made admissible against the libellant, and his general credit is also conceded.

But if the exception of the libellant prevails, and the evidence of the master is excluded, it may well be doubted whether he has furnished sufficient proof in the cause to support his action. None other would remain than his statement in the libel of the contents of the shipping articles. The evidence

implied from such statement could be carried no further than to prove the shipping contract contained those stipulations which are prescribed as part of it by act of congress. The provision of the statute is, "It shall be incumbent on the master to produce the contract, if required, to ascertain any matters in dispute, otherwise the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master." Act July 20, 1790, § 6. By the first section of that act the master of any vessel of fifty tons or upwards, bound from a port in the United States to any foreign port, is required, before he proceed on such voyage, to make an agreement in writing or in print, with every seaman on board, "declaring the voyage or voyages, term or terms of time for which such seaman shall be shipped."

The matters in dispute contemplated by the statute manifestly are those resting upon the stipulations in the shipping articles, and upon all sound principles of interpretation would be restricted to those which congress designated as vital to the contract. The penalty or disadvantage incurred by neglecting to fulfil the directions of the law is, that the master or owner will be bound by the statements of the mariner in respect to those provisions, and be further liable to the highest rate of wages paid within the last three months at that port. Whatever the seaman chooses to assert, the agreement "declared the voyage and term or terms of time of shipment to be," if disputed, must be deemed to be as he states it. Between the two versions of the agreement alleged in these pleadings, that stated in the libel must, to that extent, be adopted and executed as the true one; but I find no intimation in any authority that a seaman acquires the right under that provision to set up a contract for himself relating to any matter not specified in the act as a particular which must appear in the written or printed agreement. How far, then, the omission in the act of wages, as one of the constituents of the contract to be declared in the shipping articles, will permit the statement of the libellant to be made evidence of that particular, may be regarded questionable. If, however, under that privilege a seaman has the power to embrace every species of obligation the master is capable of entering into, he could not have one which would supply the further ingredient essential to the maintenance of his action—that is, that he had performed the voyage agreed upon. This fact can come into existence only after the execution of the shipping articles, and is incapable of being proved by their contents any more than that of short allowance, injurious treatment or abandonment of the libellant during the voyage. With whatever fulness the execution of the articles themselves might then be proved in court, no decree could be obtained on that foundation alone. There must be the additional evidence that the stipulated services were performed. The averment or statement of that fact by the seaman could avail no more in establishing it than its denial by the owner or master in an answer would in disproving it. The bargain of hiring, however explicit, affords no ground of action without the agreed services have been performed or legally excused; and accordingly, if the statement of the libellant proves in this case the agreement he sets up in his favor, he does not thereby also prove he has rendered services on the vessel, or offered to do so on his part.

In my opinion, then, the libellant cannot derive from the effect given by statute to his declarations or statement, sufficient evidence to make out a right to wages. If he might, in this instance, find in the answer admissions which, in conjunction with his statements, establish a prima facie right of action, his counsel does not avail himself of that evidence, but asserts a right to a decree in his favor solely upon the ground of his own allegations and the failure of the claimants to produce the shipping articles. In my judgment this evidence is inadequate. There may be causes for question, whether the statute is intended to render the statement of a seaman proof of his contract on trial in court, or the privilege be not limited to disputes upon points arising before a judge or magistrate on a preliminary application for a summons to the master or owner to show cause why process in rem should not issue against a vessel for wages. Giving the statute the construction most favorable to seamen, there must, no doubt, appear probable evidence that the shipping articles are in possession of the master or owner, or in a situation to be at their command, to be produced by them in court on trial, before the mariner can substitute his statement for the contract, which by the rules of the common law he would be compelled to produce and prove on his part.

The point is open for consideration, whether Act July 20, 1840, § 1, art. 2, which by necessary implication compels the owner to deposit the original articles with the collector of the port where the contract is made, does not modify the sixth section of Act July 20, 1790, in respect to the production of shipping articles in court, if not so far as to relieve the master or owner from producing them at the call of the seaman, because now in the custom-house and as much at the command of the mariner as of the owner or master, yet at least to compel the seaman to give distinct notice, a reasonable period of time previously, that he requires their production at a specified time and place, to be used on the trial. These shipping articles were executed, one at Boston, in December, 1842, and the other at New-Orleans, in March, 1843. This action was commenced in this court, without summons, in March, 1846, and the claim and answer was filed by the claimants the May there-

after. No definite notice was given the claimants to produce either set of articles on the trial, previous to the time the cause was put on actual hearing. The issue was made on the pleadings the 30th of May, and the cause was heard the 16th of June. The brig being a foreign vessel, and the libellant, in both instances, having executed the articles in question out of the state of New-York three years previous to bringing his suit, I think it exceedingly questionable whether he can act upon his statement of their contents in the libel, without proof that the articles were at the time in court, or at least that he had given notice to the claimants in reasonable time that he should require their production there on the trial. This may become a very important question in the construction of the two acts together, and as the necessities of the case do not demand an explicit decision upon it, I shall leave the point open for consideration until the case shall arise which renders its determination indispensable, remarking only that the libellant has no right of standing in court other than on this technical point, that his own statement constitutes, prima facie, a full right of action and recovery in his favor. The claimants prove satisfactorily that the libellant had been paid wages due him to the time he left the vessel at Bordeaux, with the exception of three or four dollars. That he wilfully deserted her at that port, and caused thereby an expense to the vessel in waiting for and obtaining a substitute cook to fill his place, exceeding the balance unpaid him.

The counsel of the libellant takes two positions, which he insists obviates the charge of his desertion: first, that he could lawfully abandon the vessel at any time on the voyage, because the claimants do not give legal proof that he had bound himself to the brig by shipping articles executed as required by law; and in the second place, because the log-book is not produced and proof furnished by that, according to the provisions of the 5th section of the act of July 20, 1790, that the libellant was absent from the ship without leave of the officers in command of her. There is clearly no foundation for the first point. The 10th article of section 1 of the act of July 20, 1840, renders all shipments of seamen made contrary to the acts of congress void, but that, or any other statute, does not annul the obligation of seamen to the vessel, and permit them to leave the service at their option, when the shipping articles are merely not forthcoming by the master to verify his authority over the crew. The obligation of the mariner is complete on the due execution of shiping articles, and is not revoked by its subsequent loss or destruction. If once duly executed it retains its binding effect upon all parties, if a reasonable excuse for not producing them in evidence be furnished.

The libellant avers in his libel that he signed shipping articles, and claims wages under that contract from Boston to New-Orleans and from New-Orleans to Bordeaux, and thence back to a port of discharge in the United States. He thus precludes himself from asserting that his shipment was void. In the second place, it being proved that the libellant wilfully and clandestinely absconded from the brig with the intention not to return to her again, he forfeits his wages under the general marine laws. 3 Kent, Comm. 198. And the offence may be established according to those laws without resort to the methods of proof designated by the 5th section of the act of July 20, 1790. Cloutman v. Tunison [Case No. 2,907], 1 Hagg. 163; Pratt v. Thomas [Case No. 11,-377]. The statutory evidence is necessary to convict a seaman of a desertion, which carries a forfeiture of wages, when not shown to be wilful and with intention not to return to the vessel. The desertion punished as an offence by the maritime law is defined in the same terms and established by the same process as it was prior to the act of July 20, 1790. So, also, without invoking the law specially applicable to seamen, the libellant, under the common law contract of hiring, could not maintain an action for compensation for serving a portion of the time bargained for. When the engagement is for an entire period or undertaking, it must be fully performed, or all claim to compensation under it is lost. In either alternative, whether the libellant claims a right to recover on the effect given to his statements by the statute, or succeeds in excluding the testimony of the master, he will stand before the court without evidence entitling him to a decree. But I think, independent of the act of the libellant in reading part of the deposition of the master in support of his demand, and thus bringing the whole deposition into the case as evidence, that the proofs satisfactorily show the master was no way disqualified as a witness, having no interest in the vessel or in the event of the cause. The libel must accordingly be dismissed with costs.

Case No. 10,603.

OSGOOD et al. v. ALLEN.

[1 Holmes, 185; 6 Am. Law T. Rep. U. S. Cts. 20; 7 Am. Law Rev. 568; 3 O. G. 124; 4 Cent. Law J. 282; Cox, Manual Trade-Mark Cas. 231.] [1]

Circuit Court, D. Maine. Nov., 1872.

COPYRIGHT—PROTECTION OF TITLE—TRADE-MARKS—INFRINGEMENT.

1. The title of a copyrighted publication, separate from the publication which it is used to des-

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission. 7 Am. Law Rev. 568; 4 Cent. Law J. 282; and Cox, Manual Trade-Mark Cas. 231,—contain only partial reports.]

ignate, is not within the protection of the copyright.

[Cited in Benn v. Le Clercq, Case No. 1,308; Donnelley v. Ivers, 18 Fed. 595.]

2. The office of a trade-mark is to point distinctively to the origin or ownership of the article to which it is affixed.

3. Where a trade-mark right is invaded, the essence of the wrong consists in the sale of the goods of one manufacturer or vender as those of another. It is only when this false representation is directly or indirectly made that relief is granted in equity.

[Cited in Amoskeag Manuf'g Co. v. Trainer, 101 U. S. 61.]

4. Where, in a suit in equity to restrain alleged infringement of a trade-mark right in the title of a publication, it did not appear whether or not the public was actually deceived, or in danger of being deceived, into buying the defendant's publication as that of the complainant, the cause was referred to a master, to ascertain and report whether such was the fact.

Bill in equity [by James R. Osgood and others against Edward C. Allen] for an injunction to restrain the defendant from the use of the words "Our Young Folks," as the title of a publication. The case was heard on an agreed statement of facts, the material parts of which were substantially as follows: The complainants, at the time of the acts of the defendant complained of, were, and for several years had been, the proprietors and publishers of a monthly magazine for the young, published at Boston, Mass., under the title "Our Young Folks;" each issue of which was duly copyrighted, and which had acquired a large circulation and a valuable reputation. The defendant advertised and published at Augusta, Me., a fortnightly paper under the title "Our Young Folks' Illustrated Paper," each issue of which was duly copyrighted. Before the publication of his paper, the defendant was notified by the complainants that they claimed the exclusive right to the title "Our Young Folks," and requested to withdraw the announcement of his publication, and refrain from the use of those words in its title; which the defendant declined to do, and published and sold large numbers of his paper. The two publications were in no respect similar, except in the use of the words "Our Young Folks" in the title of each.

R. M. Morse, Jr., and Richard Stone, Jr., for complainants.

I. The title of a book which is descriptive of its individuality, and indicates its character to the public, is within the protection of the copyright in the book. Curt. Copyr. pp. 293–298. The use of a title previously appropriated, and still used by another, is an injury to the person first adopting the title, and an injury for which there is no adequate remedy, except under the law of copyright. The principles of law applicable to trade-marks and the good-will of trades do not in all cases afford effectual protection to the title of a work. In order to obtain the aid of a court of equity upon those principles, it is necessary for a party to prove that he has derived profits from his publication. Id. 294. But in the case of a newly published work, no profits can be proved. And in the case of a work not yet given to the world, no amount of expenditure incurred upon it will give an exclusive right to the title. Turner, C. J., in Maxwell v. Hogg, 2 Ch. App. 307. Under the act of 1831 (4 Stat. 436), which is substantially the same as the act of 1870 (16 Stat. 198), it has been settled that periodicals are protected as books; that copyright includes the whole book, and every part of it; that quantity is, of itself, no test by which to determine whether a quotation amounts to a piracy; and the question in such cases is, whether the quotation tends to, or does in fact, injure the book from which the extract is taken. Curt. Copyr. 109, 238, 243, 244; Folsom v. Marsh [Case No. 4,901]; Story v. Holcombe [Id. 13,497]. The title of a book is a part of, or a necessary appendage to, the book, and, in the case of a periodical, is the most valuable part of it. In Bradbury v. Dickens, 27 Beav. 60, which was a case relating to the property in "Household Words," Sir John Romilly, master of the rolls, declared that "the property in a literary periodical like this is confined purely to the mere title;" and the right to publish any periodical or other work under the title "Household Words" was sold by auction under a decree of the court, for £3,550. According to the decision in Jollie v. Jaques [Case No. 7,437], if the body of the book is not protected by the copyright, the title is not. It is equally true, that if the title is not protected by copyright, the body of the work will not receive the protection which the copyright acts seem to have intended. If the protection of copyright does not extend to the title, why should the time of copyright date from the time of recording the title? The author or proprietor can derive no benefit from the statute before publication which he did not possess before. Up to that time the common law furnishes him an ample remedy against piracy. Bartlette v. Crittenden [Id. 1,082]; Wheaton v. Peters, 8 Pet. [33 U. S.] 657. It was held in Roberts v. Myers [Case No. 11,906], that after the title-page has been deposited, the author can maintain an action for infringement of his copyright, though the work may not have been published. In Maxwell v. Hogg, 2 Ch. App. 307, and Correspondent Newspaper Co. v. Saunders, 12 Law T. [N. S.] 540, it was held that the statute did not protect the title before publication, because by the English statute the time of copyright dates from the time of publication. Upon the same principle, it should be held that the acts of 1831 and 1870 protect the title, because the time of copyright under them dates from the time of recording the title.

II. The complainants have a right to the exclusive use of the name "Our Young Folks," as indicating a periodical, under the law of

trade-marks. Maxwell v. Hogg, 2 Ch. App. 307; Kelly v. Hutton, 3 Ch. App. 708; Clement v. Maddick, 1 Giff. 98; Lee v. Haley, 5 Ch. App. 155; Bell v. Locke, 8 Paige, 75; Snowden v. Noah, Hopk. Ch. 354; Matsell v. Flanagan, 2 Abb. Pr. (N. S.) 459; Hogg v. Kirby, 8 Ves. 215; 2 Story, Eq. Jur. § 951; Spottiswoode v. Clarke, 2 Phil. Ch. 154; Crucible Co. v. Guggenheim, 3 Am. L. J. & R. 293, and cases cited. The defendant's use of the words "Our Young Folks" is an infringement of the complainants' right. His publication is intended to supply the same demand as theirs. It will be known to its readers and to the trade by the same name. The public will be deceived, and the complainants injured. Seixo v. Provezende, 1 Ch. App. 197; Croft v. Day, 7 Beav. 89. The defendant admits in his letter that "the names might, in some cases, be confounded," and claims that his publication will be a benefit instead of an injury to the complainants, because, as he says, "your publication has but a small circulation compared to that which ours will have, and therefore * * * ours will be an advertisement for yours." That is, the defendant will advertise the complainants, or the complainants will advertise the defendant; and in either case the public are to be deceived. The complainants' right to maintain this bill does not depend on the innocence of the defendant in using the complainants' title. Hall v. Barrows, 33 Law J. Ch. 204; Pasley v. Freeman, 2 Smith, Lead. Cas. Eq. 92; Clement v. Maddick, 1 Giff. 98; Millington v. Fox, 3 Mylne & C. 338.

Causten Browne, Jabez S. Holmes, and A. A. Strout, for defendant.

I. There is no copyright in the title of the complainants' publication. The copyright act contemplates no copyright in any thing but the book, and regards the title only as a designation of the book. It is merely a name for the copyrighted publication, and the only exclusive right which the author or proprietor has in it is as a title to that particular work. The title differs from the literary composition which is the subject of copyright in the fundamental characteristic of such composition: it need not be original. Its sole literary merit is in its appropriateness. It may be, often is, a quotation. In Cruttwell v. Lye, 17 Ves. 335, and Maxwell v. Hogg, 2 Ch. App. 305, the court intimated strongly the opinion that there could be no copyright in a title. See, also, Jollie v. Jaques [supra]. If, then, the complainants have any exclusive copyright in the words "Our Young Folks," it is as a part of their publication. But the use of those three words in the defendant's publication would not be an infringement of complainants' copyright in their magazine. It has never been held that the use of three words is an infringement of a copyright in a previous publication which contains them.

II. The complainants allege infringement of an exclusive right in the title "Our Young Folks" as a trade-mark. The fundamental principle of the law of trade-mark is, that no manufacturer or proprietor has a right to sell his goods as those of another. Hogg v. Kirby, 8 Ves. 214; Cruttwell v. Lye, 17 Ves. 335; Knott v. Morgan, 2 Keen, 213; Spottiswoode v. Clark, 10 Jur. 1043; Sykes v. Sykes, 3 Barn. & C. 541; Rodgers v. Nowill, 5 Man. G. & S. 109; Burgess v. Burgess, 17 Jur. 292; Perry v. Truefitt, 6 Beav. 66; Leather Cloth Co. v. American Leather Cloth Co., 11 Jur. [N. S.] 513; Stokes v. Landgraff, 17 Barb. 608; Howard v. Henriques, 3 Sandf. 725; Fetridge v. Wells, 4 Abb. Pr. 144; Taylor v. Carpenter [Case No. 13,784]; Marsh v. Billings, 7 Cush. 322; Coats v. Holbrook, 2 Sandf. Ch. 586; Partridge v. Menck, Id. 622, 2 Barb. Ch. 101, 1 How. App. 558; Delaware & H. Canal Co. v. Clark [Case No. 3,764]; Snowden v. Noah, Hopk. Ch. 347; Bell v. Locke, 8 Paige, 74. The question, in all cases where an infringement of the right is alleged, is whether the defendant has so appropriated or simulated the plaintiff's mark that the public has been deceived into buying the defendant's goods as those of the plaintiff, or is likely to be. The plaintiff cannot claim an abstract right in his mark, whenever and however used. It must be used by the defendant in such association as to deceive the public. If the plaintiff's mark in itself designates the true origin of the goods to which he has applied it, and the defendant has actually used it, that is in itself the fraudulent misrepresentation. But if the mark is not in itself indicative of the origin of the goods to which the plaintiff has affixed it, many considerations are to be taken into account in determining the question of infringement. The defendant must have simulated the mark of the plaintiff, so that the public will naturally mistake the one for the other. Leather Cloth Co. v. American Leather Cloth Co., 11 Jur. (N. S.) 513; Croft v. Day, 7 Beav. 84; Crawshay v. Thompson, 4 Man. & G. 357; Seixo v. Provezende, 1 Ch. App. 192; Cocks v. Chandler, L. R. 11 Eq. 446; Welch v. Knott, 4 Kay & J. 747; Amoskeag Manuf'g Co. v. Spear, 2 Sandf. 599; Swift v. Dey, 4 Rob. [N. Y.] 611; Partridge v. Menck, 2 Sandf. Ch. 622; Amoskeag Manuf'g Co. v. Garner, 55 Barb. 151. And the resemblance must be such as to deceive a person using due caution. He must have used the mark upon goods of the same kind as those upon which the plaintiff has used it. Cases above cited. If the use of the thing to which the plaintiff has affixed his mark, or in which he has acquired a good-will, is from its nature necessarily local, the defendant's use must be in the same place. Howard v. Henriques, 3 Sandf. 725; Corwin v. Daly, 7 Bosw. 222; Marsh v. Billings, 7 Cush. 322; Christy v. Murphy, 12 How. Prac. 77; Knott v. Morgan, 2 Keen, 213. The cases directly involving an exclusive right in the title of a

periodical affirm the same principles. Colladay v. Baird, 4 Phila. 139; Emerson v. Badger, 101 Mass. 82; Spottiswoode v. Clark, 10 Jur. 1043; Bell v. Locke, 8 Paige, 75; Snowden v. Noah, Hopk. Ch. 347; Matsell v. Flanagan, 2 Abb. Pr. (N. S.) 459; Stephens v. De Couto, 4 Abb. Pr. (N. S.) 47. The doctrine of the case of McAndrew v. Bassett, 10 Law J. (N. S.) 445, approved in Maxwell v. Hogg, may fairly be construed so as to be in accordance with the cases already cited and the principles upon which they rest. In this case there is no simulation of the complainants' title. The two publications are entirely dissimilar. Deception or misleading of the public into buying the defendant's as that of the complainants is not only improbable, but almost impossible. The law presumes that a purchaser exercises some caution. No actual misleading of the public is pretended.

SHEPLEY, Circuit Judge. The complainants are the proprietors and publishers of an illustrated magazine for boys and girls, entitled "Our Young Folks," which has been published monthly, in the city of Boston, under the same title, since December, 1864. Previous to the publication of the first number, the publishers duly entered the title of their magazine for securing the copyright thereof. The publication and sale have been continued in regular monthly numbers by the firm of Ticknor & Fields and their successors, including the complainants; and the copyright of each number was taken out and secured according to law, previous to its publication. Complainants allege, that, when the copyright of the first number was taken out, the title "Our Young Folks" had not been adopted, and was not in use for any other similar publication, and has not been used for any similar publication since, except by the defendant; that they have expended large sums of money in publishing and selling the same; that, by reason of their expenditure, and the care and skill by them bestowed, the magazine has acquired an extensive and valuable reputation throughout the United States and elsewhere as a publication for young people, under the title of "Our Young Folks," and was a source of profit to complainants.

The defendant, a publisher at Augusta, Me., announced, by advertisements and otherwise, that he would publish, on the first and fifteenth days of each month, commencing October 1, 1871, an illustrated publication for young people, under the title "Our Young Folks' Illustrated Paper." It is admitted that he accordingly did issue a very large edition of his illustrated publication, a copy of which is filed with the proofs in the case; and that, upon demand by the complainants before publication, he refused, and still refuses, to withdraw the announcement of the publication, or to change the title, and has published and sold large numbers under said title.

The complainants claim that they are entitled to a remedy under the law of copyright, and also that they have a right to the exclusive use of the name "Our Young Folks," as indicating a periodical, according to the doctrine of trade-marks as applied to the protection of literary publications. It is apparent upon inspection, and not disputed, that the publications of the complainants and the defendant are in no respect the same, or even similar, except in the use by both of the words "Our Young Folks" as a part of the title. The title of the one on the title-page is, "Our Young Folks: an Illustrated Magazine for Boys and Girls;" of the other. "Our Young Folks' Illustrated Paper." Both are illustrated periodicals for the young. The reading matter and the illustrations are not the same, or similar.

Copyright laws are designed for the encouragement of learning, by securing to authors and their representatives the exclusive right to the publication of their literary compositions, as patent laws secure to inventors certain exclusive rights in their discoveries. The constitution conferred upon congress the power to promote the progress of science and the useful arts "by securing, for limited times, to authors and inventors the exclusive rights to their respective writings and discoveries." Accordingly, in 1790 [1 Stat. 124], congress passed an act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned. This act provided, that the author and authors of any map, chart, book, or books "shall have the sole right and liberty of printing, reprinting, publishing, and vending such map, chart, book, or books, for fourteen years from the time of recording the title thereof." The remedy provided by this statute was a right of action given to the proprietor of the copyright, against any person who, without his consent, should publish, sell, or expose to sale, or cause to be published, sold, or exposed to sale, any copy of such map, chart, book, or books.

The act of 1870, "to revise, consolidate, and amend the statutes relating to patents and copyrights," provides, that the author or proprietors of any books, &c., shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same. The nineteenth section provides, that no person shall be entitled to the benefit of the act unless he shall, before publication, deposit in the mail, for the librarian of congress, a printed copy of the title of such book, and shall, within ten days after publication, mail to the librarian two copies of such copyright book. The remedy of the author or proprietor under this statute is against the person who, without the consent in writing of the proprietor of the copyright, shall print, publish, or import, or, knowing the same to be so print-

ed, published, or imported, shall sell or expose to sale, any copy of such book.

By the plain terms of the statute, the copyright protected is the copyright in "the book," the word "book" being used to describe any literary composition. Although a printed copy of the title of such book is required, before the publication, to be sent to the librarian of congress, yet this is only as a designation of the book to be copyrighted; and the right is not perfected under the statute until the required copies of such copyright book are, after publication, also sent. It is only as a part of the book, and as the title to that particular literary composition, that the title is embraced within the provision of the act. It may possibly be necessary in some cases, in order to protect the copyrighted literary composition, for courts to secure the title from piracy, as well as the other productions of the mind of the author in the book. The right secured by the act, however, is the property in the literary composition,—the product of the mind and genius of the author, and not in the name or title given to it. The title does not necessarily involve any literary composition; it may not be, and certainly the statute does not require that it should be, the product of the author's mind. It is not necessary that it should be novel or original. It is a mere appendage, which only identifies, and frequently does not in any way describe, the literary composition itself, or represent its character. By publishing, in accordance with the requirements of the copyright law, a book under the title of the life of any distinguished statesman, jurist, or author, the publisher could not prevent any other author from publishing an entirely different and original biography under the same title. When the title itself is original, and the product of the author's own mind, and is appropriated by the infringement, as well as the whole, or a part of, the literary composition itself, in protecting the other portions of the literary composition, courts would probably also protect the title. But no case can be found, either in England or this country, in which, under the law of copyright, courts have protected the title alone, separate from the book which it is used to designate. In Jollie v. Jaques [supra], Mr. Justice Nelson says, "The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it as certainly as the principal carries with it the incident." The only doubt expressed by Mr. Justice Nelson in that case is as to how the question might be decided in case of a valid copyright of a book and an infringement of the title by the defendant. While expressing no opinion upon this question, the reasoning by which he arrives at the conclusion, that when the book fails to be protected the title goes with it, would seem clearly to point to a similar result in a case of alleged infringement of copyright of the book; namely, that if there was no piracy of the copyrighted book, there could be no remedy under the act for the use of a title which could not be copyrighted independently of the book. The injunction granted in the case of Hogg v. Kirby, 8 Ves. 215, was not founded on copyright, but on the power a court of equity has to restrain one person from carrying on a trade, or from publishing a work, under a fraudulent representation that such trade or work is that of another. The chancellor (Lord Eldon), in the opinion in that case, says, "In this case, protesting against the argument, that a man is not at liberty to do any thing which affects the sale of another work of this kind, and that because the sale is affected therefore there is an injury (for if there is a fair competition by another original work really new, be the loss what it may, there is no damage or injury), I shall state the question to be, not whether this work is the same, but, in a question between these parties, whether the defendant has not represented it to be the same; and whether the injury to the plaintiff is not as great, and the loss accruing ought not to be regarded in equity upon the same principles between them, as if it was in fact the same work. Upon the point whether the work was in fact meant to be represented to the public as the same, I do not say that it is not a question proper for a jury." In the case of Jollie v. Jaques, Mr. Justice Nelson declined to consider the question whether the court will interfere to prevent the use of a title in fraud of the plaintiff, upon principles relating to the good-will of trades, because, in the case before him, both parties were residents, and, for aught that appeared in the case, citizens, of New York; and, therefore, independently of copyright, the court had no jurisdiction in the case.

In the case before this court, the bill is filed by complainants as citizens of the commonwealth of Massachusetts, against the defendant, a citizen of Maine. Relief is sought not only under the law of copyright, but upon the general ground of equity, as related to the good-will of trades and the doctrine of trade-marks. It becomes necessary for the court to determine, in this case, how far the complainants are entitled to a remedy, upon these grounds of equity jurisdiction, and upon the general principles governing courts of equity jurisdiction. Property in the use of a trade-mark or name has very little analogy to that which exists in copyrights or patents for inventions. In all cases where rights to the exclusive use of a trade-mark are invaded, the essence of the wrong consists in the sale of the goods of one manufacturer or vender as those of another. It is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. Delaware & H. Canal Co. v. Clark, 13 Wall. [80 U. S.] 311, 322. Words or devices may be adopted

as trade-marks, which are not original inventions of the one who adopts and uses them. Words in common use may be adopted, if, at the time of adoption, they were not used to designate the same or similar articles of production. A generic name, or a name merely descriptive of an article of trade, or its qualities or ingredients, cannot be adopted as a trade-mark, so as to give a right to the exclusive use of it. The office of a trade-mark is to point distinctively to the origin or ownership of the article to which it is affixed. Marks which only indicate the names or qualities of products cannot become the subjects of exclusive use, for, from the nature of the case, any other producer may employ, with equal truth and the same right, the same marks for like products. Geographical names, which point out only the place of production, and not the producer, cannot be appropriated exclusively, so as to prevent others from using them and selling articles produced in the districts they describe under these appellations. In the case of Brooklyn White-Lead Co. v. Masury, 25 Barb. 416, the court said, that, as both plaintiff and defendant dealt in the same article, and both manufactured it at Brooklyn, each had the same right to describe it as "Brooklyn White Lead." Lord Langdale, master of the rolls, well expresses the whole law of trade-marks by names, in the case of Collins Co. v. Cowen, 3 Kay & J. 428. He says: "There is no such thing as property in a trade-mark as an abstract name. It is the right which a person has to use a certain name for articles which he has manufactured, so that he may prevent another person from using it, because the mark or name denotes that articles so marked were manufactured by a certain person, and no one else can have the right to put the same name upon his goods, and then represent them to have been manufactured by the person whose mark it is."

Applying these principles to the case before the court, the question presented on this branch of the case is, whether the defendant has so simulated the mark of the complainant as to deceive the public, so that the public will naturally mistake his publication for that of the complainant.

Complainants aver that defendant, fraudulently designing to procure the custom and trade of persons who are in the habit of buying their magazine, and to induce them and the public to believe that his publication is in fact the complainants', and in order to obtain for himself the benefit of the reputation of complainants' publication, advertises, prints, and offers for sale, his publication under that title; and allege that the public will be deceived by the title, and led to purchase defendant's publication under the belief that it is the magazine of the complainants. The agreed statement of facts is silent on the question whether the public are deceived, or are in danger of being deceived, as alleged; and whether the customers of the complainants or the public are induced to believe, or are in danger of being induced to believe, that defendant's publication is in fact the complainants', and thereby led to purchase the defendant's magazine under the belief that it is the complainants'.

The case will therefore be referred to a master to ascertain and report the fact upon the foregoing questions to the court; and further proceedings in the case will be stayed until the coming in of the master's report.

Case No. 10,604.

OSGOOD v. CHICAGO, D. & V. R. CO. et al.

[6 Biss. 330;[1] 7 Chi. Leg. News, 241; 2 Cent. Law J. 275, 283; 14 Am. Law Reg. (N. S.) 506; 2 Am. Law T. Rep. (N. S.) 242; 21 Int. Rev. Rec. 149.]

Circuit Court, N. D. Illinois. April, 1875.

REMOVAL FROM STATE COURT — CO-DEFENDANTS — JUDGMENT CREDITORS — CROSS-BILL — SEIZURE OF RES BY A STATE COURT — COLLATERAL ISSUES — VACATION — IRREGULARITIES IN THE REMOVAL — RECORD — CERTIFICATE — VERIFICATION.

1. Act of congress of March 3, 1875 (18 Stat. 470), construed.

[Criticised in First Nat. Bank of Manhattan v. King Wrought-Iron Bridge Co., Case No. 4,803. Cited in Chicago v. Gage, Id. 2,664; Seckel v. Backhaus, Id. 12,599.]

[Cited in Stone v. Sargent, 129 Mass. 506.]

2. This act consolidates and repeals all previous general acts of congress on the subject.

[Cited in Burdick v. Hale, Case No. 2,147; Seckel v. Backhaus, Id. 12,599.]

[Doubted in Sharp v. Gutcher, 74 Ind. 359.]

3. Since its passage a defendant, though a citizen of the state where the suit is brought, may remove the case from the state to the federal court.

4. Petitioners may have a removal though their co-defendants do not join in the petition, if the controversy is wholly between them and the plaintiff, and can be fully determined as between them; and such a case arises where a bill is filed by a bondholder of a railroad company, and the company, its officers and the trustees under its mortgages petition for removal.

[Cited in Petterson v. Chapman, Case No. 11,042; Donohoe v. Mariposa L. & M. Co., Id. 3,989; McLean v. St. Paul & C. Ry. Co., Id. 8,892; Taylor v. Rockefeller, Id. 13,802; Ruckman v. Ruckman, 1 Fed. 590; Merchants' Nat. Bank v. Thompson, 4 Fed. 878; Bybee v. Hawkett, 5 Fed. 10; Re Iowa & M. Const. Co., 10 Fed. 405.]

5. The existence of judgment creditors and the fact that one of them has filed a cross-bill, does not affect the right of removal.

6. Seizure of res by a state court does not affect the case, for that is necessarily transferred with the case.

7. Collateral issues connected with the res in the state court do not destroy the right of removal, provided the parties are within the statute.

8. The petition and bond may be filed in the state court during vacation, and may be suffi-

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

cient, though there was no action upon the petition or bond.

[Criticised in First Nat. Bank of Manhattan v. King Wrought-Iron Bridge Co., Case No. 4,803. Cited in Re Iowa & M. Const. Co., 10 Fed. 405. Approved in Noble v. Massachusetts Ben. Ass'n, 48 Fed. 339.]

9. Irregularities in the removal do not vitiate it, nor authorize the federal court to remand or dismiss it; if it has jurisdiction, it should retain it.

[Quoted in Mayo v. Taylor, Case No. 9,357. Cited in Ruckman v. Ruckman, 1 Fed. 591; Woolridge v. McKenna, 8 Fed. 668; Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 343; Central Trust Co. v. South Atlantic & O. R. Co., 57 Fed. 10.]

10. It is not essential that the record be certified by the judge of the state court; the attestation of the clerk under the seal of the court is sufficient.

[Quoted in Mayo v. Taylor, Case No. 9,357.]

11. It is not necessary that the petition for removal be verified by affidavit.

[Criticised in First Nat. Bank of Manhattan v. King Wrought-Iron Bridge Co., Case No. 4,803.]

12. When the petition and bond are filed in the state court during vacation the jurisdiction of that court ceases; it does not remain until the court can act upon them in term time; and it is not for the state court to decide whether a proper case is made.

[Criticised in First Nat. Bank of Manhattan v. King Wrought-Iron Bridge Co., Case No. 4,803. Cited in Warren v. Wisconsin Val. R. Co., Id. 17,204; Dennis v. Alachua County, Id. 3,791; Miller v. Tobin, 18 Fed. 613; Owens v. Ohio Cent. R. Co., 20 Fed. 15.]

[Cited in Erie Ry. Co. v. Stringer, 32 Ohio St. 485.]

[See Shaft v. Phœnix Mut. Life Ins. Co., 67 N. Y. 544.]

[This was a bill in equity by Stephen Osgood against the Chicago, Danville & Vincennes Railroad Company and others.]

On the 22d of February, 1875, the plaintiff, a citizen of Massachusetts, as a bondholder of the railroad company, filed a bill in the Will county circuit court, to foreclose a mortgage, making as defendants, the company, its president, treasurer, and directors, and also the trustees of mortgages amounting to several millions of dollars, given by the railroad company. The bill charges various breaches of trust on the part of the officers of the company, and asks for an injunction to prevent them from negotiating certain bonds of the company, and for a receiver. The court, without notice to the defendants, issued the injunction and appointed receivers at the time the bill was filed. On the 23d of February, a petition was filed in the state court by some of the non-resident defendants to remove the suit into this court, which was refused by that court. On the 24th of February, the bill was amended by making various judgment creditors defendants. On the same day, one of the judgment creditors answered and filed a cross-bill praying the court to enforce the lien against the company, and that the receiver should pay the same. On the 26th of February, on petition, other creditors of the company were made defendants, who asked leave to file cross-bills. These claims of the judgment and other creditors were all subsequent in point of time and right to those of the bondholders under the mortgages. On the first of March certain persons petitioned to be made co-plaintiffs.

There was no action of the court on the petition last referred to, and the only crossbill filed was that of the 24th of February, already mentioned. A demurrer had been filed to the bill, argued and taken under advisement by the court. There had also been some incidental motions made in the case, which need not be particularly referred to. The court had adjourned for the term. This was accordingly the position of the case when, on the 22d day of March, petitions were filed in that suit with the clerk of the court by the railroad company, a corporation of this state, Judson, the president, and Tenney, the treasurer, and by the trustees, Roberts, Fosdick and Fisk, asking for the removal of the cause from the state court to this court, under the act of congress of the 3d of March, 1875. The petition alleged that the amount in controversy was of the value of more than $500, that the plaintiff was a citizen of Massachusetts, that the parties who had petitioned to be made co-plaintiffs were citizens of Pennsylvania, and that Judson, Tenney, and Fisk were citizens of New York, Fosdick, a citizen of Connecticut, and Roberts, a citizen of Illinois. Bonds were filed, conditioned as required by the act of congress. A transcript of the record of the suit in the state court was filed in this court March 24. A motion is made by plaintiff to dismiss the suit, on the ground that this court has no jurisdiction of the case.

Henry Crawford and Joseph E. McDonald, for plaintiff.

Edwin Walker and Geo. C. Campbell, for defendants.

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

DRUMMOND, Circuit Judge. It seems to have been the intention, in the recent act, to consolidate into one act all the previous general acts of congress conferring jurisdiction upon the circuit court, and at the same time to give the court jurisdiction in some cases where no previous act of congress had conferred it. The court has now jurisdiction in suits between the citizens of different states, without regard to the fact whether or not one of the parties is a citizen of the state where the suit is brought. The act also authorizes a case to be removed from the state to the federal court under such circumstances. The judiciary act of 1789, as construed by the supreme court, required that each of the parties plaintiff should have the right to sue each of the parties defendant, in a suit between citizens of different states, and equally so in the case of removal.

from the state to the federal court under the authority conferred by the 12th section of that act. 1 Stat. 79. The act of 1866 declared that when a suit was brought in a state court by a citizen of that state against a citizen of another state, and a citizen or citizens of the same state as the plaintiff, that if the controversy might finally be determined between the plaintiff and the citizen of the other state without the presence of the co-defendants, it might be removed to the federal court. 14 Stat. 306. The recent act of congress declares that in any suit mentioned in the law when there shall be a controversy which is wholly between citizens of different states, and which can fully be determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove the suit into the federal court. This is the first time that congress has authorized a defendant, a citizen of the state where the suit is brought, to remove the case from the state to the federal court. As this is a case where there are several defendants, some of whom have not joined in the petition for removal, the question is whether there is a controversy wholly between the plaintiff and those who have petitioned for a removal and which can be fully determined as between them. The controversy in this case, as between these parties, is whether the bonds referred to in the bill are valid debts against the company, and the mortgages can be foreclosed and the claim enforced against the company; and whether the officers of the company have been guilty of any of the breaches of trust alleged against them. The officers named as defendants, and the railroad company, would seem to be parties whose rights, as between them and the plaintiff, can be fully determined as being a controversy wholly between them. The other parties who have joined in the petition for removal are mere trustees. It is a controversy wholly between citizens of different states.

The fact that there are various judgment creditors whose rights are subject to the prior liens of the bondholders, cannot affect the power of removal, their rights remaining unchanged. Neither can the fact that a judgment creditor has filed a cross-bill, for then it would always be in the power of a creditor to prevent the operation of the statute.

The difficulty arising from the possession of the property by the state court is more apparent than real. If the res has been seized as an incident of the controversy between the citizens of different states, then the removal of the cause into the federal court transfers the res with it as a necessary part of the proceedings, and the fact that collateral issues as connected with the res have sprung up in the state court, cannot destroy the right of removal, provided the parties seeking it bring themselves within the terms of the statute. The language of the third section is that the petition for the removal must be filed in the state court before or at the term at which the cause can first be tried. It may prove in some cases, particularly those in equity, difficult to determine the term when the cause can first be tried. It is not claimed in this case that the petition was not filed in due time, but it is objected that it was filed in vacation, and not during any term of the court, and that there was no action of the court upon the petition or on the bond. I do not think the objection can be sustained on either ground. The law requires the petition to be filed in the suit, and it may be before the term, and, in fact, it is often desirable immediately after a suit is commenced in the state court to remove it into the federal court before there is any action of the state court in the case. It is true that under the statute the bond must be good and sufficient security, but it does not declare that it shall be approved by the judge. It requires the state court to accept the petition and bond and proceed no further in the case. Now suppose the state court should refuse to accept the petition or the bond, or should decide that a bond valid under the law and with good and sufficient security, was not so, would that deprive the party of the right of removal? Clearly not. This statute seems to have been passed with a full knowledge of the difficulties growing out of the action or non-action of the state courts under previous laws, and with a determination to make the power of removal independent of the action of the state court. It is not stated in every case under this statute, as in those of 1789 and of 1866, that certain facts are to appear to the satisfaction of the court. And this is the more apparent from the authority conferred on the circuit court, by the 7th section, to issue writs of certiorari to the state courts with power to enforce them, and from what is stated in the same section as to the time of removal if the circuit court of the United States shall hold its next term within twenty days after the petition and bond are filed in the state court. The 5th section was intended to protect a party in case of the improper removal of a suit from the state to the federal court, but the language of that section is peculiarly significant as affecting the motion now before the court. The copy of the record has been filed in this court, and the law seems to indicate under what circumstances only, in such an event, the case should be remanded back to the state court. It is when it shall appear to the satisfaction of the federal court that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, or that the parties have been improperly or collusively made, or joined, for the purpose of creating a case cognizable under the act. It is true that the act prescribes the manner

in which the removal shall be made, and the directions of the law should be complied with. But the 5th section does not authorize the court to remand or dismiss the cause for the reason that it may appear that there was any irregularity in the means taken to procure the removal. The purpose obviously was, if the record was filed in the federal court under the law, and the court could see that it had jurisdiction of the case, that it should retain it, notwithstanding there might be defects in the manner of removal.

It is also objected that the record from the state court, while certified by the clerk under the seal of the court, has not also the certificate of the judge. This last has never been considered necessary where the record comes from a court of this state. The attestation of the clerk under the seal of the court is sufficient in any court of this state, and is so in this court. A further objection is that the petition for removal is not verified by affidavit. That is not required by the act of 1789 or the act of 1866, nor is it by the act of 1875, though it was by the act of 1867. Cases of Sewing Mach. Cos., 18 Wall. [85 U. S.] 553. So that on the whole I think it is the duty of the court to allow the case to stand as between the plaintiff and the parties defendant who have petitioned for its removal into this court, and to overrule the motion to dismiss; and it will be so ordered.

After the foregoing opinion was prepared, on application of plaintiff's counsel, a reargument was allowed before DRUMMOND, Circuit Judge, and BLODGETT, District Judge.

DRUMMOND, Circuit Judge. It has been insisted on the re-argument that this court cannot take jurisdiction of the case, on two grounds:

1. The case itself is of such a character that it is not removable under the statute.

2. The case cannot be removed independent of the action of the state court.

The first clause of the second section of the act of 1875 (18 Stat. 470), states when a case can be removed to the federal court. It must be a suit of a civil nature at law or in equity, pending at the date of the act, or brought thereafter in the state court. The matter in dispute must exceed $500. It must be a suit arising under the constitution or laws of the United States, * * * or in which there shall be a controversy between citizens of different states. * * * This clause refers to a removal by either party, that is, by the whole of what constitutes the one side or the other.

The second clause of that section states when a case can be removed by either parties less than the whole. There must be in a suit in the state court a controversy wholly between citizens of different states, and such that it can be fully determined as between them; if so, then any one or more of the plaintiffs or defendants actually interested in the controversy may remove "said suit," into the circuit court of the United States.

There was here a civil suit in equity pending in the state court at the date of the act, where the matter in dispute exceeded, exclusive of costs, the sum or value of $500.

Was there in this suit a controversy wholly between citizens of different states? The plaintiff was a citizen of Massachusetts, the railroad company a citizen of Illinois. The railroad company had executed to trustees certain mortgages on its property to secure an indebtedness due from the company, of which the plaintiff held a part. He was not a trustee of either of the mortgages. The trustees and the company, and some of its officers, made defendants and all of them citizens of different states from that of the plaintiff, petitioned for the removal of the cause.

Now, the controversy between these parties was wholly as to the debt and validity of the mortgages and the enforcement of the same.

The trustees represented the other creditors as well as the plaintiff. It was then in effect a controversy wholly between the trustees as the representatives of the creditors, and the railroad company. There can be no doubt that, so far as it relates to citizenship, it was entirely competent for the plaintiff to bring his suit in this court instead of the state court. And having done the latter, that it was equally competent for the defendants, as the case then stood, to remove it to the federal court. Was this right lost by the subsequent facts which appear in the case?

After the bill was filed receivers were appointed, and certain judgment and other creditors were made defendants, one of whom filed a cross-bill.

The mere possession of the property clearly could not affect the result, as appears from the fourth section of the recent act. That was connected wholly with the controversy of the original parties, and did not prevent it from being exclusively between them. It does not appear that any of the creditors were citizens of the same state as the plaintiff, but, conceding that there was a controversy in the suit whether the judgments were valid liens on the property, and whether the debts of the other creditors were binding on the company, and that some of the creditors were citizens of the same state as the company, was the right of removal gone?

It is said that the language of the second section of the act of 1875, is different from the act of 1866, the former declaring that either one or more of the parties "may remove said suit" into the federal court. It is insisted that that means the whole suit, and not the part which involves merely a controversy between citizens of different states, and therefore, if there should be incidentally a

controversy in the suit between citizens of the same state the effect would be to remove this last as well as the other, and therefore, the federal court would take jurisdiction of a controversy between citizens of the same state, which would be unconstitutional.

If we were to admit the premises we hardly think the conclusion would follow. If the whole suit is removed because of the principal controversy between citizens of different states, and in order to fully determine that as between them, other controversies between citizens of the same state arise in the suit, there is no objection to the federal court taking jurisdiction of the latter. It is matter of common practice to do this in the settlement of legal and equitable rights. Having control and jurisdiction of the principal, the incidents go with it. In every case where this court forecloses a railroad mortgage, this doctrine is enforced; so that the true rule, even on the hypothesis stated, would seem to be to ascertain whether this court had jurisdiction of what may be regarded as the main controversy, and whether the others, between citizens of the same state, are mere incidents of such controversy. In this case the claims of the defendant-creditors, it is presumed, depend on the effect and validity of the mortgages, which, if sustained, give the bondholders the paramount claim. The former may therefore be said to represent mortgage debts. If this is so, there is no good reason why the whole suit may not be removed to this court. Whether the act intends to authorize the removal of the whole suit in every case where there is a controversy between citizens of different states, and which can be fully determined as between them, without regard to other controversies in the same suit and the citizenship of the parties in the suit, and whether, if so, the act is in that respect constitutional, need not be here decided. Neither is it necessary to decide whether the act, in any case where there may be in the suit controversies between citizens of the same state, permits them to remain to be determined by the state court.

Upon the second ground we commence with two admissions made by the plaintiff's counsel. They concede:

1. Under the 3d section of the act of 1875 (18 Stat. 471), the petition for removal and the bond required, can be filed in vacation in the suit pending in the state court.

2. If the statute is complied with, the state court has no discretion, and its refusal to accept the petition and bond, and the omission to note the refusal on the record, would not deprive the party entitled thereto of the right of removal.

These admissions necessarily grow out of the words of the statute. If the facts as named therein exist, then the party entitled to remove the suit may file a petition in such suit in the state court before the term at which the cause could be first tried, and file therewith a bond with good and sufficient security. The bond and petition may therefore both be filed out of term time; they are to be filed in the suit pending in the state court, that is, with the clerk in the ordinary way in which papers are marked and filed in a suit. Now, if the proper petition and bond are filed with the clerk in the suit pending in the state court by the party entitled to do so, in vacation, what is the status of the case from the time of filing the same until the meeting of the state court?

According to the view of plaintiff's counsel, the court having had no opportunity in open court to accept or refuse the bond and petition, there is jurisdiction still in the state court, and the judge of that court can make any order in the case permitted to a judge under such circumstances; that is, he can, if necessary, grant an injunction, and (in this state) appoint a receiver of property. There ought to be authority somewhere to protect the rights of parties in the contingency named. Having filed the petition and bond with the clerk in the given case, the applicant has done all that the statute requires. He need not call upon the court to act at all. No order is to be made in court, at least the statute names none, unless the mandate that the court "shall accept the petition and bond" implies one.

The language is somewhat different in the other statutes: "shall accept the surety." When is it that the court shall "proceed no further in such suit"? It is well to notice the different language in another part of the section. When the suit relates to the title of land, and is between citizens of the same state, then the value must be made to appear, and certain statements (and affidavit if required by the court) must be made, all showing that the court is called on to act. But it is said that, in this case, the court must judge whether the bond was good and sufficient security, and must accept that and the petition.

It may be proper to consider the former legislation on this point. The act of 1789 required, in order to effect a removal from the state to the federal court, that the defendant should, at the time of entering his appearance in the state court, file the petition for removal. 1 Stat. 79.

The act of 1866 declared that the petition might be filed "at any time before the trial or final hearing of the cause;" but nothing is said as to the manner of filing other than by the use of such general words. 14 Stat. 306. The act of 1867 required an affidavit and petition to be filed in the state court at any time before the final hearing or trial of the suit. Id. 558.

These acts were, it is presumed, all repealed by the Revised Statutes of the United States, which, however, incorporated their substantial provisions in section 639.

The law in force upon the subject of removal, at the date of the act of 1875, was as follows: "In order to such removal, the pe-

titioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said state court good and sufficient security," etc. Rev. Stat. 1874, p. 113, § 639.

The act of 1875 for the first time expressly authorized the petition and bond to be filed out of term time. There must have been some object in this change. We think it was to prevent the state court from proceeding further in the case after the proper papers were filed in the suit with the clerk.

There was nothing more to be done in order to perfect the right. A condition of the bond is that the petitioner shall enter in the circuit court of the United States at its next term a copy of the record of the suit, and pay the costs if the suit be wrongfully removed, and is for the benefit of the opposite party.

The seventh section of the statute has an important bearing on the question. It often happens that the terms of the state court are only once or twice a year. If after the filing of the petition and bond in the suit in the state court not in term, the circuit court of the United States should sit before the state court—for example, the former in one month and the latter in two months from the time of filing the petition and bond—if there must be an opportunity for the state court to act on them before the right of removal is perfected, how is it possible for the petitioner to comply with the condition of the bond?

The only answer that can be given is that, in spite of the words of the third section that the bond and petition may be filed before the term, there is in fact and law no filing of the petition and bond until the court is in session, in effect thereby striking those words out of the statute, and thus the state judge has power over the case from the commencement till the petition and bond are presented to him while holding court, which we think congress intended he should not have when they were duly filed in vacation.

Under previous laws, in some instances the clerks of the state court would not give copies of the record when a petition for removal was filed. The recent act imposes a severe penalty in case of their refusal to furnish a copy of the record, after tender of the legal fees, to any one applying for removal, not when the removal is ordered or refused by the court. It is said there must be a power in the state court to determine whether the petition and bond are sufficient, and whether the case is removable under the statute. It is true that the party seeking the removal of the cause must be entitled to the same, but we think the statute did not intend to permit the state court to judge in such a case as this whether a proper case was made. That was one of the difficulties under former statutes. If the state court chose to proceed, the only remedy was supposed to be through the highest court of the state, to the supreme court of the United States. See Hough v. Transportation Co. [Case No. 6,724]; Akerly v. Vilas [Id. 119]; In re Cromie [Id. 3,405]; and authorities cited in those cases and notes. This statute gives the circuit court of the United States power to issue the writ of certiorari to the state court in any cause removable under the act, and therefore to the federal court the right to determine whether the cause is properly removable.

It is claimed by the plaintiff's counsel that that is given when the state court refuses to act. But the state court may omit to place on the record the refusal or non-action, and whether it does or not, there can be no object in issuing a writ of certiorari, the sole effect of which is to bring the record into the federal court, if it is already there duly certified by the clerk under the seal of the state court. This statute has not given power to the circuit court of the United States to compel the state court to act by writ of mandamus or otherwise. The sole object of the writ of certiorari, as the statute itself says, is to make a return of the record.

The fifth section contains provisions which are new. It is true that in practice under previous laws, when a case came into the federal court by removal from the state court, motions could be made to dismiss and remand the case, but their decision depended on general principles. Now the fifth section controls the action of the federal court, both as to the dismissal and remanding of cases. It did not intend that the suit should be dismissed or remanded on account of irregularities, provided it satisfactorily appeared that the court had jurisdiction of the cause. Here the only thing to which objection is now made is as to the character of the suit and the want of opportunity of the state court, as a court, to act or refuse to act. There is no complaint made against the sufficiency of the bond.

It is said we treat the state courts with disrespect in not allowing them to pass upon the case under the statute. We would treat them more disrespectfully if we disregarded and overruled their action, as it is admitted we would have the right to do in a proper case.

What might be the effect of the record of the state court being filed in the federal court before the term next after the filing of the bond and petition in the suit in the state court, upon the general status of the case, it is not necessary to consider. There possibly might be a question whether the case would be in every respect before the federal court prior to its next term.

It may be admitted that there are difficulties in any view we may take of this part of the case, but we are at a loss to understand how the fact that the state court has not had the opportunity to pass upon the application, can alone confer the right of removal, when it is admitted that the action or non-action of the state court may be immaterial.

If the petitioner has brought himself and is within the terms of the law, and the right of removal is complete, then when there is added to that a copy of the record duly filed in the federal court (and special bail given when requisite), the act of removal has taken place.

NOTE. The above decision commented on by Judge Baker, of the Alexander county circuit court, who held that the act of congress contemplated some action by the state court, and that if the state court was satisfied that the party was not entitled to removal of the cause, the cause might be placed upon the docket, and proceed to trial. Mayo v. Taylor [Case No. 9,357]. See, also, as to possession of res, Gaylord v. Ft. Wayne, M. & C. R. Co. [Id. 5,284], and Union Trust Co. v. Rockford, R. I. & St. L. R. Co. [Id. 14,401].

OSGOOD (GOODYEAR DENTAL VULCANITE CO. v.). See Case No. 5,594.

OSGOOD (JONES v.). See Case No. 7,487.

OSGOOD (LUSCOM v.). See Case No. 8,608.

OSGOOD (LUXOM v.). See Case No. 8,608.

Case No. 10,605.

OSGOOD et al. v. ROCKWOOD.

[11 Blatchf. 310;[1] Cox, Manual Trade-Mark Cas. 242.]

Circuit Court, S. D. New York. Sept. 27, 1873.

TRADE-MARKS — PROTECTION AFFORDED BY ACT OF JULY 8, 1870—"HELIOTYPE."

1. The protection given by the 77th and 78th sections of the act of July 8, 1870 (16 Stat. 210, 211), to the use of a trade-mark, the recording of which in the patent office is therein provided for, is to the exclusive use of such trade-mark only so far as regards the particular description of goods set forth in the filed statement as the particular description of goods to or by which the trade-mark has been, or is intended to be, appropriated; and the prohibition is only against the use, by another, of substantially the same trade-mark on goods of substantially the same descriptive qualities as such particular description of goods set forth in such filed statement.

2. A statement filed by O. set forth that his trade-mark consisted of the word "Heliotype," "in connection with the production and publication of prints," and that "the particular article of trade" upon which he had used it was "the prints" which he designated as "Heliotype." Such prints were made by a process to which the name "Heliotype" was applied, and which was a process secured by letters patent of the United States, under which O. was the sole licensee. The defendant used the word "Heliotype" on prints published by him, but not made by such patented process: *Held*, that the right of O. to the recorded trade-mark was limited to its use on prints made by such patented process.

[This was a bill in equity by James R. Osgood and others against George G. Rockwood for the alleged unlawful use of a trade-mark. Heard on motion for a provisional injunction.]

Charles F. Blake, for plaintiffs.
Josiah P. Fitch, for defendant.

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

BLATCHFORD, District Judge. The bill in this case alleges, that, before the 8th of December, 1869, one Ernest Edwards, of London, England, was the original and first inventor of certain improvements in the process of photographic printing; that he obtained four English patents for the same; that, afterwards, desiring to designate the process embodying his said inventions by a specific name not used or known before, or applied to any other process or art, he devised and invented the name "Heliotype," which name he applied to his said process, and printed the same upon impressions printed by his said process, and used the same as a trade-mark in the business and practice of the said inventions; that, after the issue of the said English patents, Edwards assigned all his interest in them and in the inventions secured by them, for Great Britain and for the United States, to the Heliotype Company, an English company, by virtue whereof the title to the said inventions for the United States, and the right to any patents which might be issued therefor in the United States, became vested in said company; that, afterwards, two letters patent of the United States, for said inventions, were issued to Edwards, assignor to the said company; that, prior to the issuing of the latter patents, the plaintiffs, by virtue of a contract made between them and the said company, became the sole and equitable owners of the said inventions for the United States, and the sole licensees to practice said inventions within the United States, and also became entitled to an assignment of the latter patents, when issued, from the said company; that said company are about to execute to the plaintiffs an assignment of all their interest in the latter patents; that the plaintiffs, desiring to designate the practice of the said inventions in the United States by the same name as that by which it is known and practiced in England, registered the word "Heliotype" in the patent office of the United States, according to the provisions of the statute in such case provided, and received a certificate of registration from the patent office, whereby the exclusive right to the use of the said word "Heliotype," as a trade-mark, was vested in the plaintiffs for the period of thirty years; that the defendant has infringed on the exclusive privilege granted by said certificate, by printing upon certain prints by him made, the word "Heliotype," which the plaintiffs charge to be substantially the same word as the word "Heliotype," and to be calculated to mislead purchasers and to cause them to believe that they are purchasing prints made by the practice of the said inventions of Edwards; that the defendant, in so doing, intends to deceive the public and to injure the plaintiffs; and that the defendants are greatly injured by such unlawful use of their trade-mark. The bill prays for an account of profits and damages and for an injunction.

The answer of the defendant admits that

he has imprinted the word "Heliotype" on certain prints or pictures made by him, but denies that, in so using that word, he had any intention, or that the same was calculated, to mislead purchasers or cause them to believe that they were purchasing prints made by the practice of the said inventions of Edwards, or that such prints were made by the plaintiffs.

The plaintiffs now move for a provisional injunction. They do not contend that the defendant employs the Edwards process or infringes the patents. On the contrary, the affidavit of one of the plaintiffs sets forth that their reputation is connected with the success of such process, "and will be liable to be injured if inferior reproductions by other processes," bearing what is known to the public as the plaintiffs' trade-mark, are allowed to go upon the market. The defendant, in an affidavit, sets forth, that he is a photographer, and has denominated the process by which his photographic prints are taken as a heliotype process, and has printed the following words on certain pictures made by him: "By Rockwood Photo-Engraving (Heliotype) Process;" that, by so doing, he did not intend to simulate or imitate the imprint of the plaintiffs, or to convey the idea that such pictures were made by the plaintiffs or came from their establishment, or were made by a process over which they had control, or which they had the exclusive right to use, and did not make any such imitation or simulation; and that such imprint, as used by the defendants, was not intended or calculated to deceive purchasers of said pictures, or to cause them to believe that said pictures were made by or came from the plaintiffs. Nothing is disclosed as to the process whereby such pictures are made by the defendant, except that it is stated to be one whereby a print or type is made by the action of the sun's light.

The "statement" filed in the patent office by the plaintiffs, under the 77th section of the act of July 8, 1870 (16 Stat. 210), as a basis for their claim to a trade-mark, is in these words: "Specification of a trade-mark used by the firm of James R. Osgood & Co., of Boston, Massachusetts. Our trade-mark consists of the word 'Heliotype,' either alone or combined with some suitable ornamentation, in connection with the production and publication of prints. We have generally used the word alone, as shown in the accompanying drawing. This trade-mark we have used in our business since October, 1872. The particular article of trade upon which we have used it is the 'prints' which we designate as 'Heliotype.' We may also print our trade-mark, to wit, the word 'Heliotype' upon the outside of packages of such prints, and also upon cards or circulars advertising the same."

The 77th section of the act provides, that any firm domiciled in the United States, and who are entitled to the exclusive use of any lawful trade-mark, may obtain protection therefor by complying with certain specified requirements, one of which is, that they must record in the patent office a statement, under oath, setting forth "the class of merchandise, and the particular description of goods comprised in such class, by which the trade-mark has been, or is intended to be, appropriated," and, also, "a description of the trade-mark itself, with fac similes thereof, and the mode in which it has been, or is intended to be, applied and used."

The statement filed and recorded by the plaintiffs, as a compliance with these provisions, sets forth, as "the class of merchandise," "prints" which are capable of "publication." It further sets forth, as "the particular description of goods comprised in such class," by which the trade-mark, namely, the word "Heliotype," has been appropriated, the prints which the plaintiffs designate as "Heliotype," that being what is meant by the statement, when it says that "the particular article of trade" upon which the plaintiffs have used the trade-mark is the prints which they designate as "Heliotype." It further sets forth, as the mode in which the trade-mark "has been, or is intended to be, applied and used," that they have used it on the prints which they designate as "Heliotype," and that they may also print it on the outside of packages of such prints, and also upon cards or circulars advertising the same.

The 78th section of the act provides, that a trade-mark for which protection is obtained by a compliance with the requirements of the 77th section, shall, during the period that it remains in force, entitle the party registering it "to the exclusive use thereof, so far as regards the description of goods to which it is appropriated in the statement filed under oath," and that "no other person shall lawfully use the same trade-mark, or substantially the same, or so nearly resembling it as to be calculated to deceive, upon substantially the same description of goods." The 79th section provides, that, if any person "shall reproduce, counterfeit, copy or imitate any such recorded trade-mark, and affix the same to goods of substantially the same descriptive properties and qualities as those referred to in the registration," he shall be liable to an action for damages, and "the party aggrieved shall also have his remedy according to the course of equity, to enjoin the wrongful use of his trade-mark, and to recover compensation therefor."

It is apparent, that the protection given by the statute is to the exclusive use of the trade-mark only so far as regards the particular description of goods set forth in the filed statement as the particular description of goods to or by which the trade-mark has been, or is intended to be, appropriated; that the inhibition of the statute is only against the use of substantially the same trade-mark or substantially the same particular description of goods; and that the wrongful use

which may be enjoined is only the affixing, by another, of substantially the same trade-mark to goods of substantially the same descriptive properties and qualities as those set forth in the filed statement as the particular description of goods by which the trade-mark has been, or is intended to be, appropriated.

The only reasonable construction of the language of the filed statement in the present case is, that the plaintiffs mean, that the word "Heliotype," as a trade-mark, has been, and is intended to be, appropriated by them, only to the prints which they designate as "Heliotype." What those prints are appears by the bill and other papers. They are prints produced by the Edwards patented process, and only such prints. Such prints are the only particular description of goods named in the statement, as that on which the plaintiffs have used the word "Heliotype" as a trade-mark, and to which they have appropriated it, or intended to appropriate it, as a trade-mark. "Prints" are named as the class of merchandise. The prints designated as "Heliotype" by the plaintiffs, are "the particular description of goods comprised in such class." And such is the purport of the bill. It avers, that Edwards invented the name "Heliotype," and applied it to his process, and printed it on impressions printed by his process, and used it as a trade-mark in the business and practice of his patented inventions; and that the plaintiffs, desiring to designate the practice of the said inventions in the United States by the same name as that by which it is known and practiced in England, registered the word "Heliotype" in the patent office, according to the statute.

Inasmuch, therefore, as the defendant is not shown to have used the word "Heliotype" in connection with prints which are substantially the same description of goods as the prints which the plaintiffs designate as "Heliotype," or with prints which have substantially the same descriptive properties and qualities as those which the filed statement refers to as the prints which the plaintiffs designate as "Heliotype," the plaintiffs are not entitled to the relief asked, by reason of any right acquired under the statutory registration set forth in the bill.

The 83d section of the act declares, that nothing in the act shall prevent, lessen, impeach or avoid any remedy at law or in equity, which any party aggrieved by any wrongful use of any trade-mark might have had if the act had not been passed. As the fact probably is, that the plaintiffs are citizens of Massachusetts, and the defendant is a citizen of New York, although the bill does not so specifically aver, the bill could, doubtless, be amended so as to give to this court jurisdiction to administer the proper remedies in equity in behalf of the plaintiffs, to which they may be entitled by reason of any wrongful use of a trade-mark which they may have the right to use independently of any statutory registration. The bill, however, is not framed in view of any such case. It does not set forth any title in the plaintiffs to any trade-mark. It avers that Edwards invented and used the word "Heliotype," as a trade-mark. It does not aver that he ever assigned to the plaintiffs any right to use it as a trade-mark. It does not aver that the plaintiffs have ever used it as a trade-mark. Nor is there any evidence that the use, by the defendant, of words indicating that the prints he produces are made by "Rockwood's photo-engraving (heliotype) process," are calculated to mislead purchasers, and to cause them to believe that they are purchasing prints made by the Edwards process, or that the defendant, in so doing, intends to deceive, or is deceiving, the public, or intends to injure, or is injuring the plaintiffs.

The motion for an injunction is denied.

OSIO (UNITED STATES v.). See Case No. 15,972.

Case No. 10,606.

The OSPREY.

[1 Spr. 245;[1] 17 Law Rep. 384.]

District Court, D. Massachusetts. Sept., 1854.

COLLISION—STEAM AND SAIL—RULES AS TO COURSES.

1. When a steamer meets a sailing vessel going free, it is the duty of the sailing vessel to keep her course, and the duty of the steamer to keep out of her way, by all reasonable and practicable means in her power, without being restricted to going to the right or to the left, or to any other particular measure.

2. Law of collision generally.

3. General rules as to the course to be pursued by vessels approaching each other, to avoid collision.

[Cited in Crowel v. The Radama, Case No. 3,442.]

This was a suit in rem, promoted by Kenneth Urquhart and others, owners of the British brig Fanny, against the steamer Osprey, for a collision. At the same time, a cross-libel was promoted by John Linton & Co., of Philadelphia, owners of the Osprey, against the brig Fanny. The two suits were tried together, upon the same evidence and arguments.

R. H. Dana, Jr., and D. W. Gooch, for the Osprey.

The rules in the law of collision, which seem technical and arbitrary, will be found, on careful analysis, to be simple, and founded in equity. All will be found to turn up-

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

on the consideration, whether the two vessels meet on terms of equality or of inequality. If the former, the loss and labor of deviation is borne equally. If the latter, the vessel having the advantage takes the whole duty upon herself, and the other vessel keeps her course. If the favored vessel may keep her course, she must do so, that the other vessel may know what to depend upon. Where both vessels are steamers, or both are close-hauled, or both are free, they are equal, and each keeps to the right. The rule, where both are close-hauled, has usually been stated as though the vessel on the starboard tack was favored; but it is really only an instance of the rule, that each keeps to the right. Where one is going free, and the other is close-hauled, they are on an inequality, and the favored vessel takes the whole duty of avoiding the other, and the latter keeps her course. The Gazelle, 2 W. Rob. Adm. 517; The George, 5 Notes of Cas. 368; The Woodrop-Sims, 2 Dod. 83; The Speed, 2 W. Rob. Adm. 225. Where a steamer meets a sailing vessel close-hauled, it is well settled that the latter is to keep her course, and the steamer to get out of her way. The Shannon, 2 Hagg. Adm. 173; The Columbine, 2 W. Rob. Adm. 27; The Gazelle, Id. 517; The Birkenhead, 3 W. Rob. Adm. 75; The Vivid, 7 Notes of Cas. 127. Whenever one vessel is to keep her course, and the other is to take the whole duty of avoiding her, the latter, whether steamer or sailing vessel, is not restricted to going to the right, but may take any course, and resort to any measures, which are most judicious and convenient. The Birkenhead, 3 W. Rob. Adm. 75; The James Watt, 2 W. Rob. Adm. 270; The Northern Indiana [Case No. 10,320]; The Leopard [Id. 8,264]; St. John v. Paine, 10 How. [51 U. S.] 557; Newton v. Stebbings, Id. 590. A steamer meeting a sailing vessel free, is a case of inequality, and should be governed by the latter rule. The proof, in this case, of a usage to that effect, on the American coast, is incontrovertible. It is founded in better policy, because it gives one uniform rule in all cases of steamers meeting sailing vessels, and does away with all inquiries, at the time or afterwards, into the question whether the sailing vessel was close-hauled or free. It is also more equal. The judicial decisions in America favor this rule. The Leopard [supra]; The Northern Indiana [supra]; St. John v. Paine, 10 How. [51 U. S.] 557; Newton v. Stebbings, Id. 590. In the English cases heretofore cited, although the sailing vessels happened to be close-hauled, the rule was not restricted to those cases, and the case of The Shannon, 2 Hagg. Adm. 173, favors the uniform rule. The only case to the contrary is that of The City of London, 4 Notes of Cas. 40. In that case, the court follows a phrase instead of a principle, and feels bound to treat a steamer as a sailing vessel having the wind always free. That phrase was used in cases of steamers meeting vessels close-hauled, and was not intended to apply to and limit cases of steamers meeting vessels sailing free. The rule we contend for is founded in usage, in policy, in equity, and is supported by the weight of judicial authority.

J. C. Park, for the Fanny,

Contended: 1st. That upon the facts in the case, it appeared that the brig was coming up the harbor, about mid-channel, was holding her course nearly before the wind, and did not port her helm, until the steamer had put her helm to starboard, and veered to leeward; that then it was done, to give the steamer more space and more time to "slow," "stop," and "reverse" her engine, and that she (the steamer) should have done this, and thus have avoided the collision. 2d. That if the brig did port her helm, on discerning the steamer, she was right in so doing: and reliance was placed on the judgment of Dr. Lushington, in the case of The City of London (A. D. 1845) 4 Notes of Cas. 40. In that case, which, in most of its facts, was similar to the one at bar, after stating the rule, as well understood, that a steamer is to be regarded as a vessel sailing with the wind free, the court went on to say: "I have had occasion, over and over again, to say in this court, and I will endeavor to put it in the clearest language I can command, that whenever two vessels meet at sea, and there is any probable chance whatever of collision, it is their duty to abide by the principles of navigation, and each of them to take the precaution of putting the helm to port, where both are free, so as to avoid the chance of accident; and for this obvious and plain reason: that in a dark night like this, how often must it happen, that some doubt will arise, whether the vessel be direct ahead, or one point to the starboard, or to the larboard? And are you to leave to mere chance, the discovering this, with perfect accuracy; or are you not immediately, to adopt that which is the only safe precaution; that is, following out the principle of the order, putting the helm to port at once, and so avoiding the collision?" 3d. That adherence to the rule laid down above, by this highest English authority, would insure against the accident itself, by giving an arbitrary rule, safe and sure, whether there really were danger or not; while the other rule, that the sailing vessel should hold her course, and the steamer choose her course, at her own peril, although it might enable the court to determine with certainty, where the fault lay, after the collision had occurred, furnished, by no means, so sure a mode of avoiding it. 4th. That the rule of keeping to the right, having been adopted and sanctioned by judicial decision, and nine years' uniform practice in England and the British territories (with whom was much of our commercial intercourse), it was the best policy to adopt the same arbitrary rule, for the sake of uniformity of practice. Reverse Dr. Lushington's opinion, and the steamers and sailing

vessels now multiplying between the two countries, must be governed by different rules, depending upon the waters they are navigating. 5th. To give an American decision adverse to that adopted in England for nine years, would place the vessels of the two countries in an awkward position. When two vessels should meet in a narrow channel, in an obscure light, in waters not under the jurisdiction of either government, one would adhere to the American, the other to the English rule, and a collision would be the sure consequence. In obscurity and doubt, an arbitrary uniform rule of action is always the safest. 6th. It was contended, that, on the evidence, the crew of the steamer descried the brig ten minutes before the collision; that the steamer was then going at the rate of six miles an hour, and she must therefore have steamed one mile before the collision; that it had been shown, that she could be stopped in two hundred yards, and, the engineer testifying that the signal to "reverse" only preceded the collision fifteen seconds, that it was culpable negligence in the steamer's crew not to "stop" and "reverse" sooner; even though the sailing vessel had been wrong in "porting" her helm. For each vessel was bound to use all its powers, in order to avoid injury to itself and others. Two wrongs could never make a right.

SPRAGUE, District Judge. In these cases, I have received great aid from the learned and able counsel.

They are cross-libels for damage by collision.

The collision took place about eight o'clock in the evening of the 12th of August last, in that part of Boston harbor called the "Narrows," where the channel is about a fourth of a mile in width. When the vessels discovered each other, the Osprey, a steamer, was going down the harbor, in about mid-channel, at the rate of seven or eight knots, the northern shore being on her larboard hand, and the southern on her starboard. The Fanny, a sailing vessel, was coming up the harbor, nearer to the southern shore, and between the southern shore and the middle of the channel, and her direction was either straight up the channel, or inclined to the south. There was a five-knot breeze from the S. S. W., which was a free wind for the Fanny, being a little abaft her beam, and on her larboard side. Upon discovering each other, the steamer put her helm to starboard, and the Fanny put hers to port, which carried both vessels toward the northern shore, where the collision took place. The steamer went so far as to take the ground on the northern shore, which was very bold, just at the time, or a few seconds before, the vessels came in contact. The Fanny ran head on to the steamer, striking her starboard bow, at an angle of about forty-five degrees.

The collision would have been avoided, by the steamer taking the measure she did, if the Fanny had either kept her course, or put her helm to starboard; and it also would have been avoided, by the Fanny taking the measure she did, if the steamer had put her helm to port. According to the weight of judicial opinion and nautical practice, in England, the brig was right and the steamer was wrong; but, according to the weight of judicial opinion and nautical practice, in this country, the steamer was right and the brig was wrong.

This renders it necessary to examine the question, on principle, as well as on authority. The great increase of navigation within a few years past, and the multiplication of clipper ships and steamers, moving with great speed, and the vast amount of property, and the number of human lives constantly exposed to the dangers of collision, render it of great and increasing importance, that the rules for its prevention should be uniform throughout the commercial world; and that they should be plain and simple, and founded upon principle.

All the rules upon this subject are founded upon the supposition, that there is some reason to apprehend collision; for, if the position and course of the vessels are such that there is no danger of their coming in contact, the rules are not called into action, and each vessel keeps on her course. It is to be premised, in the first place, that the object to be attained is safety; and, in the next place, that it is desirable that this should be attained at the least cost, whether that cost consist in labor, delay, or risk.

All the cases may be comprised in two classes: First, when vessels meet on terms of equality; second, when they meet on terms of inequality. The first comprises three cases, namely:

1st. Two sailing vessels, both going free.

2d. Two steamers.

3d. Two sailing vessels, both close-hauled.

To all these cases, one simple rule may be applied, namely: Both go to the right. This rule is partly arbitrary, and partly founded on substantial reasons. It is arbitrary, so far as it directs to the right rather than to the left; but in requiring both parties to take measures, as far as practicable, to get out of the way, it is founded on principle.

Take the first case,—that of two sailing vessels approaching each other, both having the wind free. By the rule, both must diverge from their course. The reason is, that thus safety is more certain than if one only diverged, and the inconvenience is justly divided between them, as both can deviate from their course with equal facility, and both can, by a free wind, regain the line on which they were sailing before they met.

The same reason applies to the second case, that of two steamers meeting.

In the third case, that of two sailing vessels, both close-hauled upon the wind, the rule, as generally expressed, is, that the one on the starboard tack shall keep on her course,

and the one on the larboard tack shall give way, by porting her helm. But the rule thus expressed is, in effect, a direction to both, to go or keep to the right. The one on the starboard tack, being close-hauled, is already going as far to the right as possible. When, therefore, the rule says she shall keep on her course, it, in fact, says she shall keep to the right. The one on the larboard tack also goes to the right, and she must deviate far enough to avoid the collision. She is thus, indeed, subjected to the whole inconvenience necessary to secure the safety of both, that is, to all the labor, delay, and risk, of diverging to the leeward; but this is because the other vessel cannot diverge from her course, by going farther to windward.

The second class, above mentioned, viz., where vessels meet on terms of inequality, embraces two cases, at least, viz:—

1st. Two sailing vessels, one free, and the other close-hauled.

2d. A steamer and a sailing vessel, the latter being close-hauled.

Here the rule is, that the vessel having the advantage must keep out of the way, and the other must keep her course. Thus, in the first case, that of two sailing vessels, one going free and the other close-hauled, the one having the advantage of a fair wind can diverge from the line of her course, so as to avoid collision, and then return to that line, or take another verging toward it, and carrying her to the same point. But the vessel which is close-hauled, whether on the larboard or starboard tack, can give way only by going to leeward, and cannot regain the line of her previous course, but when she again hauls to the wind, must proceed on a line parallel to her former course. She thus loses the whole distance she has diverged to the leeward, which may sometimes occasion great delay and hazard. The same reasons apply with increased force to the second case, that of a steamer meeting a sailing vessel close-hauled; the motive power of the former giving her a greater advantage than even a fair wind does to a sailing vessel.

We come now to the case before the court, that of a sailing vessel going free, meeting a steamer. Shall we apply to it the rule of the first class, which requires both to go to the right; or the rule of the second class, which requires the one having the advantage to keep out of the way, and the other to keep her course?

1st. A steamer has an advantage over a sailing vessel, even with a free wind. She can oftentimes turn in a shorter time and space, and check, stop, and reverse her motion, in a manner which a sailing vessel cannot. The motive power of the one is under human control, and at all times available; that of the other is not. The wind bloweth not only where it listeth, but when it listeth; and it is of importance to the sailing vessel, to improve it to the utmost, while fair. It may suddenly come ahead, or wholly cease; and in the latter case, she would be helpless.

2d. Safety and convenience are promoted by having the rules simple, uniform, and governed by a plain principle. If we require a steamer, meeting a sailing vessel, to keep out of her way, and the sailing vessel to keep her course, whether she be going free or close-hauled, we have one plain rule for all cases between steamers and sailing vessels, which may be instantly applied. The moment they see each other, both will know their duty; the one, that she must keep her course; the other, that she must keep out of the way, by all means in her power, without being restricted to the right, or to the left, or to any other particular measure. If we have one rule, when the sailing vessel is close-hauled, and another when she is going free, then the steamer must first ascertain the direction she is sailing, and afterwards whether the wind is fair for that course, which may sometimes be a matter of doubt and difficulty; for the steamer is not as watchful of the wind, and cannot as readily determine its direction, as if she depended on sails. As she moves rapidly, the wind will often appear to be more ahead, and consequently more fair for the approaching vessel, than it actually is, especially if it be light; beside which, the wind may sometimes be baffling. All these doubts and uncertainties will be obviated, by having one rule for all cases of sailing vessels meeting steamers.

3d. The general principle is, that the vessel having the advantage shall take all the burden of keeping out of the way. This principle governs all other cases of inequality, and should be applied to this also, unless there be some necessity for making it an exception.

On the other hand, it may be said, that by requiring both to go to the right, safety will be promoted, as they will separate more rapidly, and also that the inconvenience will be divided, instead of being wholly borne by one. And these considerations certainly have weight. But they apply also to the case of a vessel close-hauled, with her larboard tacks aboard, meeting a steamer; and yet, in such case, those considerations have never been thought sufficient to outweigh the advantage of the other rule. The force of this last remark, however, is weakened by the fact, that the inconvenience of giving way is greater to a vessel close-hauled, than to one going free.

On the whole, the balance of advantage seems to be in favor of one uniform rule.

Let us now see how the question stands upon authority. In the case of The City of London, in the high court of admiralty, in 1845, reported in 4 Notes of Cas. 40, it was decided by Dr. Lushington, assisted by Trinity masters, that in a case like the present, both vessels must port their helm, that is, go to the right. This decision rests entirely on the proposition, that "a steamer is always to be considered a vessel with the wind large." Is this proposition true? It is not laid down

in any statute, admiralty regulation, rule of the Trinity House, or other maritime association: nor required by any judicial decision, or previous nautical usage.

Cases had arisen, of collision between a steamer and a sailing vessel close-hauled, and the courts had decided that, in such cases, the steamer should be under as great obligation as a sailing vessel with the wind large, that is, must keep out of the way; and the reason is obvious. The steamer has at least as great power and ability as such sailing vessels, and therefore should be under as great obligation. But has she not greater power, and may she not be under greater obligation? This question was not involved in these previous cases, and was neither decided nor considered by the court. In those cases, the declaration that a steamer was to be considered a sailing vessel going free, was first made use of. That expression was well enough, for the occasion on which it was used, and taken pro hac vice. But it is not to be presumed that the court intended to lay down the proposition, that a steamer was at all times, and in all cases, to be deemed merely a sailing vessel going free; and if they did, so far as it went beyond the case before the court, it was no decision, but a mere dictum. That expression, or proposition, was taken up by the court in the case of The City of London, and made the sole ground of decision. But it is neither an argument, nor the statement of a principle. It is rather an assertion founded on a comparison; and comparisons may illustrate, but can prove nothing.

I have said that the assertion that a steamer is always to be considered a vessel with the wind large, taken as a general proposition, embracing the case now before us, is not sustained by any previous rule, or nautical usage.

This is confirmed by the very authority which we are now examining. The learned judge does not say, or intimate, that there had been any such rule or practice, in the precise case, viz., a steamer meeting a sailing vessel going free; but states the practice, in the case of two sailing vessels, both going free, and the Trinity rule as to two steamers, and then asserts that the principle of that practice, and the spirit of that rule, are applicable to the new case then before the court. But are they applicable? The two former cases are, as we have seen, those of perfect equality, and the latter, one of inequality. How, then, the principle, or spirit of the rule or practice which governs the former, is applicable to the latter, is not apparent without explanation, and the explanation is not given. It is to be regretted, that that learned and able judge did not go into the rationale of the rule which he was about to adopt, and make a comparison of its advantages and disadvantages, and show that it would conduce to the safety and convenience of navigation. This was not done. The reason assigned is not satisfactory. The decision, however, as an authority upon this subject, is the highest in England, and entitled to very great respect.[2]

There is a case reported, decided in 1828, The Shannon, 2 Hagg. Adm. 173, in which the opinion of the Trinity masters, and the judgment of the court thereon, seem to be adverse to the decision in the case of The City of London. The report, however, is imperfect.

In the courts of the United States, there have been four cases bearing upon this question. In St. John v. Paine, 10 How. [51 U. S.] 557, a sailing vessel in Long Island Sound, while on her starboard tack, with the wind two points free, came in collision with a steamer. It was decided that the steamer was in fault, because on her rested the obligation to keep out of the way. Mr. Justice Nelson, in delivering the opinion of the court, says that the sailing vessel was nearly close-hauled; and the decision may not perhaps be deemed a direct authority, where she has the wind large, but the remarks of the learned judge fully cover such a case. He says that a steamer has a greater power of directing her course and controlling her motion, than a sailing vessel going free, and is bound to keep out of her way; and that a sailing vessel meeting a steamer may keep on her course, whether she be close-hauled or going free.

The same doctrine is countenanced by the case of Newton v. Stebbins, 10 How. [51 U. S.] 586, in which a sailing vessel coming down the North river, and carried chiefly by the current, the wind being light, came in collision with a steamboat going up. The court held that the steamboat was to blame, in not keeping out of the way; and by the report, it seems that they did not deem it necessary to inquire what was the direction of the wind, or how far it could control the movements of the vessel.

In the case of The Leopard [Case No. 8,264], in the district court of Maine, in 1842, a sailing vessel going up the Kennebec river, with a fair wind, came in collision with a steam ferry-boat. It was held, that the former had a right to keep on her course, and that the latter was bound to keep out of her way, on the ground that the steamer has greater ability than any sailing vessel.

In the case of The Northern Indiana [Id. 10,320], in the Northern district of New York, in the year 1852, a sailing vessel on Lake Erie, on her larboard tack, with the wind one point, or one and a half, free, came in collision with a steamer. It was held, that the former had a right to keep her course, and the latter was bound to take the necessary measures to avoid a collision.

We now come to the evidence of nautical usage. One witness, the pilot who had charge of the Fanny, and whose conduct is now in question, testifies that by the Brit-

[2] The law as laid down in The City of London is now established in England, by legislation. 17 & 18 Vict. c. 104, § 296; The Inga, Stu. Adm. 335.

ish practice, when a steamer meets a sailing vessel going free, both port their helm, and that the British steamers which come to Boston always act upon, and inculcate, that rule. On the other hand, several pilots and ship-masters testify, that in such case, on the American coast, the sailing vessel always keeps her course, and the steamer must keep out of the way. Upon the whole, I am led to the conclusion, that when a sailing vessel, going free, meets a steamer, the rule that requires the former to keep her course, and the latter to keep out of the way, is best sustained by principle, by authority, and by the evidence before me of nautical usage. It remains to be seen, whether this rule is applicable to the place where this collision occurred.

There are various exceptions to these general rules, which cannot here be enumerated. In general, they will be found to rest upon the principle, that when the observance of the rule would not promote, but defeat, its great purpose, safety, the rule ceases to be obligatory.

Thus, if there be two sailing vessels, both close-hauled, and the one on the larboard tack is so far to windward of the other, that, if she ports her helm, it will produce collision, the rule ceases to be obligatory. Such distance to the windward has been sometimes defined by saying, that if the vessel on the larboard-tack would, if both keep their course, be struck by the other abaft the beam, on the starboard side, she is not to port her helm.

So also, when collision has become inevitable, the general rules are no longer enforced, but each vessel may adopt such measures as will diminish her danger.

Again, there may be obstructions to navigation, which prevent the application of the rule.

In this case, the vessels were in the Narrows, in Boston harbor, where the channel is a fourth of a mile wide. The banks are bold, and there was no current, rock, shoal, vessel, or other obstruction, to interfere with the application of the rule, and it was therefore obligatory upon both vessels. The Fanny, then, ought to have kept her course, and in deviating from it she did wrong. The Osprey had a right to go to the left, and in putting her helm to starboard, she was not to blame.

But there is another ground, on which it is insisted that the Osprey did wrong, and that is, in not stopping her engine, as soon as she might and ought to have done, after she had put her helm to starboard, and saw that the Fanny had put hers to port. Although the Fanny made a mistake, yet the steamer was still bound to prevent a collision, by all practicable and reasonable means, and when she saw that the Fanny had put her helm to port, she ought promptly to have stopped her engine, if that would have avoided the collision. How is the fact? (The judge here went into a particular examination of the evidence.) Upon the whole, I do not think that it is shown that the Osprey was negligent in this respect, or in any manner to blame, and the decree must be against the Fanny.

See The Steamer Oregon, 18 How. [59 U. S.] 570.

OSPREY, The, v. The DELAWARE. See Case No. 3,763.

Case No. 10,607.

The OSSEO.

The SANDY HOOK.

[8 Ben. 518.] [1]

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

COLLISION IN LONG ISLAND SOUND — SCHOONERS CROSSING—BURDEN OF PROOF—LOOKOUT.

1. Two schooners, the O. and the S. H., came in collision in Long Island Sound at night. The O. alleged that the wind was south and she was heading south-west by west, close hauled, and made no change of course; and that the S. H. was seen, showing no light, about two points on the starboard bow of the O., sailing free, and would have passed the O. on the starboard bow of the O. but she ported her helm and ran into the O. The S. H. alleged that the wind was east of south and she was heading east by north-half-north; that the red light of the O. was seen off the lee bow of the S. H.; and that the O. put down her helm and ran into the S. H.: *Held*, that the courses of the two vessels were crossing, so as to involve risk of collision.

2. Therefore, it was the duty of the O. to keep her course and of the S. H. to keep out of the way.

[Cited in The Maria & Elizabeth, 7 Fed. 254.]

3. The burden of proof was on the S. H. to establish that the O. did not keep her course, and she had not established it.

4. No question of the lookout on the O. arose, it not being shown that she changed her course.

5. The S. H. was liable for the damages sustained by the O.

In admiralty.

R. H. Huntley, for the Sandy Hook.

R. D. Benedict, for the Osseo.

BLATCHFORD, District Judge. These are cross libels, founded on a collision which took place in Long Island Sound on the 12th of March, 1875, in the evening, after dark, between the schooner Sandy Hook, bound to the eastward, and the schooner Osseo, bound to the westward, whereby both vessels were damaged. The Sandy Hook had a cargo of oysters and was lightly laden. The Osseo was heavily laden with a cargo of laths, part of which was on deck.

The libel against the Osseo avers that the wind was east of south and was blowing a seven-knot breeze; that the Sandy Hook was under all her sails and top-sails, and

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

[2] [Reversed in Case No. 10,608.]

was laying her course east by north-half-north, and the wind was abeam, so that she was making her course and was on her starboard tack; that she had all her lights properly set and burning brightly; that the atmosphere was clear, though the sky was overcast, and lights could readily be seen; that the Sandy Hook discovered the red light of a vessel at a distance of from one to two miles off, and to the eastward, and off her lee bow, which light proved to be the light of the Osseo; that, at that time, the wind was abeam to both vessels, and both were laying their courses; that the Osseo was steering about west by south, and was at all times to the leeward of the Sandy Hook, until she had approached to within about ten lengths of the Sandy Hook, when, being off the lee bow of the Sandy Hook, she suddenly put down her helm and changed her course; that, almost immediately upon so changing her course, the Osseo came violently into collision with the Sandy Hook, striking her in the bend of the bow, about opposite the cat-head; that, prior to and at the time of the collision, the lights on the Sandy Hook were burning brightly and were properly stationed; that a good and efficient lookout was stationed forward on her deck, and was in the active performance of his duties; that all proper means and efforts were taken by the master and crew of the Sandy Hook to avoid the collision; and that it was caused solely by the negligence and carelessness of those navigating the Osseo.

The answer of the Osseo alleges that the wind was blowing from the south a good breeze, and the Osseo was close-hauled, and on a south-west by west course, laying her course, and making about 3 or 3½ knots an hour; that she continued such course without change till the collision; that the Sandy Hook had the wind about 3 points abaft the beam, and was sailing free about 7 knots an hour; that, when the Sandy Hook was first discovered by those on board of the Osseo, she was about half a mile distant, and about 2 points on the starboard bow of the Osseo, not having any of the regulation lights burning, and heading on a course which, if she had continued it, would have carried her past the Osseo some distance on the starboard hand; that the Sandy Hook, instead of continuing on that course, suddenly ported her helm and changed her course to the starboard, and came across the course of the Osseo, and ran into her, striking her on the bow; that, at the time of the collision, the Osseo had a competent man on the lookout, between the fore-mast and the main-mast, on the lee side, walking backward and forward, faithfully performing his duty, and she had all the lights required by law properly set and burning brightly; that the night was a clear night and lights on a vessel could be seen a long distance; and that the collision was caused by the carelessness and negligence of those on board of and navigating the Sandy Hook, in that she had no proper lookout forward, performing his duty, in not sooner seeing the Osseo, in not having the lights required by law set and burning, in porting her helm and changing her course to starboard, and in not taking measures to avoid the Osseo, and was not caused by any negligence of those on board of and in charge of the Osseo.

The libel against the Sandy Hook contains the same averments which are above set forth as contained in the answer of the Osseo, and the additional averment that the Sandy Hook struck the starboard bow of the Osseo.

The answer of the Sandy Hook contains the same averments before set forth as contained in the libel against the Osseo, except that such answer avers that the wind was about south by east, and omits the averment that it was east of south; and except that such answer omits the averment that the wind was abeam; and except that such answer contains the averment that the Sandy Hook was on the wind though not close-hauled; and except that such answer avers that the red light of the Osseo was discovered to the north-eastwardly and omits the averment that it was discovered to the eastward; and except that such answer avers, that when such red light was discovered, the vessels were both on the wind, and omits the averment that, at that time, the wind was abeam to both vessels; and except that such answer avers that the Osseo luffed into the wind and ran directly upon the Sandy Hook, and omits the averment that the Osseo changed her course and, almost immediately after so changing her course, came into collision with the Sandy Hook; and except that such answer avers that the collision was caused solely because the Osseo put down her helm and luffed, as before described, and because there was not a proper lookout on board of the Osseo.

The testimony in this case is so conflicting that it is impossible to arrive at a satisfactory conclusion as to what the truth is. But yet a satisfactory decision can be made, in accordance with the rules of navigation and with the rules applicable to the trial of suits for collision. Rule 17 of the rules of navigation in section 4233 of the Revised Statutes of the United States provides, that, "when two sail vessels are crossing so as to involve risk of collision, then, if they have the wind on different sides, the vessel with the wind on the port side shall keep out of the way of the vessel with the wind on the starboard side, except in the case in which the vessel with the wind on the port side is close-hauled and the other vessel free, in which case the latter vessel shall keep out of the way." Rule 23 of said rules provides, that, where, by rule 17, "one of two vessels shall keep out of the way,

the other shall keep her course." The evidence shows that the courses of these two vessels were crossing, so as to involve risk of collision. The course of the Osseo was south-west by west and the course of the Sandy Hook was east by north-half-north. These courses drew on to each other a point and a half, and they were courses which crossed each other in such manner as to involve risk of collision, because their place of intersection was ahead of each vessel. Under such circumstances, it was the duty of the Sandy Hook to keep out of the way of the Osseo, and it was the duty of the Osseo to keep her course, because the Osseo had the wind on her port side, and was close-hauled, and the Sandy Hook had the wind on her starboard side and was free. The Sandy Hook did not keep out of the way of the Osseo, but she alleges, as a reason why she did not, that the Osseo, when at a point where, if she had kept her course, she would have gone clear of the Sandy Hook, luffed into the wind, and departed from her course, and turned towards the Sandy Hook and ran into the Sandy Hook. Where a vessel under obligation to keep out of the way of another vessel alleges that the latter prevented the performance of that duty by not keeping her course, it is incumbent on the former vessel to make out affirmatively such dereliction of the latter vessel, by a satisfactory preponderance of evidence. I do not think that the Sandy Hook has satisfactorily established, by the evidence, that the Osseo luffed or changed her course. It is not necessary to discuss the evidence in detail. The Osseo had the proper lights set and burning. If she is not shown to have changed her course, the question of her lookout does not arise.

The libel against the Osseo must be dismissed, with costs, and, in the suit against the Sandy Hook, there must be a decree for the libellants, with costs, with a reference to ascertain the amount of the damages sustained by the libellants.

[On appeal to the circuit court, both vessels were found to be in fault and the costs in both courts were equally divided. Case No. 10,608.]

Case No. 10,608.

The OSSEO.

The SANDY HOOK.

[16 Blatchf. 537; 8 Reporter, 328.] [1]

Circuit Court, S. D. New York. July 31, 1879. [2]

COLLISION — BETWEEN SAILING VESSELS — WIND FREE AND CLOSE-HAULED.

A sailing vessel having the wind free and a sailing vessel close-hauled collided. They were approaching each other very nearly end on, on courses which crossed not far from the place of collision. It being the duty of the former vessel to keep out of the way, she was held in fault for attempting to pass so close to the latter vessel, that a mistake of the latter vessel in luffing caused the collision. The latter vessel was held in fault for luffing, because she had no sufficient lookout, although the luffing was just at the moment of the collision.

[Cited in McWilliams v. The Vim, 12 Fed. 911.]

These were cross libels filed in the district court, in rem, in admiralty. The district court decreed against the Sandy Hook, and dismissed the libel against the Osseo [Case No. 10,607]. The Sandy Hook appealed to this court, in both suits. This court found the following facts: "Shortly after eight o'clock in the evening of March 11th, 1875, a collision occurred in Long Island Sound, a little to the northward of Stratford light boat, between the schooners Osseo and Sandy Hook. The Sandy Hook was of about two hundred tons burden, loaded with oysters, and bound from New York to New Haven. The Osseo had a carrying capacity of a little less than two hundred tons. She was deeply loaded with lath, and bound to New York. A part of her cargo was stowed on deck, about six feet high, and extending forward a little beyond the fore-mast. It came close up to the booms; and a person standing on the sides could not see under the sails, except at the bow and stern, where the deck was left clear. She was a keel vessel, without a centre-board, very crooked, and loaded so deep that the water came on deck midships. The wind was south, or a little east of south. The Sandy Hook was sailing east by north, half north, with the wind two points or more free. The Osseo was close-hauled, and steering by the wind, south-west by west, a little west. Both vessels had their regulation lights set and burning. The Sandy Hook had the wind on her starboard side, and the Osseo had it on her port side. The Sandy Hook was making about seven knots an hour, and the Osseo three or three and a half. The red light of the Osseo was seen from the Sandy Hook, a little off the port bow, when the vessels were a mile or more apart. The mate was on the lookout, and the light duly reported by him. The captain at once, on hearing the report, came on deck and took the wheel. The Sandy Hook kept steadily on her course, without any change, until just at the moment of the collision, when she luffed a little, to ease the blow. The lights on the Sandy Hook were not seen at all from the Osseo. Not many minutes before the collision, the watch on the Osseo was changed, her captain and one man going below, and the mate and another man coming on deck. There were only four men on board to stand the watches. The man coming on deck took the wheel from the captain, with instructions to steer by the wind and keep as close as he could. The mate went to the lee side, and walked

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 8 Reporter, 328, contains only a partial report.]

[2] [Reversing Case No. 10,607.]

on the lath between the two masts, going no further forward than the fore-mast. The man at the wheel could not see at all to the leeward. The mate, while walking on the lath, noticed that the sails were shaking. He at once went aft, upon the windward side, and ordered the man at the wheel to keep them full. Having given this order, he looked at the compass, and then, jumping down on deck, looked under the mainsail, when, for the first time, he discovered the Sandy Hook close upon him. He ran forward and almost immediately hailed the approaching schooner to keep off. Just then the Osseo luffed, and the two vessels came together, the Osseo striking the Sandy Hook near the cathead, on the port side. The force of the blow was such as to cut into the Sandy Hook somewhat and to injure the stem of the Osseo. The Sandy Hook kept on her course, and swung the Osseo around, so that she headed eastward. In swinging around, the jib-boom of the Osseo was broken, and the vessels separated. The Sandy Hook kept on to New Haven without stopping. The Osseo, after clearing away the wreck, put about, and went to New York. Both vessels were somewhat injured, but not enough to delay materially the voyage of either. Up to the very moment of the collision there was no one on the deck of the Osseo except the mate and the man at the wheel. There was nothing to prevent the Sandy Hook from keeping far enough away from the Osseo to avoid all danger of collision."

Richard H. Huntley, for the Sandy Hook.
Robert D. Benedict, for the Osseo.

WAITE, Circuit Justice. There is much conflicting testimony in these cases, but a few controlling facts are substantially conceded on both sides. Thus, it is admitted that the Sandy Hook was sailing somewhat free, while the Osseo was close-hauled. This made it the duty of the Osseo to hold her course, and of the Sandy Hook to keep out of the way. Rev. St. § 4233, rules 17, 23. The two vessels were approaching each other very nearly end on, upon courses which crossed not far from the place of collision. The Osseo was first discovered a little over the port bow, and to the leeward, of the Sandy Hook. Her red light only was seen until just before the collision, though, it is evident, from the testimony, that it drew more and more over the bow, as the vessels came nearer together. It is not claimed that the Osseo changed her course materially until she luffed, and as, when the vessels came together, she was still swinging on her helm, and her sails were shaking, it is evident that the Sandy Hook held her course until she was too near for absolute safety. As it was her duty to keep out of the way, and there was plenty of room for her to do so, it was a fault for her to attempt to pass so close that the luffing of the Osseo would produce a collision.

That the Osseo did luff just at the moment of the collision is, to my mind, certain. The original courses of the two vessels varied only about one point, and, if the collision had occurred where they crossed, it would have been end on, or nearly so. The Osseo was a keel vessel, deep in the water. Her own witnesses say her deck was under water midships. Had the vessels come together in that way, the concussion would have been very heavy, as the combined speed was, at least, ten miles an hour. It is difficult to believe, that, under such circumstances, the Sandy Hook could turn the bow of the Osseo around from west to east, break the jib-boom, clear herself from the entanglement of the collision, and keep on her voyage, without stopping or materially changing her course, as all agree she did. If, however, the Osseo did luff, and was heading well toward the south, when the vessels actually came together, all that subsequently occurred is easily explained. The momentum of the Sandy Hook, at the speed she was going, would be quite sufficient to carry the bow of the Osseo with her until the jib-boom broke, when there would be nothing to prevent her going off free.

Undoubtedly, this luff of the Osseo occurred when those on board supposed the danger was imminent, and when, under ordinary circumstances, it would not have been a fault; but, as it is apparent, from the testimony, that she had no sufficient lookout, and the mistake would not have been made if the Sandy Hook had been seen in time, that which would otherwise have been only an error connects itself with the fault of a want of lookout, and places the vessel in the wrong. The mate was the only person on deck who could act as lookout, but he was attending to the navigation of the vessel, and, besides, was not at his proper place. The evidence satisfies me that the Sandy Hook had her lights set and burning, and it is impossible to believe, that, if the mate had taken his place on deck at or near the bow, and had given attention to his business, he would not have seen the approaching vessel in time to have prevented the erroneous movement which was, as I think, the immediate cause of the collision. Had he noticed the Sandy Hook as she came up, he would have seen, that, in all probability, if he kept his course, as it was his duty to do, the vessels would go clear, and, at any rate, that to luff was the very worst thing to be done. I am, therefore, clearly of the opinion, that the Osseo was guilty of a fault which directly contributed to the collision.

Both vessels being at fault, the damages must be apportioned, and, as cross libels have been filed, the costs, in both courts, should, under the rule laid down by the circuit judge of this circuit, in Vanderbilt v.

Reynolds [Case No. 16,839], be divided equally. A decree may be prepared accordingly, and a reference ordered to ascertain the amount of damages sustained by the Sandy Hook and make the apportionment.

Case No. 10,608a.

The OSTEONTHE.

[6 Adm. Rec. 166.]

District Court, S. D. Florida. Nov. 24, 1858.

SALVAGE—COMPENSATION—DISPOSITION OF SURPLUS PROCEEDS OF CARGO.

[1. Fire broke out in the hold of a vessel, loaded with cotton, lying at the wharf in Key West. She was cast loose from the wharf and drifted across the channel where she grounded. The master having decided to scuttle her, employed a mail steamer to pull her off the bank and tow her up the harbor to a suitable place. This service was performed in about three hours, without danger to the towing vessel. *Held*, that $400 was a reasonable compensation.]

[2. Where a master made a contract to pay ten thousand dollars for getting out cargo and raising the hull of a vessel, which was scuttled in the harbor of Key West, to extinguish a fire, *held*, that such contract was reasonable and should be enforced, the total proceeds of the vessel and hull amounting to over $28,000.]

[3. Surplus proceeds of cargo remaining after the payment of the salvage awards will not necessarily be paid at once to the master, although he is the only claimant, but a reasonable time may be allowed to permit the owners of the cargo themselves, or the underwriters, if they have paid, as in case of total loss, to appear and file claims in their own behalf.]

[This was a libel for salvage by Oliver Nelson and others, master, etc., of the mail steamer Matagorda, against the hull, materials, and cargo of the ship Osteonthe.]

Winer Bethel, Esq., for libellants.
John L. Tatum, for respondent.

MARVIN, District Judge. This ship (Maxwell, master), while employed at this port in taking in a cargo of cotton and corn, which had been previously wrecked on the Florida Reef, in the American ship Sultan (Berry, master), was discovered to be on fire in her hold. She drifted across the channel after being cast loose from the wharf and grounded in fourteen feet of water on the middle ground. It being thought desirable by the master that she should be scuttled and sunk, he employed the mail steamer Matagorda (Nelson, master), then lying in the harbor, to pull her off the bank and tow her up the harbor to a suitable position where she could be sunk. This service was well performed by the steamer in about two hours, without incurring danger to herself and without incurring much expense. It contributed to save the property concerned, and the libellants claim a salvage compensation therefor. The master scuttled and sunk the ship, but not so effectually but that the top of the ship was burnt off, and a portion of the cargo consumed by the fire. The master afterwards employed Mr. Charles Tift to get out and land the cargo, and raise the hull of the ship, under an agreement entered into with him to give him $10,000 for this service. This agreement, it was thought at the time by the master, was the best agreement he could make to save the property. The agreement has been fully performed by Mr. Tift, and now he petitions the court to be paid the sum agreed upon out of the proceeds of the property in the registry of the court. The master admits and affirms the agreement, and still thinks, with others, that the sum agreed to be paid Mr. Tift is reasonable in amount, and no more than a fair compensation for the work and labor performed; and the court is of the same opinion. Several boats saved rigging, etc., to the value of $144.51. The hull, materials, and cargo saved have been sold by the marshal under a previous order of the court for the gross sum of $28,594.81; the cargo selling for $25,192.05, and the hull and materials for $3,402.76. Under the circumstances, it is ordered, adjudged, and decreed that the clerk pay the libellants, Oliver Nelson and others, out of the proceeds of said ship and cargo, the sum of $400, in full compensation for their services and the services of the steamer Matagorda rendered in towing the said ship and cargo to the upper part of the harbor, as by them alleged in their libel; and that he also pay to the several boats named in the marshal's account sales $48.17; and, that he also pay out of the said proceeds the sum of $10,000 to Mr. Charles Tift, for his services in raising the hull of said ship, and getting out and landing the cargo, as above stated; and that he apportion the said sum of $10,448.17, the costs and expenses of this suit, and such other charges upon the property as have been incurred for the common benefit of both ship and cargo, between the proceeds of both ship and cargo, and make a statement thereof; and that he pay the remaining proceeds of the said ship to Captain Maxwell, the late master thereof, for and on account of whom it may concern.

Touching the remaining proceeds of the sales of the cargo, it is to be remarked that Captain Maxwell is at present, in his capacity of master of the ship Osteonthe, the only claimant before the court. But it is suggested by Mr. Welch, a general agent of underwriters in this country and in England, that the original owners of the cargo, or the underwriters upon the same who have paid a total loss, would prefer that the money should remain in the registry of the court until they have notice and time allowed them to claim it. The suggestion is probably true, and the question is whether the court should allow them further time to make their claim.

Ordinarily, in salvage causes in this court, where the voyage is broken up, and the cargo sold, and the master is the sole claimant,

the remaining proceeds are ordered by the court to be paid to him, for and on account of whom it may concern. And he commonly, in accordance with usages of trade, pays them to the shipowner, to be accounted for by him to the persons entitled to them. But neither this practice of the court nor this usage of trade in any manner interferes with the exercise of a sound discretion on the part of the court as to the time the order for the disposal of the proceeds should be made. Neither the master nor the shipowner, as such, has any interest in the proceeds of the cargo. They act only as agents for others. Their authority to receive the proceeds is superseded by the interposition of a claim by their principals in person or by their specially authorized agent. The owners of the cargo, whether original or made such by the acceptance of an abandonment, have the right, if exercised in due time, thus to supersede the master and shipowner, and receive their money from the court. And this question is here simply whether further time should be allowed them for that purpose. I am of the opinion that it ought. The money, if paid over to Captain Maxwell, would undoubtedly be accounted for by him and by the shipowner; for the court does not distrust their integrity. At the same time, it is not ignorant of the fact that, in many instances, where masters have, in like cases, received from the court proceeds of cargoes, they and the owners of their ships have forgotten to pay them to the persons entitled. This remark is made without any reference to Captain Maxwell or the owners of the ship Osteonthe, but with the view to show the propriety of generally giving time to parties interested to interpose for the protection of their interests. The money is safe where it is. The court is competent to ascertain to whom it rightly belongs, and to settle and determine every demand upon it. The facts, too, that this cargo has been wrecked twice; that it was originally shipped on board the ship Sultan, whereof Berry was master, and by him reshipped on board the Osteonthe; that Berry was in the port at the time the disaster to the Osteonthe occurred, and at the time this suit was commenced; and that the cargo was attached,—afford an additional reason for delay in making a decision on the question of the present claim, for it suggests the question whether, under the circumstances, Maxwell is authorized virtute officii to make the claim. However, I attach but little importance to these circumstances, and hold the claim of Maxwell valid, and the proceeds will be paid to him in the absence of any better claim being interposed, after a reasonable time has been given for that purpose.

It is ordered that the decision, upon the question of the disposition of the proceeds of the cargo remaining in court be postponed to the eighth day of March next, and that in the meantime, parties interested be at liberty to file their claims.

Case No. 10,609.

In re OSTERHAUS.

[6 Am. Law T. Rep. 519.]

Circuit Court, E. D. Michigan. May 12, 1864.

"UNITED STATES COURTS" DEFINED — CONSTRUCTION OF ACT OF MAY 12, 1864—COMMITMENT.

1. A territorial court is a United States court within the meaning of the act of May 12, 1864 [13 Stat. 74].

2. A territorial court, being a court of the United States, is tc be regarded as coordinate with the courts organized under the constitution.

3. In cases of imprisonment under section 1 of the act of May 12, 1864, no special process of commitment is necessary.

Osterhaus was convicted of the crime of passing counterfeit money in the district court of the Third judicial district of Wyoming territory, and by that court sentenced to imprisonment in the Detroit house of correction in this state and district for the period of ten years. He was so sentenced to that particular prison by virtue of a designation by the secretary of the interior made in pursuance of section one of the act of congress of May 12, 1864 (13 Stat. 74). The provision of that act, upon which any question arises, is as follows: "That all persons who have been or may hereafter be convicted of crime by any court of the United States—not military—the punishment whereof shall be imprisonment, in a district or territory where, at the time of such conviction, there may be no penitentiary or other prison suitable for the confinement of convicts of the United States, and available therefor, shall be confined during the term for which they have been or may be sentenced in some suitable prison in a convenient state or territory, to be designated by the secretary of the interior, and shall be transported and delivered to the warden or keeper of the prison by the marshal of the district or territory where such conviction shall have occurred," &c.

At the time Osterhaus was delivered to and received by the prison authorities, the only paper delivered with him as authority for his reception and detention there was a duly certified copy of the record of the aforesaid conviction and sentence. At that time, also, there had been no act of the legislature of Michigan, or other express legislative authority, for the reception and detention of United States prisoners in that particular institution.

A petition for habeas corpus was presented to the district judge of this district and his allowance of the same indorsed thereon, but for some reason unnecessary to inquire into, the writ was not issued. Thereupon, the legislature of Michigan, being then in session, an act was passed (Laws Mich. 1871, p. 24) authorizing the reception and detention in said house of correction of United States prisoners, and the continued

detention of all such prisoners as should then be held therein. A formal commitment, or mittimus from the territorial court, was also forwarded to and received by the superintendent of the prison. After this the petition for habeas corpus before mentioned, together with a supplement thereto stating the facts last above cited, was again presented to the district judge, and its allowance again indorsed. The writ having been issued and served, the prisoner was produced and a return made setting forth substantially the cause of detention as above stated.

The matter was exhaustively and ably argued by counsel. The points made by them were quite voluminous, and a detail statement of them is omitted. The questions presented for consideration, however, briefly stated, were as follows: 1. Is the district court for the Third judicial district of Wyoming territory a "court of the United States" within the meaning of the act of congress of May 12, 1864 (13 Stat. 74, 75)? 2. If so, can this court on habeas corpus inquire into the cause of commitment, it appearing that the same is in execution of a sentence of that court in a matter of which it had cognizance? or, in other words, can this court in that manner or in any manner inquire into the matter at all, and to what extent, it appearing that the imprisonment is in execution of a sentence of a United States court of competent jurisdiction? 3. Whether the question as to whether the necessary preliminaries, under the act of congress of May 12, 1864, existed to entitle that court to sentence a criminal to the house of correction at Detroit was not a question for that court to decide, and if an error has been committed in that respect, whether it is anything more than a mere irregularity which can be corrected only by application to that court? or, in other words, whether this court can go behind the judgment more in that respect than any other? 4. Whether a formal commitment was necessary in the first instance, or was a certified copy of the sentence and judgment sufficient? and if such formal commitment was necessary, then whether its issuance and delivery to the keeper of the house of correction before habeas corpus issued was sufficient?

Alfred Russell, for petitioner.

Mr. Swan, Asst. U. S. Dist. Atty., opposed.

LONGYEAR, District Judge. First. The Wyoming territorial court is not a court of the United States, within the meaning of the constitution establishing a judicial department, and therefore is not affected by laws of congress enacted in relation to courts established under that authority. Territorial courts are established under that provision of the constitution authorizing congress to make all needful rules and regulations concerning the territories of the United States. Clinton v. Englebrecht, 13 Wall. [80 U. S.] 434. But does this make those courts any the less "courts of the United States," within the meaning of the act of 1864? It was clearly not so considered by congress, because territories are expressly included in its provisions. And so, too, as to military courts, by excepting them from its operation. In passing the act of 1864, congress then clearly assumed that territorial courts and military courts both come under the appellation of "courts of the United States." Was this assumption authorized? And, in view of the decisions of the supreme court, in Clinton v. Englebrecht [supra], and the previous decisions in American Ins. Co. v. Canter, 1 Pet. [26 U. S.] 542; Hunt v. Palao, 4 How. [45 U. S.] 590; Benner v. Porter, 9 How. [50 U. S.] 235; Dred Scott v. Sanford, 19 How. [60 U. S.] 445; Orchard v. Hughes, 1 Wall. [68 U. S.] 73; and Freeborn v. Smith, 2 Wall. [69 U. S.] 173,—can it be given its full force and effect as it reads?

The effect of the decision in Clinton v. Englebrecht is that the laws of the United States in relation to the drawing of juries relate alone to courts organized under the judicial system, as established by the constitution. That the territorial courts are organized under a different system under the constitution, to wit, that relating to the government of the territories; and therefore, congress having made no provisions in relation to juries in those courts in the organic act, juries must be selected and empanelled in pursuance of the territorial laws. That case does not go to the extent of holding that those courts are not courts of the United States in any sense whatever, but its ruling is limited to this, that they are not courts of the United States within the meaning of that branch of the constitution providing for a judiciary branch of the government, and are therefore not affected by laws relating alone to courts organized thereunder. 13 Wall. [80 U. S.] 447. In American Ins. Co. v. Canter, 1 Pet. [26 U. S.] 542, the court, at page 546, say: "These courts are not constitutional courts, in which the judicial power conferred by the constitution in the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations respecting the territories belonging to the United States. The jurisdiction with which they are invested is not a part of the judicial power which is defined in the third article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States. * * * In legislating for them congress exercises the combined powers of the general and of a state government." That in this sense they are courts of the United States, I think can scarcely admit of doubt.

Without further comment at this time, I

think it clear that: 1. When "courts of the United States" are spoken of without any further designation, constitutional courts only are meant, and the words cannot be extended to cover any other courts, although established by federal authority. 2. When that phrase is used with a further designation, and showing the intention of the law-making power to extend its meaning to those courts established by federal authority, under constitutional powers other than that for establishing a judicial department, such as those for raising and supporting armies, and for the government of the territories, the courts will give it such extended application. The act of 1864 does contain such further designation, and the Wyoming territorial court must therefore be held to come within the operation and effect of that act.

Second. It being settled that the Wyoming court comes within the provisions of the act of 1864, and that court being a court of superior jurisdiction, in that sense that jurisdiction is to be presumed and need not be proven (Kemple's Lessee v. Kennedy, 5 Cranch [9 U. S.] 185); all the other questions raised in the case except that relating to process of commitment, being questions necessarily involved in the rendition of the judgment under which Osterhaus is held in custody, this court being a court of co-ordinate jurisdiction merely, with no power to revise the judgment of the Wyoming court, cannot consider those questions at all, or grant any relief even if satisfied that irregularities had occurred in rendering the judgment. Osterhaus can obtain such relief only by application to the court in which the judgment was rendered, or by appeal to the supreme court of the territory. Ex parte Watkins, 3 Pet. [28 U. S.] 201; In re Griffin [Case No. 5,815]; Hurd, Hab. Corp. 331, 351, and cases cited; Cooley, Const. Lim. 347, and note 3; Organic Act Wyo. T. (15 Stat. 181), last clause of section 9.

Third. As to the process of commitment. No special process or warrant of commitment was necessary. The record of the order or judgment of commitment was sufficient. An exemplified copy of such record is sufficient authority for the jailer or keeper of the prison, and this the superintendent of the house of correction had. Hurd, Hab. Corp. 400, and case cited. Even if such formal process were necessary, however, it was furnished to and was held by the superintendent in time, and was held by him when the supplemental petition was presented and the habeas corpus finally allowed and issued, although it was not delivered to him at the time Osterhaus was placed in his custody, nor until after the original petition had been presented. It results that the writ of habeas corpus must be dismissed and the prisoner remanded.

An appeal having been taken, the petitioner's counsel made the additional point before the circuit judge, that the act of congress of May 12, 1864, authorizing imprisonment outside the district in which the offence was committed, is unconstitutional, and the sentence to such confinement is a nullity. The circuit judge affirmed the decision of the district judge, as follows:

EMMONS, Circuit Judge. It is to me a source of regret that the state of my health renders impossible the preparation of a written opinion in this case. The argument has been exceptionally elaborate and able, both on the part of the petitioner and of the government, and I approach the decision of the questions involved with strong confidence that the exhaustive researches of counsel have omitted nothing which could throw light upon those questions.

In the reasoning, and with the conclusions reached by my Brother LONGYEAR I entirely concur. These are, as here briefly summarized, negations of the points made by petitioner's counsel, and with the district judge, I hold,

First. That the territorial court of Wyoming is a United States court within the meaning of the act of May 12, 1864. See American Ins. Co. v. Canter, 1 Pet. [26 U. S.] 542; Dred Scott v. Sanford, 19 How. [60 U. S.] 445; Hunt v. Palao, 4 How. [45 U. S.] 590; Benner v. Porter, 9 How. [50 U. S.] 235; Freeborn v. Smith, 2 Wall. [69 U. S.] 173; Orchard v. Hughes, 1 Wall. [68 U. S.] 73. There is nothing adverse to this conclusion in Clinton v. Englebrecht, 13 Wall. [80 U. S.] 444. The broad language there used must be construed with reference to the authorities cited for the proposition in support of which they are adduced. The case simply reaffirms those authorities.

Second. The second point made by the petitioner's counsel—want of authority in the superintendent of the Detroit house of correction—I likewise hold, with the district judge, to be an objection which petitioner cannot raise. The state of Michigan, whose officer the superintendent is, can alone question the legality of his action in the reception and detention of a person convicted of crime outside of the limits of the state. The act of 1871 [16 Stat. 398], extending the power of the superintendent to the reception of convicts from other states and territories, and the express authority therein given for the continued detention of persons before received from such other states and territories, is a legislative ratification of the action of the superintendent.

Third. The amendatory act of the legislature of Michigan (Sess. Laws 1871) was passed after the sentence and commitment of petitioner, and authorized the superintendent of the house of correction to receive and keep all persons convicted of crime by any court of the United States. It is claimed that such legislation is as to petitioner ex post facto. The position is untenable. The relator's confinement is under the authority of the United States. The state law neither fixes the penalty of the offence of which he stands con-

victed, nor in any manner affects the procedure, nor alters the sentence. In brief, no definition of ex post facto laws would embrace the act in question in its effect upon the detention of petitioner in this case.

Fourth. The absence of a formal commitment at the time of the delivery of the petitioner by the territorial marshal cannot impair the legality of his detention. The warrant of commitment is merely the evidence of the authority for his imprisonment under the sentence. It is a sufficient answer to this point that a certified copy of sentence was produced at the return, to evidence the legality of the detention. A merely formal defect in the warrant of commitment capable of amendment, would not authorize a discharge. In such case a petitioner would be remanded until the amendment of the process.

Fifth. No authority is cited by counsel for the proposition that the imprisonment of petitioner beyond the jurisdictional limits of the territorial court is unconstitutional. The authority of congress to designate any place of confinement within the United States is not inhibited by the constitution, nor has it ever been questioned, so far as I have been able to learn. Frequent instances of the exercise of such a power were mentioned at the bar.

Sixth. On behalf of the United States, it is argued that the judgment of the territorial court is conclusive upon this court, and cannot be here inquired into. Without doubt the sentence of that tribunal is res adjudicata here. Ex parte Watkins, 3 Pet. [28 U. S.] 193. Neither this court nor any other court not clothed with revisory or appellate jurisdiction over the tribunal whose judgment is sought to be vacated can revise the judgment of a court of record of competent jurisdiction through the instrumentality of the writ of habeas corpus. Nothing in the late decisions of the supreme court has modified the doctrine laid down in 3 Pet. [28 U. S.]. Ex parte Callicot [Case No. 2,323]. Ample provision is made in the organic act creating the territorial government of Wyoming, for the review of the decisions of the territorial district courts by appeal and writ of error, and relief from their judgments must be sought in the manner, and from the tribunal in whom congress has vested revisory jurisdiction.

I have thus briefly reviewed the grounds upon which my judgment is based, that I might not seem to have overlooked any of the arguments so forcibly urged for the discharge of relator. I can add nothing to the cogency of the opinion of the district judge, denying the discharge of petitioner. That opinion is here adopted and affirmed. Petition denied.

O'SULLIVAN (UNITED STATES v.). See Cases Nos. 15,973–15,975.

OSWALD (LYMAN PATENT REFRIGERATOR CO. v.). See Case No. 8,630.

Case No. 10,610.

The OSWEGO.

[8 Ben. 129.][1]

District Court, S. D. New York. June, 1875.

TOW-BOAT AND TOW—NEGLIGENCE—PLEADING.

1. A canal boat was taken in tow by the steamboat O., at New York, to be towed to Hudson. She was in the head tier of the boats towed astern of the O., and next to the outside boat on the starboard hand. When the steamboat and her tow were off Haverstraw, the canal boat sank. Her owners filed a libel against the O.. to recover their damages. They alleged that, a storm arising on the passage, they hailed the steamboat to give notice that the canal boat was leaking and in danger, which hail was heard, but the steamboat kept on, no attention being paid to the hail, till the canal boat sank. They alleged negligence, in that the boat was improperly placed in the tow, because her stem projected beyond the stems of the other boats in the tier; that the tow should have been landed at Piermont, or at some pier above Piermont, or anchored; and that the steamboat should have gone to the east side of the river, as the wind blew from the north-east. On behalf of the O., all negligence was denied, and it was alleged that the canal boat was old and rotten and easily water-logged, and sank by reason of her being overladen and rotten, and that, as soon as any notice was given of the canal boat's being in danger, every effort was made to save her. It appeared in evidence that the steamboat stopped at Piermont for some time, and took another boat in tow, but no notice was there given from the canal boat that she was in danger. It also appeared that the hatches of the canal boat were not properly covered, and that her sinking was due to the water's finding its way into the hold through such open hatches: *Held*, that there was no peril to the boat before she reached Piermont or at Piermont; and that if there had been, it would have been gross negligence, directly causing the subsequent disaster, that those in charge of the canal boat did not make known the peril at Piermont, to those in charge of the steamboat, for which they had ample opportunity.

2. The sinking of the boat was caused by the hatches of the boat not being kept properly covered; and, although this was not set up as a defence in the answer, yet, as the evidence was not objected to when offered, it must be *held* to establish fault on the part of the canal boat, contributing to the disaster.

[Cited in Philadelphia & R. R. Co. v. New England Transp. Co., 24 Fed. 506.]

3. There was no negligence on the part of the steamboat in placing the boat where she was placed, although the master of the steamboat, according to his own testimony, thought the boat was old and weak, and was, therefore, bound to use great precaution in towing her.

4. There was no negligence on the part of the steamboat in not going up on the east side of the river, or in not leaving the canal boat at Piermont.

5. On the facts, although those on the canal boat signalled the steamboat as soon as the peril commenced, such signals were not seen or heard from the steamboat until a late period.

6. As the disaster was due to the uncovered condition of the hatches, and those on the steamboat were not informed of such dangerous condition, and did not hear the signals, because the boat was so far astern, in a place in which she was put without the expression of any desire on

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

the part of her captain to be placed alongside of the steamboat, where he could communicate with her more easily, the court must, though with some hesitation, acquit the steamboat of any negligence contributing to the disaster, and the libel must be dismissed.

In admiralty.

Wilcox & Hobbs, for libellants.

Benedict, Taft & Benedict, for claimants.

BLATCHFORD, District Judge. The libellants, as owners of the canal boat General Shields, and carriers of a cargo of coal on board of her, bring suit against the steamboat Oswego, to recover for the value of said canal boat and her cargo, and of the freight on the cargo, because of the sinking and loss of the canal boat and her cargo, in the Hudson river, off Haverstraw, on the morning of the 8th of June, 1873, while the canal boat was in tow of the steamboat Oswego, under tow from New York to Hudson. The canal boat was in the head row of boats behind the steamboat (there being several rows behind the head row, the head row and the other rows being towed by hawsers from the steamboat), and was the second boat from the starboard hand and the third boat from the port hand, there being four boats in the row, all of them loaded. There was one boat towed alongside of the steamboat, on her starboard side, all the way from New York. At Piermont, which was below where the boat in question sank, another boat was picked up. She was placed on the port side of the steamboat.

The libel alleges, that the steamboat proceeded from New York up the river with the tow, the tide being flood and the wind a strong breeze from the north-east and the water somewhat rough; that the wind increased in violence and the sea became rough, so that, when the tow had arrived about off Piermont, the navigation became difficult and dangerous; that, soon after leaving Piermont, the storm continued to increase in violence, and the navigation became very difficult and dangerous, the waves washing over the deck of the libellants' boat with great violence, so that it was with difficulty one could stand on her deck; that, soon after leaving Piermont, the libellant Patrick Cunningham (who verifies the libel), who was master of the boat and was on her deck, hailed those in charge of the steamboat, and cried out and beckoned to them that the boat was in danger and to come to his rescue, and to land his boat at some safe place; but that, although the hail was heard by them, and the condition of the boat was observed by them, they paid no attention to the repeated calls and signals, and continued on with the tow as usual, the said libellant continuing to cry out to the steamboat, and using all efforts at his command to prevail upon them to stop, for at least one hour; that when about 400 yards off the brickyard at Haverstraw, the boat became water-logged, her hatches being swept away and everything off and about her decks, and she sank; that then, for the first time, the steamboat stopped; that the damage was in no way the fault of the libellants, but was solely owing to the negligence, want of care and unskilfulness of the master and owners of the steamboat, in this—that, when it was first discovered that the wind was increasing in violence, and the sea rough, the boat could and should have been shifted in the tow, so that her stem would not have projected beyond the stems of the boats in the same hawser tier, she being longer than the other boats, and for such reason receiving the full force of the winds and waves; that they did not make, or attempt to make, this change; that it was negligence to place her in that position in the tow; that the tow, or the libellants' boat, could have been landed at the Piermont pier, and this would have been a prudent course, as, even at that time, there were strong indications of an approaching and heavy storm; that, when the storm continued to increase, the steamboat could have stopped her headway and have come to a safe anchorage, or landed her tow, or a portion thereof, at a convenient or suitable dock along the western shore of the river, from Piermont to Haverstraw; and that the steamboat should have gone to the eastern side of the river, which would have been a prudent course, under the circumstances, there being a heavy wind from the north-east, and which was the course actually taken by other boats passing up the river with their tows at the time in question.

The answer alleges, that the canal boat was in as safe and as little exposed a position as she could be placed in; that the hawser tier was towed on a hawser about 500 feet long, and other boats were tailed on to said tier; that the steamboat, with her tow, proceeded up the river; the water being smooth, the tide running flood, and the wind blowing very light from the north, and arrived at Piermont at about four o'clock a. m., where she took in tow another boat on her port side, and went on up the river, the weather being all the time pleasant, and the water smooth, and no storm whatever prevailing and the navigation in no way dangerous; that the steamboat with her tow continued on her voyage in safety, until she arrived within half a mile of Haverstraw, when, for the first time, those on board of the canal boat hailed the steamboat and informed those on board of the steamboat that the canal boat was in a sinking condition, and the steamboat was immediately headed for the nearest dock, in order to place the canal boat in a place of safety, but, before she could be got there, she sank in deep water, with her cargo on board; that the said hail was the first intimation that those on board of the steamboat had, that there was anything wrong with the canal boat, and, as soon as they learned that she was in a sink-

ing condition, they took every means in their power to save her, but, notwithstanding all such efforts, she sank; that the canal boat was old and rotten and easily water-logged, and was unfit to carry so heavy a load, and sank by reason of over-loading and rottenness, and not by reason of any stress of weather, or negligence of those on board of the steamboat; that the tow was made up in the usual manner, and the libellants' boat was placed where she was with their full knowledge and consent, and her stem did not project beyond the stems of the other boats in the tier so that she received the full force of the winds and waves; that no request was made by any one on the canal boat to land her at Piermont, or to change her position in the tow, and there were no indications, at that time, of an approaching and heavy storm, and it would not have been prudent, if such a storm had been approaching, to come to anchor, after leaving Piermont; that it was gross negligence on the part of those on board of the canal boat in not sooner informing those on board of the steamboat of her condition, in order that they might have sooner taken steps to save the canal boat and cargo; that the steamboat was not guilty of any negligence in the premises, but did all in her power to save the canal boat; and that the steamboat proceeded up the river in the usual and proper course.

On all the evidence in the case it is entirely clear, that, at no time while the tow was below Piermont, or was at Piermont, was there any peril to the canal boat. If there had been, it would have been gross negligence on the part of the canal boat, directly causing the subsequent disaster, for those in charge of her not to have made known that peril, at Piermont, to the persons in charge of the steamboat. There was abundant opportunity to do so. Hammond (the mate of the steamboat) and another man went from the stern of the steamboat, in the small boat of the steamboat, to the wharf at Piermont, getting on board of such small boat from the stern of the steamboat. The entire flotilla stopped off Piermont for some time. If any alarm had been given at Piermont from the canal boat, it must have been heard on the steamboat. I am satisfied no alarm was given at Piermont, or below Piermont. Moreover, on the evidence, there was no cause for alarm at or below Piermont, no such condition of the wind or the sea as to create alarm in the minds of those on the canal boat, no alarm or apprehension in their minds and, therefore, no manifestation of such alarm. It is incredible that, if they gave an alarm at Piermont, they were not heard. If they were in peril and gave no alarm there, they were grossly negligent. They gave no alarm there, for the reason that they were not in peril up to that time. They were not in peril up to that time, or they would have given an alarm there. The libel makes no suggestion of any peril, or of the giving of any signal, before reaching Piermont or at Piermont. On the contrary, it states that the apprehension of peril and the signalling were after leaving Piermont. The story, brought out in the testimony of Cunningham and of Boyle, of the existing danger, and their appreciation of it, and their signalling because of it, before reaching Piermont, is an afterthought; and, if it were true, it would throw the entire fault for the disaster on the canal boat, because, the canal boat could easily have been taken care of at Piermont, and those on the steamboat had no notice while at Piermont that the canal boat needed to be taken care of; and if she did need to be there taken care of, those on board of her knew it while there, and yet omitted to give notice to the steamboat while at Piermont, which could readily have been done.

That the canal boat sank because of perils which arose after leaving Piermont is clear. That she sank because water from waves raised by the force of the wind came upon her deck and found its way thence into her hold, and so filled her, is also clear. It is also established, I think, by the evidence, that such water found its way into her hold because those on board of her negligently omitted to cover her hatch openings adequately with their proper coverings. That cause for the admission of water to her hold is shown to have existed. The coming of the water upon her deck in parts where it could find access to the hold through the uncovered hatch openings, and in sufficient quantities to produce, in view of the depth to which she was loaded, the mischief which ensued, is shown. This cause was an adequate one for the disaster, and no other cause is shown. The answer represents, that, after leaving Piermont, the water was smooth, and the navigation not dangerous; and, in order to account for the sinking of the canal boat, it alleges that she was old and rotten, and easily water-logged, and unfit to carry so heavy a load, and sank by reason of over-loading and rottenness, and not by reason of any stress of weather. The fact that the canal boat sank because of negligence on the part of those on board of her in leaving room for the water to go down her hatch openings, is not set up in the answer. Yet it is clear that the water which dashed upon her deck, and found its way into her hold through her hatch openings, sank her, and that such water came upon her deck because of the waves raised by the wind which blew. There is no evidence that age or rottenness, or a tendency to be easily water-logged, in the sense of the answer, or over-loading, on the part of the canal boat, in a like sense, had anything to do with her sinking. She was adequate to the trip in respect of sea-worthiness and of load, with the weather and waves such as they were below Piermont. It was the condition of things above Piermont which overcame her —a more violent wind and a higher sea. Yet there is every evidence that she would have

been safe even then, if her hatch openings had been covered. The libel, in accounting for the sinking, states that the waves washed over the deck, and finally her hatches were swept away, and she became water-logged, and sank. It avers, however, that the damage was not caused by any fault on the part of the libellants; and the evidence introduced on the part of the defence, to show the particular negligence of those on board of the canal boat in leaving the hatch openings uncovered for the entrance of the water which came aboard when the waves rose, was not objected to by the libellants, on the ground that no such fact was set up in the answer.

It must, therefore, be held that there was fault on the part of the canal boat, contributing to the disaster.

A much more difficult question is as to whether the steamboat also was in fault. The first inquiry is, whether she was in fault in any of the particulars specially set up in the libel. As to the allegation that it was negligence in the steamboat, when the sea became rough, not to shift the canal boat in the tow, so that her stem would not project beyond the stems of the boats in the same row, and that, because of such projecting, she received the full force of the waves, and that it was negligence to so arrange her in the tow, I am not satisfied that she projected ahead to any such extent that she shipped enough more water to have made any substantial difference, in her actual predicament of load and open hatches. She was protected by the boats on either side of her, but she was low in the water. If she was to be in the hawser tier at all, her position in it was, on the evidence, as safe and as good a one as she could have had; and I cannot doubt that, if she had been the outside boat on either side of the row she was in, she would have been in a worse position. The negligence alleged in the libel, of not landing her at Piermont, has been already considered. No reason is given, in the libel, why the tow should have gone up on the east side of the river, other than that there was a heavy wind from the north-east. But the evidence shows that the wind was not from the north-east, but was from such a direction that a course up the western side of the river was full as safe as any other.

There remains the allegation of negligence, in the libel, in that, when the storm continued to increase, the steamboat could have stopped her headway and come to a safe anchorage, or landed her tow, or a portion thereof, at a convenient or suitable dock along the western shore of the river, from Piermont to Haverstraw. That the steamboat, if advised of the peril of the canal boat, when such peril first became manifest to those on board of the canal boat, could have taken such measures as would have saved the canal boat from sinking, I cannot doubt. The continued towing of the canal boat against a head wind and a head sea, after she was in peril, in the condition of load and of uncovered hatch openings in which she was, caused her to sink. She was a considerable distance behind the steamboat; and, while it is shown that those on the canal boat signalled, by waving and shouts, to the steamboat, as soon as there was any real peril to the canal boat, and continued such signals for a long time, it is also evident that the persons on the steamboat did not hear or see such signals until a late period.

Dubois, the master of the steamboat, testifies, that he examined the canal boat before he placed her in the tow, and told her captain that she was a bad one and that he hardly knew where to put her so she would go safely; that he noticed she was old and worn-out and rotten; and that, before he fastened her in the tow, he thought she was not a fit boat to tow. Certainly, after this notice and these conclusions, it was the duty of the master of the steamboat to use great and extraordinary precautions in towing the canal boat, to place her where he would be sure to be in communication with her promptly, for any exigency that might arise, such as did arise, in the increased sea from the increased wind, and to see that, if he thought her unfit to endure what the other boats would endure safely, she should not be subjected to what she could not endure. When the tow started from New York, the steamboat had but one boat alongside of her, and that was a loaded boat, on her starboard side. The boat picked up at Piermont was put alongside of the steamboat, on her port side. There was thus a vacant place where the libellants' canal boat might have been placed. If it be said that she would, in her condition, have been more exposed to danger alongside of the steamboat, it is still true that she would have been open to the immediate observation of those on board of the steamboat, and notice of danger could have been promptly heard or seen. Yet, in the condition in which the canal boat was, being low in the water with her load, it was incumbent on those on board of her to take adequate precautions against the danger of the rising of the wind and sea, and the coming on her deck of water which might find its way into her hold in quantities too great to be thrown out by pumping. They did not take such adequate precautions, and therein there was negligence which contributed to the disaster. But, that being the real cause of the disaster, it cannot be said that the steamboat was responsible in any degree for the condition of the hatch openings. It is in evidence that the boat was so full of coal, that the piling of the coal in the hatchways prevented the covers from going down to their proper seats. This was, perhaps, something which those in charge of the steamboat might have observed before the canal boat was taken in tow, but it could not be apparent to them that water coming upon the deck of the canal boat would be likely to go down into the hold in such quantities that it could not be freed by prop-

er pumping with proper pumps. This matter of the water going down the hatch openings was something for which the steamboat cannot be held to have been responsible. So that, after all, the question is, simply, whether there was negligence in the fact that this canal boat, in her condition, and in view of what is held to have been the cause of the disaster, was put behind, and not alongside of, the steamboat. It is not shown that the captain of the canal boat expressed a desire, before the tow started, to have his boat put alongside of the steamboat. On the contrary, he manifested his acquiescence in being placed where he was. The libel does not allege, as negligence in the steamboat, that she did not place the canal boat alongside of her, either originally or afterwards. On the whole case, though with considerable hesitation, I must acquit the steamboat of negligence contributing to the disaster, and must dismiss the libel, with costs.

Case No. 10,611.

The OTHELLO.

[5 Blatchf. 342.] [1]

Circuit Court, E.D. New York. July 14, 1866.[2]

BOTTOMRY—CARGO BELONGING TO UNITED STATES—LIABILITY TO SEIZURE OR ATTACHMENT.

Where a vessel was carrying, under a charter party, a cargo that was the property of the United States, and the general owner, through the master, retained the possession and navigation of the vessel, and the master, at a port of distress, executed a bottomry bond on both vessel and cargo: *Held*, on a libel filed on such bond, in admiralty, against vessel and cargo, that the court had jurisdiction of the case as regarded the vessel, but that the cargo, being the property of, and in the possession of, the United States, was not subject to seizure or attachment, nor could a suit be instituted against the government in respect to it.

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

This was a libel in rem, filed in the district court, by David G. Cartwright and Frederick H. Harrison, against the schooner Othello and her cargo, on a bottomry bond executed by her master on vessel and cargo, at St. Thomas, where she had put in, in distress, on a voyage from Wilmington, N. C., to New York, with a cargo of property that had been captured by the army of the United States. It was contended, on the part of the United States, that the vessel was owned by the United States pro hac vice, under a charter party for such voyage, and that the cargo was the property of the United States, and that, therefore, neither of them was liable to attachment in the suit. The district court dismissed the libel on those grounds, as to both vessel and cargo, with costs, and the libellants appealed to this court. See Cartwright v. The Othello [Case No. 2,483].

NELSON, Circuit Justice. On the true construction of the charter party, I am not satisfied that the government was the owner of the schooner pro hac vice. I think that the general owner, through the master, retained the possession and navigation of the vessel; that the hiring rested in covenant; and that, as respects the vessel, the court below possessed jurisdiction to hear the case on the merits.

The cargo belonged to the United States, and was in their possession as shippers of it. As such, it was not subject to seizure or attachment, nor could a suit be instituted against the government in respect to it.

The decree below is affirmed as to the cargo, except as to the allowance of costs, and the libel as to the cargo is dismissed, but without costs either in the court below or in this court. The decree as to the vessel is reversed, and the case as to the vessel will be heard on the merits.

[Subsequently a suit in equity was instituted by Goodwin to compel a specific performance of a stipulation executed by Cartwright & Harrison upon the judgment entered in this cause August 26, 1871, and to stay proceedings upon and an enforcement of said judgment. The bill was dismissed, with costs. Case No. 5,551. See 17 Wall. (84 U. S.) 515.]

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

[2] [Affirming in part, and reversing in part, Case No. 2,483.]

OTHELLO, The (CARTWRIGHT v.). See Case No. 2,483.

OTIS (BALMEAR v.). See Case No. 819.

OTIS (CUNNINGHAM v.). See Case No. 3,485.

OTIS, The (HART v.). See Case No. 6,154.

Case No. 10,612.

OTIS v. MONTGOMERY & E. R. CO.

[8 Reporter, 263.] [1]

Circuit Court, S. D. New York. June 13, 1879.

NEW TRIAL—IMPEACHMENT OF PARTY.

A party is bound to anticipate an attack upon his credibility, and if he submits his case to the jury without asking for time to produce sustaining witnesses the court will not grant a new trial, though the testimony was as to general reputation.

Motion for new trial.

WALLACE, Circuit Judge. If the point had been made at the trial, that the plaintiff could not properly be impeached as a witness by proof that his general reputation among those who knew him was bad, the defendant might have given evidence to show the character of the plaintiff for truth and veracity. The point was not made, however,

[1] [Reprinted by permission.]

but the contention on the trial was, that any evidence to impeach the plaintiff was inadmissible. This position was not tenable, because the impeachment was not of the plaintiff as a party, but as a witness, upon whose credibility the issue of fact wholly turned. The case was submitted to the jury upon the assumption that the evidence justified them in discrediting the testimony of the plaintiff because of the impeachment; and no exception was taken on the part of the plaintiff and no instruction asked to the effect that the evidence was not sufficient as an impeachment of the witness. Under these circumstances it would be unfair to the defendant to permit the point now taken to prevail, when had it been taken at the trial it might have been obviated. While the result of the trial may have been a surprise to the plaintiff, and while it may be true that he could have repelled the attack on his credibility, he was bound to anticipate the attack, and, in any event, should have asked for time to produce sustaining witnesses. If the result was produced by prejudice upon the part of the jury, there is nothing in the case to indicate this conclusion in view of the fact that the impeachment of the plaintiff was treated as one which the jury had the right to regard as an effectual one. Motion denied.

Case No. 10,613.

OTIS v. The RIO GRANDE.

[1 Woods, 279.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1872.[2]

ADMIRALTY —DECREE — COLLATERAL ATTACK FOR ERRORS—REVERSAL IN DIRECT PROCEEDING—DECREES OF FOREIGN COURTS.

1. Where a court has jurisdiction of the res in a proceeding in rem, the record of its decree cannot be collaterally attacked for errors and irregularities appearing therein.

2. When the jurisdiction of a court depends upon a fact which the court is required to ascertain in its decision, such decision is final until reversed in a direct proceeding for that purpose.

[Cited in Foltz v. St. Louis & S. F. Ry. Co., 8 C. C. A. 635, 60 Fed. 318.]

3. When at and after the beginning of proceedings in admiralty by the filing of the libel, the court is in actual possession of the res, its jurisdiction is not lost by the removal of the res from the possession of the court and beyond its territorial jurisdiction, without the consent of the libellant

4. The United States courts sitting as admiralty courts ought to carry into effect the sentences and decrees not only of other federal courts of admiralty, but also of the admiralty courts of foreign countries.

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

[This was a libel in admiralty by William Otis and others against the steamer Rio Grande.] The suit is founded upon a record of the United States circuit court for the Southern district of Alabama. [See Case No. 10,614 and note.]

T. J. Semmes and Robert Mott, for libellants.

Arthur Saucier and F. Mechenard, for claimant.

WOODS, Circuit Judge. The facts are these: The libellants in this case brought an action in the district court for the Southern district of Alabama, on the 22d of November, 1867, against the steamer Rio Grande, to enforce what they claimed was an admiralty lien for labor and materials furnished in repairing said steamer in the port of Mobile. The steamer was seized and held by the marshal of the Southern district of Alabama. On the 11th day of May, 1868, the district court in which the case was pending, dismissed the libel. On the next day the claimants moved the court for an order that the marshal deliver the steamer to Wm. Stewart and Wm. Ross, which was granted. On the 14th day of May, written notice of a demand for appeal to the circuit court for southern Alabama was filed in the office of the clerk of said district court, and on the same day an appeal bond duly approved was filed by the libellants with the clerk of the district court.

Notwithstanding the appeal, the marshal delivered the steamer to Stewart and Ross.

Afterwards, in June, 1869, Thomas McClellan, of the city of New Orleans, being in the city of Mobile, purchased the Rio Grande of James N. Williams and Mary Ann Price, who then claimed to be her owners, and afterwards sold her to the claimant in this case by a bill of sale, which only conveyed the interest acquired in the steamer by McClellan, by virtue of the bills of sale of Williams and Mrs. Price.

In the meantime the case was carried by the appeal from the district to the circuit court for the Southern district of Alabama, in which last named court, on the 11th day of January, 1871, a decree was rendered in favor of the libellants in this case for $1,508, and costs; the lien of the libellants for that amount upon the Rio Grande was recognized, and she was condemned for the payment thereof.

To enforce this decree of the circuit court for the Southern district of Alabama is the purpose of this suit, and the libel is founded on the record of the decree of the circuit court for Southern Alabama.

The only defenses that can be made against the enforcement of this decree are, either that the decree has been paid, or that it is absolutely void.

The defense set up by claimant is that the decree of the circuit court condemning the Rio Grande is void.

Counsel for claimant call attention to what they suppose to be the irregularities and errors of the proceedings in the circuit court.

Admitting such irregularities and errors to

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

[2] [Affirmed in 23 Wall. (90 U. S.) 458.]

exist, it by no means follows that the decree is void. This court has no jurisdiction to decide upon the errors and irregularities of the circuit court of Southern Alabama, if that court had jurisdiction to make the decree which it made. The errors of that court can only be corrected by the supreme court of the United States.

"When a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court." Elliott v. Peirsol, 1 Pet. [26 U. S.] 340.

Thus the circuit court in Alabama had jurisdiction to decide whether an appeal had been properly taken and prosecuted to itself from the district court. It did pass upon that question in the case of Otis v. The Rio Grande [Case No. 10,614], and that decision is binding upon this and every other court, until reversed in a direct proceeding.

So in Cooper v. Reynolds, 10 Wall. [77 U. S.] 308, it is laid down as an axiom of law, "that when a judgment of a court is offered collaterally in another suit, its validity cannot be questioned for errors which do not affect the jurisdiction of the court that rendered it."

We can therefore pass over all the irregularities and errors not affecting the jurisdiction of the court which counsel for claimants allege to exist in the record of the circuit court of Alabama, on which this suit is based, and we are authorized to inquire only whether that court had jurisdiction to render the decree set out in the record.

The jurisdiction of that court is attacked on two grounds:

1. Because the claims of libellant were for supplies and materials furnished the Rio Grande in her home port, and therefore no admiralty lien existed which that court had jurisdiction to enforce; and,

2. Because pending the case in district and circuit courts for the southern district of Alabama, the res against which the action was brought was removed from the possession and from the territorial jurisdiction of the court, and therefore the circuit court in the absence of res had no power to decree against it.

Touching the first ground, it is sufficient to say that one of the issues in the case before the circuit court of Alabama was, whether or not the Rio Grande was a foreign or domestic vessel. It was clearly within the jurisdiction of the court to decide that question, and having decided it, its decision is conclusive until reversed in a direct proceeding.

"When the jurisdiction of a tribunal depends upon a fact which such tribunal is required to ascertain and determine by its decision, such decision is final until reversed in a direct proceeding for that purpose.

"The test of jurisdiction in such cases is whether the tribunal have power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong." Colton v. Beardsley, 38 Barb. 30.

The Alabama court having decided the jurisdictional fact that the Rio Grande was a foreign vessel, it would ill become this court to hold its decree to be absolutely void because it should be of opinion that that court erred in its conclusions upon that issue.

A more serious question however is raised by the second objection to the jurisdiction of the Alabama court, namely, that the court lost jurisdiction by losing possession of the steamer Rio Grande.

The general rule is well settled that the jurisdiction of courts of admiralty in cases of proceedings in rem is founded on the actual or constructive possession of the res.

But the precise point presented in this case is this: When at and after the commencement of the proceedings by the filing of the libel, the court is in the actual possession of the res, is its jurisdiction lost by the removal of the res from the possession of the court and from its territorial jurisdiction without the consent of the libellant?

This question was passed upon by Mr. Chief Justice Marshall in the case of U. S. v. The Little Charles [Case No. 15,612]. The chief justice says:

"That the possession of the thing is necessary as a foundation for the jurisdiction of the court is, in general, true. There must be seizure to vest jurisdiction, but it is not believed that the continuance of possession is necessary to continue the jurisdiction. It is a general principle that jurisdiction once vested is not divested, although a state of things should arrive in which original jurisdiction could not be exercised. No authority has been found nor is any reason perceived for making this case an exception to the general rule." See also Wilson v. Graham [Case No. 17,804].

Following the authorities cited, I am of opinion that the removal of the Rio Grande from the control and jurisdiction of the court did not oust the jurisdiction of the court, and as a consequence, that the decree of the circuit court for the Southern district of Alabama is valid and binding.

This court is in duty bound to carry into effect the sentences and decrees, not only of other federal courts, but even of the admiralty courts of foreign countries (Jurado v. Gregory, 1 Vent. 32; 2 Sir Leo Jenkins, 714), and must give a decree in favor of libellants unless one other defense relied on by claimant should prove to be well founded.

This is, that from the very circumstances of the case, respondents could have nothing to urge against the libel in the district court, their ownership of the Rio Grande having accrued long after the proceedings in said court had terminated, to wit: in September, 1869. But their claim to ownership arose before the decree in the circuit court. They and all other persons interested were parties, and had the right to be heard in that court, and would have been heard upon proper applica-

tion. As to the "thing" which was defendant in that suit, all persons claiming it on the ground of property or possession were represented by it in that court, although they were not served with process, or had not heard of the proceedings. The lis pendens was notice to all the world. Wilson v. Graham, supra.

Believing the decree of the circuit court of Alabama to be a valid and binding decree until reversed in a direct proceeding, and that it is the duty of this court when called on to enforce it, and no sufficient reason appearing to the contrary, decree must be rendered in favor of the libellants against the steamer Rio Grande, for the amount of their several claims, with interest and costs and for the costs in the district and circuit courts of the Southern district of Alabama.

[On appeal to the supreme court, the decree of this court was affirmed. 23 Wall. (90 U. S.) 458.]

Case No. 10,614.

OTIS v. RIO GRANDE.

[1 Woods, 593.] [1]

Circuit Court, S. D. Alabama. Dec. Term, 1870.

APPEAL—PRACTICE AS TO NOTICE AND BOND—NOTICE IN OPEN COURT—MINUTES OF PROCEEDINGS.

1. Where no rule is prescribed by the court, the practice of the court as to notice of appeal, and the giving and approval of the appeal bond, makes the rule by which parties must be governed.

2. Where notice of appeal in an admiralty cause is given in open court, immediately upon the rendition of the decree, and written notice thereof filed with the clerk, and the penalty of the appeal bond fixed by the court, and an appeal bond in the penalty as fixed by the court is filed and approved by the clerk before the close of the term at which the decree appealed from is rendered: *Held*, that the appeal was well taken, although neither the term docket nor minutes of the district court recited any of the foregoing facts, or contained any evidence of the appeal.

This cause came on for hearing on the motion of libellant [William Otis] for an order to place the cause upon the docket of this court, the same having been duly appealed from the district court, and bond given as required by law.

Wm. Boyles, E. S. Dargan, and John T. Taylor, for the motion.

George N. Stewart, contra.

WOODS, Circuit Judge. The motion is resisted on the ground that there is no evidence to be found either on the term docket of the district court, or upon its minutes, that an appeal was taken. The want of such entry seems to be admitted. Proctors for libellant state professionally, that on the day the decree was rendered in the district court, they gave notice of appeal, and that the judge allowed it.

The libellant Otis makes affidavit that he was present in court when the judge decided the cause; that he asked for an appeal in a few minutes after the decision was made; that the court granted the same, and at the same time, on request of counsel, the amount of the bond to be given by libellant was fixed by the court, and a bond was given by him, which was accepted by the clerk.

There is among the files, submitted to the court on this motion, the following paper:

"Otis et al. vs. The Rio Grande—District Court of the United States for the Southern District of Alabama: Sir—The libellants Otis and other parties, who did work on the Rio Grande, intend to appeal from the final decree of the court in this cause to the circuit court. Dargan & Taylor, Proctors."

"To N. W. Trimble, Esq., Clerk: On Monday next the libellants will enter into the proper stipulation at the court room. Dargan & Taylor, Proctors.

"May 14, 1868."

This paper was filed in the district court, and bears the file mark of the clerk, of May 14, 1868.

On May 14, 1868, Otis, the libellant, filed his bond with the clerk of the district court, with security in the sum of $1,000, and the same was approved by the clerk.

This bond recited that an appeal was prayed of the court, and granted.

It further appears that the term of the court at which the decree appealed from was rendered did not close until May 18.

On this showing I cannot doubt that in fact an appeal was taken during the term from the decree of the district court, in this case.

So that the question is fairly presented, whether an entry on the minutes of the court, showing that an appeal was demanded, is essential to the perfecting of the appeal.

The law regulating appeals to the circuit from the district court, in cases of admiralty and maritime jurisdiction, simply provides that an appeal shall be allowed in all cases when the matter in dispute shall, exclusive of costs, exceed the sum of fifty dollars. No form of notice of appeal is prescribed; no time is limited except that the appeal shall be taken to the next term of the circuit court. The law does not prescribe who shall fix the penalty of the bond, or who shall approve the sureties.

All these matters seem to be left by congress to be prescribed by the rules of the court. This has never been done in the district court of this district, so far as I have been able to learn. The whole matter, as is, or was the case in the district court for the eastern district of Massachusetts, is left to custom and practice.

In the case of Norton v. Rich [Case No. 10,352], the district court, on the hearing, decreed wages to the libellant, and no ap-

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

peal was taken in court, and the court adjourned without day. Three days afterward, the respondent claimed an appeal in the clerk's office, but the district judge refused to allow it, upon the ground that the party was bound to make his appeal before the final adjournment of the court sine die, or within such other period as the court should, upon his application, prescribe. A petition was thereupon addressed to the circuit court in behalf of respondent for relief. On this application Mr. Justice Story says: "The act of congress has provided no mode as to appeal from the decrees of the district to the circuit courts, confining the appeal only to the next circuit court. In this district," he continues, "no regulations as to appeals have ever been made by the district court. The uniform course from the earliest period has been to make the appeal in open court apud acta, before the adjournment of the court. This course of practice is equivalent to a rule of the court, and must be considered as directory to all parties whenever further time to consider of an appeal has been asked for, it has been readily acceded to by an adjournment of the court for that purpose."

The effect of this is that when no rule is prescribed, the practice and custom of the court as to notice of appeal, the giving and approval of the bond makes the rule by which the parties must be governed.

In this case, so far as I can learn, the usual practice in the district court has been followed. Notice of appeal was given in open court, and a bond executed in a sum and with sureties approved by the clerk.

But the difficulty recurs that no notice of appeal was entered upon the docket or minutes of the court. Is this necessary?

The law regulating appeals in cases of admiralty and maritime jurisdiction from district to circuit courts, uses precisely the same language as the law regulating appeals from the circuit to the supreme court of the United States. These provisions of law are in the same section of the same statute, namely, section 2 of the act of March 3, 1803 (2 Stat. 244). The language in both cases is, "an appeal shall be allowed." In both cases the appeal is allowed as a matter of course. There is no discretion lodged with the court. It is the law and not the court that allows the appeal. So that all that is necessary is that notice of the purpose to appeal be given. A motion which would imply a discretion in the court to grant or overrule would be improper. If the granting of the appeal lay in the discretion of the court, and if a motion made and decided in term time were a necessary step in taking an appeal, then I should hold that the record must show the facts. But when no discretion is lodged with the court, and only notice is required, I am of opinion that it is not necessary that it should be proved by the record.

I have said that the statute uses the same language respecting appeals from the circuit to the supreme court as is used in reference to appeals in admiralty from the district to the circuit court. On a motion to dismiss an appeal from the circuit court for the Eastern district of Virginia to the supreme court of the United States in Hudgins v. Kemp, 18 How. [59 U. S.] 537, Taney, C. J., held that it was not necessary to inquire whether the entry made in the order book is to be regarded as a part of the record or merely a memorandum to preserve the history of the case by entering the appeal in the book where it is usually found and would be naturally looked for by the party interested. In either view, this entry was not necessary to give validity to the appeal. In making the appeal the party exercised a legal right. It was made in open court, and the clerk had official knowledge of the fact. And it would have been his duty even if no written memorandum of it had been made to certify it to this court, when the security was approved by the judge and the appeal allowed; and his certificate of the fact is all that is required in the appellate tribunal. He does not certify it as from a copy of the record. The appeal is made orally, and the entry usually made on the minutes or in the order book is to preserve the evidence of the act, and is not necessary to give it validity.

Judge Taney proceeds: "The act of congress does not require an appeal to be made in open court, or to be in writing, or entered on the minutes of the court, or to be recorded. It is often made before a judge in vacation when it cannot be recorded in the order book as a part of the proceedings of the court. And the law makes no difference as to the form in which it is to be made, whether it be taken in court or out of court before a judge. In either case it may be made orally or in writing."

In the case of Innerarity v. Byrne, 5 How. [46 U. S.] 295, the supreme court of the United States held that "when the record transmitted to this court does not show that a citation had been issued and served, it was no ground for dismissing the case, and that the fact might be proved aliunde."

In Martin v. Hunter, 1 Wheat. [14 U. S.] 304, the same court held that it is not necessary that all the steps necessary to give the supreme court jurisdiction should even be on file in the court below, and certainly need not appear to be of record in that court.

In the case in 18 How. [Hudgins v. Kemp], before referred to, Judge Taney concludes that want of record evidence in the circuit court that an appeal was prayed would be no ground of dismissal, and the certificate of the clerk that it was so prayed is all that is required by the court.

In the case at bar it is established beyond doubt, that in open court an appeal was prayed and allowed, and the amount of the bonds fixed on the very day the decree was

rendered. During the same term of the court, written notice was filed of the appeal and is now found among the files of the case, and before the final adjournment of the court for the term, bonds for appeal were given and approved by the clerk and filed.

Under this state of facts and controlled by the decisions of the supreme court of the United States, above cited, I cannot overrule this motion. It is therefore allowed.

[NOTE. Subsequently, on January 11, 1871, this court rendered a decree reversing the decree of the district court. Case unreported. The parties in whose favor this decree was entered filed their libel in the district court for Louisiana, setting forth the above decree, and averring that pending the proceedings in the district court of Alabama the marshal, under an order of the district judge, had delivered up the steamer, notwithstanding the appeal to the circuit court, which had operated as a supersedeas, and that pending said appeal Ross and Stewart had removed the steamer to New Orleans. The libel asserts a maritime lien, and prays for process. The libel was dismissed. Case unreported. This decree was reversed upon appeal to the circuit court. Case No. 10,613. This last decree was affirmed upon appeal to the supreme court. 23 Wall. (90 U. S.) 458.]

OTIS (SCOTT v.). See Case No. 12,543.

OTIS v. The WHITAKER. See Cases Nos. 17,524 and 17,525.

OTOE COUNTY (CHICAGO, B. & Q. R. CO. v.). See Case No. 2,667.

OTT (BANK OF COLUMBIA v.). See Cases Nos. 878 and 879.

OTT (LITLE v.). See Case No. 8,389.

Case No. 10,615.

OTT v. MURRAY.

[3 Cranch, C. C. 323.] [1]

Circuit Court, District of Columbia. May, 1828.

JUDGMENTS—HOW KEPT ALIVE.

A judgment may be kept alive by taking out a fieri facias within the year and day, to lie in the office, and so from year to year; and a fieri facias taken out within the last year and day, and put into the marshal's hands, may be executed, and if returned nulla bona, a new execution may at any time thereafter be taken out without scire facias.

[This was an action by Ott's administrator against Thomas Murray.]

Motion by Mr. Morfit to quash the execution in this case, because not issued within the year and day after judgment. The judgment was rendered January 9, 1824; a fieri facias to lie in the office was issued, returnable to April term, 1824, and so on, from year to year, until September, 1826, when a fieri facias was issued, and returned nulla bona at December term, 1826. The present execution (a fieri facias) was issued, returnable to this May term, 1828.

To show that a fieri facias, not returned, cannot be continued on the roll, Mr. Morfit cited Blayer v. Baldwin, 2 Wils. 82; Lesher v. Gehr, 1 Dall. [1 U. S.] 330; Biand v. Mears, 3 Term R. 388, and 2 Tidd, Prac. 1004.

Mr. Wallach, for plaintiff, relied upon the practice in the courts in Maryland, to take out an execution within the year and day, to lie in the clerk's office, and to be renewed from year to year, to keep the judgment alive.

CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, absent). THE COURT is of opinion that an execution, taken out and ordered to lie in the office, is sufficient to keep alive the judgment for one year; and if, within the year and day thereafter, another execution be taken out in like manner, to lie in the office, it will keep alive the judgment for another year; and so from year to year, and a fieri facias taken out within the last year and day, and put into the marshal's hands, may be executed; and if returned nulla bona, a new execution may, at any time thereafter, be taken out without scire facias, according to the opinion of this court in the case of Johnson v. Glover at May term, 1826 [Case No. 7,385].

The cases cited from 1 Dall. [1 U. S.] 330 [Lesher v. Gehr], and 3 Term R. 388, are cases of testatum fi. fa. and are not applicable to the present case. The case in 2 Wils. 82, supports the present opinion; for in that case the first execution was never put into the hands of the sheriff and no other execution was taken out for more than a year and a day after issuing the first execution, and it was irregular to enter the continuance by vicecomes non misit breve, as the first execution was not returned nor filed.

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

Case No. 10,616.

The OTTAWA.

[Brown, Adm. 356; 4 Chi. Leg. News, 153; 5 Am. Law T. Rep. U. S. Cts. 147; 6 Am. Law Rev. 575.] [1]

District Court, E. D. Michigan. Feb., 1872.

JURISDICTION—INJURY TO WHARF.

An action will not lie in admiralty against a vessel to recover damage done by her to a wharf projecting into navigable water. Wharves are but improvements or extensions of the shore, and injuries done to them, no matter by what agency, are injuries done on land, and do not constitute maritime torts for which an action in the admiralty can be maintained.

[Cited in The Maud Webster, Case No. 9,302; The Champion, Id. 2,584; The Mary Stewart, 10 Fed. 138; The C. Accame, 20 Fed. 643; Leonard v. Decker, 22 Fed. 742; The Professor Morse, 23 Fed. 804; Milwaukee v. The Curtis, 37 Fed. 706; The H. S. Pick-

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission. 6 Am. Law Rev. 575, contains only a partial report.]

ands, 42 Fed. 240; Homer Ramsdell T. Co. v. Compagnie Generale Transatlantique, 63 Fed. 848; The Mary Garrett, Id. 1011, 1012.]

This was a libel in rem, by Wm. P. Stafford and Clark Haywood, lessees of a wood dock or wharf, extending from the shore some distance over the water, at Port Hope, on Lake Huron, for a collision with, and damage to, their wharf by the propeller Ottawa, on the 6th day of November, 1869. The propeller stopped at libellants' wharf for a supply of wood. After she had obtained a supply, the agent of libellants in charge of the wharf, fearing damage from a storm which was then threatening, requested the master of the propeller to leave the wharf with his vessel. To this the master consented, but his engineer, fearing the storm, refused to work the engines, and the vessel remained moored to the wharf, the master saying to the agent he would pay for any damage she might do. The storm came on, and the propeller, by pounding against the wharf, and otherwise, damaged the same to the amount of $154.45.

H. B. Brown, for libellants.
W. A. Moore, for claimants.

LONGYEAR, District Judge. The only question in this case is whether a lien exists and a libel in rem can be maintained against the propeller for the injury and damage complained of. The criterion of admiralty jurisdiction in cases of tort is locality. That is, the injury must be done on maritime waters, or, as applied to the lakes and to rivers, navigable waters. Lake Huron comes within this category. Therefore, if the injury done to the wharf may be considered as done upon the waters, the libel will lie. If, on the contrary, a wharf is to be considered as land, as real estate, or on the land, or in fact the shore, then the libel will not lie. It is of no consequence that the damage was done by a maritime thing, the vessel, if it was not also done upon the water. The Plymouth, 3 Wall. [70 U. S.] 20; Ransom v. Mayo [Case No. 11,571]; [Philadelphia, W. & B. R. Co. v. Philadelphia & H. G. Towboat Co.] 23 How. [64 U. S.] 215.

The English cases cited by libellants' advocate (The Uhla, reported in a note to The Sylph, L. R. 2 Adm. & E. 28; The Excelsior, Id. 268; The Sylph, Id. 24) may all be dismissed with the single remark, that they are referable to an act of parliament known as the admiralty court act of 1861, by which jurisdiction in the admiralty is expressly conferred in case of "any claim for damage done by any ship," etc., and in regard to which Dr. Lushington, in the case of The Uhla, remarked: "I take it to mean any case of damage done by a ship; there is no limitation, no restriction expressed." These cases, therefore, throw no light upon what is maritime law upon the subject. Mr. Parsons, in his work on Shipping and Admiralty, at page 599, says, "It not unfrequently happens that vessels are injured, or cause injury, by striking upon wharves, or coming into contact with incumbrances in the docks beside or between the wharves. Such cases give rise to questions concerning the rights, duties, and liabilities of the vessels, or their owners, on the one hand, and of the owners of the wharves, on the other." He then cites several cases in which actions have been entertained in the courts of common law in the United States, but none in the admiralty, for injuries of this character. No case of this character in the admiralty courts of the United States was cited upon the argument, and it is believed that, aside from the English cases referred to, none can be found in the books. It is clearly a case of first impression, so far as any reported adjudicated cases in this country are concerned. May we not apply the language of Justice Nelson in the case of The Plymouth, 3 Wall. [70 U. S.] 35-37, in regard to a similar dearth of reported cases in that case, and assume with him that the reason of it is, that the case "is outside the acknowledged limit of admiralty cognizance over marine torts, among which it has been sought to be classed," and that "the remedy for injury belongs to the courts of common law?"

There are, however, several reported adjudications of the courts in this country from which we may derive aid in determining this question. In the case of The Plymouth, 3 Wall. [70 U. S.] 20, the packing-houses, for the loss of which by fire negligently communicated by a vessel lying at the wharf, a libel in rem had been filed, stood wholly upon the wharf, and the supreme court held that the damage done by their destruction was a damage done wholly on land (pages 33, 36), that the remedy belonged to the courts of common law, and dismissed the libel. In that opinion the wharf is spoken of in the same connection with the buildings, and evidently as of the same character. In the Rock Island Bridge Case, 6 Wall. [73 U. S.] 213, 216, Justice Field, in delivering the opinion of the court, makes use of the following language: "A maritime lien can only exist upon things which are the subjects of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers, and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind. Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense the subjects of maritime lien." And why not? Clearly, because they are fixed and immovable—in fact, real estate—and are not the subjects of commerce on the high seas or navigable waters. They

are, in fact, here spoken of as contradistinguished from such subjects. Not that they may not, in some sense, be subjects of commerce, but that they are not such on the waters, in the sense in which admiralty jurisdiction attaches. Being fixed and immovable—in fact, real estate—and not being subjects of commerce on the water, how can an injury to a wharf be said to be an injury done on the water? The place or locality of the injury is the place or locality of the thing injured, and not of the agent by which the injury is done. The Plymouth, supra.

In the case of Russel v. The Empire State [Case No. 12,145], my predecessor, in an able opinion, held, and no doubt correctly, that a wharf built at the terminus of a street is but an extension of the street, and subject to the same easements, rights and liabilities of a street or public highway, and nothing more. So, by parity of reasoning, a wharf, constructed by an individual proprietor, is but an extension of the shore, and as such subject to the same rights and liabilities as any real estate, so far as trespasses or other torts upon it are concerned. It is for the convenience of commerce, it is true, but in the same sense any other improvement of the shore for the same purpose would be. In the case of Russel v. The Asa R. Swift [Case No. 12,144], the same learned judge says: "He" (the owner of a wharf) "is only a lessor for the time being of a part of his real estate, to be used as a moorage." No language can be plainer, and, I think, no conclusion sounder. The case of Philadelphia, W. & B. R. Co. v. Philadelphia & H. G. Tow-Boat Co., 23 How. [64 U. S.] 209, was a libel in personam by the tow-boat company for an obstruction to navigation on navigable waters, an injury having resulted therefrom to one of the boats of the company. The obstruction was was no part of a bridge, wharf, or any structure whatever. The spile had been driven there for engineering purposes in building a bridge. When work on the bridge ceased, its uses and purposes were at an end, and it was cut off below the surface of the water, and the stub was left standing, and became a simple obstruction to navigation, and nothing more nor less, the same to all intents and purposes as any obstruction to navigation without authority, right or legal purpose whatever. Id. 216. There the injury was done to the vessel on navigable waters. Here it was done to a fixed and permanent structure, real estate, and to all intents and purposes on the land, as held by the supreme court in the case of The Plymouth, cited supra. If the action in this case was against the wharf owners for an obstruction to navigation caused by their structure, and an injury resulting therefrom to a vessel, upon the water, it would be more nearly analogous to the case last cited from 23 How. But even then the two cases would not be alike, because in the one case the obstruction was no part of any structure whatever, for the purposes of commerce or otherwise, while in the other it is an improvement of the shore by extending it out over the water to aid and facilitate commerce.

Upon a careful consideration of the question, and of the authorities bearing upon it, I must hold that a wharf is but an improvement or extension of the shore; that it is real estate, and that an injury done to it, whether through negligence or design, no matter by what agency, is an injury done wholly on land and not on the water, and, therefore, does not constitute a marine tort. It necessarily follows that the remedy for such injury cannot be sought in the admiralty, but must be found in the courts of common law.

Libel dismissed.

See The Neil Cochran [Case No. 10,087].

Case No. 10,617.

The OTTAWA.

[1 Lowell, 274.] [1]

District Court, D. Massachusetts. July, 1868.

SALVAGE — WHO MAY BE SALVORS — THE FUND — LIGHT-HOUSE KEEPER — OWNERS SHARE SALVAGE WITH CREW — OWNER OF OXEN USED IN SALVAGE SERVICE.

1. It is a general rule in salvage that all persons who give any personal assistance in saving the property are salvors. Another general rule is, that the ship, cargo, freight, &c., saved make one fund or subject of salvage.

2. Thus, where A. discovered a wreck, and with two others whom he procured took active and successful measures towards saving the spars, tackle, and rigging, and several other persons afterwards exerted themselves in the same service, and these others on the next day went on board the disabled vessel, or on board the vessels which had come to her assistance, and did whatever was found necessary, the vessel being actually saved by a steamer, *held*, that A., who staid on shore the second day, could not be decreed a salvor of the tackle, spars, and rigging only, but was entitled to come in with the others against the common fund, he bringing into the fund the value of the spars, &c., which had been set apart for his benefit.

3. The keeper of a light-house is under no obligation to render salvage services gratuitously.

4. A person whose oxen are used in a salvage service does not thereby become a salvor. Owners of vessels whose crews perform salvage service share the salvage compensation, not because their vessels are used, but as an encouragement to permit their use or the use of the men.

The brig Ottawa with a valuable cargo was anchored in a dangerous position, in Vineyard Sound, near the breakers at the island of Cuttyhunk, on the night of 7–8 April, 1868, and in a very severe gale was partly dismasted, and was abandoned by her crew. S. A. Smith, keeper of the light-house on the island, discovered a part of her tackle and

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

rigging floating near the shore, at about one o'clock that night, and attempted to give notice to Captain Church, a man of skill and experience in such matters; but he was away from home. He did notify two men, and with them made the rigging fast to the shore, so that it could be afterwards saved. Later in the day several other inhabitants of Cuttyhunk gave assistance, and by their labor, and that of Captain Church's oxen, the floating materials were all dragged on shore, and fully and finally saved. This was Wednesday; and the gale continued all that day. Two of the libellants went in a pilot-boat to New Bedford, and engaged a steamer, which tried in vain to reach the brig that day, but did so at an early hour on Thursday morning, when most of the libellants went on board either of the brig, the steamer, or the pilot-boat; and the anchor was weighed, and the brig was towed safely to New Bedford, and repaired.

The tackle, spars, and rigging which had been saved from the water were stored in Captain Church's barn, and were by him restored to the agent of the underwriters, who paid him one-half their value, namely, one hundred and fifty dollars. Captain Church rendered no personal services in saving any of the property. Mr. Smith did not go on board the brig, or render any personal services after Wednesday. All the persons engaged in the service, excepting Smith, filed a libel against the brig and her cargo, April 18, 1868, and the warrant was made returnable May 1. Before the return day, but after due claim had been made, the underwriters agreed with the salvors that five thousand five hundred dollars should be paid in full, with costs; but before the money was paid they were notified that Mr. Smith claimed to be a salvor. Thereupon the money was paid to the libellants' proctor, Mr. Crapo, upon the agreement that he should retain it until Mr. Smith's rights were ascertained and disposed of. The vessel and cargo had already been released, and the libel was dismissed by consent. Some negotiations were had, but no result was reached; and on the 18th of June the original libellants applied by petition to this court, reciting generally the above proceedings and agreements, and averring that Smith was not a salvor, and asking that he might be cited in to show cause why distribution should not be made among the original libellants, and that Mr. Crapo might be cited to show why he should not pay over the money. Upon the filing of this petition, the order dismissing the libel was rescinded by agreement of the libellants and the claimants, leaving open the question of amount of salvage as well as the distribution. On the 16th of July, which was a time agreed on by the parties, Smith appeared and filed a statement of his services in the form of an answer to the petition, and a hearing was had, at which it was agreed that the amount already paid was the just and true amount of salvage; and evidence and arguments were heard on the question whether Smith and Church were salvors.

T. M. Stetson, for Smith and Church.
W. W. Crapo, for original libellants.

LOWELL, District Judge. The amount of salvage has been agreed, and the particulars of the distribution are not submitted to me; but the questions which are submitted are questions of distribution. It is the general rule in salvage that all persons aiding in the service, however slightly, are salvors. The exceptions are when the services are insignificant and hardly amount to personal exertion, such as sending other men to work, and the like. This case appears to fall within the general rule. Mr. Smith performed some part of the work, and aided in giving the notice and information. Although he did not go off to the vessel on the second day, and gave no personal assistance in saving her, but only in the rescue of her tackle and apparel, yet the evidence shows clearly that many of those who did go from the shore, and who are properly joined in the libel, were not needed, and that several of them in fact performed no work at all, excepting such as Smith did in saving the materials. Indeed, there was little to be done by the men from Cuttyhunk on the second day, except to get up the anchor, and get out and make fast the tow-line.

The great merit of the salvage, so far as the inhabitants of the island are concerned, was in getting the news to the steamer promptly, and procuring her assistance. But only two of the salvors were actually engaged in this service.

There is some reason to suppose that the ill feeling may have arisen out of an attempt on the part of Smith to monopolize the benefits of the discovery he had made. If he made the attempt, it was not successful. The others aided during Wednesday, and his services during that day entitle him to be considered one of the salvors. The objection that he is in the employment of the government cannot avail. The vessel saved was not the property of the government; and no law or order has been show requiring the keepers of light-houses to render gratuitous services beyond the line of their ordinary employment as such keepers. Such a law does apply under some circumstances to the officers and crews of our revenue-cutters, whose duty includes, by statute, certain services of this nature.

I find that the property saved was the vessel and her tackle; that the whole must be considered a common fund and a common service, and that the libellants are not justified in severing them and proceeding against the vessel alone, without mention of the articles belonging to her which were saved on and near the shore, and by that suppression making a libel which is substantially untrue.

The money received for the tackle must be brought into the common fund, and Smith must be admitted as one of the salvors. I repeat that there is no question before me concerning the amounts which the several salvors shall have.

Captain Church, whose oxen were used, is entitled to a fair compensation for their use; but they cannot be salvors, nor make him one. Vessels are the only exception to the rule that the supply of tools or other things does not constitute their owner a salvor: The Charlotte, 3 W. Rob. Adm. 72; The Vine, 2 Hagg. Adm. 1. This exception stands on grounds of public policy; and the salvage compensation does not depend on any actual use of the vessel. It is a premium for permitting the service to be performed by the crew of the vessel, or by the vessel itself, as the case may be.

OTTAWA (HACKETT v.). See Case No. 5,889.

OTTAWA, The (UNITED STATES v.). See Case No. 15,976.

Case No. 10,618.

OTTERIDGE v. THOMPSON.

[2 Cranch, C. C. 108.] [1]

Circuit Court, District of Columbia. Dec. Term, 1814.

RESIDENT ALIENS—COMPETENCY TO MAINTAIN PERSONAL ACTION.

An alien enemy, resident here by license of the government of the United States, is competent to maintain a personal action; and if residing here before the war, as a mechanic, and continuing so to reside until the time of bringing suit, the jury may presume that he was remaining here under the permission and license of the government; although he had not reported himself according to the president's proclamation.

Assumpsit. Plea, alien enemy. Replication that the plaintiff, at the time of the impetration of the writ, was resident in the United States, with the license of the government. General rejoinder, and issue.

Mr. Law, for plaintiff, said that the replication was according to a form in Story's Pleadings, and cited Wells v. Williams, 1 Ld. Raym. 282, 1 Salk. 46; Sparenburgh v. Bannatyne, 1 Bos. & P. 163, 165, and Clarke v. Johnson, 10 Johns. 59. It was proved that the plaintiff was a mechanic, and was here before the war, and continued to reside here until the action was brought.

Mr. Key, for defendant, objected that the defendant ought to have reported himself, according to the president's proclamation, in order to entitle himself to protection.

THE COURT, at the request of the plaintiff's counsel, instructed the jury that, from the circumstances above stated, they might presume that the plaintiff was residing here under the permission and license of the government, although he had not reported himself according to the proclamation.

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

OTTMAN (UNITED STATES v.). See Case No. 15,977.

Case No. 10,619.

OTTS v. JONES.

[2 Cranch, C. C. 351.] [3]

Circuit Court, District of Columbia. Oct. Term, 1822.

COSTS—PAYMENT OF JUDGMENT BY ONE DEFENDANT—EVIDENCE IN FAVOR OF DEFENDANT.

If there are several actions against the maker and indorser of a promissory note, and judgment for the debt and costs be rendered against the maker, who pays the same, the indorser will not be permitted to give evidence of such payment by the maker, until the costs be paid in the action against the indorser.

Assumpsit against the indorser of a promissory note. Judgment had been rendered against the maker, who paid it, with costs. Mr. Lear, for defendant, contended that the plaintiff could not recover costs in this case; but

THE COURT refused to permit the defendant to give evidence of payment since the suit was brought, until the costs should be paid in the present case.

The defendant then confessed judgment for costs.

Case No. 10,620.

The OUACHITA.

[Blatchf. Pr. Cas. 306.] [1]

District Court, S. D. New York. Dec. 31, 1862. [2]

PRIZE — FALSE DESTINATION ON THE PAPERS OF THE VESSEL—SPOLIATION OF PAPERS.

1. The entire cargo of the vessel was contraband of war, and was thrown overboard while she was being chased, before her capture; and her claimant was part owner of another vessel recently condemned in this court for a violation of the same line of blockade.

2. If the vessel arrested as prize was acting in violation of public law, she is amenable to trial and condemnation therefor in behalf of the United States, whether the persons or means employed in making the seizure had authority to make it or not. It is enough that the government comes into the national court demanding the condemnation of an offender; and the court never inquires whether the party or thing proceeded against has been regularly or irregularly brought under attachment or complaint.

3. Vessel condemned for an attempt to violate the blockade and to introduce into the enemy's country a cargo of articles contraband of war.

4. A motion to redeliver to the master his nautical instruments denied, he having been actively engaged in acts of hostility against the rights of the United States and the public law.

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

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

[2] [Affirmed in Case No. 10,621.]

In admiralty.

BETTS, District Judge. This vessel was captured at sea, near the coast of the Carolinas, October 14, 1862, having, during the chase of her by the United States steamer Memphis, thrown overboard, before capture, her cargo. The prize was sent to this port for adjudication, and was libelled in this court November 28, 1862. Thomas S. Begbie intervened and filed his claim to the vessel December 16, 1862.

1. He alleges that he is a British subject, and a resident of London, England.

2. He denies that the vessel is prize of war, and asserts that she was seized by the Memphis, a British merchant vessel, owned partly by the claimant and partly by Denny, another British subject and resident, and that the United States government had no rightful possession and ownership of the Memphis when she was used in the capture, but that she was unlawfully placed by the court at the disposal of the United States before her condemnation, and is not now fully condemned, the sentence being on appeal before the circuit court, and that, therefore, there was no legal seizure. A test oath to the claim was made by Captain T. S. Gilpin, December 3, 1862.

The vessel had on board a certificate of registry, executed at London, January 14, 1862, to Thomas Sterling Begbie, and an agreement with T. S. Gilpin, as master, and a crew, for a voyage of about twelve months, dated London, August 4, 1862, from London to British North America, the American States, &c., &c., to a final discharge in the United Kingdom. The register of the vessel has indorsed on its back a note of its deposit at the customhouse, St. George's, Bermuda, September 15, and its return to the master, September 20, 1862. There was also found on board a letter to the master, dated Nassau, August 26, 1862, from Benjamin W. Hart, giving instructions to him how to conduct his vessel to avoid the Yankee cruisers; and another letter to T. S. Begbie, dated October 3, 1862, without place or address or signature, likewise giving suggestions and cautions respecting United States cruisers molesting the vessel and voyage. There was on board a memorandum of cargo, specifying wholly articles contraband of war, dated October 3, 1862, but having no signature or place of execution written upon it. The prize was cleared at St. George's, Bermuda, September 30, 1862, bound for Havana. The papers above referred to are all that were produced from the vessel on her capture, and the prize-master states, in his deposition, that they are all that were found on board the prize. He further states that the vessel was chased from 6 a. m. to 3 p. m. before she surrendered. The master, on his examination, says, that when the vessel left Bermuda she had on board the ship's register, the shipping articles, a clearance, an invoice of cargo, one bill of lading, and the letter from Mr. Hart. He is unable to remember what other papers or letters were on board at the time, but says that none of those papers, and no papers connected with the vessel, were destroyed. The mate speaks of a log-book kept by him on board. The vessel was captured at sea, off the coast of the Southern states. The master says that it was in 32° north latitude, that he does not know the longitude, that he supposes she was from 150 to 200 miles off the coast, and that he had heard they were about opposite to Wilmington. The mate testifies that he supposes the vessel was 50 or 100 miles off the coast. The second mate says that he understood, at the time, that the capture was off Wilmington, but he was not told how far. If the master is correct in his representation of the latitude, the vessel was about opposite to Charleston; and if the longitude had been furnished by the log, or other competent proof, it could have been readily ascertained how near she had approached the land. At all events, it is manifest she must have been wide of any reasonable route from St. George's to Havana.

If this cause is appealed, it may merit more detailed reasoning in support of the decision to be rendered; but, as it is represented to the court upon these proofs and the argument of the respective counsel, I hold as follows:

1. The suspicion is impressive and cogent that the representation, in the clearance of the vessel, that the voyage was from St. George's, Bermuda, to Havana, was simulated and false, and that she was so immediately in a course towards blockaded ports as to justify the presumption that she was attempting to enter one of them.

2. All the ship's company were fully aware of the war and of the blockade of the ports towards which she was running.

3. The absence of the log-book, of the invoice of the cargo, and of the bill of lading, proved to have been with the vessel, affords, unexplained, vehement presumption of their intentional destruction or suppression by the ship's company.

4. The vessel was fitted out for the voyage at St. George's, her entire cargo being contraband of war; and it also appears, in the course of the evidence, that the owner of this vessel was also part proprietor of the Memphis, recently condemned in this court for an illegal violation of the same line of blockade.

The point made for the claimant, that the capture of this vessel by the Memphis is void at law, on the ground that the latter vessel was incompetent to be employed to that end or in that service, cannot be regarded as of any weight. She was captured by a vessel commanded and employed by the United States naval forces, and acting under its flag and authority. If the vessel arrested was acting in violation of public law, she is amenable to trial and condemnation therefor, in behalf of the United States, whether the person or means employed in making the seizure had authority to make it or not. It is enough

that the government comes into the national court demanding the condemnation of an offender; and the court never inquires whether the party or thing proceeded against has been regularly or irregularly brought under attachment or complaint. The government is entitled to have the violated laws vindicated by the punishment of the offender, without question as to the propriety of the acts or agencies used in bringing the offence to judgment. The Amiable Isabella, 6 Wheat. [19 U. S.] 1.

There must be a decree of condemnation and forfeiture of the vessel, for being employed in an attempt to violate the blockade of the ports of the Southern states, and to introduce therein a cargo of articles contraband of war.

NOTE. My impression is that the question raised between the parties about the surrender to the master of this vessel of the nautical instruments, as being his personal property, was deferred for further hearing. If a delay is not asked for by either party, the court is prepared to dispose of the point.

January 2, 1863, ordered, that the motion for the redelivery of nautical instruments to the master be denied, he having, as appears in proof, been actively engaged, on board of his vessel, in acts of hostility against the rights of the United States and the public law.

This decree was affirmed, on appeal, by the circuit court July 17, 1863. [Case No. 10,621.]

Case No. 10,621.

The OUACHITA.

[Blatchf. Pr. Cas. 652.] [1]

Circuit Court, S. D. New York. July 17, 1863.[2]

PRIZE—ATTEMPT TO VIOLATE BLOCKADE.

Decree of the district court, condemning vessel and cargo for an attempt to violate the blockade, affirmed.

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

In admiralty.

NELSON, Circuit Justice. The steamer Ouachita was captured, as prize, by the steamship Memphis, on the 14th of October, 1862, off the Southern coast, north of Charleston, S. C., in latitude 33° north, and longitude 77° 26′ west. At the time of her capture she was some 150 miles from land. When she was first discovered by the Memphis, she was only 50 or 60 miles from land. The Ouachita is owned by T. S. Begbie, a British subject, who is her claimant, and was commanded by T. S. Gilpin, also a British subject. She is a screw steamer of about 50 tons burden. Her voyage was from London to Havana. She left in ballast, in August, 1862, and was stopped at St. George's, Bermuda, where she took in a cargo of arms and ammunition for Nassau, consigned to a resident there, named Hart. The master had verbal directions from the owner, upon his arrival at Nassau, to deliver the vessel to Hart, together with whatever she had on board. Among the papers is a letter from Hart to the master, received by him while at Bermuda, in which the writer, after saying that he had been advised by the owner, Begbie, that the vessel would touch at that place, points out to the master the difficulties of escaping the United States vessels of war, in the passage to Nassau, and instructs him how to avoid them. When the master left London, some letters were delivered to him by the owner, which, on opening, he found to be instructions to report to a person by the name of Bowne, at Bermuda, who would supply him with whatever was needful. Another letter was an introduction to Hart, of Nassau, and was of like purport with the one to Bowne. Bowne was shipper of the arms and ammunition on board of the vessel, at Bermuda, for Nassau. There were no bills of lading or invoice or other papers usual in case of a bona fide shipment; the only papers being the register, the shipping articles of the crew, and the clearance. Verbal instructions were given by Bowne to the master to follow the directions of Hart at Nassau, both as to the vessel and cargo. There were some 35 tons of arms and ammunition on board. Soon after the discovery of the Memphis, on the morning of the 14th of October, the day of the capture, the Ouachita changed her course to the eastward, and, some hours after, finding that the Memphis gained on her, the master gave orders to throw the whole of the cargo overboard, which was done, with the hope of escaping, but she was overtaken and captured about 4 o'clock p. m. The master further states that he was chased by vessels under the command of Commodore Wilkes, when he left Bermuda, and escaped by running his vessel among the reefs. One of the crew, E. Young, first a cook on board and afterwards a hand before the mast, testifies that the Ouachita was bound from Bermuda to Charleston, S. C.; that the cargo consisted of Enfield cartridges, rifles, and gun caps; that the master applied to him and others of the crew to sign a paper by which to agree to run the blockade at Charleston, and offered £8 sterling if the vessel ran clear, and if not, three months' pay after capture.

I concur with the court below in the condemnation. It is impossible to doubt, upon the proofs, that the cargo was put on board the Ouachita with the intention of running the blockade of the southern coast of the Confederate States, and, especially, the blockade of the port of Charleston. The voyage from Bermuda to Havana was but a pretext. The vessel was, when captured,

1 [Reported by Samuel Blatchford, Esq.]

2 [Affirming Case No. 10,620.]

some six degrees north of Bermuda, and, when first chased, was within 50 or 60 miles off the coast. It is quite apparent that she was not in a course which would convey her to Nassau or Havana. The proofs also show that Begbie, the owner, was privy to, and, doubtless, originated the adventure.

Decree below affirmed.

OUACHITA COUNTY (UNITED STATES v.). See Case No. 15,919a.

Case No. 10,622.

In re OUIMETTE.

[1 Sawy. 47;[1] 3 N. B. R. 566 (Quarto, 140).]

District Court, D. Oregon. Feb. 21, 1870.

DEFENSES SEPARATELY PLEADED — SURPLUSAGE — DEMURRER — MOTION TO STRIKE OUT — TENDER NO DEFENSE TO PETITION IN BANKRUPTCY — PROMISSORY NOTE—WHEN NOT PAYMENT—PETITION—WHO MAY MAINTAIN.

1. Distinct defenses to a petition in bankruptcy should be separately pleaded.

2. A denial of the allegation in the petition respecting the insolvency of the respondent is a sufficient answer thereto, and a further statement as to the value of respondent's assets compared with the amount of his indebtedness, is surplusage and immaterial.

3. A demurrer is not the proper mode of objecting to irrelevant or immaterial allegations, or the mingling in one plea of distinct defenses, but a motion to strike out.

4. In a petition in bankruptcy, the debt and the act of bankruptcy constitute the cause of action, and the defense thereto may go to either or both of these matters, but if there are several defenses they must be separately pleaded.

[Cited in Risser v. Hoyt, 53 Mich. 198, 18 N. W. 617.]

5. A plea of tender can under no circumstances be a defense to a petition to have a debtor adjudged a bankrupt.

6. The mere delivery and receipt of the promissory note of the debtor or a third person does not constitute payment, but it must also appear that the creditor expressly agreed to take such note as payment.

[Cited in Re Morrill, Case No. 9,821; Re Parker, 11 Fed. 399; Gest v. Packwood, 34 Fed. 375.]

7. Where a creditor took the promissory notes of third persons from his debtor upon an agreement that they should be considered as taken in payment, if collectable, such creditor is bound to use ordinary means and diligence to collect such notes, and, if necessary, he must sue upon them.

8. A creditor whose debt is provable in bankruptcy, though not due, may maintain a petition to have his debtor declared a bankrupt.

In bankruptcy.

J. W. Whalley and Walter M. Thayer, for petitioners.

John H. Mitchell and Joseph N. Dolph, for respondent.

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

DEADY, District Judge. This petition is brought by S. A. Frankenau et al. and H. Rosenfeld et al. The petition states that on November 30, 1869, said L. H. Ouimette being indebted to the petitioners respectively in the sums of $157.45 and $144.54, on account of goods, etc., theretofore sold and delivered to said Ouimette, made and delivered to said petitioners his two promissory notes for sums respectively, payable to their several orders, sixty days after the date thereof, with interest at one per centum per month, and that said petitioners are still owners and holders of said accounts and notes, and that the sums aforesaid are respectively payable thereon. That on or about December 15, 1869, said Ouimette committed an act of bankruptcy: In that, said Ouimette being then insolvent, did sell and deliver all his stock of goods, then used by him in his business of merchant, at St. Louis, in the district aforesaid, the same being then and there of the value of $1,500, to Pierre & Mull of the place last aforesaid, in consideration of the relinquishment of a debt of $1,200 then due said Mull from said Ouimette, with interest, thereby to give a preference to said Mull; and with intent to hinder, delay and defraud his other creditors; and with intent to defeat and delay the operation of the bankrupt act. Wherefore the petitioners pray that Ouimette may be adjudged a bankrupt, etc.

On February 3, 1870, Ouimette appeared and answered the petition. The answer is long and rambling. Besides the specific denials of certain allegations in the complaint, it contains two or more supposed defenses to the petition, but neither these denials nor supposed defenses are separately pleaded, but on the contrary, form one continuous and mingled statement.

At common law the defendant was confined to a single plea consisting of a single matter of defense. Gould, Pl. 426. But this rule, sometimes operating unjustly, led to the enactment of the statute of 4 Anne, c. 16, § 4, which provided that the defendant, with leave of the court, might "plead as many several matters as he shall think necessary for his defense."

In the construction of this statute, it was held that it did not authorize the defendant to allege more than one defense in one plea. In other words, that each plea must still be single as at common law (Gould, Pl. 429, 430); and that it did not extend to dilatory pleas (Id. 431).

On this subject, the rule prescribed by the Code, in effect, coincides with the rule of the common law as modified by the statute of Anne. It provides that the answer shall contain a specific denial of each material allegation of the complaint controverted by the defendant, and a statement of any new matter constituting a defense or counter-claim; also, that the defendant may set forth by answer as many defenses and counter-claims as he may have; but they shall be separately stat-

ed and refer to the causes of action which they are intended to answer in such manner that they may be distinguished. Code Or. 156, 157.

After denying certain allegations in the petition respecting the indebtedness and the solvency of Ouimette and the commission of the act of bankruptcy, the answer "further alleges" that Ouimette "has property which he holds and owns in his own right over and above all debts and liabilities of the value of $2,000." Then follows an allegation by way of "further answering said petition," to the effect that on January 5, 1870, at the request of the petitioners, Ouimette delivered to petitioners the notes of third persons then held and owned by said Ouimette for the aggregate sum of $285.26 principal, with interest from various dates within the year 1869, with "the agreement that said petitioners should make inquiries as to whether said notes were collectable, and if so, they are to be received by said petitioners in payment of said notes of him, said Ouimette, to said petitioners;" and that said notes, with the exception of one for the sum of $52.26, with interest from March 16, 1869, "were good and collectable;" and that said "petitioners have never notified said Ouimette that said notes were not collectable," but have proceeded to collect said notes and have collected some portion of the same, but what amount he is unable to state.

Then follows an allegation to the effect that, on the day when the notes of the petitioners became due, Ouimette tendered to each of said petitioners the sum due on his note respectively in United States gold coin, upon condition that said petitioners would deliver to said Ouimette said notes and the notes by him "deposited" with said petitioners; but that said petitioners refused to deliver said Ouimette said notes, or either of them; and that said Ouimette "is still ready to pay said sum upon the surrender of his said notes and deposits the same with the clerk of this court, to be and remain a continuing tender upon the same conditions of the surrender of his said notes set forth in the petition and said notes deposited with said petitioners." As a conclusion it is then alleged, that "by reason of the facts aforesaid, the petitioners have elected to receive the said notes deposited as aforesaid in payment of Ouimette's said notes in the petition set forth, and that said notes are paid. Wherefore he prays that said petition may be dismissed," etc.

The petitioners, by their attorneys, demur to all the allegations in the answer following the specific denials of the allegations in the complaint, because "said matter constitutes no defense to the proceedings in bankruptcy herein," with special causes of demurrer also assigned.

The allegation as to the value of the property which the defendant "owns and holds" is simply surplusage and immaterial, and ought to be stricken out. But it is no cause for demurrer. Ouimette having denied the allegation that he was insolvent at the time of the sale of the goods to Pierre & Mull, should have rested there. Besides, if it were proper to set up the value of his assets as compared with his liabilities, to show thereby that he was not insolvent, it should have been pleaded separately.

The pleas of payment by the delivery of notes of third persons, and of tender in cash after petition filed, are run together as one story or transaction. They are distinct matters, and if defenses, distinct ones, and should have been pleaded separately, that is, so that each one would stand or fall by itself, without the aid of the other. On this account, this part of the answer should have been stricken out. But this objection not having been taken, for the purpose of this demurrer, these defenses or matters will be considered, in this respect, as if they had been properly pleaded.

To maintain an action to have one adjudged a bankrupt, it must appear from the petition, that the party proceeded against, owes debts provable under the bankrupt act, to the amount of $300, and at least $250 thereof to the petitioner or petitioners, and that such party has committed an act of bankruptcy. The debt and the act of bankruptcy taken together constitute the cause of action. The defense set up, may go to either or both of these matters, and there may be several defenses to each, but they must be separately stated.

The matters pleaded in the answer as a tender of the petitioner's debts after petition filed, are immaterial, and might have been stricken out as irrelevant. They constitute no defense to the action. If, as is alleged, Ouimette is insolvent, he has no right to tender or pay to these petitioners their debts in full. It would be a fraud upon his other creditors. Nor would the petitioners have any right to receive such proffered payments, because, having alleged the insolvency of Ouimette, they would be acting in violation of the bankrupt act, and run the risk of forfeiting their debts. On the other hand, if Ouimette did not commit an act of bankruptcy, of which insolvency is a material ingredient, it matters not, so far as this proceeding is concerned, whether he owes the petitioners or not, or whether he tendered them the amount due then or not. This is not an action to collect a debt, but to procure an adjudication of bankruptcy against Ouimette, and therefore a plea of tender of the amount due the petitioners, can, under no circumstances, be a defense to it. The allegation of the petition, is that the party is not only indebted to the petitioners, but that he committed an act of bankruptcy with intent to evade the law and to defraud them. To this, it is no sufficient answer to allege—true, but I now tender you the amount of your debts.

In the course of the argument, counsel for Ouimette suggested, that in the absence of any allegation to the contrary, the court might presume that the petitioners were his only creditors, and therefore, the tender might be lawfully made and received. But I do not think such a presumption would be according to the ordinary course in such matters, and therefore, it ought not to be made. If, in fact, there are no other creditors, and for that reason, a plea of tender would be a good defense to the action, the plea should have contained an allegation to that effect. The only ground upon which such a plea should be considered to constitute a defense would be, that payment by the alleged bank rupt, under such circumstances, could neither prejudice nor injure any one, and, therefore, no one could complain of it. But even then, I do not think such a plea ought to be held to be a good defense. The fact that there are no other creditors to be prejudiced by, and complain of the payment, cannot be presumed to be within the knowledge of the petitioners. Before they accept the tender, must inquire concerning it, and they may be mistaken. Besides, no understanding of the petitioners, or proceeding between them and the alleged bankrupt upon such question, could prevent third persons, who might be creditors, from asserting their rights as such.

Treating this portion of the answer as frivolous and immaterial, there remains to be considered the allegation, which in effect amounts to a plea of part payment in the promissory notes of third persons. It will be observed that the plea does not state whether or not these notes are negotiable, or whether or not they are endorsed by Ouimette to the petitioners. For the purposes of the demurrer, I will assume that the notes are negotiable, and that they were so transferred to the petitioners, as to authorize them to sue and collect them as owners.

There is no question but what, with the consent of the creditor, payment of a pre-existing debt, can be made in the promissory note of the debtor, or that of a third person. But there is some disagreement in the decisions as to what is sufficient evidence of such consent.

In Massachusetts it is held that the delivery and acceptance of the note is sufficient evidence that it was received in payment, and it will be so determined, unless it is clearly shown, that such was not the intention of the parties. Thacher v. Dinsmore, 5 Mass. 302; Maneely v. M'Gee, 6 Mass. 145; Ilsley v. Jewett, 2 Metc. [Mass.] 173.

In New York and other states and in the national courts, it is held that the mere delivery and receipt of the note do not constitute payment, but it must also appear that the creditor expressly agreed to take it as payment. Without such agreement being shown, the delivery of the note is only a conditional payment—a payment provided that the note is paid when it becomes due. It is, however, to be deemed an absolute payment if the creditor parts with or is guilty of negligence in presenting it for payment or the like; but it seems he is not bound to sue upon it. Tobey v. Barber, 5 Johns. 72; Johnson v. Weed, 9 Johns. 311; Booth v. Smith, 3 Wend. 68; New York State Bank v. Fletcher, 5 Wend. 87; Olcott v. Rathbone, Id. 492; Jones v. Savage, 6 Wend. 662; Lyman v. Bank of U. S., 12 How. [53 U. S.] 243; Downey v. Hicks, 14 How. [55 U. S.] 249. The latter rule is the one which must prevail in this court.

The delivery of the notes to the petitioners under the circumstances stated in the plea amounted to a conditional payment. If the notes were paid or collected according to their tenor, the debt of the petitioners would be paid and extinguished. If they were not so paid or collected, and the petitioners were not guilty of negligence in the premises, the delivery would amount to nothing.

The conditions upon which the notes were taken by the petitioners as stated in the plea, differ, I think, in one particular from those which the law would attach to the transaction in the absence of any special agreement between the parties.

The petitioners having agreed to take the notes as payment if they were collectable, thereby bound themselves to sue upon them if necessary to their collection. An agreement to take notes as payment if they are or prove collectable, implies something more than to so take them if they are paid. It is equivalent to an agreement to collect them, so far as the same can be done by the use of ordinary means and diligence.

I know it was said in the argument, that the petitioners only agreed to take these notes as payment if, upon inquiry, they found them collectable—that is, would admit or consent that they could be collected; and that until it appears that such consent was given, the delivery of the notes has no effect upon the rights of the parties whatever. Such may be the mere literal sense of the contract or condition as stated in the plea, but I do not think that it ought to be so interpreted or that the parties so understood it. If the notes were not to be considered payment unless the petitioners assented to the conclusion that they were collectable, they might, if they chose, refuse that assent when it was plain that the payers were solvent and abundantly able to pay them. If the notes were in fact collectable whatever the petitioners might say or do in the premises, from the date of their delivery they were so far payment of their debts.

Now it is averred in the plea that over $200 of these notes are collectable, and that the petitioners have collected part of them. If so, they are so far a payment of the petitioners' debts, and the balance being less than $100 would not be sufficient in amount to enable the petitioners to maintain this

action. This, it seems to me, is a good defense to the action, or matter in abatement of it.

It may be said that, although the notes are collectable, that the petitioners, having now knowledge of the insolvency of Ouimette, cannot collect them and apply the contents on their notes, without thereby taking a preference contrary to the act and running the risk of forfeiting their debts to the other creditors. But I do not think this argument sound. If the money due on the notes is received by the petitioners at any time, as between them and third persons, in contemplation of law it is received at the time of the delivery of the notes—the conditional payment. In other words, the actual receipt of the contents of the notes by the petitioners relates back to the conditional payment, and converts it into an absolute one. The question of preference then, in the receipt and collection of these notes by the petitioners, would have to be determined by the facts as they existed when the conditional payment was made. If as between the petitioners and third persons the former were justifiable in receiving these notes when they did in payment of their debts, then they became the owners of them, and their right to collect and receive the money on them at any subsequent time, cannot be affected by the fact that Ouimette has since become insolvent or that they have since learned or have good reason to believe that he was then insolvent.

The facts stated in the plea show a part payment of the petitioners' debts; and the sum remaining due—being less than $250—does not enable the petitioners to maintain this action. The plea is, therefore, a good defense to it and the demurrer must be overruled.

If this conditional payment has in fact turned out to be no payment, by reason of the notes proving worthless or uncollectable, notwithstanding the due diligence of the petitioners, they should reply to the plea, and on the trial of the issue produce the notes and surrender them to Ouimette.

It is not necessary to more than notice the allegation of the plea that the petitioners by refusing the alleged tender, then elected to take the notes as payment. At that time the petitioners were no more at liberty to receive the notes in payment than the cash. On the argument, counsel for Ouimette made the point, that the petitioners could not maintain this action, because it was brought before their debts were due. But this objection, if made at all, should have been made by demurrer to the petition. However, I am satisfied that the objection is not tenable, as a reference to the statute will show. By section 39 of the bankrupt act [14 Stat. 536] it is provided that "any person" * * * may "be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least $250." Section 19 provides: "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day * * * may be proved against the estate of the bankrupt."

These provisions seem to settle the question. The debts of the petitioners, although not then due, existed at and before "the adjudication of bankruptcy," and were therefore provable debts. Being provable debts they were sufficient to maintain the petition. An order will be entered overruling the demurrer, with leave to the petitioners to reply upon the payment of $5 costs.

OULD (HELLRIGLE v.). See Case No. 6,344.

OULTON (GERMAN SAVINGS & LOAN SOC. v.). See Case No. 5,362.

OUTERBRIDGE (UNITED STATES v.). See Case No. 15,978.

OVERHOLT (NORTHWESTERN MUT. LIFE INS. CO. v.). See Case No. 10,338.

Case No. 10,623.

OVERMAN v. PARKER et al.

[Hempst. 692.] [1]

Circuit Court, D. Arkansas. May, 1854.] [2]

JURISDICTION—BILL TO REMOVE CLOUD ON TITLE—TAX SALE—EVIDENCE OF LEGALITY.

1. The courts of the United States may entertain a bill or petition to remove clouds on the title.

[Cited in Ward v. Chamberlain, 2 Black (67 U. S.) 445.]

2. A tax deed is only prima facie evidence of the legality of the sale, and will be annulled in this proceeding if illegality appears.

3. In a sale of land for taxes, the purchaser must show every fact necessary to give jurisdiction and authority to the officer, and a strict compliance with all things required by the statute.

4. Under the statute of Arkansas, if it appears that the sheriff has not filed an oath as assessor on or before the 10th of January, and has not filed the original assessment on or before the 25th of March, and given notice thereof, as prescribed by law, no legal sale can be made for taxes, and the sale is void.

5. The case of Pillow v. Roberts, 13 How. [54 U. S.] 472, distinguished from this.

Petition to confirm tax sale, determined in the circuit court, before Hon. Daniel Ringo, district judge, holding said court; absent, the Hon. Peter V. Daniel, associate justice of the supreme court.

William Overman, at the September term, 1847, of the Dallas circuit court, state of Arkansas, filed his petition under the statute for the confirmation of a tax title, setting out the assessment of the tract of land for the

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

[2] [Affirmed in 18 How. (59 U. S.) 137.]

taxes of 1845 as the property of Robert A. Parker, which, with penalty and costs, amounted to six dollars and seventy-eight cents; that the taxes were unpaid, and that the land was sold in due form of law, setting forth how, by whom, and when; that the same not being redeemed within the time prescribed by law, a tax deed was obtained regularly, and notice given that a confirmation would be applied for, and the notice and deed were exhibited with the petition. Robert A. Parker and Miles White, alleging themselves to be citizens of the states of Tennessee and Maryland, made themselves defendants to resist the confirmation; and on their petition for that purpose, the case was removed into the circuit court of the United States for the Eastern district of Arkansas, under the act of congress in that behalf. Parker and White answered the petition, setting up several irregularities in the sale, and among others, that there was no lawful assessment of the land, and specifying the illegality complained of. Proof was taken in the cause, and came on for final hearing on the 2d of May, 1854, and was argued by—

James M. Curran and George A. Gallagher, for petitioner.

Pleasant Jordan, for defendants.

THE COURT decreed, that the title of, in, and to the tract of land, namely, section thirty, township nine south of range fifteen west of fifth principal meridian, containing 696 acres, do pass and be confirmed to, and vest in William Overman and his heirs and assigns for ever, in fee-simple, free, clear, and discharged from the claim of said defendants and all persons whomsoever, and that the sale thereof for taxes be in all things confirmed, and the defendants be perpetually enjoined from setting up or asserting any claim thereto, and that the title of said Overman be granted and assured, and that he recover costs from the defendants.

NOTE. From this decree the defendants appealed to the supreme court of the United States, it appearing that the land in controversy was worth more than two thousand dollars, and security for the appeal was given according to law.

At the December term, 1855, the supreme court reversed the decree, and declared the tax sale contrary to law and void. The case is reported in [Parker v. Overman] 18 How. [59 U. S. 137].

GRIER, Circuit Justice. As some doubts were entertained and have been expressed by some members of the court, as to its jurisdiction in this case, it will be necessary to notice that subject before proceeding to examine the merits of the controversy. It had its origin in the state court of Dallas county, Arkansas, sitting in chancery. It is a proceeding under a statute of Arkansas, prescribing a special remedy for the confirmation of sales of land by a sheriff or other public officer. Its object is to quiet the title. The purchaser at such sales is authorized to institute proceedings by a public notice in some newspaper, describing the land, stating the authority under which it was sold, and "calling on all persons who can set up any right to the lands so purchased, in consequence of any informality, or any irregularity or illegality connected with the sale, to show cause why the sale so made should not be confirmed." In case no one appears to contest the regularity of the sale, the court is required to confirm it, on finding certain facts to exist. But if opposition be made, and it should appear that the sale was made "contrary to law," it became the duty of the court to annul it. The judgment or decree in favor of the grantee in the deed operates "as a complete bar against any and all persons who may thereafter claim such land, in consequence of any informality or illegality in the proceedings." It is a very great evil in any community to have titles to land insecure and uncertain; and especially in new states, where its result is to retard the settlement and improvement of their vacant lands. Where such lands have been sold for taxes, there is a cloud on the title of both claimants, which deters the settler from purchasing from either. A prudent man will not purchase a lawsuit, or risk the loss of his money and labor upon a litigious title. The act now under consideration was intended to remedy this evil. It is in substance a bill of peace. The jurisdiction of the court over the controversy is founded on the presence of the property; and, like a proceeding in rem, it becomes conclusive against the absent claimant, as well as the present contestant. As was said by the court in Clark v. Smith, 13 Pet. [38 U S.] 203, with regard to a similar law of Kentucky: "A state has an undoubted power to regulate and protect individual rights to her soil, and declare what shall form a cloud over titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country. The state legislatures have no authority to prescribe forms and modes of proceeding to the courts of the United States; yet having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed be substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state court." In the case before us, the proceeding, though special in its form, is in its nature but the application of a well-known chancery remedy; it acts upon the land, and may be conclusive as to the title of a citizen of another state. He is therefore entitled to have his suit tried in this court, under the same condition as in other suits or controversies. In the petition to remove this case from the state court, there was not a proper averment as to the citizenship of the plaintiff in error; it alleged that Parker "resided" in Tennessee, and White in Maryland. "Citizenship" and "residence" are not synonymous terms; but as the record was afterwards so amended as to show conclusively the citizenship of the parties, the court below had, and this court have, undoubted jurisdiction of the case. What we have already stated sufficiently shows the nature of the present controversy. The decree appealed from "adjudges the absolute title to the land to pass and be confirmed to and vest in said William Overman, his heirs, &c., free, clear, and discharged from the claim of said defendants, and all persons whatsoever; and that the said sale thereof for taxes so made by the sheriff of Dallas county to said Overman is hereby confirmed in all things, and said defendants perpetually enjoined from setting up or asserting any claim thereto," &c.

The plaintiffs in error allege that this decree is erroneous, and should have been for defendants below. Much of the argument of the learned counsel in this case was wasted on the effect to be attributed to the recitals in the deed, and the decision of this court in the case of Pillow v. Roberts, 13 How. [54 U. S.] 472. That was an action of ejectment, in which this court decided that under the ninety-sixth section of the revenue law, the sheriff's or collector's deed was made prima facie evidence of the regulari-

ty of the previous proceedings. The effect of that section of the act, and of the decision in that case, was to cast the burden of proof of irregularity in the proceedings on the party contesting the validity of the deed; but as the present controversy is for the purpose of giving an opportunity "to all persons who can set up any right or title to the land so purchased, in consequence of any informality or illegality connected with such sale," to contest its validity, it would be absurd to make the deed, whose validity is in question, conclusive evidence of that fact. Consequently, the statute enacts, that in this proceeding, "the deed shall be taken and considered by the court as sufficient evidence of the authority under which said sale was made, the description of the land, and the price at which it was purchased. The deed is to be received as prima facie evidence of these three facts, and casts the burden of proof as to them on the defendant. The term "sufficient" is evidently used in the statute as a synonym for "prima facie" and not for "conclusive."

In judicial sales under the process of a court of general jurisdiction, where the owner of the property is a party to the proceedings, and has an opportunity of contesting their regularity at every step, such objections cannot be heard to invalidate or annul the deed in a collateral suit. But one who claims title to the property of another under summary proceedings where a special power has been executed, as in case of lands sold for taxes, is bound to show every fact necessary to give jurisdiction and authority to the officer, and a strict compliance with all things required by the statute. The principal objection to the regularity of the sale in this case, and the only one necessary to be noticed, is, that the land was not legally assessed. A legal assessment is the foundation of the authority to sell; and if this objection be sustained, it is fatal to the deed. In order to qualify the sheriff to fulfill the duties of assessor, the statute requires, that "on or before the 10th day of January, in each year, the sheriff of each county shall make and file in the office of the clerk of the county an affidavit in the following form," &c. "And if any sheriff shall neglect to file such affidavit within the time prescribed in the preceding section, his office shall be deemed vacant, and it shall be the duty of the clerk of the county court, without delay, to notify the governor of such vacancy," &c. The statute requires, also, "that on or before the 25th day of March, in each year, the assessor shall file in the office of the clerk of the county the original assessment, and immediately thereafter give notice that he has filed it," &c. This notice is required, that the owner may appeal to the county court "at the next term after the 25th day of March, and have his assessment corrected if it be incorrect." If the assessor shall fail to file his assessment within the time specified by this act, he is deemed guilty of a misdemeanor, and subjected to a fine of five hundred dollars.

These severe inflictions upon the officer for his neglect to comply with the exigencies of the act, indicate clearly the importance attached to his compliance in the view of the legislature, and that a neglect of them would vitiate any subsequent proceedings, and put it out of the power of the sheriff to enforce the collection of taxes by a sale of the property. The record shows that Peyton S. Bethel, the then sheriff of the county of Dallas, did not file his oath as assessor on or before the 10th of January, as required by law. He did file an oath on the 15th of March; but this was not a compliance with the law, and conferred no power on him to act as assessor. On the contrary, by his neglect to comply with the law, his office of sheriff became ipso facto vacated, and any assessment made by him in that year was void, and could not be the foundation for a legal sale. The neglect also to file his assessment and give immediate notice on the 25th of March, so that the purchaser might have his appeal at the next county court, was an irregularity which would have avoided the sale even if the assessment had been legally made. The statute makes the time within which these acts were to be performed material; and a strict and exact compliance with its requirements is a condition precedent to the vesting of any authority in the officer to sell.

We are of opinion, therefore, that the sale of the land of the appellants was "contrary to law;" and that the deed from Edward M. Harris, sheriff and collector of Dallas county, to William Overman, set forth and described in the pleadings and exhibits of this case, is void, and should be annulled.

Case No. 10,624.

OVERMAN v. QUICK.

[8 Biss. 134;[1] 17 N. B. R. 235; 10 Chi. Leg. News, 210.]

Circuit Court, D. Indiana. Jan., 1878.

CHATTEL MORTGAGE—POSSESSION—FRAUD—AGENCY.

1. In Indiana a mortgage of a stock of goods, with a parol agreement that the mortgagor should have possession and sell them in the usual course of his retail business, and apply the proceeds of the sale to the payment of the mortgage debt, is not fraudulent and void as against creditors of the mortgagor.

2. The mortgagor is, in effect, the mortgagee's agent for the sale of the goods.

[This was an action by David Overman, assignee, against John H. Quick.]

Turpie & Pierce, for plaintiff.
Ben. Davis, for defendant.

GRESHAM, District Judge. On the 21st day of January, 1876, John H. Quick, administrator of the estate of John S. Rockafeller, deceased, sold to Charles Brown, in pursuance of an order in the circuit court of the state, a certain lot of dry goods for five thousand two hundred and forty-four dollars, for which sum the purchaser, on the day of sale, gave his four equal promissory notes, payable, in six, nine, twelve and fifteen months respectively. Payment of these notes was secured by a chattel mortgage executed by the purchaser at the time of sale on the stock of goods. Brown is a citizen of Upland, Grant county, Indiana, and the sale was at Brookville, Franklin county, Indiana, the residence of Quick. Before receiving the goods, Brown informed Quick that he was going to add them to his stock at Upland, and sell them in the usual course of his retail business. Brown agreed, before Quick parted with the goods, that he would apply the proceeds of the sale to the payment of the notes, even before maturity, if he realized fast enough. He also agreed to collect several outstanding claims due him, and apply the money on this indebtedness. But there was no agreement that the goods should be kept separate from other goods, or that the

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

proceeds of the goods should be kept distinct from other moneys. The agreement was general, to pay the debts from the proceeds of the sale of the goods and collections from outstanding debts as soon as possible, even before maturity, if money was received fast enough. On this agreement Quick shipped the goods, and when received, Brown mingled them with his stock on hand and sold indiscriminately, keeping no separate accounts as to proceeds. Quick paid no further attention to the goods or his contract with Brown, until the 21st of July, 1876, when he inquired by letter, why the first note was not paid, and was informed in reply that owing to the slow sales, and difficulty in making collections, the money was not on hand. Notwithstanding default in payment of the note first due, Brown was permitted to retain possession of the goods, and deal with them precisely as before, until some time in September—just a few days before Brown went into bankruptcy—when Quick went to Marion, the county seat of Grant county, and placed the notes and mortgage in the hands of an attorney with instructions to foreclose. The first note has gone into judgment; the other three are in evidence. No part of the indebtedness to Quick has been paid. The proceeds arising from the sale of part of the goods, Brown, in violation of his agreement, applied on his other indebtedness, or in the purchase of other goods. Brown was adjudged a voluntary bankrupt in September, 1876. The mortgaged goods still on hand, which the assignee was able to identify, were appraised at four thousand four hundred dollars, and by the order of this court were sold by the assignee, and the question in dispute transferred to the proceeds. The master, to whom the case was referred, reported that the mortgage was fraudulent and void, and that the prayer of the plaintiff's bill asking that it be set aside ought to be granted. The defendant filed exceptions to the master's report.

The Indiana statute of frauds declares, that no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, when such goods are not transferred to the mortgagee or assignee, and retained by him unless such assignment or mortgage is acknowledged and recorded in the recorder's office of the county where the mortgagor resides, within ten days after its execution; and the question of fraudulent intent is in all cases to be deemed a question of fact. 1 Davis' Rev. Stat. 505.

On its face there is no objection to this mortgage, but it is claimed that the verbal agreement allowing Brown to retain possession of the goods and mingle them with his stock on hand at Upland, and dispose of them in the usual course of business without keeping any separate account of sales, rendered the instrument void. The case of Robinson v. Elliott, 22 Wall. [89 U. S.] 513, which went up from this district, is cited in support of this position. In that case the mortgage was given to secure an antecedent debt, and by its terms allowed the mortgagor to retain possession of the goods and dispose of them in the usual course of business, as before, for his own benefit. The proceeds were not to be applied on the mortgage debt. The goods were to be sold for the benefit of the mortgagor, and not for the benefit of the mortgagee. The instrument, therefore, instead of being a security for the mortgagee, was simply a shield for the mortgagor against his other creditors. It could have no other effect. Such an instrument is not intended to perform the office of a mortgage, and is not a mortgage. In the case before us the mortgage on its face is free from objection; but after its execution, and before the goods were shipped from Brookville, it was agreed that the mortgagor should add them to his stock in trade at Upland, and sell them first for the benefit of the mortgagee. The agreement was to apply the proceeds to the payment of the notes, even before maturity, if sales were brisk enough. If, in fact, that was the agreement of the parties, and there was no intention thereby to hinder or delay other creditors, the statutes of this state were not violated. It is not claimed by the plaintiff that there was any actual intention on the part of either Quick or Brown to defraud any one by this arrangement. The plaintiff's position is that the agreement was in itself fraudulent, and that was the view of the master.

In delivering the opinion of the court in the case of Robinson v. Elliott [supra], Justice Davis said: "We are not prepared to say that a mortgage under the Indiana statute would not be sustained, which allowed a stock of goods to be retained by the mortgagor and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors." Brown was, in effect, Quick's agent for the sale of the goods; if he violated his agreement by neglecting to pay over to Quick the proceeds of the sales, and misapplied them, it is Quick's loss. Brown's creditors have no right to complain if the proceeds of the goods sold, are credited on Brown's indebtedness to Quick. It was all the same to them whether Brown sold the goods and paid the money to Quick or misappropriated it. In either case Quick is charged with the value of the goods sold as between him and Brown's other creditors.

Quick, in good faith, took a mortgage on the goods sold to secure the purchase money, at the same time authorizing Brown to sell the goods and account to him for the proceeds to the extent of the four notes. Brown sold part of the goods, but failed to account to Quick for the proceeds, and went into voluntary bankruptcy. Now, it would be manifestly inequitable to say that Quick should

not be allowed to take back the goods still on hand and capable of being identified.

I think the proceeds of the goods remaining unsold at the time the assignee came into possession should go to Quick, and that he should be allowed to prove against Brown's estate as an unsecured creditor for the goods sold by Brown and misappropriated, on surrendering the notes and mortgage.

NOTE. See, further, that a clause in a chattel mortgage, allowing the mortgagor to retain possession and sell the goods for the mortgagees as their agent, and to account to them for the proceeds, is valid. Hawkins v. Hastings Bank [Case No. 6,244]. But that in Illinois, a chattel mortgage authorizing the mortgagor to sell the property mortgaged, is void as against creditors. In re Forbes [Id. 4,922]; Davis v. Ransom, 18 Ill. 396; Barnet v. Fergus, 51 Ill. 352. See, also, In re Stephens [Id. 13,365]; Bowen v. Clark [Id. 1,721]; In re Morrill [Id. 9,821].

Case No. 10,625.

In re OVERTON.

[5 N. B. R. 366.][1]

District Court, N. D. New York. May 15, 1871.

BANKRUPTCY — APPOINTMENT OF ADDITIONAL ASSIGNEE—APPLICATION TO CONTEST A CLAIM.

1. An additional assignee may be appointed to act in conjunction with the one previously appointed, upon a petition to the court showing sufficient reasons for so doing.

2. An application to contest a claim against bankrupt's estate will be allowed upon a petition and affidavits stating fully and in detail the grounds upon which such application is based.

In bankruptcy.

I. E. L. Hamilton and Wadsworth & White, for petitioning creditor.

HALL, District Judge. On reading and filing the petition of Elizabeth P. B. Overton, and the affidavits thereto annexed, it is hereby ordered and adjudged, that it is expedient that an additional assignee of said bankrupt should be appointed herein, and that Hon. Charles Mason, of the city of Utica, be and he hereby is appointed an additional assignee to act herein in conjunction with Parker N. Teft, heretofore appointed assignee in this matter, on his giving security in the sum of five thousand dollars for the faithful performance of his trust, the same to be approved by William H. Comstock, register in bankruptcy. And it is further ordered, that the petitioner be allowed to renew the application to contest the claim of the Howe Machine Company, and for an order for the disallowance and rejection thereof upon a petition and papers stating fully and in detail the grounds upon which such application may be based.

OVERTON (BROWN v.). See Case No. 2,024.

[1] [Reprinted by permission.]

Case No. 10,626.

OVERTON et al. v. GORHAM et al.

[2 McLean, 509.][1]

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

REMOVAL FROM OFFICE—NOTICE.

[Cited in U. S. v. Bank of Arkansas, Case No. 14,515, to the point that in removal from office notice is not necessary to effect such removal.]

[This was a proceeding by Overton and King against Gorham and Durley.] A judgment having been obtained in this case, at a previous term, an execution was issued and levied by the late marshal on real estate, which was sold by him after giving due notice. After the levy and before the sale, the late marshal was removed from office and a successor appointed; but before the sale he was not notified of his removal, nor of the appointment of his successor. On this state of fact, a motion was made by Mr. Hatton, in behalf of the purchaser of the land, to set the sale aside on the ground that the late marshal, having been removed from office, had no right to sell.

BY THE COURT. By the twenty-eighth section of the act of the 24th September, 1789 [1 Stat. 87], it is provided that "every marshal or his deputy when removed from office, or when the term for which the marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively, at the time of such removal or expiration of office; and the marshal shall be answerable," &c. The 3d section of the act of 7th of May, 1800 [2 Stat. 61], provides "that where a marshal shall take in execution any lands, tenements or hereditaments, and shall die, or be removed from office, or the term of his commission expire before sale, or other final disposition made thereof, the like process shall issue to the succeeding marshal, and the same proceedings shall be had as if such former marshal had not died or been removed, or the term of his commission had not expired." From this provision it is clear that the sale in this case was irregular. After his removal from office the marshal, under the act of 1789, has power to execute all such precepts as may be in his hands; but the act of 1800 provides that his successor shall sell the lands on which he has levied but not sold, before his removal. Notice to the late marshal of his removal was not necessary. His functions were terminated by the act of removal. The only doubt that arises is, whether the defendant should not have had notice of this motion. His rights may be affected by setting aside the sale. But as the provision of the act is peremptory, and the defendant cannot be notified without great in-

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

convenience and delay, and as his counsel in the judgment may object to the motion, the court will set aside the sale and order another execution to the present marshal. If any doubt could arise in the case, and it were possible to avoid this result, the court would not decide the motion until a personal notice had been served on the defendant, unless he appeared by counsel.

OVERTON (UNITED STATES v.). See Case No. 15,979.

Case No. 10,627.

In re OWEN.

[The case reported under above title in 8 N. B. R. 6, is the same as Case No. 9,968.]

Case No. 10,628.

OWEN et al. v. BLANCHARD.

[2 Cranch, C. C. 418.] [1]

Circuit Court, District of Columbia. Oct. Term, 1823.

DECEASE OF ADMINISTRATOR PENDENTE LITE.

If a suit is brought originally against an administrator, and he die pendente lite, the administrator de bonis non may be compelled to appear to defend the suit.

This suit had been originally brought by the plaintiffs [Owen & Longstreth] against William Blanchard, administrator of William Cocking. Blanchard died pendente lite, and Charles Glover, the administrator de bonis non, was summoned to defend the suit, but failed to appear; and Mr. Key, for the plaintiffs, moved for an attachment against Glover to compel his appearance.

Mr. Jones, as amicus curiæ, suggested that Glover was not bound to appear. The suit abates by the death of Blanchard, Act Md. 1785, c. 80, not having provided for the case of the death of an administrator who was the original defendant, and who had not come in pendente lite. There is no privity or connection between Blanchard and Glover. If an administrator acknowledge a debt so as to take it out of the statute of limitations, the administrator de bonis non is not bound by it. And in regard to costs, the administrator was liable, personally, for the costs, in his time; but if the administrator de bonis non comes in, he will be made liable, not only for the costs incurred in his own time, but for those of his predecessor.

Mr. Key stated that the practice of the courts of Maryland always has been to compel the administrator de bonis non to appear, in such a case.

THE COURT (nem. con.) ordered the attachment.

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

OWEN (FARMERS' BANK OF VIRGINIA v.). See Case No. 4,662.

Case No. 10,629.

OWEN et al. v. GLOVER.

[2 Cranch, C. C. 522.] [1]

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

JUDGMENT ON PRISON-BOUNDS BOND—ARREST IN ORIGINAL SUIT.

If a debtor be taken on a ca. sa. in the District of Columbia, and give a prison-bounds bond, upon which also judgment is rendered against him, he may be retaken on the original ca. sa. after the expiration of a year from the date of the bond, and committed to close custody in execution.

Mr. Jones, for the defendant, moved the court to quash the ca. sa. upon which the defendant was committed in execution. The original judgment was rendered in June, 1818. [Case unreported.] On the 20th of May, 1820, the defendant having been taken upon the ca. sa. issued upon that judgment, gave a prison-bounds bond. On the 6th of July, 1820, he broke the bounds, and the plaintiffs [Owen & Longstreth] brought suit on the bond against him and his surety, in which suit judgment was, at the last term, rendered against him, but the suit is still pending against his surety. The year from the date of the prison-bounds bond having expired, the marshal, in obedience to the act of congress of the 24th of June, 1812 (2 Stat. 755,) recommitted him to close jail, upon the original ca. sa. [For the marshal's action for his fees, see Case No. 11,845.]

Mr. J. Dunlop, for plaintiff. The original arrest on the ca. sa. and the giving of the prison-bounds bond, are no satisfaction of the judgment. The plaintiff may retake his debtor, although he has recovered part of the debt in an action against the sheriff for an escape. They are concurrent remedies. Esp. N. P. 611; Blumfield's Case, 5 Coke, 86. The plaintiff may have a fi. fa. against his debtor, and may proceed against the sheriff for an escape at the same time. Jackson v. Bartlett, 8 Johns. 281. So, in Maryland, the plaintiff may proceed upon the original judgment, or upon the supersedeas.

Mr. Jones, contra. The plaintiff can, in no case, have more than one execution at the same. time upon the same judgment. In Maryland the plaintiff cannot have execution at the same time against the original debtor on the original judgment and on the supersedeas. The case in 8 Johnson, depends upon the statute of New York, which gives a fi. fa. after escape upon a ca. sa. After a prison-bounds bond given upon a ca. sa. there is no remedy under the act of congress, but a suit upon the bond.

THE COURT (THRUSTON, Circuit Judge, absent) decided that the marshal had the

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

right to take the debtor under the original ca. sa. and that he cannot now be permitted to have the benefit of the prison bounds, the year having expired.

[NOTE. The defendant was discharged under Act March 3, 1803 (2 Stat. 237), "for the relief of insolvent debtors." The plaintiffs then issued writs of fi. fa. and took in execution lands formerly belonging to defendant, but conveyed to divers persons. Motion to quash there was overruled. Case No. 10,630. Affirmed by supreme court. 5 Pet. (30 U. S.) 358.]

Case No. 10,630.

OWEN et al. v. GLOVER.

[2 Cranch, C. C. 578.][1]

Circuit Court, District of Columbia. May Term, 1825.[2]

DISCHARGE UNDER INSOLVENT ACT—EFFECT UPON JUDGMENT—LIEN.

A discharge from commitment upon a ca. sa. under the insolvent act of the District of Columbia [2 Stat. 237] is no discharge of the debt; but the plaintiff may resort to the lien of his judgment upon the lands of his debtor, although sold and conveyed away by him while the plaintiff was pursuing his remedy against the person of his debtor, and although the plaintiff had obtained judgment against him and his sureties upon his prison-bounds bond.

The plaintiffs [Owen & Longstreth] recovered two judgments against the defendant [Charles Glover] at June term, 1818, for about $1,600, issued writs of ca. sa., upon which the defendant was taken and committed in execution, and gave prison-bounds bonds, which he forfeited, and upon which the plaintiffs recovered judgment against him and his sureties. After the expiration of one year from the date of the prison-bounds bonds, he was retaken upon the original writs of ca. sa. according to the provisions of Act Cong. June 24, 1812, § 3 (2 Stat. 755), and committed to close custody [see Case No. 10,629], from which he was discharged under Act March 3, 1803 (2 Stat. 237), "for the relief of insolvent debtors within the District of Columbia." The plaintiffs then issued writs of fi. fa., and took in execution the lands of Mr. Glover, which were bound by the judgments in 1818, although Mr. Glover in the meantime had sold and conveyed them to divers persons. These writs of fi. fa. were returnable to this term, and now

Mr. Fleet Smith, Mr. Lear, and Mr. Jones, for the tenants and purchasers, moved the court to quash the writs: 1. Because they were issued more than a year after the return of the writs of ca. sa., without a scire facias. 2. Because Mr. Glover could not be recommitted upon the ca. sa. after its return. 3. Because, by the 5th section of the insolvent act, it is enacted that "no process against the real or personal property of the debtor shall have any effect or operation, except process of execution, or attachments in the nature of executions, which shall have been put in the hands of the marshal, antecedent to the application" of the debtor for the benefit of the act.

Mr. J. Dunlop, contrà. The judgments bound this land. Mr. Glover sold it and conveyed away all his interest in it before his application for a discharge under the insolvent act, so that it was not his property when he took the insolvent's oath; and never could come into the hands of his trustee as part of his effects. The lien of the judgments is wholly unaffected by his discharge under the act.

Mr. Jones, in reply. The plaintiffs have elected to take a ca. sa., and having taken the body, have abandoned their lien on the lands. The commitment on the ca. sa. is satisfaction in law, and the only saving of the debt to the plaintiff is under the insolvent act; and then only sub modo. The remedy is pointed out by that act. If it be a lien it can be enforced only in the manner provided for in the fifth section. It does not give a general right to proceed by fi. fa. after the insolvency. This fi. fa. is against the goods, chattels, and lands of Glover; that is, against the goods, chattels, and lands of Glover, after his insolvency, which these lands are not.

THE COURT (THRUSTON, Circuit Judge, absent) refused to quash the executions, being of opinion that the judgments bound the lands, and have never been satisfied. The lands, having been sold by Mr. Glover, never could come to the hands of his trustee, so as to be liable to distribution under the insolvent act. See Tayloe v. Thompson's Lessee, 5 Pet. [30 U. S.] 358, where this decision is affirmed.

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

[2] [Affirmed in 5 Pet. (30 U. S.) 358.]

OWEN (MONTEJO v.). See Case No. 9,722.

Case No. 10,631.

OWEN v. NEW YORK LIFE INS. CO.

[1 Hughes, 322.][1]

Circuit Court, E. D. Virginia. May, 1877.

JURISDICTION — CITIZENSHIP OF FOREIGN CORPORATION COMPLYING WITH STATE LAWS — LIFE INSURANCE — FORFEITURE DURING WAR — EQUITABLE VALUE OF POLICY.

1. The law of Virginia, contained in sections 19 to 36 of chapter 37 of the Code of 1873, does not affect the right of a foreign insurance company which complies with its terms, to move for a removal of a cause in which it is a party, from the state to the United States circuit court, under section 639 of Revised Statutes of the United States and its amendments.

2. Where, under the decision of the United States supreme court, in New York Life Ins. Co. v. Statham, 93 U. S. 240, a declaration framed before this decision is held to be demurrable,

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

the court will, in its judgment sustaining the demurrer, take care that it shall not be in prejudice of the plaintiff's right to amend so as to claim the equitable value of the policy of insurance arising from premiums paid before the forfeiture of the policy by non-payment of the premiums accruing after the commencement of the civil war.

In 1859, the New York Life Insurance Company executed a policy of insurance upon the life of Isham H. Owen, of Danville, Virginia, for the benefit of Mary A. Owen, his wife, in the sum of $5,000, for a premium of $165.50 per annum, payable on that day, and annually on each succeeding 23d day of April in each year until the death of the husband. The premiums were regularly paid to John M. Johnson, an agent of the company, resident in Danville, for the years 1859 and 1860; but they were not paid afterwards; and Isham H. Owen died in October, 1862. Suit was brought in the circuit court of the state, for the city of Richmond, and, within the time prescribed by law, was removed into this court by certiorari, under section 639, of the Revised Statutes of the United States, clause third. Under chapter 36 of the Code of Virginia of 1873 (section 19 to 36 inclusive), "foreign" insurance companies not incorporated by the laws of Virginia, are required to perform, under penalties, certain acts, before engaging in business in the state; among which required acts are, the keeping an agent in the state empowered to acknowledge service of all legal process, and the depositing with the state treasurer of bonds convertible into cash, in guarantee of policies of insurance issued by them, and of taxes accruing and judgments recovered against them. The plaintiff moves that the cause be remanded to the circuit court of Richmond, as having been improperly removed here. The defendant demurs to the declaration and each count of it. The declaration as amended consists of three counts. In each count the same contract is set out, viz.: that the defendant insured the life of plaintiff's husband for her benefit upon certain conditions; that all of those conditions were strictly complied with except one, which required the payment of a premium on the 23d of April, 1861; that a state of flagrant war existed at the time when that premium became due; that the plaintiff's husband died in October, 1862; and that due notice and proof of his death was given defendant as soon as the war ceased. In all of the counts the non-payment of the premium due April 23d, 1861, and April 23d, 1862, is admitted; and it is admitted that by the terms of the contract, as declared upon, it was expressly stipulated that it should become null and void by the non-payment of any premium. The first count avers that the plaintiff was ready and willing to pay the premium due 23d of April, 1861 and 1862, but avers the defendant had no agent to receive them, and so plaintiff did not pay. The second count avers that the plaintiff was ready and willing to pay, and actually tendered the premium due April 23d, 1861, to one John M. Johnson, to whom the prior premium had been paid, who was then agent, etc., who refused to receive it, and that no tender was made April 23d, 1862, because defendant had no agent to receive it. The third count avers that plaintiff was ready and willing to pay, but did not pay, nor tender payment of premium due 23d of April, 1861 or 1862, because Johnson, who before that time had been agent, by his acts and words induced plaintiff to believe that he would not receive the money and give a valid receipt therefor, and there was no other agent of defendant to whom plaintiff could legally pay. Each and every count avers that war was flagrant on the 23d April, 1861, and continued so until after the death in 1862.

Wood Bouldin, E. E. Bouldin, and Elisha Barksdale, for plaintiff.

W. W. Old and Johnston, Baulware & Williams, for defendant.

HUGHES, District Judge. The case is before the court, first, on a motion to remand the cause to the circuit court of Richmond, whence it was removed into this; and, second, on the demurrer of defendants to the declaration, or rather, to the second and third counts of the declaration, plaintiff's counsel admitting the first count to be defective in view of the decision of the supreme court of the United States, in the case of New York Life Ins. Co. v. Statham, 93 U. S. 24.

1st. As to the motion to remand, plaintiff's counsel cite the recent decision of the supreme court of appeals of Virginia, in Continental Ins. Co. v. Kasey, from Roanoke county, 27 Grat. 216. In that case, the motion to remove from the state to the United States court was made after a final trial, and the motion was properly denied. Such is not the case here. It is not pretended that the removal was made after trial, or final hearing, in the court of Richmond. True, the court of appeals go on in the opinion to argue and express the conclusion that a foreign company which complies with the requirements of the laws of Virginia imposed upon foreign companies, by depositing with her treasurer a certain amount of securities in guarantee of their policies, keeping an agent in the state empowered to acknowledge service of process, etc., etc., thereby becomes a resident company, and loses its right as a non-resident to remove a suit to the United States court. But the very facts of having such an agent, and depositing bonds of guarantee, etc., etc., such as the law of the state requires of "foreign" companies, are badges and demonstrations of non-residence; and it is difficult to see how the very proofs of a "foreign" company's non-residence prescribed and accepted as such by law, can be construed as constituting residents. At all events, the United States courts could not delegate to a state court, even of the highest resort and authority, as

in this case, the determination of such questions of residence and citizenship as involve the right of suing in the United States courts; and a decision even of the supreme court of appeals of Virginia on this subject cannot be accepted as binding by this court. The motion to remove is therefore denied.

2d. As to the demurrer to the declaration; the averments of the three several counts of the declaration, so far as these are material to the questions raised by the demurrer, are substantially the same, though varying somewhat in detail. It is useless to particularize the distinction between these averments; because they all alike contain the common averment that war between the United States and the Confederate States existed, and was flagrant on the 23d of April, 1861, and continued so after the 23d of April, 1862. The fact may be, that the war did not exist in a legal point of view until the 27th of April, 1861; but we are concluded by the averments of the declaration and each count of it, in this respect. The fact is asserted by the declaration, and conceded by the demurrer, that flagrant war existed on the 23d of April, 1861. This fact being assumed, there was not only a non-payment of the premium on that day, but such non-payment was obligatory in consequence of the existence of war. It would have been contrary to the public duty of the plaintiff to make the payment. It was decided by the supreme court of the United States in the case of New York Life Ins. Co. v. Statham [supra], that where the non-payment of a premium is caused by the intervention of war making it unlawful for the plaintiff and defendant to hold intercourse with each other, the defendant may take advantage of the non-payment so occasioned, and insist upon it as a forfeiture of the policy of insurance, where the policy made any non-payment the condition of forfeiture. That decision carries two propositions, viz.: First, that where non-payment of a premium is made by the policy a condition of forfeiture, that provision is binding, and the company may insist upon the forfeiture; and second, that when the non-payment occurs during flagrant war, making all intercourse between plaintiff and defendant unlawful, the non-payment is absolute; and, whether it would be excusable or not if happening under other circumstances, must be treated as a fixed fact, consequent upon the existence of war, of which the defendant may take advantage. Inasmuch, therefore, as the declaration in each count admits the non-payment of the premium due on 23d of April, 1861, and on 23d April, 1862, and alleges the existence of war on both these dates, which is equivalent to alleging the illegality and nullity of the payments even if they were made, the demurrer must be sustained as against each of the three several counts. But inasmuch as the supreme court, in its decision which has been cited, held that the assured was entitled to the equitable value of the policy arising from the premiums which were actually paid, the order of the court sustaining the demurrer shall be without prejudice to the right of the plaintiff to file an amended declaration, claiming the equitable value of the policy arising from the premiums paid on the 23d April, in 1859 and 1860. I will also hear after notice a motion for leave to amend the second count of the declaration by striking out the averment of the existence of war on the 23d April, 1861.

Case No. 10,632.

In re OWENS.

[6 Biss. 432;[1] 12 N. B. R. 518; 7 Chi. Leg. News, 371; 1 N. Y. Wkly. Dig. 175.]

District Court, D. Indiana. Aug., 1875.

EXEMPTIONS—COSTS.

1. A debtor is entitled to the full benefit of the exemptions allowed by the bankrupt act [of 1867 (14 Stat. 517)], even though an execution had become a perfected lien upon his property before the filing of the petition.

[Cited in brief in Wooster v. Bullock, 52 Vt. 51.]

2. In Indiana a judgment for the costs of the opposite party is not a debt growing out of a contract, express or implied, and as against such costs the statute does not allow exemptions.

Motion to set aside the exemptions allowed by the assignee.

Jesse A. Mitchell and Alexander Reid brought an action of replevin in the Lawrence circuit court against John Owens, to recover the possession of certain personal property. The property was delivered to the plaintiffs on their executing the usual bond, and on the 18th day of February, 1874, the cause was tried and the court found that the title to the property was in the plaintiffs, and gave them judgment for one cent damages for its unlawful detention, and $1,216 for costs. On the 26th day of October, 1874, an execution issued on this judgment, which, at 9 o'clock in the forenoon of the same day, came into the hands of the sheriff, and at 3 o'clock in the afternoon of the same day was levied upon all the property of the defendant. At 7 o'clock in the afternoon of the same day John Owens filed his petition in bankruptcy, upon which he was adjudged a voluntary bankrupt before Register Butler. Subsequently, upon a proper showing, the sheriff was enjoined from proceeding to sell the said property so levied upon, and the same was restored to the possession of the said John Owens, upon his executing the proper bond. Afterwards, part of this property, amounting to $498, was set apart and exempted to the said John Owens, under the $500 clause of section fourteen of the bankrupt act, and another part of the same property, of the value of $300, was also set apart as exempt from sale on execution by the laws of this

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state. During all this time, and at the date of this decision, the said John Owens was a resident householder of Indiana.

Francis Wilson, for Mitchell and Reid.
Alexander Dowling, for bankrupt.

GRESHAM, District Judge. Section 413 of the Indiana Code enacts that: "When an execution against the property of any person is delivered to an officer to be executed, the goods and chattels of such person within the jurisdiction of the officer, shall be bound from the time of delivery." 2 Gavin & H. St. Ind. 232. Section 22 of article 1 of the constitution of Indiana reads as follows: "The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted." 1 Gavin & H. St. Ind. 32.

To carry this provision of the constitution into effect, the legislature passed an act, the first section of which reads as follows: "That an amount of property not exceeding in value three hundred dollars, owned by any resident householder, shall not be liable to sale on execution, or any other final process from a court, for any debt, growing out of or founded upon a contract express or implied, after the fourth day of July, 1852." 2 Gavin & H. St. Ind. 368.

It is claimed that under the facts in this case the exemptions made by the assignee were unauthorized. The household and kitchen furniture, and other articles and necessaries set apart to Owens were not unreasonable, if he was entitled to an exemption under the $500 clause of the act.

Laws exempting reasonable portions of the debtor's property from execution and sale, properly relate to the remedy, and are therefore liable to no constitutional objection. Bronson v. Kinzie, 1 How. [42 U. S.] 311. It would be difficult at this age of the world, to find a civilized community without such regulations. Sometimes more is exempted, sometimes less, according to prevailing ideas of policy and humanity.

Each state may enact such reasonable laws as it sees fit, regulating the remedy on contracts in its own courts. A state may not, however, render the remedy valueless by exemptions having no reference to the nature and amount of the debtor's property, or by burdening it with conditions and restrictions. Such laws would be held to violate that part of section 10, article 1, of the constitution of the United States, which prohibits to the states the power to enact laws impairing the obligation of contracts. Bronson v. Kinzie, supra; Green v. Biddle, 8 Wheat. [21 U. S.] 1. But it has been repeatedly held that there is nothing in the constitution of the United States which forbids congress to pass laws impairing the obligation of contracts, although that power is denied to the states. And it is no longer controverted that congress may, by the enactment of a uniform bankrupt law, discharge debtors entirely from the obligations of their contracts. The constitution having conferred the power to enact such laws, it is in the discretion of congress to exempt such portions and kinds of the debtor's property as may be thought necessary to protect him and his family from want and distress. And regulations of this kind may be modified from time to time, as experience demonstrates the necessity for change, and these modifications made applicable alike to past and future contracts, and rights already vested, as well as those to vest in the future. It must therefore be held, that when the creditor acquires rights, as by judgment or execution liens, such as are claimed in this instance, he does so knowing that the privilege of the debtor to claim the exemptions allowed by the statute remains unimpaired, in the event of his being adjudged a bankrupt.

As to the other branch of the case, it is clear that the statute of the state allows no exemption against a debt or demand not growing out of contract. Against a judgment for damages, in an action of replevin, it is equally clear that the benefit of the statute cannot be claimed. The question arises then, do the costs partake of the nature of the judgment as a mere incident? At common law no costs were allowed to either party. The statute allows the prevailing party to recover his own costs, on the theory that he has already paid them. But each party is ultimately liable to the officers and witnesses for such costs as he makes, and if he is not required to pay as he goes, it is on an implied assumpsit that he will pay his own costs if he does not succeed in the action, or if he succeeds and his adversary is not good for them. Thus far it would seem that costs are "a debt growing out of or founded on contract." But I am unable to see on what ground the unsuccessful party can be said to have promised to pay the costs of his adversary. It is sometimes the case that after a return of nulla bona on an execution against the unsuccessful party in an action of tort, a fee bill issues against the prevailing party for his own costs. In such a case I can see no good reason why the benefit of the statute might not be claimed against a fee bill thus issued as "final process from a court for a debt growing out of or founded on contract." I have not been able to find a ruling of the supreme court of Indiana on this question.

I think Owens is entitled to the $498 worth of property set apart to him as above stated, notwithstanding the lien of the execution had attached before the proceedings in bankruptcy were commenced. He is also entitled to the other items, amounting to

$300, exempted to him under the statute of the state, if there is anything left of his property after paying the costs made by the plaintiffs.

Case No. 10,633.

OWENS v. ADAMS.

[1 Brock. 72.] [1]

Circuit Court, D. Virginia. Nov. Term, 1803.

EVIDENCE — BOOKS OF ACCOUNT KEPT BY CLERK NOW DECEASED.

An account taken from the books of a merchant's clerk, who is dead, is not admissible evidence in an action on account, unless such books were the original books of entry, and kept by a clerk who could have proved, if living, the delivery of the goods: and his hand-writing must also be proved. Where such an account is offered, collateral testimony, as, for example, a letter from the defendants, acknowledging in general terms a balance due the plaintiffs, will not be admitted to verify an account which would be otherwise inadmissible. It must apply to the account itself, and not merely to general transactions, which have no tendency to verify the particular account produced, but would equally support a claim for a small or large amount.

[Cited in Jeffrey v. Schlasinger, Case No. 7,-253a.]

(The record in this case having been lost or mislaid, the reporter is precluded from furnishing a statement of the facts elicited in the cause. As the following opinion, however, discusses a very important question of evidence, he has thought it advisable to insert it, especially as the question is purely a legal one.)

MARSHALL, Circuit Justice. In this case the plaintiff, who is a London merchant, offered in evidence an account taken from his books, which commenced in the year 1784, connected with a receipt signed "Hunt & Adams," for a box delivered in January, 1785, and a letter from the same individuals, dated in June, 1790, mentioning a remittance then made in snuff, and acknowledging a further balance to remain due in terms which imply that balance to have been by no means inconsiderable. The books from which the account was taken, are proved to have been kept by a clerk who is since dead; and the account is proved to be an exact copy from those books. Another witness swears that he has compared the account with the original entries, and that it corresponds with them, but he does not depose to the handwriting in which those original entries are made.

The plaintiff contends, that under these circumstances, the account may be submitted to the consideration of the jury. This question depends entirely on the law of evidence, and as no legislative provision has been made for the case, it is supposed to be governed by the rules of the common law. The common law on this subject is believed to have been laid down with perfect accuracy by Mr. Blackstone, in his Commentaries (volume 3, p. 368). "So, too," says that author, "books of account, or shop-books, are not allowed of themselves to be given in evidence for the owner; but a servant who made the entry may have recourse to them to refresh his memory, and if such servant, who was accustomed to make those entries, be dead, and his hand be proved, the book may be given in evidence." This apparently relates to original entries, not only because the principle, that the best legal evidence which the nature of the thing affords must be produced, is directly recognised by Blackstone, while speaking on the same subject, but because the expression that "the servant who made the entries might refer to the book to refresh his memory," plainly designates such a servant as could have proved the delivery of the goods. The counsel for the plaintiff has not controverted this principle of law, but has contended that the clerk who is dead, in this case, was the person by whom the original entries were made. Privately, I am inclined to believe the fact to have been so, but I do not feel myself at liberty to deliver that opinion in this place. Exact uniformity of decision ought to be observed; and when principles are departed from, those substituted in their place ought to be so strongly marked, as not afterwards to be misunderstood. In this case, the term "books" is used; and if that term might be understood to mean all the books, or the original books of entry in this case, it ought so to be understood in every case, and then the rule would be completely changed. Neither do I think the form of the entries, evidence that the original books were kept by the clerk who is dead. This essential fact, on which the admissibility of the account depends, ought to be plainly stated by the party who would avail himself of that account.[2]

[1] [Reported by John W. Brockenbrough, Esq.]

[2] "The evidence of an entry," says Mr. Starkie, in his treatise of the Law of Evidence (volume 1, p. 72), "has in some instances been admitted where the party had the peculiar means of knowledge, and made it in the course of a particular routine of business, at the same time, or nearly so, with the supposed act." "In Earl of Torrington's Case, 1 Salk. 285, 2 Ld. Raym. 873, the evidence was, that according to the usual course of the plaintiff's dealings, the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer delivered out, which he set down in a book, to which the draymen set their hands; and that the drayman was dead, and that the entry was in his hand-writing; and it was held to be good evidence of a delivery. Here, the admissibility of the entry did not depend upon the mere credit given to the drayman, so much as upon the consideration that the entry was made in the usual course of business, and was contemporaneous with the supposed delivery. Where, on the contrary (Clerk v. Bedford, Bull, N. P. p. 282), the plaintiff, to prove a delivery, produced a book which belonged to his cooper, who was dead, but his name set to several articles, as wine delivered to the defendant, the evidence was rejected by Lord Raymond, who distinguished it from Earl of Torrington's Case, because there, the witness saw the drayman sign the book every night. In these cases it is ob-

Neither do I think the collateral testimony which has been offered, can help the case. That testimony shows the existence of a debt, but not its amount. The plaintiff can only be admitted to establish its amount by legal evidence; and to make his books legal evidence, he ought to prove, that the clerk who made the original entries is dead. It would be as dangerous to admit a plaintiff to establish the amount of a debt by his books, as to prove the existence of the debt by the same evidence. I therefore felt no doubt when this case was first mentioned, in determining the testimony to be inadmissible, if it was a case of the first impression in this court, and if I could draw it out of the case of Lewis v. Norton [1 Wash. (Va.) 100]. A case was referred to as having established the admissibliity of such testimony; but on a reference to the record, it appeared that the books from which the copy had been taken, were the original books, or the books in which the original entries had been made, and the clerk who kept them was dead. The terms used were considered as synonymous with shop or day-books; and that decision will be adhered to. I had much more difficulty in getting over the case of Lewis v. Norton, and was at first disposed, under the authority of that case, to permit the present verdict to stand, although directly against my own opinion. But, upon reflection, I think myself obliged to change that opinion, and to set aside this verdict. I feel no doubt concerning the law of the case. I have no doubt but that the amount of the debt can only be established by testimony, which is in itself legal; and that such collateral testimony as will make an account, otherwise inadmissible, legal testimony, must apply to the account itself, and not merely to general transactions, which have no tendency to verify the particular account produced, but would equally support a claim for £100 or £1000. I think it of most dangerous tendency to admit such evidence; and, as there is a difference between decisions which merely respect the rules of evidence, and those which affect rights, and also between a single decision subject to revision, and a series of decisions, which may be considered as fixing the law of the land, and as it is, in my opinion, of much importance that exact uniformity should be observed in decisions on that testimony which will be required by the court, in order to support a claim on account, which is but to be obtained by an inflexible observance of the rules established by law, and not by deviating occasionally from them, on circumstances perpetually varying in slight, unimportant degrees, I think it right to adhere to the safe and well-understood rules of the common law, and shall therefore direct a new trial in this case.

The following order was accordingly made: "On the motion of the defendant by his attorney, and for reasons appearing to the court, it is ordered that the judgment upon the verdict of the jury rendered in this case on Monday, the 23d ultimo, be set aside: and that a new trial be had therein at the next court; and general commissions are awarded the parties to examine and take the depositions of their witnesses in this cause residing in Great Britain: which commissions are to be taken before any notary public duly authorized, each party giving unto the other reasonable notice of the time and place of executing the same.

servable that, in the one, the whole rested entirely on the veracity of the party who made the entry; in the other, a presumption as to its truth arose from the time of the entry, and the fact, that it was made in the usual and ordinary course of business." And again, at page 315 of the same volume, Mr. Starkie says: "In the case of Pitman v. Maddox, 1 Ld. Raym. 732, 2 Salk. 690, in an action upon a tailor's bill, a shop-book was produced, written by one of the plaintiff's servants, who was dead; and upon proof of the death of the servant, and that he used to make such entries, it was allowed to be good evidence of the delivery of the goods. From these cases it may be inferred that some evidence ought to be given to show that such entries were made in the usual routine of business; but perhaps, it may not be necessary, as in Earl of Torrington's Case, to prove the signature by one who saw it written." In Welsh v. Barrett, 15 Mass. 380, the book of a deceased messenger of a bank in which, in the course of his official duty, he entered memoranda of demands on the makers, and notices to the endorsers, of notes left in the bank for collection, was admitted as evidence of a demand on the maker, and notice to the endorser, in an action on a note thus left for collection, the memorandum being first proved to be in his hand-writing. Chief Justice Parker said, that this was analagous to the case of a deceased merchant's clerk, and there could be no good reason why proof of entries made by the messenger, in the case at bar, should not be received as evidence in a case proper for the admission of a merchant's books as evidence. This case was cited and approved by the supreme court, in Nicholls v. Webb, 8 Wheat. [21 U. S.] 326; 5 Pet. Cond. R. 451; and the court held that, a fortiori, the books of a notary public, (who is a public officer) which are proved to have been regularly kept, are admissible in evidence after his decease, to prove a demand of payment, and notice of non-payment of a promissory note. In conformity with these decisions is the case of Halliday v. Martinet, 20 Johns. 168.

Case No. 10,634.

OWENS v. GOTZIAN et al.

[4 Dill. 436;[1] 16 Am. Law Reg. (N. S.) 181; Syllabi, 86; 9 Chi. Leg. News, 124; 1 Cin. Law Bul. 367.]

Circuit Court, D. Minnesota. 1876.

JUDGMENT OF STATE COURT — VALIDITY AS DEPENDING ON MODE OF SERVICE.

1. The judgment of the state court will be considered by the federal courts sitting within the territorial limits of the state in which the same is rendered, as a domestic judgment.

2. The service of summons by a party to the action is an irregularity that is cured by entry

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

of judgment, and will not avail when the judgment is attacked in a collateral proceeding.

[Cited in Swift v. Meyers, 37 Fed. 44.]

[Cited in Ex parte Ah Men, 77 Cal. 201, 19 Pac. 381.]

3. "Party to the action," as used in section 47, c. 66, p. 456, Revised Statutes of Minnesota, extends, it seems, only to parties to the record.

This action was brought [by James A. Owens, assignee of Murphy & Rowe, bankrupts, against Conrad Gotzian and Channing Seabury] to recover damages for the conversion by the defendants to their own use of certain personal property alleged to belong to the bankrupts' estate. During the trial the record of a judgment rendered in a district court of the state of Minnesota, in an action in which the present defendants were plaintiffs, and the bankrupts were defendants, was introduced in evidence, and proof was made that the defendants purchased the property in question at a sheriff's sale, under execution issued upon such judgment. The plaintiff offered to prove that the service of summons in that suit was made by a silent partner of the firm of Gotzian & Seabury, and urged that such service was invalid, and the judgment void, by virtue of the following statute of the state of Minnesota:

"The summons may be served by the sheriff of the county where the defendant is found, or by any other person not a party to the action." Rev. St. Minn. § 47, p. 456.

The testimony offered was objected to by the defendants.

Davis, O'Brien & Wilson, for plaintiff.

Geo. L. Otis and Rogers & Rogers, for defendants.

NELSON, District Judge. Two propositions are involved in the objection: 1. Is the judgment of the state court a foreign or domestic judgment? 2. If a domestic judgment, can the plaintiff attack it in this suit?

In nearly every instance where the judgment of a federal court sitting within the same territorial limits has been the subject of consideration in a state court, it has been regarded as a domestic judgment. Thomson v. Lee Co., 22 Iowa, 206, and cases cited. For obvious reasons the judgment of a state court would be regarded as domestic by the federal courts in the same state; both federal and state courts enforce and give effect to the same laws; summon jurors from, and their judgments operate upon and compel seizure and sale of the property of, the same citizens, and [they] are not, therefore, foreign to each other.

Being a domestic judgment, it may be shown void upon its face if the court rendering it had no jurisdiction of the defendant's person, and it is equally true that, except for errors affecting the jurisdiction of the court, its validity cannot be questioned. If jurisdiction of the person was obtained in this case in the state court, this court must regard it as conclusive of the question determined, and give it full force and effect. The record discloses personal service upon the defendants, yet the plaintiff urges that the service was made by one of the parties to the action, and that such service is not permitted, and renders the judgment a nullity as to strangers to the action. This proposition is not without force. If the statute prescribes the mode and manner of the service of summons, and authorizes it to be made by any person except a party to the action, the question may well be asked why a judgment entered up without any appearance of the defendants thus served is not beyond the authority of the court rendering it? Why should strangers to the judgment be prevented from establishing, perhaps a prior lien, or a superior incumbrance, on showing that the service of summons was by an incompetent person? The answer is, that this error in the service did not affect the jurisdiction of the court, and is only an irregularity. The actual service upon the defendants appears in the record, and no objection being made before judgment is rendered, the defect is cured by the entry. Such is undoubtedly the rule as between parties to the suit, and it is reasonable that strangers to the record should not impeach it in a collateral action. The service shows a defect in obtaining jurisdiction, not a want of jurisdiction, and it is presumed the court, when judgment was rendered, determined the service attempted sufficient, and passed upon that question. Thomson v. Lee Co., 22 Iowa, 206.[2] Again, an inspection of the record shows that the person who served the summons, although perhaps a silent partner of plaintiffs, was not by name a party to the suit. There has been no authoritative construction of this statute, but I think the term "not a party to the action" extends only to parties named in the proceedings, and not to a party in interest, whose name does not appear. The objection, at least, should have been made before judgment was rendered.

Objection overruled.

OWENS (JOHNSON v.). See Case No. 7,402.

OWENS (MUMM v.). See Case No. 9,919.

OWENS, The SUSAN G. See Case No. 13,634.

Case No. 10,635.

OWNER v. WASHINGTON.

[5 Cranch, C. C. 381.][1]

Circuit Court, District of Columbia. Nov. Term, 1837.

APPEAL FROM JUSTICE OF THE PEACE—AMOUNT OF JUDGMENT.

Appeal does not lie from a justice of the peace, who has rendered judgment for $5 only.

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[2] [2 Abb. Prac. 344.]

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

[This was an appeal from the justice of the peace, in a proceeding by James Owner against the corporation of Washington.]

THE COURT (THRUSTON, Circuit Judge, absent,) dismissed the appeal, because this court has no original or appellate jurisdiction where the debt or demand does not exceed five dollars.

Mr. Hoban, for defendant, contended that, as the warrant did not specify the sum demanded, it did not appear that it was not for more than five dollars; and if it was, the defendant has a right to appeal, although the judgment is for five dollars only.

But THE COURT dismissed the appeal.

OWNERS OF THE FRANCESCA CURRO (WRIGHT v.). See Case No. 18,088.

Case No. 10,636.

OWSLEY et al. v. COBIN et al.

[2 Hughes, 433; 15 N. B. R. 489; 4 N. Y. Wkly. Dig. 431; 9 Chi. Leg. News, 323; 4 Law & Eq. Rep. 49; 23 Int. Rev. Rec. 210.][1]

Circuit Court, D. South Carolina. June 2, 1877.

BANKRUPTCY — DEBT DUE BY FACTOR FOR GOODS SOLD ON COMMISSION—EFFECT OF DISCHARGE.

A debt due by a factor for the value of goods consigned to him to be sold on commission and remittance made in thirty days is not such a debt contracted in a fiduciary capacity as will be excepted from the operation of a discharge.

[Cited in Re Smith, Case No. 12,976; Zeperink v. Card, 11 Fed. 296; Hennequin v. Clews, 111 U. S. 676, 4 Sup. Ct. 578.]

[Cited in Desobry v. Tête, 31 La. Ann. 809; Woodward v. Towne, 127 Mass. 42; Hennequin v. Clews, 77 N. Y. 427; Same v. Same, 77 N. Y. 431; Scott v. Porter, 93 Pa. St. 38.]

Complaint, filed 30th day of March, 1876, sets out that plaintiffs [Owsley & Co.], citizens of Kentucky, sent to defendants [Henry Cobin & Co.], citizens of South Carolina, on 1st February, 1876, certain goods for sale on commission. That defendants sold the same, and rendered an account of sales, showing net sales due plaintiffs one thousand two hundred and forty-seven dollars and thirty-four cents, which they had failed to pay. Answer filed 22d July, 1876, admits the sales. Admits that defendants, who were in the wholesale grocery business, did receive and sell these goods on commission and as commission merchants; sets up as a defence proceedings in composition, that plaintiffs' name and address and the amount of their debt were properly stated in the schedules and statements of defendants; that the same was duly approved by the court; that the amount due plaintiffs under the composition was four hundred and fifteen dollars and seventy-eight cents, which amount, with twenty dollars for their costs, being four hundred and thirty-five dollars and seventy-eight cents, had been tendered to them, and which amount was brought and paid into court, as of the date aforesaid. [This amount was paid to plaintiffs July 22, 1876.][2] The case was tried before [the circuit court, Judges Bond and Bryan presiding, and][2] a jury April 20, 1877. [After argument the court decided that the debt sued on was not fiduciary in its character, so as to be excepted from the benefit of a discharge in bankruptcy, and directed a verdict for the defendants.][3] The jury upon instructions, found a verdict for the defendants. Notice for motion to set aside the verdict and for a new trial was given 21st April, 1877, upon the grounds "that the judges of the circuit court erred in instructing the jury that the claim sued on against the defendants for withholding the proceeds arising from the sale of goods consigned to them to be sold on commission was not a debt contracted in a fiduciary capacity; under which instructions the jury found a verdict for the defendants." [The motion for a new trial was argued on 2nd of June, 1877, before the circuit court, Chief Justice M. R. Waite presiding.][3]

Buist & Buist, for plaintiffs and for the motion, cited, In re Seymour [Case No. 12,684]; In re Kimball [Cases Nos. 7,768, 7,769]; Lemcke v. Booth, 47 Mo. 385; Treadwell v. Holloway, 46 Cal. 547; Meador v. Sharpe, 54 Ga. 125.

Augustine T. Smythe, for defendants and against the motion, submitted the following points: First. That the claim sued on was not such a debt, contracted in a fiduciary capacity, as is contemplated by the acts of congress to be excepted from the operation of a discharge in bankruptcy. Second. That, even if it be adjudged otherwise, the effect of the proceeding in composition is more extensive than that of a discharge under proceedings in bankruptcy, and discharges the debt, and cited in support of the same Chapman v. Forsythe, 2 How. [43 U. S.] 208; Cronan v. Cotting, 104 Mass. 245; Grover v. Clinton [Case No. 5,845]; Woolsey v. Cade, 54 Ala. 378; 8 Am. Law J. p. 35.

The only point considered by the court, and upon which the case was determined, was the first, the court expressly reserving its decision on the second.

WAITE, Circuit Justice. This cause was heard on a motion for new trial. The cause of action was for the value of goods consigned by the plaintiffs to the defendants, who were commission merchants, to be sold on plaintiffs' account and remittance made at thirty days after the sales. The ground of defence considered by the court was that defendants having taken advantage of the bankrupt act [of 1867 (14 Stat. 517)] the debt due to the

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 4 N. Y. Wkly. Dig. 431, and 4 Law & Eq. Rep. 49, contain only partial reports.]

[2] [From 15 N. B. R. 489.]

[3] From 9 Chi. Leg. News, 323.]

plaintiffs was barred thereby, and no recovery could be had.

The court concurs in the reasoning of the decisions submitted on behalf of the defendants, and is of opinion that the debt due by the defendants in this case as a factor or commission merchant is not such a debt, contracted in a fiduciary capacity, as is contemplated by the acts of congress to be excepted from the operation of a discharge in bankruptcy.

The motion for a new trial is dismissed with costs.

Case No. 10,637.

OXFORD IRON CO. v. SLAFTER.

[13 Blatchf. 455; [1] 14 N. B. R. 380.]

Circuit Court, N. D. New York. July 12, 1876.

BANKRUPTCY — PREFERENCES — ACT OF 1867 — AMENDMENT OF 1874—RETROACTIVE EFFECT—INTENTION—TESTIMONY OF PARTIES.

1. Under the provisions of section 12 of the act of June 22d, 1874 (18 Stat. 180), amendatory of section 39 of the bankruptcy act of March 2d, 1867 (14 Stat. 536), it is not necessary to the invalidity of an act alleged to be preferential in its character, which took place prior to December, 1873, that it should come up to the test imposed by such section 12, but such act is to be tried according to the law of 1867.

2. Where a new rule is sought to be applied to past acts, the expression of the legislative purpose ought to be clear and distinct.

3. When an amendatory law contains express provisions fixing the period of its retroaction in certain specified cases, such specification almost necessarily leads to the conclusion that, in all other and unspecified cases, the amendment is not to have a retroactive effect.

[Cited in Warren v. Garber, Case No. 17,196.]

4. The testimony of the parties to a transaction questioned as preferential under the bankruptcy act, as to their intentions, though competent, is inherently weak, and can rarely avail against the stronger proof which the transaction itself affords.

[This was an action by the Oxford Iron Company against Edwin P. Slafter, assignee in bankruptcy of Foot, Doud & Co.]

Edward C. Delavan, for plaintiff.
Dennison & Everett, for defendant.

JOHNSON, Circuit Judge. This cause was tried before me, without a jury. That the original debt was an honest debt is not disputed, and is, besides, entirely plain, upon the proof. The assignee resists the claim of the plaintiffs upon the alleged ground that the transfer by Foot, Doud & Co. to the plaintiffs, on the 29th of December, 1871, of a quantity of nails, was preferential in its character, in violation of the provisions of the bankrupt act, and that, consequently, the plaintiffs' debt became incapable of proof.

That the validity and consequences of the acts done should be determined according to the law in force at the time when they were done, is so consonant to natural justice, that, even when it is competent for the legislative power to assert a different rule, courts will look carefully to see that the expression of the legislative purpose is clear and distinct, that a new rule shall be applied to past acts. When existing laws are amended by enactments that such a section shall read in an altered manner, and the altered section contains in part the old law, and in part new provisions, the latter will be construed to relate to subsequent acts, and the former will be considered as having been the law from the time of its first enactment; and, when there is no express repeal of the law as it stood at the time of the amendment, that law will, in the absence of express provisions to the contrary, be deemed to apply to, and to govern, the validity and consequences of acts done before it was amended. Ely v. Holton, 15 N. Y. 595. More especially must this rule be adhered to when the amendatory law contains express provisions fixing the period of its retroaction in certain specified cases; for, this specification almost necessarily leads to the conclusion that, in all other and unspecified cases, the amendment is not to have a retroactive effect. Tinker v. Van Dyke [Case No. 14,058], United States circuit court, Eastern district of Michigan, Emmons, Circuit Judge.

On the 30th of January, 1872, the petition was filed for an adjudication against Foot, Doud & Co., as bankrupts, and, on the 7th of February, 1872, they were duly adjudicated bankrupts. The act of June 22d, 1874 (18 Stat. 180), amendatory of the bankrupt law, by its section 12, amended section 39 of the bankrupt act of March 2d, 1867 (14 Stat. 536), so as to read as set out in section 12. Its retroaction is limited to the first day of December, 1873, when it is prescribed that it shall [not] [2] have any retroactive operation, and this provision excludes, in my view, any other period for retroaction. It is not necessary, therefore, to the invalidity of an act alleged to be preferential in its character, which took place prior to December, 1873, that it should come up to the test imposed by the amendatory act of 1874. It is to be tried according to the law of 1867, as embodied in the Revised Statutes. Under that law, if the creditor receiving the preferential payment or conveyance had reasonable cause to believe that a fraud on the act was intended, and that the debtor was insolvent, he cannot be allowed to prove his debt in bankruptcy.

Upon a careful examination of the evidence in the case, I do not find that the presumption of fraud arising from the transaction in question being out of the usual course of business, under section 5130 of the Revised Statutes, is overcome. On the contrary, judging from the correspondence of the parties, to which I attach more weight than to the oral testimony, I think the case of the defendant is made out. That both the bankrupts and the

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

[2] [14 N. B. R. 380.]

creditors intended a preference seems to me established. That the debtors were insolvent, and that the creditors had reasonable cause to believe them to be insolvent, seems to me made out with great cogency of proof. The surrounding circumstances point too strongly to this conclusion to be overthrown by the testimony of the parties to their intentions. Such testimony, though competent, is inherently weak, and can rarely avail against the stronger proof which the transaction itself affords. There must be judgment for the defendant.

[For other cases growing out of the bankruptcy of Foot, Doud & Co., see Cases Nos. 4,906 and 4,907.]

OXLEY (GILPIN v.). See Case No. 5,450.

Case No. 10,638.

OXLEY v. TUCKER et al.

[1 Cranch, C. C. 419.][1]

Circuit Court, District of Columbia. July Term, 1807.[2]

BANKRUPTCY OF PARTNER—SET OFF—DEBT DUE BY FIRM.

A defendant cannot, under the bankrupt law [of 1800 (2 Stat. 19)], set off a debt due to him from a partnership, against a claim by the assignee of one of the firm who became bankrupt.

Assumpsit by the assignee of Thomas Moore, a bankrupt [against John and James Tucker].

The defendants offered to set off a debt due to them by Henry and Thomas Moore.

C. Simms, for defendants, cited the 42d section of the bankrupt law (2 Stat. 19); 1 Esp. 117; 1 Atk. 133. Partners are jointly and severally bound. A separate commission may issue against one partner, upon a partnership debt; consequently a joint debt may be proved under a separate commission. At the dissolution, Thomas was authorized to settle the partnership affairs, and has testified that at the time the defendants purchased the goods, he intended they should go in discharge of the debt due.

Mr. Jones, contrà. A separate commission may issue upon a joint debt, but if it issue on an individual debt, individual creditors only can come in and prove under that commission, until all the separate debts are paid. A partnership is not bound to pay the individual debt. Cooke, Bankr. Law, 237, 568, 582; Ex parte Elton, 3 Ves. 238.

A verdict was taken for the plaintiff, subject to the opinion of the court upon the following facts: Henry and Thomas Moore were indebted to the defendants in $106. The defendants were indebted to Thomas Moore, after the dissolution of the partnership, and before the bankruptcy, in $113. Thomas Moore was authorized by his partner to settle the partnership concerns, collect the debts due to the partnership, and pay the debts due from the partnership, as far as the joint funds would extend. After the dissolution, the defendants, knowing thereof, and that Thomas Moore was carrying on business on his separate account, at several times purchased of Thomas Moore, goods to the amount of $113. Thomas Moore, being examined as a witness, proved that it was his intention, at the time of selling those goods to the defendants, to give them credit for the joint debt due from Henry and Thomas Moore; but nothing was said or agreed on the subject between them, nor was such credit ever given before his bankruptcy.

THE COURT (nem. con.) gave judgment for the plaintiff, because it appeared to be a naked case of set-off of debts due in different rights. And although a joint debt may be proved under a separate commission, yet it is only to enable the joint creditor to come in for his share of the surplus, after payment of the separate creditors.

This judgment was reversed by the supreme court (5 Cranch [9 U. S.] 34), because a defendant may set off a joint debt by virtue of the bankrupt law.

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

[2] [Reversed in 5 Cranch (9 U. S.) 34.]

Case No. 10,639.

OXLEY v. WILLIS.

[1 Cranch, C. C. 436.][1]

Circuit Court, District of Columbia. July Term, 1807.

PARTNERSHIP — SETTLEMENT BY PARTNER — BALANCE DUE SUCH PARTNER BY FIRM'S DEBTOR.

If one of two partners has authority, after the dissolution of the firm, to collect the debts, and he opens a new account with a debtor of the firm, charging him with the balance due to the firm, and giving him credits for payments, and goods, &c., received, and there is found a balance in his favor; this balance is due to the bankrupt, and not to the firm.

The defendant was indebted to H. & T. Moore in a balance of $76. When the partnership of H. & T. Moore was dissolved, T. Moore continued to carry on the business, and was authorized by his partner to collect and pay the partnership debts, as far as the joint effects should come into his hands. After the dissolution, T. Moore opened an account with the defendant in his own name, in which account he charged the defendant with the said balance of $76, and gave him credit for goods delivered after the dissolution, striking a balance upon the whole, in favor of T. Moore, of $43.11. T. Moore, after the dissolution, and before the bankruptcy, advanced moneys on account of

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

the partnership, to the amount of $1,378.62 more than there were partnership effects in his hands.

Verdict for the plaintiff, subject to the opinion of the court on the above facts.

Judgment for the plaintiff, (nem. con.) on the ground that T. Moore had the power to settle the account, and had actually discharged the defendant from the demand of H. & T. Moore, by closing their account, and having actually set off the debts against each other before the bankruptcy. Quære.

P.

Case No. 10,640.

In re PACE.

[1 Tex. Law J. 315.]

District Court, W. D. Texas. May 9, 1878.

BANKRUPTCY — CARE OF PROPERTY BY MARSHAL— EXPENSE OF GUARD—NECESSITY—PER DIEM CHARGE.

1. Marshals are not entitled to per diem service for holding, constructively, possession of bankrupt property.

2. They may be allowed $2.50 per day as a disbursement paid to a guard to watch the property, on proof that a prudent caution for the care of the property required it, and the time the guard was so actually engaged in watching it, and that the disbursement charged has been actually paid.

3. The oath of the marshal is not conclusive as to the necessity of expenses charged in his account.

In bankruptcy.

By S. T. NEWTON, Register:

Pursuant to the special order of this honorable court, made and entered at Tyler on the 9th inst., referring to me the motion of H. C. Hunt, assignee of said bankrupt's estate, to retax the fee bill of Thomas F. Purnell, United States marshal in and for said district, for his service as such marshal in seizing and in the custody of a stock of merchandise belonging to said bankrupt, at Ft. Worth, in the county of Tarrant, in said district. I ordered a hearing of said matter before me at my office, at Tyler, on the 9th inst., and was attended at the hearing by John L. Henry, Esq., attorney for said assignee, and E. R. Purnell, United States deputy marshal.

From the testimony adduced I find the following facts: (1) That John A. Pace, residing at Ft. Worth, in said county of Tarrant, filed his petition in voluntary bankruptcy in United States district court, at Tyler, on the 28th day of January, A. D. 1878, and was adjudged a bankrupt by said court. (2) That some time prior to that date, W. D. Cleveland, one of the creditors of said bankrupt, had commenced suit before one McClung, a justice of the peace, for the recovery of a debt due from said bankrupt to said creditor, and that on the day of the filing of the petition in bankruptcy the said creditor recovered judgment against said bankrupt for his debt, with notice of the commencement of proceedings in bankruptcy, from which judgment the said bankrupt, by his attorneys, gave notice of appeal. (3) That on the 29th day of January, A. D. 1878, the day after the rendition of the judgment aforesaid, the plaintiff in said suit applied for and had execution issued, which was placed in the hands of one W. J. Crozier, bailiff, who levied on a portion of the stock of merchandise then in the possession of said bankrupt, and advertised the same for sale. (4) That on the 29th day of February, next thereafter, the attorneys of said bankrupt applied to this honorable court for and obtained a writ of injunction restraining the said bailiff and other parties in interest from further proceeding in the sale of said property, and by virtue of which said restraining order, one T. J. Courtney, a special deputy United States marshal seized and took possession of the stock of merchandise so levied upon by said bailiff, and also the remaining portion of the stock of merchandise belonging to said bankrupt, and his other property, and proceeded to make an inventory thereof as required by law. (5) That after making the inventory of the stock of merchandise the said United States deputy marshal moved said stock of merchandise to another room or building, locked the door, and delivered the key to said bankrupt, leaving the same in his care and custody, and returned to the city of Austin, some 267 miles distant from the residence of said bankrupt; that said deputy United States marshal left no watch, nor employed any one to look specially after or guard said property, but told said bankrupt to request a policeman to give it some extra attention, for which he would pay him, but the evidence does not show that any such attention was given; that no charge was made by the policeman, and that no disbursement was made by the United States marshal, or his deputies, to any one, for the time the goods were left in charge of said bankrupt; and that the goods so remained in the charge of the said bankrupt until he turned them over to said assignee, which the evidence shows was about the 25th day of February, A. D. 1878, 15 days from the time of the seizure of said goods by the United States deputy marshal.

From an inspection of the motion of the assignee, I find only two items in the marshal's cost bill to which exceptions are taken,

and which will be noticed: Item 6. "Custody of goods from February 8, 1878, to 23d of February, 1878, 15 days at $5 per day." Item 14. "Postage, $5.04."

General order No. 30, promulgated by the justices of the supreme court on the 11th of April, A. D. 1875, provides specifically for the fees of the United States marshal, as follows: "The marshal shall be allowed for each hour necessarily employed in making the inventory of bankrupt's property, one dollar." "For each hour actually and necessarily employed in personal attention, in taking care of bankrupt's property, one dollar." No other allowance to be made for the custody of property except for actual disbursements, which shall in all cases be passed upon by the court.

The fourth subdivision of section 5126, Rev. St., which provides for the payment of priority claims out of the bankrupt's estate by the assignee, before declaring a dividend, declares: "For the custody of property, publication of notices, and other services by the United States marshal, his actual and necessary expenses, upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, are just and reasonable, the same to be taxed and adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of such expenses." For cause shown and hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

This section would seem to modify general order No. 30, in so far as to allow the messenger, for the custody of property, his actual and necessary expenses. Said section further provides that the marshal cannot charge for expenses of keeping property more than $2.50 per day, and such amount, before being allowed, must be shown to have been actually incurred and actually paid.

The testimony in this case does not show that the United States marshal or his deputies gave their personal attention to this property from the time it was deposited in the storehouse and the key delivered to the bankrupt until it was turned over to the said assignee. Nor does the testimony show that either the marshal or his deputies made any disbursements, or expended any money for the keeping and custody of said property during the period of time the property was so under the charge of said bankrupt; but it is contended by the marshal that, though his personal attention was not given to the care of the property, or that he made no disbursement for the custody of it, being in the constructive possession of it, and being, as he claims, responsible for it, the charge is proper and ought to be allowed. I do not think this is the law, for the fees to be allowed are all specific, prescribed by statute and by general order No. 30, and the power of the court to make further allowances is taken away; and, in the custody of property, except as regards the marshal's personal attention, actual disbursements only are to be allowed, and which must be passed on by the court.

I think the intention of the law is that the property of the bankrupt shall be securely kept by the marshal from the time it comes into his possession, and has provided that, if he cannot give it his personal attention, he may employ a watch to guard it, and allows him a disbursement, for that purpose, of $2.50 per day for the time the property is so guarded, and this can only be allowed as an actual disbursement. If the theory is correct that the constructive possession of the bankrupt's property would entitle the marshal to a fee of $5 per day, he might hold constructively the possession of a large number of bankrupt estates at the same time, of much value, at many miles' distance from his place of business, bringing a handsome revenue to the office, which, in the event of being destroyed by fire or other accident, would force the creditors of these estates to the remote contingency of making the marshal responsible for them. So liberal an interpretation, I think, cannot be fairly given to the statute. In view of the law and general order No. 30, regulating the fees of the marshal, I am of the opinion the exception to item 6 in the marshal's account was properly taken.

In reference to item 14, "Postage, $5," I think cannot be allowed without further proof, and the exception to it should be sustained. In re Johnston [Case No. 7,421]; In re Comstock [Id. 3,075]; In re Burnell [Id. 2,171].

DUVAL, District Judge. The foregoing report and opinion of Mr. Register NEWTON, having been read and considered, I concur with him in the conclusions arrived at, and, therefore, approve and affirm his decision.

Case No. 10,641.

PACHECO v. UNITED STATES.

[Hoff. Land Cas. 113.] [1]

District Court, N. D. California. Dec. Term, 1855.

LAND CLAIMS—FREMONT'S CASE.

This claim entitled to confirmation under the ruling of the supreme court in U. S. v. Fremont [18 How. (59 U. S.) 30].

Claim for eleven leagues of land in Mariposa county, rejected by the board, and appealed by the claimant [Juan Perez Pacheco].

Stanly & King, for appellant.
S. W. Inge, U. S. Atty., for appellee.

HOFFMAN, District Judge. The claim in this case is founded on a grant made by Governor Micheltorena on the fourth of November, 1843.

1 [Reported by Numa Hubert, Esq., and here reprinted by permission.]

It appears from the expediente, a copy of which is contained in the transcript, that one Mejia petitioned the governor on the twenty-sixth of September, 1843, for a grant of a tract of land lying at the base of the hillocks which penetrate into the valley of San Joaquin, with the same number of sitios as belonged to Francisco Rivero, to whom the government of the department had granted, but who had neglected to occupy it during two years from the date of his grant. The governor made the usual reference of this petition to the prefect and the secretary for information. The latter officer reported that the land had been granted to Francisco Rivero since 1841, but that inasmuch as the latter had failed to comply with the condition requiring him to build a house within one year, which should be inhabited, he (the secretary) was of opinion that he had forfeited his right to the land, and that it might be granted to Mejia, the petitioner. On the third of October, 1843, the governor ordered the title to issue in conformity with this report. In the decree of concession, which was made on the fourth of the ensuing month, the governor recites that, in consideration of the long period which has elapsed "without the land being occupied by Don Francisco Rivero, and without any news of the whereabouts of said individual, and inasmuch as the interested parties have the means of improving and occupying the land," he declares José M. Mejia and Juan Perez Pacheco owners of the tract known as San Luis Gonzaga, bounded by the rancho of Don Francisco Pacheco, by the bath called Padre Arroyo's Bath, by the river and the wild Indian country. In the third condition, the land is declared to be of the extent of eleven square leagues. The original document delivered to the parties is produced, and the genuineness of the signatures of the governor and secretary duly proved. It is in entire conformity with the decree of concession found in the expediente. By the testimony of José Abrego, it appears that for eight years previous to 1853 the rancho was in the possession and occupation of the petitioner; that he constructed and occupied several small houses by himself and those in his employment; that he also built several large corrals, and cultivated portions of the land during all that period. By the depositions of Rodriguez and Dias, taken in this court, it is shown that the land was occupied as soon as the hostility of the Indians permitted; that the rancho was peculiarly exposed to their depredations, being on the route most frequented by them in coming from the Tulares. The witness Dias states that he is unable to specify the precise time when the first settlement was effected, but knows that the land was occupied in 1847. It is obvious that there is no proof that the condition requiring a house to be built within the year was ever complied with by the grantees, and for the want of such the board was of opinion that the claim should be rejected, more particularly as the claimants had obtained their grant on a denouncement founded on the neglect of the previous grantee to perform the very same condition which they failed themselves to fulfill. The proofs taken in this court show, however, an excuse for nonsettlement which was not offered to the board, and it is very doubtful whether in this case, even had the land been denounced to the Mexican government, it yould have been regranted. It is worthy of observation, that in the decree of concession the governor states, not only that Rivero, the previous grantee, had failed to occupy the land within the year, but that the period of two years elapsed "without any news of the whereabouts of that individual." It may therefore be reasonably inferred that the land was forfeited, not merely in obedience to a rigorous rule which imposed that consequence as penalty for the nonperformance of the conditions, but because the governor was satisfied the grantee had abandoned his grant, and had, at all events, failed to show either an effort to fulfill or an excuse for not doing so. But whatever action the governor might have taken had this land been denounced as against the present claimants, no such proceeding was had, and the proof shows that a settlement was effected within less than two years from the date of the grant, and during the continuance of the former government.

The principles laid down in the case of U. S. v. Fremont [18 How. (59 U. S.) 30] apply therefore with great force to this case. For here there was not only no second denouncement, but the conditions were fully complied with during the existence of the Mexican authority; and the proofs show not only that there was no unreasonable delay or want of effort, but they absolutely repel the idea that the party had abandoned his claim before the Mexican power ceased to exist, and is now seeking to resume it from its enhanced value. It may also be observed that there is no reason to suppose that under the Mexican laws land could in any case be denounced after the conditions had been fulfilled, whether within or after the time limited in the grant. The remaining objection to this claim which is noticed in the opnion of the board is, that the grant is vague and general, and has never been located by competent authority. But by the testimony taken in this court, it appears that the natural objects mentioned in the grant are notoriously known, and the description is as accurate as could be given without a survey. On referring to the grant the boundaries seem to be indicated with some precision. The rancho of Francisco Pacheco, the bath of Padre Arroyo, and the river (San Joaquin) are all mentioned, ana there seems no reason to doubt the statement of the witnesses that by means of

these calls the land can, without difficulty, be located. No other objections to this grant are stated in the opinion of the board, nor are any others raised on the part of the United States, the case having been submitted without argument or suggestion on the part of the appellees. A decree of confirmation must therefore be entered.

PACHECO (UNITED STATES v.). See Cases Nos. 15,980–15,982.

Case No. 10,642.

The PACIFIC.

District Court, S. D. Florida. 1857.

SALVAGE—AMOUNT—DAMAGE TO GOODS—LEAK IN SALVING VESSEL.

[1. Cited in The Mulhouse, Case No. 9,910, to the point that the owner of a vessel employed in the business of wrecking is liable for damages happening to goods taken on board from a wreck, caused by the leaky condition of his vessel.]

[2. Cited in Baker v. The Slobodna, 35 Fed. 542, as an instance in which 30 per cent. was allowed as salvage for cargo saved to the value of $29,776.]

[Nowhere reported; opinion not now accessible.]

Case No. 10,643.

The PACIFIC.

[1 Blatchf. 569;[1] 8 N. Y. Leg. Obs. 340; 36 Hunt, Mer. Mag. 575.]

Circuit Court, S. D. New York. Oct. Term, 1850.

ADMIRALTY JURISDICTION—SHIPS CARRYING PASSENGERS—CONTRACT AS AN ENTIRETY.

1. Ships engaged in carrying passengers on the high seas for hire, stand on the same footing of responsibility, according to the maritime law, as those engaged in carrying merchandize, the passage money being the equivalent for the freight; and, therefore, on a breach of a passenger contract, and damage resulting, the ship as well as the owner is bound to respond. The case of The Aberfoyle [Case No. 17] cited, and its doctrine confirmed.

[Cited in The A. M. Bliss, Case No. 274.]

2. The owner of a ship bound from New-York to California, agreed with C., at New-York, to take him as a cabin passenger, with his luggage, at $300; not more than 50 cabin passengers to be received, for which reason the fare was raised from $250, the usual charge; state-rooms to be fitted up between decks on each side, with a free passage between, disencumbered with freight, for ventilation and exercise; and the vessel to sail on the 5th of January. C. paid his passage money on the 2d. He lived in Massachusetts, and prepared for the voyage at considerable expense, and went to New-York at the time appointed for sailing, when he found that the state-rooms had no space between them for ventilation or exercise, in consequence of the increased number of them, and that 72 cabin passengers had been engaged, many at $275 each, so that the vessel was overcrowded with passengers and cargo, and incommodious, and dangerous to health. C. refused to embark, and demanded back his passage money, which was refused. He then, on the 20th of January, filed a libel in rem against the ship, for the return of the passage money and for his damages: *Held*, that the admiralty had jurisdiction of the case, and that the ship was liable.

3. The contract was an entirety. It is wholly of admiralty cognizance, or else it is not at all within it, as there cannot be a divided jurisdiction.

4. The stipulations in the contract, as to the fitting up of the ship, &c., were incidental and subsidiary to the main purpose of the contract, which was to convey the libellant and his luggage to California. Those stipulations have nothing to do with determining the nature of the contract, or with the question of jurisdiction.

5. As the contract was an entirety, the failure to comply with any part of it went to the whole. The libellant had a right to demand a strict compliance with every part, and, in case of refusal, to consider the contract as broken.

[Cited in Cobb v. Howard, Case No. 2,925.]

6. In the case of a contract maritime in its nature and subject, it is not essential, in order to give jurisdiction to the admiralty in rem, that the vessel should have entered on the performance, or that the breach should have occurred in the course of the voyage.

[Cited, but not followed, in The General Sheridan, Case No. 5,319. Cited in Oakes v. Richardson, Id. 10,390; The City of Brussels, Id. 2,745; The Williams, Id. 17,710; Scott v. The Ira Chaffee, 2 Fed. 403. Cited, but not followed, in The Monte A., 12 Fed. 333. Distinguished in The City of Baton Rouge, 19 Fed. 462.]

7. A maritime contract depends upon its subject matter, and, when entered into for the conveyance of goods or persons in a particular ship, it binds the ship. Her obligation results directly from the contract, and not from the performance, and the liability of the owner and that of the ship attach at the same time.

[Cited in Cobb v. Howard, Case No. 2,925. Cited, but not followed, in The General Sheridan, Id. 5,319. Cited in The Williams, Id. 17,710.]

8. In the case of a contract with a materialman, or one for repairs, the liability of the vessel arises from the furnishing of the supplies, or the making of the repairs. Short of actual repairs or supplies, the party claiming damages for a breach of contract must look to the master or owner.

[Cited in The Cabarga, Case No. 2,276; The California, Id. 2,312; James Dalzell's Son & Co. v. The Daniel Kaine, 31 Fed. 748; The James H. Prentice, 36 Fed. 781.]

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

Charles D. Cleaveland filed a libel in rem, in the district court, against the ship Pacific [her tackle, etc.][2] then lying in the port of New-York [and against the owners and master],[2] for a breach of a passenger contract. The libel set forth, that the vessel was bound on a voyage from New-York, around Cape Horn, to San Francisco in California; that her owners agreed with the libellant, at New-York, to take him, as a cabin passenger, together with his luggage, the

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

[2] [From 8 N. Y. Leg. Obs. 341.]

fare to be $300; that in order that this class of passengers might have all the accommodations desirable for so long and tedious a voyage, and sufficient space for exercise and air, not more than fifty cabin passengers were to be received on board; that the passage money was, by reason thereof, raised to $300, instead of being $250, the usual charge; that staterooms between decks were to be fitted up, making separate apartments for two passengers each, the rooms to be arranged on each side of the vessel, leaving a free passage-way between disencumbered with freight, for ventilation and exercise; that the vessel was to sail on or about the 5th of January, 1849; that the libellant's passage money was paid on the 2d of that month; that the libellant, who was a resident of Massachusetts, prepared himself for the voyage at considerable expense, and came to the city of New-York at the time appointed for the departure of the vessel, for the purpose of embarking in her and starting on the voyage, when he found that the staterooms, instead of being fitted up, as was agreed, for the accommodation and health of the passengers, had no space between them for ventilation or exercise, in consequence of the increased number that had been constructed; that seventy-two cabin passengers had been engaged for the voyage, and were to be taken on board, the price as to many of them having been reduced to $275 each, by reason whereof the vessel was overcrowded with passengers and cargo, and rendered incommodious and dangerous to health; that the libellant, on ascertaining these facts, refused to embark, and demanded a return of his passage money, which was refused. The libel was filed on the 20th of January, 1849, claiming a return of the passage money, and damages to the amount of $1000. The claimants filed a demurrer to the libel, alleging that the contract on which it was founded was not one of which a court of admiralty could take cognizance; and that, if the same or any part of it was cognizable in admiralty, no cause of action had arisen on it at the time the libel was filed. The district court overruled the demurrer, and pronounced for the libellant, for the return of his passage money and his damages [case unreported], and the claimants appealed to this court.

William Allen Butler, for claimants.

I. The contract on which the libel is founded, though including, as one of its terms, an obligation on the part of the owners of the ship, to convey the libellant and his effects from New-York to San Francisco, included, also, as the same is set forth in the libel, various other obligations, which were to be performed before the sailing of the vessel and preparatory thereto, within the city and county of New-York, where the contract was made. For, according to the libel, the owners also agreed: 1st. Not to take more than 50 cabin passengers, and, by reason thereof, to charge $300 for each passenger, and not to take any passenger for any less price. 2d. That the vessel was not to be crowded, and that freight should not be taken to the inconvenience of the passengers. 3d. That the state-rooms to be put up in the cabin, should only occupy the sides of the after part of the vessel; and the middle of the cabin was to be left open for ventilation, and the comfort and health of the passengers. 4th. That there should be no choice of state-rooms or berths, but they should be distributed equally by lot. 5th. That the state-rooms to be put up should be each at least six feet square, and well ventilated and lighted. The contract charged is, therefore, a contract to fit up the ship in a particular and specified manner; to take only a limited number of passengers, and a limited quantity of freight; to exact from such passengers a uniform specified price; to give to each passenger an equal chance by lot in respect to state-rooms or berths; and then to convey the libellant (who had paid the specified price) from New-York to San Francisco.

II. Conceding, according to decisions of the district court for this district (Marshall v. Bazin [Case No. 9,125]), one of which has been affirmed in this court (The Aberfoyle [Id. 17]), that a contract to convey passengers is within the jurisdiction of the courts of admiralty (a proposition upon which the supreme court of the United States has not yet passed), it is still insisted, that the contract in the present case is not within the admiralty jurisdiction, because it is not solely and exclusively for the conveyance of the libellant and his effects to San Francisco, but embraces in addition the several undertakings above specified, which are merely preliminary to the contemplated voyage. 1st. To give jurisdiction to the courts of admiralty in a case of contract, the contract charged and broken must be for the performance of maritime services. The Thomas Jefferson, 10 Wheat. [23 U. S.] 428; Peyroux v. Howard, 7 Pet. [32 U. S.] 343; Hobart v. Drogan, 10 Pet. [35 U. S.] 119, 120; The Orleans v. Phœbus, 11 Pet. [36 U. S.] 183; Thackarey v. The Farmer [Case No. 13,852]; New Jersey Steam-Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 385. 2d. The several things contracted to be done before the sailing of the vessel, though they related to the ship, and to the contemplated conveyance of the libellant and his effects in her, were not in themselves maritime services; and, if the contract had been confined to them, it would not have been a maritime contract cognizable in admiralty. Montgomery v. Henry, 1 Dall. [1 U. S.] 49; The Tribune [Case No. 14,171]; Andrews v. Essex Fire & Marine Ins. Co. [Id. 374]; Plummer v. Webb [Id. 11,233]. 3d. It is not enough that the contract includes an obligation or some obligations of a maritime nature; it must, as an entirety, in all its material and substantial

parts, be for the performance of maritime services. The whole contract must, in its essence, be maritime, or for compensation for maritime services. 4th. The contract in question being one and indivisible, and including various extrinsic obligations to perform services not maritime, the non-performance of which constitutes the sole ground of action, the case is wholly without the limits of the admiralty jurisdiction.

III. At the filing of the libel, no cause of action upon the contract, cognizable in any court, had arisen. 1st. The ship was then lying in the port of New-York. 2d. It is not pretended in the libel, that the voyage was broken up or abandoned; on the contrary, it is admitted therein, that the ship is ready for sea and about to sail on the voyage contracted for. 3d. It is not pretended by the libellant, that the owners or master refused to receive him in the ship, and to convey him to San Francisco; on the contrary, the libellant claims that he is not bound to go in her, but is entitled to remain, and to have a return of the passage money paid by him, and damages. 4th. The gravamina of the libel relate, exclusively, to matters to be performed within the county of New-York, preparatory to and at the sailing of the vessel. 5th. In cases of this sort, where, by the refusal of one party to perform, the other party has a right to treat the contract as terminated, his remedy to recover back money advanced, is not by an action on the contract, but by an action for money had and received, treating the contract as wholly at an end. Giles v. Edwards, 7 Term R. 181; Gillet v. Maynard, 5 Johns. 85; Raymond v. Bearnard, 12 Johns. 274; Watson v. Duykinck, 3 Johns. 335; Griggs v. Austin, 3 Pick. 20.

IV. At all events, at the filing of the libel, no cause of action of admiralty cognizance had arisen. 1st. The true basis of admiralty jurisdiction is, that the consideration, the performance, and the execution of the contract are on the sea. The mere fact that a contract has been made which relates to a ship or to a performance at sea, does not give admiralty jurisdiction, where nothing is done at sea under, or in performance, or in violation of the contract. 2d. Nor did the admiralty acquire jurisdiction over the contract by reason of its supposed abandonment by the owners of the ship. The mere fact that the contract, if executed, would have given admiralty jurisdiction, will not give such jurisdiction when it has been wholly abandoned before any maritime transaction under it. 3d. The doctrine that the contract had been broken and terminated by the refusal of the claimants to perform the same according to its terms, and that therefore the court had jurisdiction of the case, and could give relief therein, is wholly inapplicable in a court of admiralty, which, in cases ex contractu, can only take cognizance of actions founded directly on the contract. Dean v. Bates [Case No. 3,-704]; Leland v. The Medora [Id. 8,237]. 4th. Considered as a proceeding in rem, the jurisdiction asserted in the present case is especially untenable. (1) The jurisdiction of courts of admiralty in rem proceeds upon the principle, that, from the nature of the contract or of the facts, the ship herself is to be regarded, in contemplation of law, as a participant in the contract, or in the facts from which the liability results, and is therefore responsible. (2) In respect to those parts of the contract in question which are alleged to have been broken, the libellant stood on the personal security of the owners, and not on the security of the ship. (3) A maritime contract may be made on the faith of the ship, as well as on that of the owners or master; but it cannot be broken so as to attach liability to the ship, unless the ship herself has done, or has been caused to do, some act in violation of the contract. No such act had been done by or with the ship, when the libel was filed, and therefore no cause of action had then accrued against her.

V. The decision in the present case extends, inconveniently and without necessity, the jurisdiction of courts of admiralty. 1st. To permit a person who has contracted for a passage in a vessel, on the condition that certain accommodations shall be prepared for him, to libel and detain the vessel, at the moment of departure, because such accommodations have not been prepared, would not only expose the owners of vessels engaged in the transportation of passengers by sea or on tide waters, to extortion and injustice, but be productive of serious public inconvenience. 2d. Such an extension of the admiralty jurisdiction is unnecessary to the ends of justice. The courts of law and equity are perfectly competent to give adequate redress; and, as the case stood at the filing of the libel, the remedy of the libellant was exclusively to be sought in such courts.

VI. The false representations and pretences alleged in the libel to have been made, and the deceit alleged to have been practised, by the owners and their agent, do not constitute a marine tort cognizable in a court of admiralty, but are exclusively of common law jurisdiction, because done, not on the sea, but entirely upon the land.

Francis B. Cutting and Charles B. Moore [and R. Goodman], for the libellant.

The contract set forth in the libel in this case was a maritime contract, over which the district court had jurisdiction.

I. Its object, essence and whole purpose was the freighting of the vessel; the conveyance of the libellant as a passenger, with his luggage, for freight, on a single voyage from New-York, around Cape Horn, to California; a service to be performed exclusively on the high seas and on tide waters

(where the vessel already was), and pertaining exclusively to the business of commerce and navigation. The general principle has been often maintained; and there is no distinction between the carriage of passengers and of merchandize. The Aberfoyle [Case No. 17]; Marshall v. Bazin [Id. 9,125]; The Zenobia, cited in Marshall v. Bazin; The Rebecca [Case No. 11,619]; The Phebe [Id. 11,064]; The Volunteer [Id. 16,991]; The Tribune [Id. 14,171]; De Lovio v. Boit [Id. 3,776]; 3 Kent, Comm. 218; Howland v. The Lavinia [Case No. 6,797]; Plummer v. Webb [Id. 11,233]; The Thomas Jefferson, 10 Wheat. [23 U. S.] 428; Waring v. Clarke, 5 How. [46 U. S.] 441; New Jersey Steam-Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344; Moffat v. East India Co., 10 East, 468; Abb. Shipp. (Story & Perk. Ed.) 491, notes, and cases cited.

II. The minute terms of the contract, which must always be attended to in determining whether it has been performed or broken, are varied in different cases, but can have no effect upon the question of jurisdiction. In nearly all the cases cited questions arose upon such special terms, which were often the whole occasion of controversy. In the case first cited, of The Aberfoyle [supra], the passenger was to have not less than ten cubic feet for luggage, and three quarts of water per day, and the breach was, that the allowance was withheld. In the case of The Zenobia [supra], passage money being paid in advance, the breach was the leaving the passengers behind. Cases founded on any such contracts, bills of lading, charter parties, &c., generally turn upon the like special terms.

III. In the present case, the terms and conditions are all incidental to the maritime service, and relate merely to the safety, health and comfort of the passenger on the voyage. That the engagements in question are thus incidental in their character, and are highly important and necessary, and relate to foreign commerce, and to matters acknowledged to be peculiarly within the province of the federal courts, will appear by the passenger act of February 22, 1847 (9 Stat. 127), which was not applicable to this voyage when it was commenced, but was applied to it by the act of March 3, 1849 (9 Stat. 399). Without any such special or minute definition of terms, a mere agreement to take passengers would imply that they were to be taken in a safe, healthy, and comfortable manner; and, as to the precise manner, the number, &c., reference would be had to mercantile usage, and to all the circumstances. It cannot destroy the jurisdiction to specify these particulars, instead of leaving them to be implied and to be open for contestation.

IV. The libel is, in substance, founded upon the contract, and is for a breach of performance on the part of the vessel and owners, occurring after the contract had become binding, as such, upon the vessel. By advertising and preparing the vessel for the voyage, appointing a day to sail, receiving the passage money, requiring the passengers to be ready, and, when the vessel was about to sail, refusing to return the money or comply with the terms agreed upon, the owners assumed that there was a maritime contract, and put themselves upon the question, whether the libellant or the vessel was in fault for its non-performance.

V. The contract itself may be counted upon, though it be broken in the very outset. 1st. A breach in such particulars may be urged in an action in any court upon the contract itself, and damages for the breach be claimed. It was not necessary to wait longer, to show a breach of the contract. Chit. Cont. 486, 531; Long v. Horne, 1 Car. & P. 610; North's Adm'rs v. Pepper, 21 Wend. 636; Ford v. Tiley, 6 Barn. & C. 325, 327, 328 (per Bayley, J.), and 9 Dowl. & R. 448; Beswick v. Swindells, 3 Adol. & E. 868; M'Nish v. Coon, 13 Wend. 26; 1 Rolle, Abr. 248, p. 1; Sir Anthony Main's Case, 5 Rep. [Coke] 21, Res. 2. 2d. The mere rescission of the contract (though justifiable under the circumstances, so that the libellant had no option of resorting to it, so far as the mere obtaining back of the passage money paid in advance was concerned) does not afford a perfect remedy nor interfere with the above view. The libellant in this action had a right to recover his actual expenses of being ready and waiting, &c., and damages for the refusal to carry his freight. Hogan v. Shee, 2 Esp. 522; Giles v. Edwards, 7 Term R. 181; Driggs v. Dwight, 17 Wend. 71; Freeman v. Clute, 3 Barb. 424. 3d. The claimants are mistaken in a matter of fact, when they urge that the contract was abandoned by the ship-owners, or terminated by their refusal to perform. On the contrary, the ship-owners insisted on the contract, by refusing to repay the money, and by deceptively placing the libellant in a position to incur expense and disappointment if he did not go, and to have his convenience and safety disregarded if he did go.

VI. The claimants' objections are narrowed down to the claim, that the contract provided for a day of sailing, and for a particular manner of fitting the vessel before sailing, and for not taking more than a specified number of other passengers on sailing; that the breaches occurred in these particulars before sailing; that these were parts of the contract not to be performed at sea; and that, if the contract as a whole be deemed maritime, yet these breaches, occurring before the execution by the vessel was commenced, did not afford what is termed a maritime cause of action, or did not occur on the sea, or so as to bind the vessel. To which it may be answered: 1st. That they all occurred within the ebb and flow of the tide, on tide water. The vessel was afloat in the tide, about

to sail on a voyage. The performance of the contract, (though a small part of it, necessarily, was to occur in port before sailing,) was all within the recognized admiralty jurisdiction, which is not confined to matters occurring at sea. The safe, healthy and comfortable manner of carrying the passenger was to commence in port, and a breach of this (necessarily running through the whole voyage) occurred as effectually before leaving port, as it could after. To contend otherwise, is to say that a point blank refusal in port to perform a maritime contract, does not fall within maritime jurisdiction. This answer to the objection answers also the argument ab inconvenienti. The building and fitting of a domestic vessel are performed on land, and, as to them, the admiralty courts enforce only maritime liens given by the local laws. Supplies to a foreign vessel are furnished in port, and payment is generally demanded before the vessel leaves port, and is enforced as a maritime matter, in rem, or in personam. Sailors' services are performed in port as well as at sea, and freight is earned partly in port, and all are compensated for in admiralty, in personam as well as in rem (rules 12, 13), unless a part of the voyage be above tide water. The Thomas Jefferson, 10 Wheat. [23 U. S.] 428. The same rule applies here, and the definition requiring the whole performance to be at sea is unfounded. The idea that the consideration should be at sea is also unfounded. The compensation to be paid a sailor, a pilot, or a ship-owner, for a maritime service, is always on the land. The consideration afforded by the ship-owner in furnishing his vessel, and by the material-man in supplying his goods, occurs on land. 2d. The contract of a passenger is made as much on the faith of the ship, as is that of the freighter or sailor. It is broken, if the ship, when she is about to leave port, refuses performance in a material essential part, such as health and safety, as much as if she were actually to go without the passenger. The ship herself does, or is caused to do, an act in violation of the contract, when she takes other cargo or passengers, and is about to sail with them, refusing to comply with the contract, as much as though she sailed away without the passenger. 3d. No authority has been found to justify the supposed distinction between a maritime contract and a maritime cause of action. There may be a maritime tort, and a maritime cause of action for that tort, depending upon the place where is occurs. A maritime contract does not depend upon locality, but upon its essence, substance and object; and, upon every such contract, there is a maritime cause of action for its breach, the common law right of action, where it is concurrent, being saved by the proviso of the judiciary act. The cases show, that libels for breaches of performance occurring on land have frequently been sustained. Wells v. Osmond, 6 Mod. 238, and 2 Ld. Raym. 1044; Ross v. Walker, 2 Wils. 264; The Tribune [Case No. 14,171].

Benjamin F. Butler and Daniel Lord, in reply.

I. The cases of the Aberfoyle, The Zenobia, and Marshall v. Bazin [supra], so far as they relate to the carriage of passengers, were all cases in which the voyage contracted for had been actually performed, and the libellant had been either improperly left behind, or not treated on the passage in the way contracted for, or, though conveyed in the ship, had failed to pay the passage money. The only other reported case of a libel for or against a passenger, that of Chamberlain v. Chandler [Case No. 2,575], has the same distinguishing feature; the voyage had been performed, but the passenger, during it, had been maltreated. In each of the admiralty cases cited, in which the jurisdiction has been sustained by the supreme court, the voyage contracted for was begun, and either wholly or partially performed.

II. That the minute or special terms of the contract, as contradistinguished from its principal obligation, may be important in determining, in the proper forum, and at the proper time, whether it has been performed or broken, is not denied. But, can a court of admiralty take jurisdiction of a case in which only the minute and special terms of a maritime contract have been broken, while the principal obligation of such contract, that which makes it maritime, has not been broken? That is the question here. Take out of the contract and the libel these minute and special terms, and what is left? Nothing, except the contract to carry the libellant in the ship Pacific to San Francisco, and the libel not only does not show that this contract had been broken when it was filed, but expressly admits the contrary.

III. The position, that particulars reasonably essential to the safety, health and comfort of the passenger are implied in a contract to convey, as such, is no doubt correct. And it may, also, be admitted, that it cannot destroy the jurisdiction to specify these particulars, instead of leaving them to be implied and to be open for contestation. But the question now is, not whether admiralty jurisdiction, otherwise existing, is destroyed by stating these particulars; but whether such statement, with the allegation that in these particulars alone the contract has been broken, gives jurisdiction. Suppose these particulars had all been omitted (and, according to the theory of the libellant, it was not necessary to state them in order to give jurisdiction), what then would the libel have contained? Merely the allegations, that the claimants had contracted to take the libellant to San Francisco in the ship Pacific, which was about to sail for that port; that the claimants were willing to take him in the ship; but that he was unwilling to go, because he anticipated, and even on solid

grounds, that he would not be carried in a safe, healthy and comfortable manner. Would such a libel have given jurisdiction to the admiralty? Certainly not.

IV. It may be admitted that the vessel became bound to the performance of the contract, and of all the terms of the contract, from the day of the making thereof, and that the particulars in which the libel alleges the breach thereof were essential terms of such contract. But the question still recurs—did such breach, occurring before the sailing of the ship, she being actually about to sail, give jurisdiction to a court of admiralty?

V. The common law cases cited on the point of the breach of the contract prove nothing pertinent to the present enquiry, except that there was a perfect remedy in the common law courts, in which, if the owners were the only parties in fault, the libellant might not only have recovered back the passage money advanced by him, but the expenses incurred while waiting. And though, under the old system, this measure of relief might not have been obtained in the technical common law action for money had and received, yet under that system a special action on the case would have secured it; and, under the new Code of Practice, the libellant, in an action stating all the facts, would have obtained all the relief to which the most liberal and enlarged equity could entitle him, with smart money in addition, if called for by the facts of the case.

VI. 1st. The cases of material-men and of seamen's wages referred to, are cases sui generis, and do not touch the question in debate. Nor does it help the solution of this question to say, that the breaches of contract alleged in the libel occurred within the ebb and flow of the tide, or that the contract, taken in the whole, was a maritime contract, for maritime services. If the mere existence of a maritime contract gives a cause of admiralty jurisdiction, whenever and howsoever it may be broken, then a person who had agreed to ship goods, or to take passage in a ship about to sail, and who breaks this contract by refusing to send the goods or to take the passage might be sued in admiralty. But when, and by whom, has such a proposition ever been maintained? And yet, within the latitudinary doctrines urged, these are maritime contracts, providing for maritime services. This shows that the character of the breach, as well as of the contract, is to be looked to, in order to decide whether the case be one of admiralty cognizance. 2d. That the contract of a passenger is made on the faith of the ship may be admitted, so far as regards the obligation to convey, and even to convey (if the ship conveys at all), in the manner and under the circumstances agreed on. But, how can the ship be said to break that part of the contract which defines the manner and circumstances, so long as the principal part of the contract, the obligation to convey, to which the other matters are merely incidental, has not been broken. To escape this consequence it is said, that the ship, when about to sail in violation of the manner and circumstances, refuses as much to comply with the contract, though willing to take the passenger, as if she had sailed away without him. In the view of abstract justice this may be so, and the common law courts will give the proper remedy. But, is it so, in the view of those rules of admiralty law which limit the jurisdiction of the courts of admiralty to maritime contracts, for maritime services? In view of these rules, the breach of this part of the contract, so far as a breach had occurred at the time of the filing of the present libel, is another and a totally different thing from the sailing of the ship without the libellant. 3d. In the case of Wells v. Osmond (approved in Ross v. Walker) the seamen had not only rendered themselves on board of the ship agreeably to the shipping articles, but had done work on board in the harbor. In the case of The Tribune [supra], the owners not only ordered the cargo, which had been put on board at Frankfort for Lubec, on shore, but voluntarily broke up the voyage to Lubec, and, instead of sending the vessel there, sent her on another voyage.

NELSON, Circuit Justice. In the case of The Aberfoyle [Case No. 17], which came before this court, on appeal from the decree of the district court, in 1848, it was held, that ships engaged in carrying passengers on the high seas for hire, stand on the same footing of responsibility, according to the maritime law, as those engaged in carrying merchandize, the passenger money being the equivalent for the freight; that, therefore, on a breach of a passenger contract, and damage resulting, the ship, as well as the owner, is bound to respond; and that all the reasons in the maritime law for charging the ship in case of the breach of a contract of affreightment of goods and merchandize, applied with equal force in the case of the breach of a passenger contract, and the one was as much the appropriate subject of admiralty jurisdiction as the other.

I abide by that decision, as I have seen nothing since to lead me to change or modify it. That was the case of an emigrant-ship from Liverpool to New-York. The breach of the contract occurred in the course of the passage, the passengers having been kept for many days on short allowance of bread and water, the master having omitted, intentionally or otherwise, to lay in a proper supply of stores. I thought the ship chargeable, upon established principles, the contract being a maritime contract, to be performed on the high seas, and that the passenger was entitled to the remedy against her, the same as the owner of the cargo in case of the breach of a contract of affreightment. In the one case, the ship is bound to carry the

goods safely to the destined port, according to contract, for the freight; in the other, the passenger and his luggage, for the passage money.

The present case is supposed to be distinguishable from the one referred to, and from the principle upon which the decision in it was founded, on the grounds: 1st. That admitting the contract for the passage in the ship for the voyage around Cape Horn to California to be a maritime contract, and the subject of admiralty jurisdiction, the voyage was not broken up by the master, but was actually performed; that it was the fault or neglect of the passenger that the contract in this respect was not carried into effect; that the conditions and stipulations in respect to the ship's accommodations for the voyage, for the breach of which he complains, and which constitute the foundation of his libel, were not, in themselves, the subject of a maritime contract, but related to the fitting up of the ship, and to the limitation of the number of the passengers for convenience and health, and were all of them to be performed before the departure of the vessel on her voyage and preparatory thereto; that these stipulations were not for maritime services, nor was the compensation therefor compensation for maritime services, but were services and duties preliminary to the voyage. 2d. That, at the time of filing the libel, no cause of action had arisen upon the contract, and especially none of admiralty cognizance; that to give jurisdiction over a contract even maritime in its nature and subject, the ship must have entered upon the performance, and a breach must occur in the course of the performance; and that if nothing is done at sea under it, jurisdiction cannot attach.

1. The first ground of objection is founded upon a course of reasoning which cannot be maintained. It assumes that the contract is severable, and that parts of it may properly be the subject of admiralty cognizance, being for maritime services, and parts of it not, being for services that relate to subjects not maritime in their nature or object; and that, if the cause of action arises from a breach of the latter stipulations, the remedy is in the common law courts, and if of the former, it may be in the admiralty, assigning the jurisdiction to the different tribunals according to the nature of the stipulations of which a breach is charged.

Now, the short and obvious answer to all this is, that the contract is an entirety; and that, in order to ascertain whether it is the proper subject of admiralty jurisdiction, we must look to the whole and every part of it, the same as we must look to the whole and every part of a contract when endeavoring to ascertain its legal import and effect. It must be wholly of admiralty cognizance, or else it is not at all within it. There cannot be a divided jurisdiction.

The argument is also put in another form. Assuming the contract to be an entirety, and not partible, and that it must be so viewed in endeavouring to ascertain its nature and character with reference to the jurisdiction to be exercised, it is urged that it must then appear that all its material and substantial parts going to make up the essence of the contract are maritime in their character and object, and for the performance of maritime services; and that, inasmuch as the material parts of the contract in this case are not of that description, but relate to other subjects, such as the fitting up of the ship and limitation of the number of passengers, it cannot be regarded as the subject of admiralty cognizance.

No doubt, if this analysis and interpretation of the contract could be maintained [that the proposition supposes][2] the conclusion would be a sound one. The difficulty lies in that part of the argument. The contract was for the conveyance of the libellant, as a passenger, with his luggage, in the claimants' ship, for a single voyage from New-York around Cape Horn to San Francisco, and the compensation paid was for the conveyance upon that voyage. That was the object to be attained by the libellant and the service to be performed by the master and owners; and all the accompanying stipulations were incidental and subsidiary to the main purpose. They were regulations for the comfort and health of the passenger on the voyage, to be found more or less in all contracts of this description, but which have nothing to do with the determination of the nature or character of the contract, or with the question of jurisdiction; any more than the stipulations for a proper supply of bread and water during the voyage had in the case of The Aberfoyle [supra], or than those for stowage and dunnage of the cargo have in a contract of affreightment of merchandize.

The circumstance that the breach of contract relied on consisted only in the omission to comply with these particular stipulations, is supposed to bear upon the question of jurisdiction, on the ground that they were not the subject of a maritime contract. But, as the contract is an entirety, the failure to comply with any part of it went to the whole, and gave to the libellant such remedy as the nature and character of it entitled him to, whether of admiralty or common law cognizance. He was not bound to accept a part performance, or a tender of part performance, but had a right to demand a strict compliance with every part, and, in case of refusal, to consider the contract as broken, and resort to the proper tribunal for redress.

2. The second ground of objection is equally untenable with the first. It assumes that, in order to give jurisdiction to the admiralty in rem, even in the case of a contract maritime in its nature and subject, and, therefore, of peculiar admiralty cognizance, it is essential that the ship should have entered upon the

[2] [8 N. Y. Leg. Obs. p. 343.]

performance, and that the breach should have occurred in the course of the voyage; and that, if she refuses to receive the cargo on board, when it is at her side ready to be delivered, or the passenger with his luggage when he is ready to embark, the ship is not bound, and the party aggrieved must look exclusively to the master or owner.

No authority has been referred to in support of this distinction, nor have I been able in my researches to find any; and it seems to be unsustained by principle, or by any of the analogies of the law in respect to the obligation and enforcement of contracts. Maritime contracts do not depend upon locality, but upon the subject matter and the nature of the services to be performed; and, when entered into for the conveyance of goods or persons in a particular ship, they bind the ship for the due performance of the service. The ship itself in specie is considered as pledged for the performance, and this, whether the vessel be in the immediate employment of the owner, or be let by a charter-party to a hirer who is to have the whole control of her. The obligation results directly from the contract, and not from the performance, which is simply in fulfilment and discharge of it. The owner is bound as soon as he or the master settles the terms upon which the ship is to enter upon the service, and it is difficult to perceive why the liability of the latter should be postponed till the inception of performance, or any reason for distinguishing as to the time when the liability of the one and that of the other shall attach.

The distinction cannot depend upon the character of the damages resulting to the shipper or passenger from the breach of the contract at the ship's side, for these may be quite as serious and prejudicial as if it had occurred in the course of the voyage. In the case before us, the libellant had paid the three hundred dollars passage money, and had made all his preparations for a settlement in a distant country, doubtless at a considerable additional expense. That the vessel should be bound to enter upon the performance of the contract at the port of shipment, would seem to be as important and as material to the security of the shipper or passenger, as that she should do so at any period of time after the voyage had commenced.

A distinction was taken on the argument between a maritime contract and a maritime cause of action, and it was urged that, in a proceeding ex contractu in the admiralty, both must concur to give jurisdiction; and that, admitting the contract in this case to be maritime in its character and object, unless it bound the ship, no cause of action in rem existed. This is no doubt correct, and the whole question turns upon the point, whether the ship was bound to the performance. I think it was.

The case was likened on the argument to the case of a contract with a material-man or one for repairs, and it was asked, whether, if the owner should refuse to permit the repairs, the ship would be liable. I suppose not, for the reason that the liability of the vessel in this class of cases arises from the repairs having been made, or the supplies actually furnished, and not in favor of those who have contracted for them. Short of actual repairs or supplies, the parties must look to the master or the owner for any damages in case of a breach of contract, as no lien attaches to the vessel within the terms of the rule.

Upon the whole, I am satisfied that the decree of the court below is well supported upon the principles of maritime law, and is within the doctrine of the case already determined by this court, and that it should be affirmed.

Case No. 10,644.

The PACIFIC.

[Blatchf. & H. 187.] [1]

District Court, S. D. New York. Dec. 10, 1830.

ADMIRALTY — SUIT AGAINST FOREIGN VESSEL FOR WAGES.

1. Where a seaman, a native and subject of Hayti, had shipped in that country for a voyage "to New-York," and the master had given security to return him to St. Domingo, the port at which he shipped: *Held*, that he could not sue in New-York for his wages, no special cause being shown for his suing, or for his leaving the vessel, the vessel being about to return to St. Domingo, and the master offering him a passage.

2. The question of the right of a seaman to sue his vessel or its officers in a foreign port, considered.

[Cited in The Topsy, 44 Fed. 635.]

This was a libel in rem for seaman's wages. The answer alleged that the master was bound to return the libellant to St. Domingo, and that the wages were not due until his arrival there; and it was so stipulated in the shipping articles. The libellant was a native and subject of Hayti, and shipped there, conformably to the laws of that country, for the present voyage. The shipping articles were authenticated before public functionaries of that country, and the master was required to give security to return the seamen, though the voyage was described in the articles as "to New York."

BETTS, District Judge. The voyage in this case is not broken up or discontinued, the ship being bound back to her home port, and no special cause has been assigned by the libellant for leaving the ship or for bringing this action. The master has given security to return the libellant to St. Domingo, and the court cannot say what is the import of the shipping articles by the laws of Hayti, or whether the municipal laws of that country do not impose reciprocally upon the seamen the obligation to return. The articles them-

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

selves do not require the seamen to remain by the ship, nor do they authorize them to leave at intermediate ports. On these points they are silent, requiring, however, in case of the death or desertion of a seaman at a foreign port, that the master shall procure a certificate of the fact from competent authorities at the place where the death or desertion shall occur.

There are obvious objections to allowing a suit like this to be brought at an intermediate port, (as New-York must be considered, though the articles do not expressly show it,) when the seaman's remedy will be open to him on his arrival in St. Domingo, and when no particular reason exists for his suing here. It cannot be a matter of right for a seaman to maintain an action for wages in a foreign port against his ship. It may be, that the laws of his own country or his shipping contract may secure to him the privilege of claiming wages at each port of delivery on the voyage. Still, it would be a matter of comity and not of obligation with foreign tribunals, whether they would take cognizance of the demand. Maritime courts are not considered open as of right for a foreign seaman to prosecute his ship or its officers, on causes of action arising out of the voyage or out of his contract; and, upon high considerations of policy affecting the trade and navigation of all commercial communities, an action calculated to impede or break up a voyage, and probably cause the sale of the ship abroad, will not be entertained in favor of a seaman whilst he is connected with his vessel, except in most urgent cases. Gardner v. Thomas, 14 Johns. 134; Johnson v. Dalton, 1 Cow. 543. If a seaman is discharged and left destitute in a foreign port, the judicial authorities there might afford him the means of compelling his ship or its master to satisfy his dues, or render him compensation for his wrongs. The Courtney, Edw. 239. But this case is not of that character. Upon the facts as they appear, and since the vessel is about to return, and the master offers a passage to the libellant, I shall dismiss the libel.

Case No. 10,645.

The PACIFIC.

[Deady, 192.][1]

District Court, D. Oregon. Nov. 17, 1866.

DISTRICT ATTORNEY—COMPENSATION — PER CENTUM ON SUMS "COLLECTED" AND "REALIZED."

1. The act of March 3, 1863, § 11 (12 Stat. 741), does not give district attorneys a per centum on the amount of a judgment or decree obtained by them in favor of the United States, but only upon the sum actually collected or realized thereon.

2. The words "collected" and "realized," as used in said section, are substantially synonymous; and money is not "realized" by the United States within the meaning of the same, until it has received the same or the benefit of it.

3. Amount allowed district attorney for attending an examination to procure remission of a forfeiture under section 50 of the collection act of March 2, 1799 (1 Stat. 665).

[Followed in The Orizaba, Case No. 10,576.]

In admiralty.

Joseph N. Dolph, for libellant.
William M. Strong, for claimant.

DEADY, District Judge. The steamship Pacific was seized and libelled in this court for a violation of section 50 of the collection act of March 2, 1799 (1 Stat. 665). The claimant, the California Steam Navigation Co., appeared and obtained the delivery of the vessel upon giving bond for its appraised value, $225,000. Upon the return day, March 15, 1865, the claimant having failed to answer the libel, this court pronounced in favor of the forfeiture of the vessel, and gave a decree against the sureties in the claimant's bond for the appraised value thereof; and because it appeared that the claimant had instituted proceedings to procure the remission of the forfeiture, it was then ordered that the enforcement of such a decree be stayed until the further order of the court. Now at this day, counsel for claimant moves to discharge such decree against the sureties, and in support thereof, produces and reads to the court a warrant of remission from the secretary of the treasury, upon the conditions, among others, that the claimant pay all costs of court in all proceedings touching said forfeiture, and such a per diem fee to the United States district attorney for his actual attendance at the summary examination as this court may direct.

The question is made on the argument, what is included in the phrase, "all the costs of the court?" The district attorney maintains that the case falls within the provision of section 11 of the act of March 3, 1863 (12 Stat. 741), which provides: "That there shall be taxed and paid to district attorneys two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, conducted by them, in which the United States is a party;" and that such per centum shall be in lieu of all fees and costs allowed by the act regulating fees of February 26, 1853 (10 Stat. 161). Under the latter act the compensation of the district attorney would be a docket fee of $40, while under the former it would amount to $4,500. The difference is a material one to both the attorney and the claimant.

The argument of the district attorney assumes that the sum for which the decree was given was realized by the United States, because it was adjudged that they should recover it, and that it might have been actually collected at any time since, but for the order of this court, made in the interest and at the instance of the claimant, staying the execution of the decree. It is also maintained that

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

the attorney had earned this per centum when he had obtained the decree, and that the granting of the supersedeas during the time taken by claimant to procure a remission of the forfeiture ought not to be allowed to work to his prejudice.

However just the claim of the district attorney, I cannot assent to his construction of the act of March 3, 1863. This two per centum is only to be paid on "moneys collected or realized." Now, it is not pretended that this sum was ever "collected." But the terms "collected" and "realized" are used here as substantially synonymous. That which is realized by the United States is collected by it, and contrariwise. That which is realized is made certain, but it cannot be said that this money was certainly possessed or obtained by the United States before it was collected and while it rested in decree. The object of the act is manifest. By offering this per centum to district attorneys, it is intended to stimulate them to make the money on judgments and decrees in favor of the United States. Prior thereto such attorneys were only paid for bringing an action or suit for the United States and pursuing it to judgment or decree. No specific compensation was allowed for attending to the matter of enforcing such judgment or decree, and the result often was, what might reasonably have been predicted, the United States was "beaten on the execution." This per centum is to be paid upon the moneys realized by the United States through the professional exertion and services of its attorney. But if for any reason no money is realized, then there is no fund upon which to compute it. It is in the nature of a fee contingent upon the collection of the money, and if the contingency does not happen, the right to the per centum never attaches, and the attorney's compensation is limited to the docket fee allowed by the act of 1853 for prosecuting the proceeding to judgment or decree. In my judgment the district attorney is not entitled to tax this per centum against the United States in lieu of costs. If this conclusion be correct, it follows that the payment of such per centum cannot be exacted from the claimant under this warrant as a condition of the remission, because the phrase therein, "all costs of court," only includes such costs as the United States are liable for. The costs made by the claimant are paid by it in any event. True, it was in the power of the secretary, to impose upon the claimant more favorable terms for the district attorney, but he has not seen proper to do so, and this court has no power to revise his action in this respect.

I next consider the fee to be allowed the district attorney for his services in connection with the proceedings to obtain a remission of the forfeiture. The extent and nature of these services, are within my personal knowledge. The cause was an important one to the government and the claimant. The amount involved was large, and the labor and responsibility devolved upon the district attorney, by reason of the power and influence of the claimant, was arduous and extraordinary. The claimant has had the influence to procure a remission of a forfeiture produced by a willful, if not a corrupt violation of law by its agents, the master and mate of the Pacific, upon the single ground that it, a corporation without body or soul, was not expressly consenting to such violation, and without other terms than the payment of this fee to the attorney,—such a per diem fee as the court may direct. Counsel for the claimant suggest that the per diem of district attorneys is fixed by the act of 1853, and that if this court is not bound by that act in this instance, it ought to take it as a guide in fixing the amount to be allowed. But the warrant remits the amount of the per diem to the judgment of this court. Now the per diem allowed by the act of 1853, is in addition to the fees earned by the attorney, during the progress of the same, while in this case the per diem to be allowed by the court is the whole compensation of the district attorney for the labor performed in the proceeding to obtain a remission. For prosecuting the suit for forfeiture to a decree, he is allowed the paltry fee of $40 in currency, and that is all the compensation he obtains in this whole matter, aside from that which the court is about to allow him. Of course the court ought not to exercise this power, so as in effect to forfeit the vessel, or any very considerable portion of its value to the district attorney, and thereby nullify the action of the secretary in making the remission. But at the same time, all the circumstances of the case considered, I prefer within reasonable limits, to err in favor of the district attorney, rather than the claimant, and therefore, fix his per diem allowance at the sum of $200.

Order, that the claimant pay the costs of court, and pay the district attorney the sum of $200, within ten days from the entry hereof, and that thereupon, and upon the filing of the warrant of remission from the secretary of the treasury herein, the decree against the claimant, and his sureties, for the appraised value of said vessel be discharged, and held for naught; and that, in default thereof, execution issue to enforce such decree, notwithstanding such warrant or remission.

PACIFIC, The. See Case No. 12,644.

PACIFIC, The (BLUKEMAN v.). See Case No. 1,571.

PACIFIC, The (RIDER v.). See Case No. 11,812.

PACIFIC, The (RUMBALL v.). See Case No. 10,643.

PACIFIC, The (SELLER v.). See Case No. 12,644.

Case No. 10,646.

PACIFIC COAST WRECKING CO. v. The EASTPORT.[1]

District Court, D. California. March 27, 1876.

SALVAGE—COMPENSATION.

[A steamer bound to San Francisco, having become disabled near the mouth of the harbor by striking upon rocks, came to anchor, and sent the mate with three seamen to San Francisco for a tug. The next morning a steamer passing up the coast was discovered, which, upon request, took the vessel in tow. On reaching the mouth of the harbor, a tug, which had been engaged, was met, and the vessel was taken in tow by her, the steamer turning back upon her course. The time of service by the steamer was two hours, and the total time lost from her voyage was three and one-half to four hours. The weather was fair, the injured vessel was in no danger, and there was no hazard connected with the service. The tug had agreed to bring the vessel in for $125; the value of the tow was about $60,000, and that of the towing steamer about $20,000. It appearing that $2,000 had been offered and refused, and $7,500 demanded, *held*, that the offer was fair and liberal, and a decree for that amount should be entered.]

In admiralty.

M. Andrus, for libellants.

McAllister & Bergen, for respondents.

HOFFMAN, District Judge. About 11 o'clock on the night of April 2, 1875, the steamer Eastport, then on a voyage from this port to Coos Bay, struck on the water edge of Duxbury reef. She "pounded" on the rocks for a few minutes, when she came off with the loss of her rudder and rudder post and one blade of her propeller. An anchor was at once let go, and an attempt made to devise a steering apparatus by means of the long boat. This seems to have proved unsuccessful, and a new contrivance was resorted to, by the aid of which the vessel succeeded in reaching a point some six miles distant from the Heads. The falling of the wind, and the situation of the vessel, which, with defective steering apparatus, rendered an attempt to pass between the "Potato Patch" and the shore dangerous, induced the master to again bring her to an anchor. Shortly after the accident he had dispatched the second mate and three seamen in a boat with instructions to proceed to this city, report to the owners, and obtain the aid of a tug. A little before seven o'clock of the next day the steamer Mary Taylor, bound on a voyage up the coast, was discovered; she was signaled and requested to tow the Eastport to San Francisco, to which her master assented. A hawser was passed on board the Eastport, and she was towed to the mouth of the harbor where the steam tug Look-Out, which had been dispatched to the relief of the disabled steamer, was encountered. The Mary Taylor thereupon cast off the Eastport, and, turning back, resumed her voyage. The latter vessel was towed to her wharf by the tug. The time occupied in the service was about two hours. From the time the Mary Taylor commenced towing until she reached the place where she began the service, it was three and one-half or four hours. The distance was about six miles. The value of the Eastport was about $60,000. That of the Mary Taylor about $20,000.

The service was attended with no danger. It was in no respect arduous, and its successful performance was at no time doubtful. The tug would, had she not met the vessel, have reached the place where the Eastport lay in about two hours. She had agreed to perform the service for $125. At the time the Mary Taylor took hold of the Eastport, the latter was in no immediate danger. An attempt was made to show that it was possible the Eastport might have dragged her anchors before the tug could have arrived. But I see but little ground for this suggestion. The wind did not blow with any unusual violence until much later in the day, and the steamer had one spare anchor to let go, in case of emergency. She could also, perhaps, have used her propeller, after casting off the jury rudder which had been rigged. There can, I think, be no reasonable ground to doubt that if the Mary Taylor had not engaged in the service, it would have been successfully performed by the tug. If the appearance of the latter had been entirely accidental, the fact that she would have arrived in time to effect the service ought not perhaps to be much considered in estimating the danger of the Eastport's situation. But she had been sent for and was on her way, and this, not because she was accidentally found ready to undertake the enterprise, but because the Eastport lay very near to the entrance of the harbor, within sight of Fort Point, and near enough to the city to command all the assistance which its resources could furnish.

I think, therefore, that under all the circumstances it cannot be said that the Eastport was in any serious danger, either imminent or prospective. Relief was in point of fact near, and relief could in her position be reasonably expected. The only doubt respecting its arrival which could have been felt would be caused by the uncertainty whether the boat dispatched for assistance had succeeded in reaching the city. But the duty on which it was sent does not appear to have been considered dangerous. It was, so far as we know, undertaken with alacrity. It was certainly performed with success. It is not suggested that the performance of the service was attended with any risk whatever to the Mary Taylor. It is to be distinguished from an ordinary towage service chiefly by one feature. The vessel was not a towboat. She was a steamer performing a regular voyage. To effect the salvage she was obliged to deviate and return to the port from which she had sailed. In a somewhat similar case $500 on a value of $12,000 to $14,000 was allowed

[1] [Not previously reported.]

to a tug by this court for hauling off a vessel from the vicinity of rocks and towing her to the wharf. The service occupied about three hours, but the danger to the vessel was in that case more imminent. On the other hand, the service of the tug differed but slightly from her ordinary employment. In the case at bar the value of the salved property was about $60,000, but a tug was ready and willing to perform the service for $125.

In the cases of The Oak Hill [Case No. 10,391] and The Annapolis [Id. 406], this court had occasion to examine at some length the rules and analogies by which courts are guided in fixing the compensation for services of this description. It is unnecessary here to cite the authorities referred to in those cases. The insurance company appear to have offered the libellants $2,000 in gold as a just compensation. The offer was refused and $7,500 demanded. I consider the offer fair, even liberal. I doubt whether, if it had not been made, I should have decreed as much. No money has been paid into court. But I think it proper to discourage, so far as it lies in my power, such extravagant pretensions as those set up by the libellants. I shall therefore decree to them the sum of $2,000, but without costs.

PACIFIC INS. CO. (CATLETT v.). See Case No. 2,517.

Case No. 10,647.

PACIFIC INS. CO. v. CONARD.

[1 Baldw. 138.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1830. [2]

RESPONDENTIA BONDHOLDER — RIGHT TO MAINTAIN — TRESPASS FOR GOODS TAKEN — LEVY ON GOODS OF THIRD PERSON BY MARSHAL — RULE OF DAMAGES—EXPENSE OF SALE.

1. A person who holds goods in virtue of a respondentia bond, with an assignment of the bill of lading, may recover damages in an action of trespass against one who takes them unlawfully to the full value of the property, though it exceeds his debt due on the bond.

[Cited in Lynd v. Picket, 7 Minn. 184 (Gil. 128).]

2. If a marshal levies on the property of a third person, pursuant to instructions, without any abuse of his authority, he is liable only for the injury actually sustained.

[Cited in Watson v. Sutherland, 5 Wall. (72 U. S.) 79.]

[Cited in Pascal v. Ducros, 8 Rob. (La.) 112; Cleveland, C. & C. R. Co. v. Bartram, 11 Ohio St. 466.]

3. In such cases the rule of damages is the value of the goods, with interest from the time of taking them; or, if they are articles of merchandize, from the expiration of the usual term of credit on sales.

4. If an auction sale has become necessary in consequence of the levy, the plaintiff will be entitled to recover the expenses of such sale; also the amount of the premium for insurance against fire effected on the goods. But he is not entitled to recover for money paid counsel, or other expenses incurred in prosecuting the suit.

[Cited in Burr v. McEwen, Case No. 2,193; Jacobus v. Monongahela Nat. Bank, 35 Fed. 397.]

[Cited in Cleveland, C. & C. R. Co. v. Bartram, 11 Ohio St. 466.]

This and several other actions of trespass against the same defendant were tried at this term, the facts of which were the same. A number of questions of law were raised in the argument; but as they had been decided in former cases it is not deemed necessary to make a detailed statement of the case, or to notice the arguments of counsel. Vide [Conard v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 386; [Conard v. Nicoll] 4 Pet. [29 U. S.] 291; Atlantic Ins. Co. v. Conard, Case No. 627.

BALDWIN, Circuit Justice, charging jury (HOPKINSON, District Judge, had been counsel in the cause): In this case there are two questions for your consideration: (1) Whether the plaintiffs can sustain this action. (2) The amount of damages to which they are entitled. The facts of the case are few. On the 10th and 11th of July 1825 the plaintiffs advanced 60,000 dollars to Edward Thomson on his respondentia bonds. He shipped the money for Canton, took bills of lading, deliverable to his factor John R. Thomson, and assigned them to the plaintiffs. The money arrived safely, and was invested in the teas now in controversy. The teas were shipped on board of the ships Addison and Superior, which arrived in the Delaware on the 15th of March 1826, when, with their cargoes, they were levied on by the defendant by virtue of an execution, at the suit of the United States, against Edward Thomson. The teas in question were landed and deposited in the public stores, under the care of the custom house officer, where they remained until the fall of 1826; when, by an agreement made between the plaintiffs and the secretary of the treasury, they were delivered to them and sold under their direction for their account. Immediately on hearing of the levy, the plaintiffs, by their agent, offered to the collector to secure the duties, and demanded the teas. They were refused. On this state of the facts the counsel for the defendant contends that Edward Thomson remained the legal owner of the teas at the time of the levy; that the plaintiffs did not become the owners or the consignees thereof, or the agents of Thomson, so as to authorise them to enter the teas at the custom house according to the provisions of the thirty-sixth section of the revenue law, which he contends could only be made by Thomson himself. That he being indebted to the United States by bonds for duties unpaid, was, by the proviso of the sixty-second section of the law, prohibited from making an entry without the actual payment of the duties accruing, for

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

[2] [Affirmed in 6 Pet. (31 U. S.) 262.]

which the United States had a lien until they were paid, and that therefore the plaintiffs not having offered to pay the duties on their demand of the teas from the collector, had no right to the possession of the goods, and cannot maintain this action.

Were this a question open for consideration, I should have no hesitation in saying that the whole transaction between Thomson and the plaintiffs made them the legal owners and consignees of the property purchased by the outward shipment, and that as such they had a right to enter the teas on securing the duties without being affected by the delinquency of Thomson at the custom house; as much so as if the shipment had been made in their own name, and on their own account. But it has not been left for me to declare the law in this case. It has been definitely settled by the supreme court in the case of Conard v. Atlantic Ins. Co. (decided at January term, 1828) 1 Pet. [26 U. S.] 386; and the case of [Conard v. Nicoll] 4 Pet. [29 U. S.] 291. The first of these cases was an action of trespass brought to try the right of property in the plaintiffs to teas shipped in the Addison and Superior, under circumstances in all respects agreeing with this case. The court decided that they were entitled to the proceeds of what had been sold under the agreement, being the owners and consignees by the agreement between them and Thomson, and the consequent acts. The second was a similar action brought for the same purpose, as well as the recovery of damages for levying on certain goods, and a quantity of teas shipped, and in all respects circumstanced like the present. The cause was tried before Judge Washington in this place, and resulted in a verdict and judgment for the plaintiffs, not only for the proceeds of the property which had been sold, but a large amount in damages. It was removed by writ of error to the supreme court, and the judgment affirmed. That case embraced every point material to the decision of this, and connected with the opinion of the court in the former case, leaves for you and the court no other duty than acquiescence in the well established principles which control the cause before you.

The right of property in the teas, which are the subject of this action, has already been settled by the judgment of this court in a former action between the same parties, and is conclusive on that point in this. But the defendant's counsel contends that in the case of Harris v. Denny [3 Pet. (28 U. S.) 292], decided at the last term of the supreme court, a principle has been settled which will prevent the plaintiffs' recovery. The case was this: James De Wolf, Jr., was indebted to the United States on duty bonds unpaid; goods consigned to him arrived in the port of Boston, which were attached by his creditors in Massachusetts by a writ in the hands of Denny, the sheriff. The marshal attached the same goods by process from the district court, at the suit of the United States. At the time of the attachment by Denny, the plaintiffs offered to secure the duties, and demanded possession, which the collector refused. On an action by the sheriff against the marshal, the court decided that he could not sustain it, because the plaintiffs in the attachment were neither owners, consignees nor agents; that De Wolf continued the owner, and being delinquent on former bonds, had no right to enter the goods till payment of the duties; and that the plaintiffs, claiming only as creditors, had no right to the possession on the mere offer to secure them. This case has no bearing on the right of an owner or consignee to enter goods on offering to secure duties accruing. It was there declared that the United States had no lien on the goods for the amount due by De Wolf on other importations. It only decided that a mere creditor could acquire no right to the possession of goods so imported consigned to De Wolf, until the duties were actually paid. [Harris v. Denny] 3 Pet. [28 U. S.] 292; [Harris v. De Wolf] 4 Pet. [29 U. S.] 148. The authority of the two cases referred to, does not seem to me to be at all shaken by that of Harris v. Denny, and I am therefore clearly of opinion, that the plaintiffs have well established their right to maintain the present action for the recovery of damages for the seizure of the goods in question.

It is next alleged, that by the agreement of the 9th of October, and the acts accompanying it, the defendant is released from all claims for damages. The decision of this and the supreme court in the case of Conard v. Nicoll [supra], settles the reverse, and declares that damages may be recovered, notwithstanding this agreement. In this case, the defendant pleaded this agreement as a bar to this action: the court overruled the plea and rendered judgment for the plaintiffs, so that this question has already been settled, as a matter of law, and is not open for your consideration as one of fact.

The counsel for the defendant next contends, that the rule of damages in this case is furnished by the balance due on the respondentia bonds, after deducting the amount of the sales. This ground is assumed by considering the plaintiffs as mere mortgagees of the teas, an idea wholly inadmissible, after the two solemn decisions of the supreme court, each adjudging the legal right of property to be in the respective plaintiffs, as owners; and one of them awarding damages without any reference to the amount due on the respondentia bonds. These decisions are binding authority on this court, which must be governed by them to their full extent. We are not at liberty to say that the plaintiffs in those actions were legal owners, only to the extent of the debt due them by Edward Thomson. The entire property in the teas was vested in them, and this court has passed the same judgment as to those now in controversy. This action of

trespass would assume a singular aspect, if the plaintiffs could not recover damages to the amount of their property, which has been taken from them by the defendant on an execution against Edward Thomson, who had no legal property in these teas. Whether the plaintiffs can, in any event, be considered as trustees for him, his creditors or assigns is not material to inquire in this action. On this question of damages, we cannot settle accounts between trustees and cestui que trusts (if there can be such as to this property), who are no parties to this suit. It is enough for the plaintiffs to exhibit record evidence of their being the acknowledged legal owners. It necessarily results, from such ownership, that they are legally entitled to all the damages arising from its seizure and detention, and the right to damages must be commensurate with the right of property. Any other rule would introduce endless confusion and mischief. The plaintiffs then are before you as the legal owners of the teas, and with no legal impediment in the way of their recovery.

The next question for your consideration is the amount of damages which the plaintiffs are entitled to recover, as the legal owners of the teas. The rule which ought to govern juries, in assessing damages for injuries to personal property, depends much on the circumstances of the case. When a trespass is committed in a wanton, rude and aggravated manner, indicating malice, or a desire to injure, a jury ought to be liberal in compensating the party injured, in all he has lost in property, in expenses for the assertion of his rights, in feeling or reputation; and even this may be exceeded by setting a public example to prevent a repetition of the act. In such cases there is no certain fixed standard; for a jury may properly take into view, not only what is due to the party complaining, but to the public, by inflicting, what are called in law speculative, exemplary or vindictive damages. But when an individual, acting in pursuance of what he conceives a just claim to property, proceeds by legal process to enforce it, and causes a levy to be made on what is claimed by another, without abusing or perverting its true object, there is and ought to be a very different rule, if, after a due course of legal investigation, his case is not well founded. This is what must necessarily happen in all judicial proceedings, fairly and properly conducted, which are instituted to try contested rights to property. The value of the property taken, with interest from the time of the taking down to the trial, is generally considered as the extent of the damages sustained, and this is deemed legal compensation, which refers solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner by the trespass. These are taken into consideration only in a case more or less aggravated. But where the party, taking the property of another by legal process, acts in the fair pursuit of his supposed legal right, the only reparation he is bound to make to the party who turns out ultimately to be injured, is to place him, as to the property, in the same situation in which he was before the trespass was committed. The costs of the action are the only penalty imposed by the law, which limits and regulates the items and amount. In the present case, the defendant acted under the orders of the government, in execution of his duties as a public officer: he made the levy, but committed no act beyond the strictest line of his duty, which placed him in a situation where he had no discretion. The result has been unfortunate for him: he has taken the property of the plaintiffs for the debt of Edward Thomson, and must make them compensation for the injury they have sustained thereby, but no further.

It has long since been well settled, that a jury ought in no case to find exemplary damages against a public officer, acting in obedience to orders from the government, without any circumstance of aggravation, if he violates the law in making a seizure of property. In the case of Nicoll against the present defendant, Judge Washington instructed the jury that they might give the plaintiff such damages as he had proved himself to be justly entitled to, on account of any actual injury he had proved to their satisfaction he had sustained, by the seizure and detention of the property levied on, but that they ought not to give vindictive, imaginary or speculative damages. The affirmance of his charge makes it the guide for us, in this case. Our true inquiry then must be, what damages have the plaintiffs so proved themselves to be entitled to? There can be no doubt that they have a right to the value of the teas at the time of the levy, with interest from the expiration of the usual credit on extensive sales. You may ascertain the value from the sales made at New York or this place, in the spring of 1826; if, in your opinion, they afford evidence of their real value, or if you are satisfied from the evidence you have heard, that the seizure and storing of these teas had the effect of depressing the prices, you may make such additions to the prices, at which sales were actually made, as would make them equal to what they would have been had they come to the possession of the plaintiffs, at the time of the levy.

In marine trespasses the supreme court have, at different times, laid down the following as the rule of damages, in cases unaccompanied with aggravation. In [Murray v. The Charming Betsy] 2 Cranch [6 U. S.] 124, [Head v. Providence Ins. Co.], Id. 156, the actual prime cost of the cargo, interest, insurance, and expenses necessarily sustained by bringing the vessel into the United States. In [Del Col v. Arnold] 3 Dall. [3 U. S.] 334, the full value of the property injured or de-

stroyed; counsel fees rejected as an item of damage. [Arcambel v. Wiseman] Id. 306. In [The Anna Maria] 2 Wheat. [15 U. S.] 335, the prime cost of the cargo, all charges, insurance and interest. In [The Amiable Nancy] 3 Wheat. [16 U. S.] 560, the prime cost, or value of the property at the time of loss, or the diminution of its value by the injury, and interest. In The Lively [Case No. 8,403], the prime cost and interest. In [The Apollon] 9 Wheat. [22 U. S.] 376, 377, where the vessel and cargo are lost or destroyed, their actual value, with interest from the trespass. The same rule also as to the partial injury, when property has been restored, demurrage for the vessel, and interest; where it has been sold, the gross amount of sales and interest, with an addition of ten per cent, where the sale was under disadvantageous circumstances, or the property had not arrived at its place of destination. In [The Amiable Nancy] 3 Wheat. [16 U. S.] 559, a loss by deterioration of the cargo, not occasioned by the improper conduct of the captain, is not allowed. Próbable or possible profits on the voyage, either on the ship or cargo, have in every instance been rejected. [The Apollon] 9 Wheat. [22 U. S.] 376, 377; [The Amiable Nancy] 3 Wheat. 552; [La Amistad De Rues] 5 Wheat. 18 U. S.] 389.

In none of these cases do the court recognize an allowance for counsel fees now set up by the plaintiffs; but they all seem to concur in adopting a rule which excludes them. No good reason seems to be presented for a distinction between the compensation due to a party injured by a marine trespass, and one committed on land; neither do the judges, in delivering the opinion of the court, refer to such distinction as one existing. In the case of The Apollon [supra], Judge Story observes: "Such, it is believed, have been the rules generally adopted in practice, in cases which did not call for vindictive or aggravated damages." And it may be truly said, if these rules do not furnish a complete indemnification, in all cases, they have so much certainty in their application, and such a tendency to suppress expensive litigation, that they are entitled to some commendation on principles of public policy ([The Apollon] 9 Wheat. [22 U. S.] 379), and in almost all cases will give a fair and just recompense ([The Amiable Nancy] 3 Wheat. [16 U. S.] 561). In [The Amiable Nancy] 3 Wheat. [16 U. S.] 558, the court, in assigning their reasons for giving other damages in the case then before them, remark, that it was one of gross and wanton outrage, without any just excuse, and that, under such circumstances the honour of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutral for all the injuries and losses actually sustained by him. The respondents in that case were the owners of a privateer, who were, as a rule of policy, held responsible for the conduct of the officers and men employed by them, but not to the extent of vindictive damages.

If the present were a case of marine trespass, I think there is no doubt that the damages could not exceed the value of the teas, and interest, if they had not been restored, or as the result has been a restoration, the injury done by the seizure, which would be the loss in the sales by the fall in the market, and interest for the detention: for there exist none of the matters of aggravation which have induced courts of admiralty to go further. It is in their sound discretion to allow or refuse counsel fees, according to the nature of the case, either as damages, or a part of the costs, as in the case of The Apollon; but by a late case, they were allowed as costs in a case where it was adjudged by the supreme court that no damages could be claimed. They form an item of costs in such courts, but not in courts of common law. It would be legislation by the common law courts, to order them to be taxed as costs. The expenses of prosecuting claims of the present description do not come within the principles established by the courts in causes of admiralty jurisdiction, but seem to be considered as extra damages, beyond the value and interest, where there is aggravation, but not otherwise.

I think it is a safe rule in common law actions of trespass, and can perceive no sound reason for holding a marshal to a harder rule of damage than a naval or revenue officer, or the owner of a privateer. The same principle ought to govern all alike; or, if any discrimination prevails, it should be in favour of the defendant who could use no discretion, but was bound to do the act which has exposed him to this action. The case of Woodham v. Gelston, seems to me to be based on this rule, and the damages recovered in that case were only such as related to the property. The marshal fees were for seizing and keeping possession of the vessel. On the restoration to the plaintiff, he paid them; they were a charge on the property, in the nature of storage or bailment. In sanctioning this item, the court seem to put it on the ground of its being a charge on the defendant, and having been paid by plaintiff, he was entitled to recover it back; but they say, if it had been a mere voluntary payment, a deduction would have been proper. The other items were for wharfage and ship keeping, which were disallowed because they were after the restoration. These were all the claims for expenses presented in that case, and they all attached to the property taken; none related to personal expenses in prosecuting the suit.

In declaring that voluntary payments shall be deducted, the court settled the principle as to the right to charge for the marshal's

fees. They held the jury to strict rules, for they struck out an item of compound interest allowed by the verdict. 1 Johns. 137, 138. On the principle of this case of Woodham v. Gelston, the charges of the auction sales are allowable, because such sale had become necessary, and the expenses thereof became a charge on the teas. Also fire insurance, which is a substitute for bailment, and the premium paid in place of storage. It is all important, that in matters of this kind, the principle which governs them should be fixed and uniform; if we once begin to diverge from the old line, it will be difficult to draw and define a new one with accuracy. It may be thought a hardship that the plaintiffs shall not be allowed their actual disbursements, in recovering this property; but the hardship is equally great in a suit for money lent, or to recover possession of land. They are deemed in law, losses without injury, for which no legal remedy is afforded.

I am therefore of opinion, that you cannot, in assessing damages in this case, allow any of the items claimed by the plaintiffs for disbursements; they being consequent losses only, and not the actual or direct injury to their property which they have sustained by its seizure and detention, for which alone they are entitled to recover damages in this case, it not being attended with any circumstance of aggravation on the part of the defendant. Had there been any such, a very different rule would have been applied, by reimbursing the plaintiffs to the full extent of all their expenses and consequential losses.

You will then carefully weigh all the evidence in the cause, and ascertain the true value of the teas, at the time of the levy, or when they could have come into market, by the rules of the custom house, if there had been no claim asserted to them by the United States, other than for the duties, with interest; deducting therefrom the net amount of sales, after payment of duties and charges of sales, the balance will be the amount to which the plaintiffs will be entitled. You will consider Mr. Conard as the only defendant. The government is no party to this suit, nor is there any evidence which justifies us in saying that they agreed to indemnify him. That must depend exclusively on the discretion of congress, who are bound by no pledge given by executive officers. You will have no reference, in making up your verdict, to the course which may, in any event, be taken there, on an application by Mr. Conard for relief. You will award to the plaintiffs such sum as you may think them entitled to receive from the defendant, according to the rules of law, without taking into view the supposed hardship on him. The plaintiffs' recovery is not to be one dollar less than their legal right, though it might ruin the defendant; nor one dollar more, though you might think the public treasury would be opened for his relief.

A verdict was given for the plaintiffs, and the damages found were 42,591 dollars 58 cents. Judgment was rendered accordingly.

This judgment was affirmed on writ of error. 6 Pet. [31 U. S.] 262.

PACIFIC INSURANCE CO. (HURLBERT v.). See Case No. 6,919.

PACIFIC MAIL STEAMSHIP CO. (BROWN v.). See Case No. 2,025.

PACIFIC MAIL STEAMSHIP CO. (RICHARDSON v.). See Case No. 11,793.

Case No. 10,648.

PACIFIC MAIL STEAMSHIP CO. v. TEN BALES GUNNY BAGS.

[3 Sawy. 187.][1]

District Court, D. California. Oct. 23, 1874.

SALVAGE.

Sixteen thousand dollars awarded as salvage compensation, where both vessels belonged to the same owners.

[Cited in The Colima, Case No. 2,996; The Colon, Id. 3,024; Brooks v. The Adirondack, 2 Fed. 390; A Lot of Whalebone, 51 Fed. 924.]

Libel for salvage.

McAllisters & Bergin, for libellants.
Milton Andros, for claimant.

HOFFMAN, District Judge. About one one o'clock in the afternoon of March 15, 1874, as the steamer Colima was prosecuting her voyage from Panama to this port, a sudden jar or shock was felt, followed by the immediate stoppage of her engines. On examination it was found that three blades of her propeller were broken, and that her steam motive power was, in consequence, unavailable.

Sail was at once made upon the ship and she was headed for the land. About six in the evening she came to anchor under Cerros island, distant southerly from the port of San Diego about 292 miles, and from Cape St. Lucas, northerly, about 420 miles. An officer was immediately sent ashore to hoist a signal of distress on the island, and in the morning a boat was dispatched for San Diego with instructions to intercept and send to the assistance of the Colima, any steamer that might be fallen in with, or, in case none was met, to proceed to San Diego and communicate by telegraph with the agents of the Pacific Mail Steamship Company, at this city. On the succeeding day another boat was dispatched southward to Cape St. Lucas with similar instructions as to any steamer which might be met.

The latter, after a navigation of several days, fell in with the steamship Arizona,

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

bound for San Francisco, and the master, on learning the situation of the Colima, proceeded without delay to Cerros island, where he arrived on the morning of the 25th. Preparations were at once made for towing the Colima, and on the evening of the same day the vessels started for this port, where they arrived on the morning of March 30. The distance from Cerros island to San Francisco is about 730 miles. The voyage of the Arizona was lengthened by her entering upon the service some two and a half or three days.

Her deviation was not considerable, as the usual course of steamers along the coast is, in fine weather, not far from the island, and such was in fact the position of the Colima when the accident occurred. Both vessels belonged to the same owner, the Pacific Mail Steamship Company, and the present suit is brought against a portion of the cargo of the Colima for a salvage compensation, with the understanding that the court shall determine the whole amount of salvage, if any, to be paid by the cargo; such amount to be afterwards apportioned amongst the shippers, according to their respective interests.

The cause of the accident is somewhat obscure. On examination here, it was found that out of the four blades of her propeller, three were entirely gone, and of the fourth one-half remained. The external appearance of the casting indicated no defect, but on close inspection of the iron at the place of fracture it was found to be slightly porous or honey-combed, showing an original defect in the manufacture. The experts testified that they knew of no test by which this defect could have been detected.

The vessel, with the same propeller, had very recently made a voyage from New York to this port without accident. She had then proceeded to Panama, and had accomplished about three-quarters of her return trip, when the accident occurred. At the time it happened, the sea was calm and the weather moderate. The vessel was going at her usual rate of speed.

That the defect in the casting impaired the strength of the propeller is obvious, but whether sufficiently so to account for its breaking under the circumstances, the engineer was unable to form an opinion. If the defect was such as to render the vessel unseaworthy from the time she was built, it is difficult to understand why it did not sooner disclose itself; on the other hand, if it was not, it is equally difficult to account for the accident. No rocks or other objects upon which the propeller might have struck are known to exist in the part of the ocean where the accident occurred. The advocate for the claimant contends that the accident was caused by a latent defect in the means employed by the carrier, the consequences of which the law requires him to bear. That this defect constituted a breach of his implied warranty of seaworthiness of the ship, and that as the carrier and the salvor are the same corporation, he cannot recover as salvor a compensation from the shipper, which he would, as carrier, be obliged to reimburse.

In the view I take of this case, it is unnecessary to determine whether the accident was solely caused by the defect in the propeller, and whether that defect was such as to render the vessel unseaworthy, and the carrier liable for its consequences under the rules of the common law by which the liabilities of carriers are determined.

The cargo of the Colima was shipped under bills of lading which provided, among other things, that the vessel should not be liable "for accidents, loss and damage from machinery, boilers and steam, or from accidents or perils of the seas, or of land and rivers, or of sail or steam navigation, of whatever kind or nature whatsoever."

Although these stipulations would not avail to exonerate the carrier from liability for damages caused by his actual negligence, yet, if they are to have any force at all, they must exempt him from liability for the consequences of a secret defect which no diligence could discover or guard against, and where the previous history of the vessel afforded the strongest grounds for the belief that it could not exist. The point was expressly ruled in the case of the Miranda, 4 Mar. Law Cas. 440, after extended argument.

That case bears in all its details so striking a resemblance to the cases at bar, that if its authority be admitted, it is decisive on every point raised in the latter. The Miranda, like the Colima, became disabled at sea by an accident to her machinery, and was towed into port by the Roxana, a vessel belonging to the same owners. The value of the property was considerable, and service occupied about two days. The owners of the Roxana claimed salvage on the cargo of the Miranda. It was contended for the defence:

1. That the owners of the Roxana were bound to carry and deliver the cargo laden on board the Miranda, to London. That they would not have fulfilled this contract unless they had rendered assistance to the Miranda, and that this assistance must therefore be considered as an act done for the sole benefit and advantage of the owners of the Roxana.

2. That implied in the contract between the owners of the Roxana and the owners of the cargo of the Miranda, there was a warranty of the seaworthiness of the Miranda. That the accident arose from the breach of such warranty. And that the owners of the Roxana were therefore liable for all the consequences of such breach, and so were not entitled to salvage remuneration for averting a loss which, if it had happened, would have fallen on themselves.

Both of these defences were overruled. As the first was not insisted on at the argument of the cases at bar, it is unnecessary further to advert to it. The state of facts under which the second defence was interposed,

was identical with those in the case of the Colima.

The shaft of the Miranda broke in fair weather and without any assignable cause, except a latent defect existing at the commencement of the voyage. The bill of lading contained a clause exempting the vessel from liability for non-performance of the contract, caused by "accidents, or damage from machinery, boilers and steam." The terms of the bills of lading in the cases at bar are "accidents, loss and damage from machinery, boilers and steam."

As to the nature of the exemption thus created, Sir R. Phillimore, delivering the judgment of the court, said: "But I think the true question in the case is, does the exception 'accidents from machinery,' include the present case? I must come to the conclusion that the accident in question finds its place among the excepted perils; it is, therefore, unnecessary for me to discuss the able argument which has been addressed to the court with respect to a warranty of seaworthiness being implied in the contract."

The libellants in the case at bar being thus found not to be liable as carriers for the consequences of the accidents to the machinery, they are entitled to claim as salvors a reasonable compensation for their service to the cargo. The amount to be allowed will be determined on a consideration of all the circumstances.

The Colima, at the time she was taken into tow by the Arizona, though not in immediate peril, was in an exposed and somewhat dangerous position. If a gale from the south or southeast had suddenly arisen, she would, in all probability, have gone ashore. And even if it had come on gradually there is some doubt whether she would have been able to put out to sea. Capt. Lappidge is of opinion that she could not have done so; but this opinion involves the supposition that her master voluntarily put her in a position from which it was impossible with any wind to extricate her. I incline to think, therefore, that under favorable circumstances she might have succeeded in getting to sea. She would thus have avoided an impending shipwreck, but she would not have secured her final safety—nor the accomplishment of her voyage. With the winds which prevail at that season of the year, an attempt to reach San Francisco by the use of her sails would have been hazardous—it could, if practicable at all, have been accomplished only after a protracted voyage, before the expiration of which her provisions would have been exhausted. She had on board 285 passengers and the ship's crew.

The entire cargo was destined for San Francisco. Its delivery at the earliest practicable moment was, no doubt, of great importance to its owners. To reach its destination at all it must either have been transhipped, or the vessel on which it was laden must have been towed up, as was in fact done, and by this means it arrived after a detention far less than would otherwise have been incurred.

All these ingredients constitute a meritorious salvage service, from which the owners of the cargo have derived great benefit. "On the other hand, I must remember" (applying the language of Sir R. Phillimore, in The Miranda, mutandis mutatis, to this case), "that the Colima was owned by the owners of the Arizona; that the owners of the Arizona were earning freight for the carriage of the cargo of the Colima; that no material deviation occurred to the Arizona as she towed the Colima to the port to which she was herself bound. I must also bear in mind that the weather was, with some inconsiderable exceptions, fine, and that there was no appreciable danger."

It must also be remembered that San Francisco was the only port on the coast where the Colima could be repaired, and that for that purpose she must necessarily have been towed thither. The interest of the owners as well as regard for the safety of the passengers, would have required them to accept the services of the Arizona, even if there had been no cargo on board.

Another consideration is, I think, entitled to much weight. The Pacific Mail Steamship Company is the owner of a fleet of steamships plying regularly between this port and Panama. Except when they avoid the land during fogs, their course is, probably, nearly uniform, and confined within a comparatively narrow belt of the ocean.

In case of accident they may count with tolerable certainty upon being able to intercept and obtain assistance from other vessels of the line. If such assistance when afforded is to be accounted a salvage service of a high order of merit, and to be compensated as if rendered by a stranger vessel, a direct encouragement is held out to the company to relax the diligence which it is their duty to exercise, and to send their vessels to sea with imperfect or unreliable machinery.

Actual negligence can rarely be proved, for the best machinery is liable to accidents. And the company might in almost every instance demand and receive a salvage compensation for performing a service, the necessity for which arose from the negligence of its agents, and the inconvenience of affording which, falls chiefly, if not exclusively, on the passengers and owners of the cargo on board the salving vessel.

The service seems to have been somewhat severe and straining upon the Arizona. She sustained, however, no serious injury, although repairs were necessary to remedy some derangement to her machinery. The cost of these is not shown. It was, probably, inconsiderable.

In the case of The Miranda the value of the ship was £15,000; of the cargo, £18,755; of the freight in course of being earned, £1,875; total, £35,630, stated by Sir R. Phillimore as about £36,000, or $180,000. On this value he

decreed £350, less than one per cent., and this allowance included compensation for the loss of a hawser valued at £45.

The estimated value of the Colima is $500,000; of her cargo, $700,000; freight, $40,000, in gold. But in this estimate the market value of the cargo is given. It should, therefore, be reduced by deducting the freight. The total contributory value will, therefore, be about $1,200,000. The Roxana was delayed on her voyage forty hours, the Colima from two and a half to three days. The value of the coal consumed by the Roxana during her forty hours' detention was about $190. The value of the coal consumed by the Colima during two and a half days was from twelve to eighteen hundred dollars.

Guided by the analogies afforded by the case so often cited, I shall award the sum of $16,000 to be paid by the owners of the cargo laden on board the Colima.

PACIFIC MUT. INS. CO. v. The BELLE. See Case No. 1,269.

PACIFIC MUT. INS. CO. (SIMPSON v.). See Case No. 12,886.

PACIFIC RAILROAD (OPDYKE v.). See Case No. 10,546.

PACIFIC RAILROAD (UNITED STATES v.). See Cases Nos. 15,983 and 15,984.

PACIFIC R. CO. (BAILEY v.). See Case No. 742.

Case No. 10,649.

PACIFIC RAILROAD CO. v. LEAVENWORTH.

[1 Dill. 393;[1] 3 Chi. Leg. News, 306; 5 West. Jur. 306.]

Circuit Court, D. Kansas. 1871.

MUNICIPAL CONTROL OVER STREETS—RIGHTS AND REMEDIES.

1. Under the statutes of Kansas, a railroad company is forbidden to construct and operate its roads upon the streets of an incorporated city "without the assent of the corporate authorities."

2. Under this statute, the city authorities are not limited to a simple granting or denial of the right of way, but they may prescribe conditions on which they will give their assent, and if these are lawful and proper and are accepted by the railroad company, they are binding upon the parties.

[Cited in Union Pac. R. Co. v. Merrick County, Case No. 14,383.]

[Cited in brief in Frankford & S. P. C. P. Ry. Co. v. Philadelphia (Pa. Sup.) 4 Atl. 551. Cited in State v. Mayor, etc., of Bayonne, 55 N. J. Law, 241, 26 Atl. 81; Omnibus R. Co. v. Baldwin, 57 Cal. 167; Union Depot R. Co. v. Southern Ry. Co., 105 Mo. 571, 16 S. W. 922; Moundsville v. Ohio R. R. Co., 37 W. Va. 107, 16 S. E. 519.]

3. Accordingly, where the right of way along a street was granted by a city, on condition that the company should build a depot in a certain part of the city and grade, rip-rap, and pave the street it used, and the company agreed to accept it on these terms, it was held that it could not hold and enjoy the grant, and not comply with the conditions on which it was made.

[Cited in Omnibus R. Co. v. Baldwin, 57 Cal. 165; Moundsville v. Ohio R. R. Co., 37 W. Va. 107, 16 S. E. 519.]

4. An ordinance and contract, special in their terms, construed to give the city a right to re-enter and take possession of the street, and remove the railroad track on the failure of the company to comply with the conditions of the ordinance granting to it the right of way.

5. The principles, which will, in such cases, govern the chancellor in granting or denying a temporary injunction against the city, to restrain it from taking possession of the street, and removing the rails, and preventing the running of the trains of the company, considered.

On motion for an injunction. The complainant, the Pacific Railroad Company (of Missouri) is a corporation chartered by the state of Missouri, and it built and is operating a road from St. Louis to the Kansas state line. By virtue of its charter, it leased the road of the Missouri River Railroad Company, extending from the state line of Kansas to the city of Leavenworth, and it likewise leased on the 28th day of September, 1870, the road of the Leavenworth, Atchison, & Northwestern Railroad Company, extending from Leavenworth to Atchison, in Kansas. Substantially, the present controversy is between the complainant (the Pacific Railroad Company of Missouri) and the city of Leavenworth, and relates to the rights of the parties under the ordinances and contracts hereinafter mentioned. By the statutes of Kansas, it is provided that the assent of the corporate authorities of cities is necessary before a railroad company is authorized to lay down its track and operate its road in the streets of a city. Gen. St. Kan. 202. With this statute in force, the city of Leavenworth, on the 13th day of January, 1869, passed an ordinance granting the right of way to the said Leavenworth, Atchison, & Northwestern Railroad Company through the city upon the public streets, or ways thereof (along Water street and the levee), "upon the condition and restrictions" in the ordinance set forth. Among these conditions, one was, that the said railroad company should construct and maintain, between certain streets named, and within a specified time (one year), "all of the freight and passenger depots used and required for the transaction of the business of said company in said city." The character of the buildings thus to be erected is particularly described. Among these conditions, also, was one that the "railroad company shall, within one year, under the direction of the city engineer, grade, rip-rap, and pave the levee, and that the said levee shall be so completed as to form a uniform and straight line from, &c., to, &c., and provided, further, that where it is necessary to remove the present rock levee for the purpose of laying their track, the company shall repave the same in as good condition as before they removed it."

The ordinance provides that it shall not

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

take effect so as to confer the right of way until a contract is executed between the company and city, binding the former to keep and observe the requirements of the ordinance; which contract, it may be mentioned, was subsequently duly entered into and signed by the respective parties. The ordinance contains this provision as to the rights of the city, in case the company fails to comply with its agreement, to wit: "Provided, that if the said railroad company shall fail to perform either of the above specifications and agreements, the right of way hereby granted shall cease, and the city of Leavenworth shall have the right to re-enter and take possession of all the public grounds of the city over which the said company shall have constructed its road by virtue of this grant."

Subsequently, the city twice extended the time for completing the work required of the company, but reserving otherwise all of its rights. It is admitted that the extended time has expired, and that the company has not yet erected any depot buildings, nor commenced their erection; nor has the company finished the work on the levee required to be done by the ordinance and contract; but it is alleged and shown that it entered upon its performance and has expended therein about thirty thousand dollars. In the lease of the Leavenworth, Atchison, & Northwestern Railroad to the complainant, no reference is made to the ordinance and contract with the city of Leavenworth, nor is there any assumption by the complainant of the duties and obligations of the lessee in the premises.

After the passage of the original ordinance, and the making of the contract in conformity therewith, the company laid down its track on Water street as authorized by the ordinance, and continued to use the same until its road was leased to the complainant, and after that the complainant continued to use the same until forcibly prevented by the city, on or about December 30, 1870.

On the 23d day of December, 1870, the city council of Leavenworth passed an ordinance reciting the former ordinance of January 13, 1869, granting the right of way to the Leavenworth, Atchison, & Northwestern Railroad Company on certain terms, and the failure of the company to comply therewith, and enacting that the city elects to consider all of said contracts rescinded and at an end, and declares the right of way therein granted to have ceased, and that the city elects to re-enter and resume possession of all the public grounds over which the road of the company is constructed. The marshal of the city is ordered to re-enter and take possession accordingly, and notify the company thereof. The city marshal, by resolution of the council passed December 30, 1870, was instructed "to maintain the rights of the city at all hazards, and with such force as may be necessary, and that if the railroad company, or any person shall run, or move, or offer to run or move any car or engine on or over the said levee, Water street, or public grounds of the city, to remove so much of the railroad track as may be necessary to prevent it." These orders the marshal obeyed, and took possession of the said grounds, and removed portions of the track, and by reason of such possession, forcibly taken and held, prevents the complainant from operating said road through the city, and no trains have run through the city, or to Atchison since that time. The bill sets forth the above facts, and that the damage thereby caused is irreparable, stating the facts showing it to be so.

The bill alleges no excuse for the company's failure to perform the agreements respecting the depot buildings, and levee, except that it charges that the city had no lawful power to require the company to erect depot buildings, and the company had no lawful power to agree to grade, rip-rap, and pave the levee. The bill makes the said Leavenworth, Atchison, & Northwestern Railroad Company, as well as the city of Leavenworth, defendants, and prays for an injunction to prevent the city, or its officers, from interfering with the use of the railroad track through the city by the complainant, and for general relief.

On the bill and exhibits and certain affidavits, the complainants moved the circuit judge, at his chambers, on the 9th day of January, 1871, for the allowance of a temporary injunction; and it was upon this motion that the subjoined opinion was given.

Crozier, Stillings, Hurd & Fenlon, for complainants.

McCahon & Moore, for the city.

DILLON, Circuit Judge. This is an application by the Pacific Railroad of Missouri for a temporary injunction against the city of Leavenworth to prevent it from interfering with the complainant's use within the city, of the track of the Leavenworth, Atchison, & Northwestern Railroad Company, of which latter company the complainant is the lessee.

The legal rights of the complainant to the use of the streets of the city, are wholly derived from the Leavenworth, Atchison & Northwestern Railroad Company, and can mount no higher than their source. The rights are derived from the ordinances and contracts referred to in the statement of the case.

By a statute of the state of Kansas it is enacted that "every railway corporation may construct its road across, along, or upon * * * any street, highway, &c., but the company shall restore the same to its former state, &c. Nothing herein contained shall be construed to authorize the construction of any railroad not already located, in, upon, or across any street in any city incorporate, or town, without the assent of the corporate authorities of such city." Gen. St. Kan. 1868, p. 202, tit. "Corporation," § 47. This statute went into effect November 1, 1868, before the location of the Leavenworth, Atchison, &

Northwestern Railroad, and it was in force at the time when the ordinance of January 13, 1869, was enacted, and remains unrepealed. The city of Leavenworth is incorporated as a city of the first class. It is unnecessary to inquire what would be the respective rights of the railroad company, and of the city, if this statute were not in force, or did not apply to them.

The power of the legislature over private corporations (section 1, art. 12, Const. Kan.) and over all public or municipal corporations, and over the uses to which public streets and highways may be devoted, is such that it cannot be doubted that it was entirely competent for it to enact that the company should not construct its road in the streets of an incorporated city, without the assent of its authorities. City of Clinton v. Cedar Rapids & M. R. Co., 24 Iowa, 455; People v. Kerr, 27 N. Y. 188; Com. v. Erie R. Co., 27 Pa. St. 339, 354; Moses v. Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516; Springfield v. Connecticut R. R., 4 Cush. 63.

The legislature of Kansas did so enact in the words above quoted; and under that statute no railroad company could construct its road upon the streets of Leavenworth "without the assent of the corporate authorities thereof." It has been argued in behalf of the complainant that this statute simply clothes the city with the power to say "yea" or "nay," but that it does not authorize it to stipulate for terms or conditions. But in this view I cannot concur. Its power is complete; and it was undoubtedly the design of the legislature that the city authorities, as the representatives and guardians of the public interests of the city and its inhabitants, should have the power to prescribe, as conditions of giving their assent, such lawful and proper terms as they deemed expedient. In point, see Northern Cent. R. Co. v. City of Baltimore, 21 Md. 93.

In the exercise of this authority the city said to the company, you may construct your road along Water street upon, inter alia, two conditions: 1. You shall, within a given time, build depot buildings, of a given character, and at a specified place. 2. You shall also grade, rip-rap, and pave the levee (which is part of Water street, and on and along which the right of way is granted). To this the company agreed, not only by accepting of the grant of the right of way on these conditions, but by executing a contract to this effect.

It is now insisted by the company that the city has no lawful power to contract for the erection of depot buildings, and hence so much of the ordinance and contract as relates to this subject is in excess of its authority, and void. My opinion is otherwise: and it is strengthened by an examination of the extensive powers with which it has been the policy of Kansas to clothe its municipal corporations. Gen. St. Kan. 1868, c. 18, art. 1, p. 129; Id. p. 163, pl. 25. It is also objected by the complainant that the railroad company had no authority to agree to grade, rip-rap, and pave the streets of a city, and that its agreement to do so in this instance, is ultra vires and void. 39 Eng. Law & Eq. 28, 37; 30 Eng. Law & Eq. 120. In the case now before me, the work which the company agreed to do in consideration of the right of way granted, seems to be upon or connected with the street occupied, and there is nothing in the record to show that more was required of the company than was reasonable under the circumstances, and nothing to show that the company would not be benefited as well as the city, by the making of the required improvements. If the use of a street by a company by reason of the grade adopted, or other peculiarities of situation, would cause an expenditure of money by the city to put the street in repair or fit it for use, it would seem to be competent for the city to make the grant of the right of way conditioned on the payment of so much money. If so, may it not require, as the condition of giving its assent, that work of such a character and to such an amount shall be done upon the street, and if the company agree to do this, and accept the grant accordingly, may it keep and enjoy the grant and be heard to say that its agreements, in consideration thereof, are ultra vires? I think not.

For the purposes of this application, the ordinance of January 13, 1869, and the contract executed in pursuance thereof, must be taken to be binding upon the parties. Confessedly, this contract has not been performed by the company. It has not performed, nor even entered upon the performance of the agreement to erect depot buildings. It has only performed, in part, its agreement in respect to the street. The bill as now framed, sets forth no excuse for the non-performance, and does not aver a readiness or even an intention hereafter to perform the contract. On the contrary, the complainant says that as between it and its lessor it is the duty of the latter to perform this contract and to maintain it in the possession and use of the road; but with this dispute, the city has, as I conceive, no concern. The company, then, not having kept the contract with the city, and setting forth no equitable excuse for the failure, was the city authorized to take possession of the street, and prevent the further use of it by the company? Upon this point my opinion is with the city. This opinion rests upon a construction of the ordinance which granted the right of way. It seems to have been very carefully drawn. It is impossible to read the ordinance and its various amendments, without perceiving that the city feared, or at least contemplated, a failure on the part of the company to keep its engagements, and in that event provided a remedy, to which the company agreed. This was that "the right of way hereby granted shall cease, and the city shall have the right to re-enter and take possession," &c. In re-en-

tering and taking possession the city has done nothing but that which the company agreed it might do in the contingency of a failure to perform its agreement.

Whether the things to be performed by the company are conditions subsequent, as claimed by the city, or mere covenants, as contended by the company, it is not perhaps material, on this application, to decide. This depends upon the intention. 4 Kent, Comm. 135, 136. And although courts incline against conditions, they will or should carry out the intention of the parties; and my opinion is that the parties here intended that the city should have the right to take possession on the failure of the company to keep its contract.

It has been strenuously maintained by the counsel for the city that its marshal having removed the track of the company and taken possession of the street, the injury complained of is consummated—a fait accompli—and that it is not the province of an injunction to command a party to undo what is already done. Wangelin v. Goe, 50 Ill. 459, and authorities cited and reviewed. But this is a different case from the one cited, and depends upon different principles. I refuse the injunction not on this ground, but on the ground that the company is in default and the city is only pursuing a remedy which is given to it by the contract of the parties.

But were the city in the wrong and the company not, and the former had, without right, interfered with the operation of a long and important line of railroad, causing a break as shown of about three miles, which has resulted in stopping the operation of the road to the north, there can be no doubt but that it would be a case where nothing but an injunction would be adequate to protect the rights of the company, and those of the public. The injunction would not issue to command the city to restore the rails it had removed, but to restrain it and its servants from further interference with the company in the use of the right of way granted to it by the city. Upon the case made, the injunction asked must be denied. Injunction denied.

Subsequently, upon representations that the complainant would adapt its bill to the views above expressed; that it was suffering irreparable damage by the break in its line, and the public great inconvenience; that the use of the street by the company pending the litigation would occasion no considerable, if any actual, injury to the city, or inconvenience to its inhabitants; that it was willing to give the most ample security to the city to abide the result of the suit, &c., the following order, in substance, was made as expressing the conditions on which a temporary injunction would be allowed. This order proceeds it will be observed upon the idea that the contract is binding, but that a court of equity, in view of part performance by the company, the fact that the complainant was an assignee and not in actual default, and of the public interests involved, would or might have the right to relieve against the forfeiture, the city seemed to be enforcing. It was stated by counsel for the city that its purpose was not to stop the operating of the road through the city, but to compel the company to comply with its contract.

Ordered, that if the complainant will amend its bill so as to admit the obligation to comply with the ordinance and contract, and will give security in the sum of $50,000 that it or its lessor will at once enter upon the work of erecting the depot buildings and completing the work on the levee and street with reasonable despatch, and abide all the orders and the final decree of the court, that an injunction will be allowed to restrain the city, until further order, from all interference with the complainant in the use of the right of way granted by the ordinance [of the city, and the right is reserved to the city to move to dissolve it because this order is not complied with.][2] Ordered accordingly.

NOTE. The legislature has the power to authorize the building of a railroad on a street or highway, and may directly exercise this power or devolve it upon the local or municipal authorities. Mercer v. Pittsburgh, Ft. W. & C. R. Co., 36 Pa. St. 99; Moses v. Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516; Murphy v. Chicago, 29 Ill. 279; New Orleans & C. R. Co. v. Second Municipality of New Orleans, 1 La. Ann. 128, 9 La. Ann. 284; Geiger v. Filor, 8 Fla. 325; Springfield v. Connecticut River R. Co., 4 Cush. 63; Tate v. Ohio & M. R. Co., 7 Ind. 479. See New Albany & S. R. Co. v. O'Daily, 13 Ind. 353, 12 Ind. 551; People v. Kerr, 27 N. Y. 188; City of Clinton v. Cedar Rapids & M. R. Co., 24 Iowa, 455; Lackland v. North Missouri R. Co., 31 Mo. 180. But where the public have only an easement in the street or highway, it has been often, but not always, held that against the proprietor of the soil the use of the street or highway for the purposes of a railroad is an additional burden or servitude, of which, under the constitution, he cannot be deprived without compensation. Mahon v. New York Cent. & H. R. R. Co., 24 N. Y. 658; Carpenter v. Oswego & S. R. Co., 24 N. Y. 655; Gray v. St. Paul & P. R. Co., 13 Minn. 315 (Gil. 289); Williams v. Natural Bridge Plankroad Co., 21 Mo. 580; Ford v. Chicago & N. W. R. Co., 14 Wis. 616. And this, says Judge Cooley, appears to be the weight of judicial authority. Const. Lim. 549. A different rule has been applied where the fee of street is in the city corporation and not in the adjoining owner. See Lexington & O. R. Co. v. Applegate, 8 Dana, 289; Williams v. New York Cent. & H. R. R. Co., 16 N. Y. 97, obiter; Wager v. Troy Union R. Co., 25 N. Y. 526; note observations p. 533; City of Clinton v. Cedar Rapids & M. R. Co., supra; People v. Kerr, supra; Protzman v. Indianapolis & C. R. Co., 9 Ind. 467; 13 Ind. 353, supra; Moses v. Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 522. See Cooley, Const. Lim. 555, 556, and notes. In the absence of special restriction there is much to recommend the doctrine of the plenary power of the legislature over all streets and highways and public places, and their uses, which is asserted in the Pennsylvania cases, the leading one of which is the Case of Philadelphia & T. R. Co., 6 Whart. 25; affirmed, 27 Pa. St. 339, 354; criticised, Williams v. New York Cent. & H. R. R. Co., 16 N. Y. 97, 106. See,

[2] [5 West. Jur. 314.]

also, O'Connor v. Pittsburgh, 18 Pa. St. 187, 189; Com. v. Passmore. 1 Serg. & R. 217; approved, Chicago v. Robbins, 2 Black (67 U. S.) 423. Remedy by injunction by and against city corporation. City of Clinton v. Cedar Rapids & M. R. Co.. 24 Iowa. 455. 482. note; Northern Cent. R. Co. v. City of Baltimore. 21 Md. 93; Morris, &c., R. Co. v. City of Newark, 2 Stockt. [10 N. J. Eq.] 352.

PACIFIC R. CO. (KETCHUM v.). See Cases Nos. 7,738–7,740.

PACIFIC R. CO. (PAUL v.). See Case No. 10,845.

PACK (EVANS v.). See Case No. 4,566.

PACKAGE OF LACE (UNITED STATES v.). See Case No. 15,985.

PACKAGE OF WOOL (UNITED STATES v.). See Case No. 15,986.

PACKAGES OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of packages.]

Case No. 10,650.

Ex parte PACKARD.

In re BUTLER.

[1 Lowell, 523.][1]

District Court, D. Massachusetts. 1871.

MORTGAGE FOR ADVANCES—USE OF PROCEEDS.

If a mortgage is for money advanced at the time, and the mortgagor assures the mortgagee that the money is to be used in his business, and there is no evidence that these statements were false, the mortgage must be held valid, though it was given out of the ordinary course of the trader's business.

[This was a petition by DeW. C. Packard for the payment to him of the purchase money of goods mortgaged by the bankrupt B. Butler.]

H. C. Hutchins, for mortgagee.

T. F. Nutter, for assignee.

LOWELL, District Judge. This case illustrates the difficulties which surround the construction of the thirty-fifth section of the bankrupt act [of 1867 (14 Stat. 535)]. Taken abstractly it is difficult to distinguish this transaction from that arising under the same bankruptcy, in which the mortgage was decided to be voidable by the assignee, and yet I have no doubt that this mortgage is valid. See Ex parte Mendell [Case No. 9,418].

The mortgage here, as in that case, was of the whole stock in trade in one of the two shops kept by the bankrupt, and was out of the ordinary course of his trade. The differences are that this mortgage was two months earlier than that, before the debtor's affairs were desperate, and was given for money advanced at the time, without any cause of suspicion excepting the fact itself that such a mortgage was offered as security. In the former case it was impossible to doubt that the whole transaction was an attempt to prefer a particular creditor, and that the mortgagee might have ascertained the facts by the slightest inquiry. Indeed I expressed a decided opinion that he must have been acquainted with the nature of the affair, and intimated that he might prove his innocence and save his money by requiring the assignee to sue the preferred creditor for his benefit. If I am rightly informed no such action was taken, and the case, after some preliminary proceedings by way of appeal, was settled on the footing of my decree. The money that was borrowed of this petitioner went to pay several different persons, but in such a way that the assignee admits he could not follow it, and it seems the lender was told by the borrower that he was "all right;" that he needed the money for use in his business, and that he expected to receive a certain sum within a short time in a way that he explained. There is nothing to contradict this, nor even to show that the statements were not true, excepting that it now appears certain that Butler must have been insolvent at the time; that he knew he was insolvent, or that he really paid this money out with any intent to commit a fraud of any kind is not proved. Every case of this sort must be decided on its own facts, and it will never be possible to lay down any general formula applicable to all cases. The intent to prefer a creditor necessarily involves the idea of an expectation of paying some others less than their whole debt, and this expectation is not always proved by the proof even of a known insolvency; there must be a fear or anticipation of stopping payment, which, indeed, may often be inferred from insolvency, or from acts which have a tendency to produce it, but which is to be decided as a fact in each case. Here it is not shown to my satisfaction that the borrower intended to use the money by way of preference, nor that the lender could have ascertained such an intent by inquiry. I shall not readily assent to a sweeping rule prohibiting insolvent persons from borrowing money on mortgage, even of their stock in trade, nor to one requiring mortgagees to see to the application of the money they lend. If it be true that the petitioner was put upon inquiry, it seems that he was not likely by any usual inquiry to discover any thing to prevent his lending the money. While it is true, as I held before, that a mortgage may be avoided if the mortgagee is privy to a preference, even though the preferred creditors themselves are innocent, yet this case does not come within that rule, because neither is a preference proved, nor knowledge or means of

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

knowledge on the part of the mortgagee. The burden of proof that the thirty-fifth section casts upon one who takes security out of the course of business is met by the uncontrolled evidence of the bankrupt. Petition of the mortgagee for payment to him of the purchase money of the mortgaged goods granted.

PACKARD (BACHMAN v.). See Case No. 709.

PACKARD (DOWSON v.). See Case No. 4,049.

Case No. 10,651.

PACKARD et al. v. GILBERT et al.

[4 Betts, C. C. MS. 87.]

Circuit Court, S. D. New York. April 25, 1846.

PATENTS—FIRST DISCOVERER—ABANDONMENT.

[This was an action by Austin Packard and others against L. Gilbert and I. Wilson.]

NELSON, Circuit Justice. 1. The subject matter in contestation, as shown by the case, was whether the patentee was the first and original discoverer of the thing patented. The cause did not turn, as supposed by the plaintiff, on the effect of a limited use of the invention by others before the patent was granted.

2. A prior discovery and use of a patented thing, by a stranger will destroy the validity of the patent, however limited such use may be, provided it be not intentionally secret and concealed.

3. A patent cannot be maintained by an inventor on his own discovery of a thing before known, though given up and disused by original and first inventor, before patent taken out or discovery made by patentee.

4. The charge of the judge was correct on the law, and motion for new trial denied.

Case No. 10,652.

PACKARD v. The LOUISA.

[2 Woodb. & M. 48;[1] 9 Law Rep. 441.]

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

SEAMEN—WAGES — MARITIME CHARACTER OF EMPLOYMENT OF VESSEL—DELAY.

1. Where a vessel was under fifty tons burthen, and not engaged in the foreign trade, or in the coasting trade out of the state, but with a license was employed in carrying and laying stone during summer in Quincy river and Massachusetts Bay, it is doubtful whether her employment was of that maritime character which would render the vessel liable for wages.

[Cited in The Mary, Case No. 9,190; The Canton, Id. 2,388. Cited in brief in The May Queen, Id. 9,360.]

2. If a person is hired on board of her by the master, who has chartered the vessel of all the owners at a fixed proportion of the profits, and this fact is known to the person, and if he signs no shipping articles, and resorts to the master only for payment two or three years after the service is finished, and is paid in part by him,—it is strong evidence that the contract was originally with the master alone, and not intended to bind the owners as such, or the vessel.

[Cited in brief in The Canton, Case No. 2,388.]

3. This presumption is strengthened if the person was thus hired and employed to load and unload, and lay the stone, as well as to navigate the vessel, instead of signing shipping articles, and being employed exclusively in marine duties. The usage of a port, in such a case, has some influence.

4. A delay to institute proceedings against the vessel for wages for three years after they became due from the master, under the above circumstances and contract, and when in the meantime some of the owners had changed and become insolvent, exonerates her from the lien for wages.

[Cited in Leland v. The Medora, Case No. 8,237; The Bolivar, Id. 1,609; Pierce v. The Alberto, Id. 11,142. Cited in brief in The Canton, Id. 2,388. Cited in The Artisan, Id. 567; The Bristol, 11 Fed. 163.]

5. There is no fixed time for liens to expire, which exist at common law, except the time of parting with the possession, and none in maritime liens, where possession does not exist with them exclusively, except the end of the next voyage, or the intervention, after it, of rights by third persons without notice.

[Cited in Leland v. The Medora, Case No. 8,237; Greely v. Smith, Id. 5,750; The Missouri, Id. 9,654; Hill v. The Golden Gate, Id. 6,491; The Dubuque, Id. 4,110; Griswald v. The Nevada, Id. 5,839.]

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

This was an appeal from a decree of the district court, dismissing the following libel. It was filed by the libellant [John S. Packard] in November, 1845, against the sloop Louisa, of forty tons burthen, for wages due to him for services on board of her, commencing in March, 1842, and ending in November after. The libel alleged that Packard served as a seaman, hired by the master, Hersey, at twenty-three dollars per month, and that she was employed on the high seas, carrying stone, and he doing duty on board faithfully till duly discharged. The claimants were Seth Spear and John Briesler. Their answer denied that the libellant was a seaman in the Louisa, but averred that he contracted as a laborer, to load and lay stone with the master, Hersey; and denied that the vessel, employed as she was, ever became responsible for wages, she being hired by the master of the owners, in carrying and laying stone, within the state of Massachusetts, for one third of the profits; and that this was known to the libellant. It insisted also, that if the Louisa was ever liable, she had ceased to be so by Packard's resorting to the master, and receiving payment partially of him, and by the delay to institute proceedings against the vessel so long, and till the ownership had, in part, become changed.

Mr. Kingsbury, for libellant.

W. S. Morton, for vessel and claimants.

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

WOODBURY, Circuit Justice. The evidence and agreements of counsel in this case accord in substance with the facts set out in the libel and answer. Packard is proved to have actually served on board the vessel, both in loading stone, and in navigating her. She was of $40^{9}/_{59}$ tons burthen, and employed in transporting stone within the state of Massachusetts, and laying it, without shipping papers signed by the crew, or any regular clearances, except a coasting license. The libellant and Hersey came to a settlement in the winter of 1843, and part of what was due has since been paid by Hersey. It was shown that Spear owned three fourths of her, and Hersey one fourth, and that the former, in June, 1844, said that Hersey ought to pay Packard what was due, and he hoped that P. would not libel the vessel; and that about the first of March, 1845, Spear was again notified that the debt was unpaid. From sixty to seventy dollars still remained so. It was further shown, that in such vessels, under such contracts, the wages were considered a claim on the master, and not on the owners. It is a matter of regret that some of the details, as to the employment and papers of this vessel, are not more fully proved and alleged. It is, however, questionable, on all the facts as they stand, whether the Louisa, in such an employment within the river, at Quincy, and within Massachusetts Bay, without any regular clearances, ought to be deemed a vessel liable to any lien for the wages of men, not hired as seamen under any shipping articles, or exclusively for navigating her. Thackarey v. The Farmer [Case No. 13,852]. Here their business was to help to load, unload, and lay the stone, no less than to navigate her. Whether unloading a vessel belongs to a seaman, as such, depends on the usage of particular places, the heat of the climate, and the character of the hiring and voyage. Swift v. The Happy Return [Id. 13,697]; The Mary [Id. 9,191].

By the Laws of Oleron (Dunl. Adm. Prac. 98), it appears, that particular officers once existed for this purpose. It is certain, however, that laying stone is no part of the business of a seaman. This vessel, and the employment of Packard, seem to have been of a mixed or amphibious character, not distinctly and exclusively marine; and at the same time, not distinctly and exclusively independent of marine service and marine liabilities. The vessel was not destined to carry freight in the coasting trade from state to state, nor for people in general; nor merely to carry stone for particular objects, but to carry it for special purposes within the bay, and aid in laying it in wharves and other ways. And Packard was engaged to work in the latter employment as a laborer, as well as in navigating the vessel, and on a contract with Hersey, who had hired her of the owners, and not under ordinary shipping articles with the owners.

The questions then are, had he a lien for his wages in such a vessel, or for such an employment, either by an express contract, or act of congress, or any principles of admiralty law? The claim of a seaman on the vessel for his wages is, at any time, rather an equitable privilege than a technical hypothecation of the vessel. The Nestor [Case No. 10,126]; 2 Brown, Civ. Law, 142; Story, Bailm. § 288. It is a charge on her as a favor for priority of payment, if seasonably enforced. It is given in certain cases by admiralty law, and of course it cannot be sustained there, as that law is founded on the civil law, except where equitable. See cases cited, post. And in many respects in its character, looking for what is equitable, it must be regarded as analogous to other liens, given otherwise than by express statute or express contract. When such statutes or contracts provide for it, they of course furnish the limitations and conditions. But here no specific agreement is pretended to have been made for such a lien, as in case of pledges and mortgages. Nor are any state statutes cited on the subject, such as exist at times in favor of mechanics on houses. Nor can it be pretended that any lien is probably created, in a case like this, by the acts of congress. There are but two on this subject. One, passed July 20, 1790 [1 Stat. 131], relates to vessels when bound to a foreign port, or if of fifty tons burthen, and engaged in the coasting trade beyond the neighboring state, and then gives a lien on vessels, which probably means such vessels as just described. The other, passed June 19, 1813 [3 Stat. 2], gives it to all vessels engaged in the bank or cod fisheries. This vessel, the Louisa, was of less than fifty tons burthen, and not engaged in the coasting trade out of the state, nor employed in the foreign trade, or in the bank or cod fisheries, and of course the libellant can claim nothing from her in these views. As those acts, however, do not prohibit liens for wages created by any principles of admiralty law, on vessels of less than fifty tons burthen, they may, when coming within those principles, be sustained by this court on appeals, under the jurisdiction expressly conferred on the district courts, by the ninth section of the judiciary act of 1789 [1 Stat. 76]. [Penhallow v. Doane] 3 Dall. [3 U. S.] 54, 56; [Brown v. U. S.] 8 Cranch [12 U. S.] 137. But, on those general principles, where and how employed must the vessel be, to give a lien? And to whom on board? It must be an employment from one port to another; and not merely along shore, or in the shore fisheries. 1 Kent, Comm. 343; Abb. Shipp. 476, 477. It must also be at sea. Id.; Case of The Thomas Jefferson, 10 Wheat. [23 U. S.] 428; Stone v. Gadet [unreported]; Montgomery v. Henry, 1 Dall. [1 U. S.] 49. Not lying merely at a wharf. Phillips v. Scattergood [Case No. 11,106]. Not as ferry boats. Smith v. The Pekin [Id. 13,090]; Thackarey v. The Farmer [Id. 13,-

852], or merely carrying wood across a river. And it must be from one port to another, where the tide ebbs and flows, and not on fresh water. The Orleans v. The Phoebus, 11 Pet. [36 U. S.] 183, 184; Janney v. Columbian Ins. Co., 10 Wheat. [23 U. S.] 418, 428. The person libelling must also be engaged in maritime duties on board. [The Thomas Jefferson] 10 Wheat. [23 U. S.] 428; Case of The Phoebus, 11 Pet. [36 U. S.] 183.

The next inquiry is, what are such duties, and to whom is the lien given, if on board a suitable vessel, or one engaged in maritime employment? Not carpenters on board, though they may have a lien at times as mechanics, or if acting as seamen. The Lord Hobart, 2 Dod. 104; De Lovio v. Boit [Case No. 3,776]; North v. The Eagle [Case No. 10,309]; Prithard v. The Lady Horatia [Id. 11,438]; The Jerusalem [Id. 7,294]; [The Aurora] 1 Wheat. [14 U. S.] 96; [The General Smith] 4 Wheat. [17 U. S.] 438. Not a pilot from Gravesend to Deptford. Ross v. Walker, 2 Wils. 264; Trainer v. Superior [Case No. 14,136]. Though it does include pilots on the high seas. 6 C. Rob. Adm. 227. The Anne [Case No. 412]. And pilot, deck hands, engineers, and firemen may sue in rem against a steamboat. All these are engaged in what is really maritime. But not mere landsmen on board, as physicians. Gardner v. The New Jersey [Id. 5,233]; 2 Dod. 104; Mills v. Long, Sayer, 136; Trainer v. Superior [supra.]

It is doubtful, therefore, whether Packard's employment on board of the Louisa, partly in loading and laying stone, or the business of the sloop herself, could be regarded as strictly maritime and commercial. It seemed to be not wholly that of the sailor, whose services in and for the ship, and whose reckless character in ocean dangers, have made the law indulge him with this additional security. If this kind of claim be not contemplated by the parties from the character of the vessel, or nature of the duties required of the men, it would be unjust to let it be set up against the vessel. Such is the case with seamen on board ships of war, or revenue cutters,—and for the reasons that the employment of such vessels and such seamen is not entirely commercial, as well as that the ownership of the vessels, being in the government, bars the practicability of any resort to them for wages having been contemplated, as well as prevents their liability. Ellison v. The Bellona [Case No. 4,407]; Moitez v. The South Carolina [Id. 9,697]; Abb. Shipp. 476; Hopk. 104. But the lien is not lost if the vessel merely carries the public mail. 2 Dod. 100. Nor in letters of marque which pay wages, and are engaged in commerce; but otherwise with mere privateers, paid by shares. Ellison v. Bellona [supra]. So there may be other circumstances connected with a transaction, which repel or rebut the idea that the parties looked to a lien. And when these occur, the lien either does not attach, or the evidence of such circumstances shows it to be relinquished. Crawshay v. Homfray, 4 Barn. & Ald. 50.

Thus, in the present case, beside the equivocal or ambiguous position of the libellant, and of the vessel in which he labored, there had been a hiring of the Louisa, by the captain, of the other owners, and a contract by the captain with Packard, not as captain of her for the owners, but for himself; it being his duty as the charterer of her, to supply the men. All this was known to Packard; and he signed no shipping articles, and perhaps he ought to be considered as having no expectation of a lien, originally, on the vessel. In some cases this inference might not arise from that alone. Jameson v. The Regulus [Case No. 7,198], note; The Crusader [Id. 3,456]. But here, coupled with the other facts, it looks like an agreement, made to serve for the captain rather than the owners, when the latter had hired the vessel at a fixed freight, and also hired the men, with a knowledge of his contract. The captain could not resort to the vessel for any services or wages of himself, by the admiralty law. The Orleans v. The Phœbus, 11 Pet. [36 U. S.] 184; Gardner v. The New Jersey [supra]; Phillips v. The Thomas Scattergood [Case No. 11,106]; 2 C. Rob. Adm. 196; Abb. Shipp. 476; Montgomery v. Henry, 1 Dall. [1 U. S.] 49. Sed quære, De Lovio v. Boit [Case No. 3,776]. Such are the decisions, rather forced on the admiralty by courts of law. Because, on principle and analogy, the master should have the same lien on the vessel as the seamen. 2 Brown, Civ. Law, 95, 96. But notwithstanding his claim on principle in cases generally, he could not have it here, as being not employed by the owners, or working for the ship, but for himself; and it seems just that a seaman so employed by him, and with a full knowledge of all these facts, should stand in a like position. A different course would be tantamount to giving Packard a claim on the owners, as owners, when they had not employed him; nor had their agent done it for them. There must have been no knowledge of the facts, or the repairs be very durable, or the charter must have contemplated it, if the owners are liable for repairs, when the master has hired the vessel, and orders them. Moll. 355; 2 Brown, Civ. Law, 135. The usage in such case to look to the captain alone, would be nothing more than what seems legal and reasonable. In new cases an existing usage should not be without some influence. The George [Case No. 5,329]; The Reeside [Id. 11,657]. Indeed, usage governs often at particular places, as to the duties of seamen. Relf v. The Maria [Id. 11,692], note; The Mary [Id. 9,191].

But however any of these views may be, in their force and weight, I think the dismissal of this libel by the district court is on another ground so well supported, both by principle and authority, that the decree ought not to be reversed. It is the long delay to

resort to the vessel, and when, in the meantime, the owners had changed, and one of them become insolvent.

The claim of a seaman for wages on the vessel, is a species of lien upon an article, which he should not long forbear to enforce, or it may become inequitable. Having assisted to keep in repair, and navigate and use her for purposes profitable to the owners, and having been so attached to it by a contract or shipping-papers, and having been exposed to all the risks, and toils, and responsibilities of a seaman in her, he is allowed a privilege to charge and hold on upon her for his payment. But all analogies show that the claim, if renewed after long abandoned, will mislead the public as well as the owners, and embarrass commerce and sales, through secret and unknown and unrecorded outstanding claims. Maritime liens are not, like common law liens, limited to possession. The Nestor [Case No. 10,126]. Indeed, exclusive possession seldom accompanies them at all. But they are claims in rem, or charges in rem, having priority, and are to be seasonably enforced, else they may work great fraud in the community, where possession is not taken or retained and no public register or record is made of them, and the property thus secretly encumbered is allowed to depart, it may be, again and again, to the opposite side of the globe. The Nestor [supra]; Ex parte Foster [Case No. 4,960]. Hence, where congress has given an express lien in the two acts before referred to, they evidently contemplate, as a part of sound public policy, a speedy and prompt enforcement of it. The first act provides that seamen, "as soon as the voyage is ended" and the cargo and ballast fully discharged, "shall be entitled to all the wages due; and if not paid in ten days, or if a dispute arises, the master shall be summoned to show cause why process shall not issue against the vessel," according to the course of admiralty, to answer for the said wages; "and if the master neglects to appear or settle for the wages, process is to issue forthwith, and the master must produce the contract or day-book," and if the vessel is about to proceed to sea before the ten days have expired, or has left the port of delivery before paying the wages, "immediate process out of any court having admiralty jurisdiction" may be had. This looks to early proceedings only, and contemplates only ten days' delay, and indeed no departure of the vessel, even on a new voyage, till the libel should be filed. And if she does in the mean time depart, or prepares to depart, a process still earlier than ten days can be instituted against her.

In the case of fishing vessels, the claim given to the seamen on the vessel is, by the act of June 19, 1813, § 2, limited to six months after the sale of the fish or fare; but is given for that period as fully as in the merchant service. Indeed the sailor, after reaching land, is so impatient for his wages, and so needy, that he will seldom consent to wait long, unless his contract or service has been of a land character rather than maritime, and his habits partake more of the former business. The law, in order to protect him under his improvident habits, when a mere seaman, gives him three modes of redress and security, so as speedily and surely to obtain his just dues. But, doing this, and following the claim on the vessel, even to the last plank or nail, if wrecked or condemned. 1 Dod. 40; Lewis v. The Elizabeth & Jane [Case No. 8,321]. Yet a corresponding diligence must be exercised, in order to secure freedom and safety to commercial transfers of property against secret liens. A prominent reason for giving him a libel in the admiralty, against the ship, is, that he may at once detain her for security; and another is, that the admiralty court being always open, he may obtain satisfaction sooner than by a suit at common law. 2 Brown, Civ. Law, 77, 85. Most other liens, raised by implication, if at common law, are dissolved by a separation from the goods, which is permanent and of much length. 1 Durn. & E. [1 Term R.] 4; 3 Durn. & E. [3 Term R.] 119; 6 East, 27. The innkeeper has it only till his guest receives his baggage, and quits. The common carrier does not retain his lien after the articles are delivered over. Even in maritime cases, a lien on goods for freight is lost, if the goods are delivered, or time is allowed to the charterer of the vessel to make payment of the freight. 2 Ld. Raym. 974; 6 Mod. 12; 11 Mod. 6; 4 Adol. & E. 260; 2 Brown, Civ. Law, 82. In many cases, liens on domestic ships by those repairing or furnishing materials for repairs are also lost, if the ships are allowed to go to sea without the liens being enforced on them. Johnson v. The M'Donough [Case No. 7,395]; Mont. Liens, 19; 2 Moore, 34; Abb. Shipp. 77, etc.; [Spring v. South Carolina Ins. Co.] 8 Wheat. [21 U. S.] 268; 2 Dow. 29; 11 Mass. 34; 15 Johns. 298; 16 Johns. 89. But there may be cases of supplies furnished, or money advanced to the master in a foreign place, which are not secured by an express contract of bottomry or mortgage, and time expressly given, but being to be repaid usually out of the fruits of the voyage, may rest on a different ground, and create liens for the whole voyage, or longer. It is not here pertinent to examine them, and I merely allude to them with a view to exclude them. See Leland v. The Medora [Case No. 8,237]. Again, a lien on goods for salvage is lost, if the goods are given up to the possession of the owner. Brevoor v. The Fair American [Id. 1,847]. The policy of the law to shorten such liens, is manifested also in those which are expressly allowed by statute. Thus, where a lien has been created by express statute, in favor of mechanics on houses they have helped to build for others, it usually is made to last for only six months, and sometimes

but thirty or sixty days. They too are at times required to be recorded. See the Revised Statutes of Massachusetts.

All these limitations are wise, whether created by statute or usage, so as to prevent secret claims from existing on property, independent of its possession, and independent of what is recorded by mortgages or otherwise; and so as to obviate litigation, and remove speedily any obstacle to the free disposal and circulation of property. 14 Serg. & R. 333. To allow a seaman, then, after his voyage is over and his contract ended, and his connection with the vessel dissolved, and he embarked for years in employment elsewhere, to retain a secret claim on the vessel, and thus prevent her sale or use, unincumbered, and thus embarrass any new purchaser without notice, would be very bad policy. Abb. Shipp. 187, note; Id. 539, note; The Rebecca [Case No. 11,619]; 3 Kent, Comm. 198. Much more would the long continuance of the lien, under these circumstances, not be reasonable, if the lien itself, for any time whatever, was doubtful from the nature of his undertaking; as here, being as much that of a laborer to lay the stone, which the vessel carried, as to navigate her, and not having signed any shipping articles as a seaman, nor being engaged on the high seas, or even in the coasting trade to other states. The seaman, like the common carrier or innkeeper, or mechanic, would still be able to sue on his contract, till barred by some other equitable defence, or by some statute of limitations. By the statute of Anne, he is not barred, in an action at law for wages, till six years be expired. See Jay v. Allen [Case No. 7,237], at this term. Again, in equity, a party, though otherwise chargeable, is sometimes relieved if there has been such delay in the complainant as to prevent the respondent from having a remedy over so good as if prosecuted earlier. See Mason v. Crosby [Id. 9,234]. If the delay leads to new interests and relations, it operates against the plaintiff guilty of it, and sometimes lessens the amount to be refunded, and at others prevents the rescinding of a contract.

Courts of admiralty, on the matters within their jurisdiction, must be governed by equitable principles. 8 Pet. [33 U. S.] 538; Harden v. Gordon [Case No. 6,047]; Andrews v. Essex Fire & Marine Ins. Co. [Id. 374]; 1 Hagg. Adm. 176, 357. They are chancery courts for the sea. See Jay v. Allen [supra], this term. Here a new owner of one quarter had come in instead of Hersey, and any remedy over against the latter had become worthless by his insolvency. This part of the case, it will be seen, does not go on the ground that the claim of the plaintiff is barred on his contract with the master in two or three years, or in any period short of the statute of limitations, as before suggested, if one exists. Ang. Lim. c. 4, § 3; The Sarah Ann [Case No. 12,342]; Pitman v. Hooper [Id. 11,186]. But it rather proceeds on the ground, that if the seaman sets up an equitable lien on the vessel as collateral security to that contract, and one raised by construction of law, and not regulated by express contract or positive statute, he must enforce it within an equitable period, considering the nature of the lien and of the employment of the vessel, and the changes of interest happening in it. If he asks equity, in this respect, it must be by doing equity, and not violating it. Where the vessel was so situated that the interests in her could not be changed, as, if condemned abroad, as in Pitman v. Hooper [supra], or where the length of time is accounted for by absence of the seaman or want of recovery for the vessel when condemned or lost after freight is earned (Sheppard v. Taylor, 5 Pet. [30 U. S.] 675), the only bar, perhaps, in most cases, is the statute of limitations, or what is equivalent to it. All depends, if the title in the vessel has not been sold, on the circumstances and the equities of the case. 3 Kent, Comm. 196; Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328; 3 Hagg. Adm. 238; The Sarah Ann [supra]; Trump v. The Thomas [Case No. 14,206]; The Rebecca [supra]; The Eastern Star [Case No. 4,254]; The Mary [Id. 9,186]; Curtis on American Seamen, 321; The Chusan [Case No. 2,717]. These may require, as a general rule, that the lien for wages is to end, if not enforced soon after the voyage ends. Semb. [Blaine v. The Charles Carter] 4 Cranch [8 U. S.] 328. See former analogies. And yet cases may occur where equity would enlarge the time, on some facts, to one year, and on others to several years. When the vessel continues in existence and employed, or is sold without notice, no case has been found where the lien extended beyond the end of the next voyage. There is a positive statute thus in 2 Laws Pa. 475 (March 27, 1784). The Rebecca [Case No. 11,619]. The time of delay there was only nine months. If an owner himself neglects to resume a claim on his ship, once derelict or abandoned, a year and a day, he is estopped from recovering his own property. Lewis v. The Elizabeth Jane [Id. 8,321]; 1 C. Rob. Adm. 34; 2 Brown, Civ. Law, 49. Justice Livingston says, there is no rule requiring seamen to prosecute at once,—though in France, after a sale of a vessel and one voyage, they will not allow a proceeding in rem. The Mary [supra]. In that case, the seamen were discharged at New Orleans, and prosecuted at New York, their home, as soon as the ship returned there from Liverpool, which was her originally intended voyage. Though she remained some time at New Orleans, over six months, yet she was sued speedily on her return.

The present case is, therefore, decided on its own peculiarities, as before explained. Again, if the responsibility of the vessel for

the fulfilment of the contract of the master, if existing at all, was considered like that of a surety for the master, being collateral, though it is not so strong as that, how incumbent would it be to resort to the surety early, and not sleep over claims, till the original debtor becomes insolvent, and the interests of the owners have changed? The United States laws, as to sureties of deputy postmasters, on account of the danger of injury to them by long delays expressly exonerate them, if the principal be not used in two years after the debt is liquidated. So, in courts of equity, sureties are often exonerated by negligence as to the principals, or giving them new and extraordinary forbearance, if the liability over has been injured or lost by the principal becoming insolvent, after the usual credit or agreed delay expired, or after the claim ought to have been enforced according to the ordinary course of business and its usages. 7 Johns. 332, semb.; 13 Johns. 383; King v. Baldwin, 17 Johns. 384.

There is another ground of defence under positive precedents, which might be urged so far as regards the new owner in the ship and his interests in common cases. He is a purchaser for valuable consideration without notice, for aught which appears, of this secret outstanding trust, and usually would hold property, thus purchased, exonerated from such a trust. 2 Story, Eq. Jur. 1217, 1228; 9 Ves. 100. This would be correct in relation to trusts on land, growing out of parol agreements. So in mortgages of personal property not recorded, where they are required to be recorded. In the case in The Rebecca [supra], the purchase was with notice. But in case of liens like this, it deserves more consideration before I could allow it to prevail, even as to that purchaser, if the want of notice stood as the only answer to this claim, so much like a bottomry claim, and of which a record or notice is not necessary. See Leland v. The Medora [Case No. 9,237].

On the whole facts, the nearest precedent which I have found is this. In the case of a lien on a vessel by a bottomry bond, created July 14, 1796, and to take effect on the arrival of the vessel in Europe; she went thither, and returned here Sept. 28th, 1796; but she was not then arrested or libelled to pay it, and it was delayed till the 19th January, 1798, between which periods she had made two voyages, and been attached by creditors. It was held that the lien had thus become discharged. Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328. But this was less delay than has occurred here; and Justice Story says, in Notes to Abb. Shipp. 539, that the rule would be similar in a lien for wages as in a bottomry lien. The decree below is affirmed.

PACKARD (SPRING v.). See Case No. 13,260.

Case No. 10,653.

PACKER v. NIXON.

[9 Pet. 793, Append.]

Circuit Court, E. D. Pennsylvania. Dec. 26, 1833.[1]

DESCENT—HEIR AT LAW—STATUTES OF PENNSYLVANIA.

These extracts are inserted as showing the views of the court of the effect of the domicile of Matthias Aspden, the testator, in the construction of his will. See [Harrison v. Nixon] 9 Pet. [34 U. S.] 494.

BALDWIN, Circuit Justice. "The same principle is the rule in Pennsylvania, in all cases to which the common law had been applied by adoption; and it remains now the law of descent of both real and personal estate, if the provisions of an act of assembly do not in their words embrace the very case in controversy.

"This must be taken to be a point conclusively settled as the law of the state, by the authoritative decisions of the high court of errors and appeals in Johnson v. Haines, 4 Dall. [4 U. S.] 64, and of the supreme court in Cresoe v. Laidley, 2 Bin. 279, 284, and no longer open to discussion: That there is in this state such a person as an heir at common law, distinct from the statutory heir, to whom the real estate of a person dying seized and intestate, shall descend by the general course of the law in right of blood and inheritance; that the common law of both countries is the same, designating the same person, by the same rules and courses of descent, as the heir to an ancestor in all cases, and the heir to his estates of inheritance, unless in the particular event which has happened, an act of assembly has substituted some other person or persons to take the place of the ancestor; for its enjoyment and disposition, as a special law for the case, like to the law of custom, which breaks the course of descent according to the general course of the common law.

"This was the law of the province from its first settlement, it was expressly declared so by the eighth section of the act of 1705, and the heir was referred to as the heir in the abstract, according to the meaning of the word as given by Hobart. 'The said lands and tenements shall descend and come to the intestate's heir at law according to the course of the common law aforesaid.' 3 Smith's Laws, 153, 158, note; 1 Dall. Laws Appends. 45."

"That heir at law, or heir simply, does not mean heirs by custom in England, or statutory heirs in Pennsylvania, is the evident meaning of Judge Yeates. The observation of Chief Justice McKean in the same case (2 Yeates, 61; [Ruston v. Ruston] 2 Dall. [2 U. S.] 245): 'Thomas could not in this case be considered as heir at law in Pennsyl-

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[1] [Reversed in 9 Pet. (34 U. S.) 483.]

vania, where, if at that time a person died intestate leaving divers children, his real estate descended to all his children equally; the eldest son having only a double portion or share, and therefore the devise may even be considered a condition,'—draws us irresistibly to the same conclusion. The eldest son could not take as heir at law by the course of descent, in a case to which the act of assembly applied, and by superseding the common law established a special course of descent; but he could be and is, by the existing law, heir at law, in this state, according to the opinion of the court, delivered by the chief justice in Johnson v. Haines [supra], and of Judge Yeates, in Findlay v. Riddle [3 Bin. 139], in a case not embraced in any act of assembly, which accords precisely with the principle they laid down in Ruston v. Ruston [supra]. Taking these three cases in conjunction with Cresoe v. Laidley, they completely negative the proposition that there is any difference between an heir at law here and in England, except such as is made by custom or act of assembly. This becomes a negative, pregnant with important consequences as to the legal meaning of the word heir at law, that it not only is that which the common law gives it, but that it is not to be taken to refer to the customary or statutory heirs. 'The term heir at law conveys no idea; with us they are all his coheirs.' It is thus a term of contradistinction and of designation, denoting the person who has and can have no coheirs, the sole inheritor of the estate of the ancestor by right, in its nature necessarily exclusive. The law of both countries recognizes heirs as a class or a number of persons having equal rights by special law, and the heir as one person entitled by common law to the whole estate by right of blood alone. This necessarily follows from the opinions of the judges in Ruston v. Ruston, in accordance with the rule laid down in all the cases from Counden v. Clerke to Findlay v. Riddle, that customary or statutory heirs cannot take by a deed or devise to the heir at law, the heir, or right heir of the grantor or devisor, because they are different persons, claiming in different characters and capacities, and the words are incapable of substitution as convertible terms, without uprooting the whole course of descent, and every settled rule of inheritance and construction. Vide Gilb. Dev. 16, 162; 3 Salk. 336."

"In all the cases which have arisen on the construction of wills, the supreme court have given to the word heirs, in all the modes of expression, the same effect which they have by the common law, whether as a word of purchase or limitation, as conveying an estate for life, in fee, or in tail. Whenever it operates as a word of limitation, the estates descend to the heir at common law or in tail, as the case may be, and not the especial or statutory heirs according to the act of assembly, the operation of which is confined to cases where an intestate is seized in his own right, both at law and in equity, of an estate of inheritance, descendible to his heirs general."

"We do not deem it necessary to examine in detail the various cases which have been decided in this state on the subject of the descent of lands. The very accurate and valuable digest of Mr. Wharton furnishes, under the appropriate heads, a host of authorities, which fully establish the position of Judge Duncan in the case of Lyle v. Richards, 9 Serg. & R. 358.

" 'It is plain that from the date of the charter, until laws were made to alter the succession, lands descended according to the course of the common law; and not only descent, but enjoyment and purchase, including every other mode of acquisition, were governed by that law, acquired and lost by the course of the same common law.'

"Assuming it, then, to be the settled law of both countries, that the words heir, right heir, or heir at common law, without any qualifying or explanatory words, in a will, are to be taken as words of limitation, it remains to take a view of the cases in which they are words of purchase or a designation of the person to take by the will, as purchasers and not by descent. Fearne, Rem. 79a, 149, 158, etc."

"Whether, therefore, this case is to be decided by the law of England or of this state, the result must be the same as settling the law of the case, which we will now apply to the will in question."

"Nothing is left for presumption or construction in face of this solemn certificate and repeated declaration of intention. It negatives all belief that he meant to leave his estate to be disposed of by the will of anyone but himself, or that anyone was intended to be his heir but the one who was made so by the law in right of blood. Nor can we be convinced that it was his intention that while his will remained unaltered for 33 years, his own disposition of his estate should be subject to the changes in the law of the state from time to time.

"But, had this been in his mind, it would make no difference, for in 1824 he had no half brothers and sisters alive, and the act of 1797, making no provision for such case, his heir at law, his lawful heir by the common law of Pennsylvania, was John Aspden of Lancashire, England, who would have inherited his real estate, and his personal property would have been vested in the administrator appointed by the register, in trust for the next of kin, according to the law of England. The effect of his will is to leave the real estate to descend to his devisee, as if no will had been made, and as to the surplus to appoint an executor with directions to pay it over to the person whom by his will he had substituted as his benefi-

ciary, in place of his next of kin. This person was designated by a well known and understood term, which the law of both countries fastens on John Aspden, as indissolubly as if he had been especially described by name, birth, residence and occupation."

"From all these cases we are abundantly satisfied that the law of this case is definitely settled, both in England and this state, and we can have no hesitation in expressing our most decided opinion that John Aspden, the heir at law of the testator, is entitled to the whole of his estate by the fixed rules of law, which we are not at liberty to question."

[NOTE. A bill of review in this case was filed, but dismissed upon hearing. Case No. 11,270. Subsequently, on appeal, the decree above was reversed by the supreme court. 9 Pet. (34 U. S.) 483. The case was again before the supreme court upon a certificate of division of opinion among the judges of the circuit court upon a matter of practice. The supreme court decided the matter not properly the subject of such certificate. 10 Pet. (35 U. S.) 408. The whole subject of Matthias Aspden's estate was again before the court upon the question of the interest of the devisees under the will. Case No. 589.]

PACKER, The E. A. See Case No. 4,241.

Case No. 10,654.

The PACKET.

[3 Mason, 255.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1823.

BOTTOMRY—WHO MAY BE CLAIMANTS—NECESSARY REPAIRS—SALE OF CARGO—MARSHALLING ASSETS—LIEN ON FREIGHT.

1. In a suit in rem on a bottomry bond, underwriters, to whom an abandonment is made, which has not been accepted, are not admissible as claimants.

[Cited in The Idaho, Case No. 6,996; The Senator, Id. 12,664.]

2. In case of necessary repairs the master may sell part of the cargo, or hypothecate it.

[Cited in The Fortitude, Case No. 4,953; Roberts v. Eldridge, Id. 11,901; Pope v. Nickerson, Id. 11,274; Dupont de Nemours v. Vance, 19 How. (60 U. S.) 170; Delaware Mutual Safety Ins. Co. v. Gossler, 96 U. S. 651.]

[Cited in brief in Dunning v. Merchants' Mut. Mar. Ins. Co., 57 Me. 112. Cited in Babcock v. Terry, 97 Mass. 488.]

3. If he has money on board belonging to shippers, he is not bound to apply it to the ship's necessities before borrowing on bottomry, at least if not equal to the amount of repairs. But the law invests him with a large discretion on the subject.

[Cited in The Julia Blake, 107 U. S. 427, 2 Sup. Ct. 692.]

4 If he has sufficient money of the owners, he cannot borrow on bottomry; so, it seems, if he has of his own, on board.

[Cited in The William and Emmeline, Case No. 17,687; The Larch, Id. 8,085.]

5. Courts of admiralty will marshal the assets in case of bottomry, so as to make the proper priorities in favour of shippers, against the property of the owner and master.

[Cited in Pope v. Nickerson, Case No. 11,274; The Panama, Id. 10,703; The Serapis, 37 Fed. 438.]

6. The decree in bottomry, is to consider the sum lent and the premium, as a principal, and to allow common interest on that sum for the delay of payment after it is due.

[Cited in The Mary, Case No. 9,189; The Archer, 15 Fed. 282.]

7. The master of a ship has a lien on the freight for all advances made abroad for the ship's use.

[Cited in The Gold Hunter, Case No. 5,513; Ex parte Clark, Id. 2,796; Pope v. Nickerson, Id. 11,274; The Eliza Jane, Id. 4,363. Cited in note in The Bowditch, Id. 1,717.]

8. Quere if not also on the ship.

[Cited in Ex parte Clark, Case No. 2,796; Pope v. Nickerson, Id. 11,274.]

9. If the property of a shipper be taken and sold for the ship's necessities and to enable her to perform the voyage, the party has a right of contribution over against the other shippers, and his remedy is not confined to the ship owner. A bottomry bond may be good in part and bad in part; and will be sustained by the court so far as it is good.

[Cited in The Boston, Case No. 1,669; The Gold Hunter, Id. 5,513; The Hunter, Id. 6,904; The Leonidas, Id. 8,262; The Bridgewater, Id. 1,865; Mutual Safety Ins. Co. v. The George, Id. 9,981; Greely v. Smith, Id. 5,750; Carrington v. The Ann C. Platt, Id. 2,445; The Archer, 23 Fed. 352.]

10. The court may, if the premium is inflamed by extortion, moderate it.

[Cited in The Hunter, Case No. 6,904.]

Libel on a bottomry bond, pledging the ship, freight, and cargo. The ship Packet with a valuable cargo on board, belonging principally to various shippers, was, on a voyage from St. Petersburg (in Russia) to Boston (in America), run down by another vessel at sea, and was so much injured, that she was compelled to put into Christiansand (in Norway) for repairs. It was then found that the ship must undergo very considerable repairs, and the master not having sufficient funds in cash, and being unable to borrow money there, instead of selling a part of the cargo, which could be done only at a great sacrifice, applied to the libellants, Messrs. Thomas Wilson & Co. at London, for an advance of the necessary funds. The libellants accordingly advanced to the master for the repairs, &c., the sum of £8,074. 13s. 9d. sterling money, and on the eve of the vessel's resuming her voyage, took a bottomry bond for £9,205. 2s. 10d. sterling, being the amount of the advances, with a premium of fourteen per cent. pledging the ship, freight, and cargo. The bond was in the usual form on the voyage of the ship from Christiansand to Boston, and the amount was payable three days after the ship's arrival at Boston, in lawful money of the United States, according to the current rate of exchange on London. The ship sailed from Christiansand on her voyage,

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

and safely arrived at Boston in May, 1823. But in the course of the voyage, meeting with contrary winds, she put into Portsmouth in England, and while there the master drew upon Messrs. Wilson & Co. on account of disbursements, &c. for the further sum of £378. 0s. 9d. sterling which was paid by them. For this sum as well as for that secured by the bottomry bond, the libellants prayed payment out of the ship, cargo, and freight, and admiralty process brought them within the jurisdiction of the court. The ship and cargo were sold by an interlocutory decree, and the proceeds brought into the registry. The net proceeds of the sale of the ship were $8,442.57, of the cargo $49,428.09, and of the freight after payment of the wages $2,398.77. The amount of the bottomry bond as finally liquidated was $45,303.88. The repairs, expenses, and premium, therefore, amounted to about five times the actual value of the ship at the end of the voyage. Various claims were interposed by shippers and others claiming a right to the cargo, and also by the New England Marine Insurance Company, which had underwritten on the ship, and to whom she had been abandoned; but the abandonment had not been accepted by them.

The cause was argued by Mr. Dorr and L. Shaw, for the libellants and by Gorham, Hubbard, Welsh, Prescott, and Webster, for the interests of certain of the adverse parties. The case is so much commented on by the court, that it is not thought necessary to give the arguments at large.

STORY, Circuit Justice (after stating the facts). This is a very calamitous and extraordinary case; and yet it seems not now disputed by the parties before the court, that the transactions have been in entire good faith. Upon these facts, the court is not called upon to express any opinion, except so far as the parties to the controversy have brought before it their particular grounds of objection. I may be permitted, however, to observe, that the case of The Gratitudine, 3 C. Rob. Adm. 240, has established, upon the most satisfactory and conclusive grounds, the right of the master in a case of necessity to hypothecate the cargo, as well as the ship and freight; and that in that case the value of the ship, when sold in England, scarcely exceeded one fifth part of the amount of the bottomry bond. There may therefore be cases, unmixed with fraud, and perhaps liable only to the imputation of an indiscreet exercise of judgment, honestly but erroneously formed, in which the master may bind the whole property far beyond the ultimate benefit to the owners, or the voyage.

The first point, which I am called upon to consider, is, whether an underwriter, who has refused to accept an abandonment, can be permitted to claim property in the ship in this court. In my opinion it is perfectly clear, that he cannot. He has not, and pretends not to have, any jus ad rem, or jus in re. All that can be said is, that he may ultimately have an interest in the questions here litigated. But an interest in the question forms no title to claim property in the admiralty. This court looks only to rights in the thing itself, to ownership general or special, and to such claims as are direct in the proprietary interest, such as a legal title, or jus in re, or to such as are indirect, as a lien, or jus ad rem. In respect to the latter, the court, as a court of prize, is not in the habit of giving them effect, at least as against the superior claims of captors. The claim of the New England Marine Insurance Company must therefore be rejected. Underwriters, as such, cannot litigate here as to the rights of the libellants, or the claimants. They are mere strangers, and no more entitled to be heard than any contingent debtor or creditor of either party. Objection has been taken to the conduct of the master in giving the bottomry bond, that as he had specie dollars on board, belonging (as he says) to some of the shippers, he was bound to apply this money in the first instance to the relief of the ship, before resorting to the extraordinary measure of bottomry. If he was so bound, then it is farther contended, that to this extent at least, the other shippers are entitled to relief against the bottomry-holders. I am not prepared to say, that there is any absolute rule, which compels the master at all events, and under all circumstances, to make use of monied coin of third persons, which he happens to have on board, in preference to any other mode of proceeding. The general principle is, that he is bound to act with a reasonable discretion. He is to get the necessary repairs done at as little sacrifice as is practicable. If he has money on board, and the use of that will be the least sacrifice, he ought to resort to it in the first instance. But there may be cases, in which the use of such money would be the greatest sacrifice that could be made, and the whole objects of profit in the voyage might be thereby defeated. Suppose a voyage to the East Indies or China, in which the principal outward property on board is Spanish dollars, and a disaster happens on the first passage, requiring repairs, the use of those dollars may be the most mischievous exercise of his discretion, and destroy the hopes of the voyage. In other voyages, the sale or disposal of the money on board, from its depreciation at the foreign port, or its high value at home, may be a greater loss to all concerned, than the sale of any merchandise. In all these cases therefore, much must be left to the master's discretion, and he must exercise it conscientiously for the general interest. If he acts bona fide and with reasonable care, the rights of the parties are bound up by his acts, although it should afterwards be found, that he had committed an error in judgment, and might have acted more beneficially in another manner. The court therefore cannot

lay down any such universal rule as is contended for; and especially ought it not to be laid down in any case, like the present, where the use of such money of the shippers would have been utterly insufficient to complete the repairs. Under such circumstances the master must resort to borrowing; and he has a right to consider, whether the premium upon the borrowing, is not on the whole a less sacrifice of interest, than a partial appropriation of the shipper's funds. There are no facts brought before the court in the present case, which enable me to say, that the master has acted discreetly or otherwise; and I cannot presume without evidence, that there has been a wanton abuse of authority. But the objection, if it were well founded, would not go to the destruction of the bottomry bond, but at most would only operate to diminish its validity, as a lien, to the extent of the money, which might have been appropriated, and leave it in full force for the residue. It is not here, as in courts of common law, that the bond must be good in whole or not at all. Courts of admiralty act ex æquo et bono, as courts of equity; and a bottomry bond may be held good in part and bad in part. So far as the money was properly advanced, it may be held to give a valid lien, and be dismissed as to the rest. And if the premium has been unduly inflamed from a knowledge of the master's necessities, the court may, in the exercise of a sound discretion, moderate it, or at least refuse to exert its authority to ratify it. The cases of La Ysabel, 1 Dod. 273, and The Augusta, Id. 283, are in point. The doctrine had antecedently been recognized by this court.

There is another view of this particular point which deserves consideration. In the case of a sale of part of the cargo by the master for the necessities of the ship, the sale is in the nature of a compulsive loan for the benefit of all concerned, and to enable the ship to prosecute her voyage. It bears a considerable resemblance to the case of a jettison, for the owner is deprived of his property for the common good; and to him it must be immaterial, whether the loss be by a sacrifice at sea or on shore. In the case of The Gratitudine, 3 C. Rob. Adm. 240, 264, Lord Stowell manifestly treated it as a case of contribution. His language is, "All must finally contribute in the case of an actual sale of a part;" and then adverting to the case of bottomry of the whole, which he considered as equivalent to a sale of a part, he added, "All contribute in this, as a portion of the whole value of the cargo is abraded for the general benefit, probably with less inconvenience to the parties, than if any one person's whole adventure of goods had been sacrificed by a disadvantageous sale in the first instance." This opinion is again intimated in The Hoffnung, 6 C. Rob. Adm. 383, although the facts of that case did not require its application. The same doctrine is supported by Emerigon (Emerig. Mar. Loans, c. 4, § 9; Id. c. 12, § 4), who expressly holds, that the owner of the goods sold has a right of contribution against the owners of the goods saved, whatever may, in the event of a successful voyage, be the ultimate right of recovery over against the owner of the ship. There is also no inconsiderable weight of authority in its favour from other maritime sources. See Stev. Av. 19, 24, 28, 29; Weskett, Gen. Av. 252, 256, 259, art. 16; authorities cited in Emerig. Mar. Loans, c. 4, § 9; Consolato del Mare, cc. 104, 105; Abb. Shipp. pt. 3, c. 8, §§ 5, 8. Whether this right of contribution would entitle the party to the full benefit of having it deemed a general average for all purposes, or whether the loss by such a sale would be recoverable under a common policy of insurance, are questions, with which I do not meddle, and which may depend upon other principles. But I confess myself strongly inclined to the opinion of Lord Stowell; and sitting in the admiralty, with the whole property rightfully under the jurisdiction of the court, I should upon an application by the party, deem his right of contribution good against the other shippers, and not turn him round to a remedy exclusively against the owner of the ship, even supposing the latter might under the circumstances be made ultimately liable for the payment. But, supposing this doctrine questionable, there is another principle obligatory upon the court, and which in the present case would lead to the same results. It is clear by the general maritime law, that the party, whose goods are so sold, has a lien upon the ship and freight for reimbursement. The Consolato del Mare (chapters 105, 106), recognizes the principle; and in general the money so lent upon a forced loan is deemed to be in the nature of bottomry. Emerig. Mar. Loans, c. 4, § 9; Id. c. 12, § 4; Cleirac, Cantract Marit. c. 5, arts. 35, 36. Lord Stowell alludes to the right in The Gratitudine, 3 C. Rob. Adm. 240, 264, and says, that if the ship and freight were omitted in the literal terms of the bond, they would be liable to the extent of their value, although the cargo alone had been made amenable to the foreign lender, who has nothing to do with averages of any kind. In our own country it has been long since asserted in the admiralty courts, that money lent in a foreign port to supply the ship's necessities, constitutes a charge on the ship. Bulgin v. The Rainbow [Case No. 2,116]. And I am not aware, that this decision, though never brought before any higher tribunal, has been in practice questioned. A fortiori, a compulsory loan is entitled to such a privilege. And it appears to me, that it would be an extreme hardship to allow the master a right to elect the sale of the goods of one shipper for the general benefit, and to confine his remedy exclusively to the owner of the ship; thus giving the full benefit to the other shippers without in any measure sharing the burthen. I have no doubt, there-

fore, that under the circumstances of this case, any forced sale at Christiansand, and upon the same principles any appropriation of money on board for the ship's necessities, ought to be reimbursed by a general contribution. The posture of the case is not then changed as between the shippers by any omission so to appropriate the money. In point of fact, however, it turns out upon farther investigation, that the money of the shippers was actually expended towards the repairs. It happened in this way. After the libellants had engaged to make the necessary advances, their agent at Christiansand was out of funds, and the master upon the exigency of the moment applied the specie then in his hands to the purpose, intending to draw on the libellants for the amount, and repurchase dollars for the shippers. In the subsequent events, he was unable to procure them, and therefore remitted the amount (with some deduction) to the libellants at London, to be drawn for by the shippers in America. The bottomry bond covers the whole amount expended, and the libellants now offer the shippers liberty to draw for the amount on London, or to deduct the same from the bottomry proceeds in court. In effect therefore the money is included in the bottomry bond; and to say the least of it, the court is not inclined to displace the lien on the ship, so far as respects the money so expended, the shippers having elected to receive compensation here. The appropriation of the money was not made by the master absolutely, but sub modo; and under all the circumstances the libellants were not wrong in originally including it in the bottomry bond.

In the progress of the cause various other questions have been made, which have rendered it necessary for the court to prosecute its inquiries into the question, to whom the money on board of the ship actually belonged. It was insisted, that it belonged originally to the master, and that no real legal appropriation of it had ever been made by the master to the shippers, who now claim it. An objection was made in behalf of the shippers to the jurisdiction of the court to institute such inquiries; but I am utterly at a loss to perceive upon what ground the objection can rest. The proceeds of the whole property are in the custody of the court, and the rights of all parties claiming title to any part of them, are necessarily put in contestation. The court must work its way through these questions of title before it can arrive at any decree disposing of the property. There is in this case a broader ground to exercise the jurisdiction. It is this, that if the master has money of his own on board, sufficient for the ship's necessities, it is by no means certain, that he has a right in such case to resort to the extraordinary measure of bottomry. In case of there being money of the owner of the ship on board, it is very clear, that he cannot resort to bottomry. And though I would not absolutely decide, that under no circumstances he could so resort, where he has sufficient money of his own on board; yet if he can, it must be in a case of a very peculiar character, and such as ought to induce the court to uphold it from great public principles. The onus would certainly lie on the master to establish such a case; and it would be listened to by the court with scrupulous hesitation. And there is good reason for adopting such a course. The master has a lien upon the freight for all the advances, which he may make on account of the ship; and can intercept it, when earned, to reimburse himself. Lane v. Penniman, 4 Mass. 91; Milward v. Hallett, 2 Caines, 77; White v. Baring, 4 Esp. 22; Hodgson v. Butts, 3 Cranch [7 U. S.] 140. He may be considered therefore as having a reasonable security for all advances not exceeding the value of the freight. By the maritime law of foreign countries, he has also a farther lien on the ship, for all advances for the ship; and there certainly seems much reason for upholding such a right. It has been indeed denied, that the common law affords him any such lien (Hussey v. Christie, 9 East, 426; Abb. Shipp. pt. 2, c. 3, § 9); though the courts of equity have shown a strong inclination to sustain it. Hussey v. Christie, 13 Ves. 594; Ex parte Halkett, 3 Ves. & B. 135; 19 Ves. 474; 2 P. Wms. 367. Our own admiralty courts have on several occasions recognized its existence and enforced it. Burgin v. The Rainbow [Case No. 2,116]; Gardner v. The New Jersey [Id. 5,233]. See, also, Emerig. Mar. Loans, c. 12, § 3, etc. However the law may be on this point, if the master having money of his own, omits to apply it pro tanto to the ship's necessities, and binds the ship and cargo by a bottomry bond valid to a certain extent, the court will exercise its discretion, and marshal the assets in favour of the shippers of the cargo, so as to bring their property last into contribution. Upon examining the evidence and documents in the cause, I am not satisfied that any, but a small part of the money, ever belonged to the master. And, taking the master's own testimony, which in the absence of all countervailing proof must be taken to be true, it is sufficiently established, that before his departure from St. Petersburg, the whole money was legally appropriated to the shippers, and was at their risk during the voyage. It was the return of adventures sent out by them, and the master had a right to separate it for this purpose. The court therefore pronounces, that Messrs. Thomas Welsh, A. Aspinwall, P. & T. Curtis, Boardman & Pope, and J. Bromfield are entitled to it as legal proprietors.

The next consideration is, how the assets are to be marshalled in paying the bottomry bond. It is said, that there is property of

the owner and property of the master on board, included in the bottomry of the cargo. My opinion is, that the property of the owner is to be first applied to the payment of the bond. In respect to the master I should hold, that if he had money of his own on board, at least so far as the shippers are concerned, the bottomry bond should be held pro tanto not to attach upon the cargo. And I at present incline also to the opinion, that the other property of the master included in the bond, ought to be applied before that of the shippers. But it may be as well to reserve any absolute opinion on this point, until the facts are ascertained by commissioners. The only remaining point is, in what manner the amount due upon the bottomry bond is to be calculated. The rule laid down by Mr. Marshall in his treatise on Insurance and Bottomry (book 2, c. 4, p. 752) is, that "if, when the risk is ended, the borrower delay payment, the common interest begins to run, ipso jure, without any demand. 'Discusso periculo, majus legitimâ usurâ non debebitur.' But this interest runs only on the principal, not on the marine interest; for this would be interest upon interest. 'Accessio accessionis non est.'" For this doctrine he cites no English authority, but relies altogether upon the civil law and Pothier and Emerigon. Poth. Gross. Avent. note 51; Emerig. Gross. Avent. c. 3, § 4; 2 Emerig. 414. The doctrine of the civil law denying compound interest, is not of universal application under the common law. The opinions of Pothier and Emerigon seem certainly opposed to allowance of interest upon the maritime premium, (commonly, but somewhat improperly, called interest); but Emerigon admits, in explicit terms, that the law and practice in France are in favour of it. Upon examining his reasoning on the subject, it is by no means satisfactory, being obviously founded upon mere motives of compassion. My opinion is, that as by the successful termination of the voyage, the maritime premium, as well as the sum lent, becomes due, the whole forms one aggregate debt, and that any delay in discharging it, ought to be followed by the allowance of common interest exactly as in other cases of debt. In making up the decree, the sum lent and the bottomry interest are to be considered as the principal, and common interest upon this amount is to be added from the time the bond became due to the time of the decree. It will become necessary to refer the cause to commissioners, to audit the accounts and ascertain the rights of the claimants, according to the principles here stated; and an interlocutory order must be passed for this purpose.

It is unnecessary to give any opinion on the point, whether the libellants are entitled to any remedy in rem for the additional sum advanced the master at Portsmouth, because the lien, if admitted, would only extend to the ship and freight, and these are exhausted by the bottomry bond. Order accordingly.

[Subsequently a claim was brought forward by Sweet & Hammond, factors, to the proceeds of certain goods, part of the cargo of the Packet. The claim was allowed, with a reference to a commissioner to ascertain and adjust the claim. Case No. 10,655.]

Case No. 10,655.

The PACKET.

[3 Mason, 334.][1]

Circuit Court, D. Massachusetts. May Term, 1824.

MARITIME LIENS—FACTOR—ADVANCES—PROCEEDS—COSTS.

1. A factor, to whom a general shipment has been entrusted as security for advances, commissions, and expenses, has a special property only in the shipment, and subject to his lien for those charges, the owner may dispose of them as he pleases, and the conveyance will carry the right.

[Cited in Boston & M. R. Co. v. Warrior Mower Co., 76 Me. 261.]

2. In the admiralty, where the factor, and the persons claiming a derivative title under the owner, contest the right to the proceeds, the court will decide upon the equities of all concerned, and decree the amount of the lien to the factors, and the residue of the proceeds to the other claimants.

[Cited in Leland v. The Medora, Case No. 8,237; The Lady Franklin, Id. 7,983.]

3. If, in such a case, a factor sets up a title as general owner, and not merely for a lien, he will not be entitled to costs.

[Cited in Hunter v. Marlboro, Case No. 6,908.]

The principal questions were disposed of at the hearing at the last term, and the opinion of the court will be found [in Case No. 10,654]. Messrs. Swett & Hammond, however, claimed a right to the proceeds of certain goods, part of the cargo, under the following circumstances, which were stated in the report of the auditors. On the 27th of June, 1821, Captain Barker entered into an agreement with them as follows: "Memorandum of an agreement made between Swett & Hammond, and Samuel P. Barker, all of Boston. The said Barker agrees to pay Swett & Hammond one per cent. for endorsing his bills on Thomas Wilson & Co. of London, at sixty days' sight, for £1500 sterling, and the said Barker agrees to deliver to Swett & Hammond the following merchandise, as collateral security, viz., 82 boxes of brown Havannah sugar, 72 do. white sugar, 72 barrels of coffee, 52 bales of cotton, valued at $9983,08 (in the aggregate). And it is further agreed, that Swett & Hammond are to ship the above merchandise to Steiglitz & Co., St. Petersburg, or Good, Rainals, & Co., Copenhagen, for sale, and the proceeds subject to the order of said Swett & Hammond, and on the arrival at Boston of the returns from Copenhagen or St. Petersburg, the merchan-

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

dise to be consigned to the said Swett & Hammond, who are to enter and sell the same, and charge a commission of two and a half per cent., and when the money is received for the sales, it is to be paid over to the said Barker by Swett & Hammond, provided the bills before mentioned are paid. The said Barker is to pay all expenses, and to be at all the risk. The said Swett & Hammond are to get the property insured out and home, and in case of loss, the amount insured is to be paid over to the said Barker, after deducting two and a half per cent. and all other charges."

Captain Barker had previously bought, at New York, a quantity of coffee and sugar, amounting to upwards of $25,000, which goods had been pledged to Swett & Hammond, as collateral security for advances made by them, to pay for the same at New York. These goods were shipped from New York to Boston, consigned to Swett & Hammond, and after their arrival, several parcels of them were sold to Thomas Welsh, William Oliver, P. & T. Curtis, and Samuel Upton and Hawkes Lincoln. A part of the same purchase was the sugar and coffee referred to in the foregoing memorandum. The goods, stated in the memorandum, were shipped in the Packet, and consigned by Swett & Hammond to Steiglitz & Co., at St. Petersburg, for sales and returns. Steiglitz & Co. acknowledged the receipt of these goods, and sent a separate account of sales of them to Swett & Hammond, and shipped to them, as returns, certain goods, viz. 716 bars of iron, 7 bundles of hemp, 50 packs half duck, 25 casks of tallow, and 463 coils of cordage, the proceeds of which were now claimed by Swett & Hammond. The bills drawn by Captain Barker on Thomas Wilson & Co. for £1500 were duly paid; and Captain Barker stated before the auditors, that he considered the memorandum contract with Swett & Hammond thereby terminated; and as he had procured Steiglitz & Co. to consign to Swett & Hammond an amount of goods equivalent to the amount pledged to them, on which they would receive a commission, he thought himself at liberty to appropriate his own property so shipped as aforesaid by Steiglitz & Co. as returns, to such of the other shippers as he pleased. He accordingly appropriated to P. & T. Curtis 114 coils of cordage and 4 bundles of hemp; to A. Aspinwall 381 bars of iron; to Samuel Upton the residue of the iron, three bundles of hemp, and 114 coils of cordage. The 50 packs of half duck and 25 casks of tallow he considered as appropriated to Swett & Hammond, as returns for an invoice of $3151,57, consigned by them, on the intended voyage, to Captain Barker, for sales and returns. The bills of lading of the respective appropriations were handed to Curtis, Aspinwall, and Upton, by Captain Barker on his arrival at Boston; but Captain Barker stated, that the appropriation was made at Cronstadt, and letters of advice and bills of lading were sent by him to them from thence accordingly; but they never reached the parties, who had no notice of the appropriation, until the arrival of the ship at Boston. The claim of Swett & Hammond was not for a lien, but as general owners of the property. The 463 coils of cordage above referred to were also claimed in behalf of J. J. Pflug of Cronstadt, as his own property. The facts, as stated by the auditors, were as follows. A bill of parcels of 463 coils of cordage, and 2 cables, signed by J. J. Pflug, at Cronstadt, on 16th of September 1821, with the weight and cost, was produced, containing a statement, that it is "shipt on joint account on board the American vessel Packet, bound to Boston," and charges Captain Barker with his half of the amount of the cost, and adds, "you will have the goodness to pay my brother, Mr. Charles Pflug." Captain Barker also produced a memorandum of account in the handwriting of J. J. Pflug, in which he is charged with the one half of the cost, and is allowed certain credits, leaving a balance due to Pflug of reals 3626,17, to meet which balance Captain Barker stated, that he left in the hands of Pflug property amounting to $1000, out of the proceeds of which Pflug was to receive his balance. There was also a letter from J. J. Pflug of the 29th of September 1821, to Captain Barker, in which he states, "agreeably to our mutual consent, I have shipped for joint account and risk on board the ship Packet, B. No. 1 to 465, 40 tons of tarred cordage, weighing &c. (the exact amount in the bill of parcels). Further, have loaded in said ship, on my own account and my own hazard, 8 hawsers, weighing &c., which permit me to consign to your good self, and request you will be good enough, on your safe arrival at Boston, to dispose of the above hawsers, as well as my half share of the above 40 tons cordage, to the best advantage possible, and be pleased to remit of the net proceeds $2000 to my friends Messrs. William & James Levin in London. The insurance for these 44 tons cordage, you assure me has been already effected; will you therefore be good enough to say at what rate of primage, &c." In a postscript he adds, "the residue of the proceeds, after remitting the $2000 &c., I shall settle with you here in 1822, or otherwise through my friends in America, in case of your not arriving at that time." Captain Barker advised Steiglitz & Co. of this shipment on board of the Packet, and signed a bill of lading for the whole of the cordage, as shipped for account of Swett & Hammond, and consigned to them. The reason of which was, as he stated, that the property might be covered by an insurance, which Swett & Hammond had caused to be effected for him on the voyage out and home. Captain Barker also signed a bill of lading for the whole quantity of cordage, as shipped by said Pflug, but consigned to himself (Barker) at Boston.

Upon these facts, stated at large in the report of the auditors, several questions arose in respect to proprietary interest, which were referred by the auditors to the court for decision.

Hubbard & Gorham, for Swett & Hammond.

Mr. Aylwin, for Pflug.

Mr. Welsh, for Aspinwall, Curtis, and Upton.

STORY, Circuit Justice. The first question is as to the proprietary interest of Swett & Hammond in the goods in controversy. The proceedings of the master were certainly somewhat loose and irregular, and not so satisfactorily explained as the court could desire. Still the court must, in the absence of all contradictory proofs, take the facts to be as they were stated by the master before the auditors, and reported by them, for he is certainly a competent witness, standing in point of interest indifferently between the parties. The claim of Swett & Hammond is framed so as to present only a general and absolute proprietary interest, and gives not the slightest intimation of such a qualified interest, as is now asserted. There is no pretence to say, that in point of fact they are entitled to be considered as general owners. The memorandum of agreement establishes, in the most satisfactory manner, that Captain Barker is the real owner, and that Swett & Hammond are mere factors and consignees, and that their original interest in the shipment never extended beyond a lien for security of the draft of £1500 on Messrs. Wilson & Co., and their claim for commissions, insurance, and expenses. The draft of £1500 has been paid; and thus the lien of Swett & Hammond, under the agreement, is cut down to the other charges above stated. It is now asserted, that they are creditors of Captain Barker on general account, and claim a title to retain for the balance. Assuming it to be so, they are not at liberty to enforce such a claim against bonâ fide purchasers under circumstances like the present. They have never had these goods in their possession, nor the proceeds in their hands; and an attempt to affect this shipment with such a claim is directly against the stipulations in their agreement.

What then is the case before the court? It is the common case of a factor, who is consignee, claiming the property against his principal, and those asserting a derivative title from him. So far as the factor has a lien, he is certainly entitled to the protection of the court. But certainly he has no rights beyond that claim. Discharging the lien, the principal has an unquestionable right to dispose of the property in any manner, which suits his own interest or convenience. Supposing, therefore, that the original shipment vested a special property in the factors, and that the investment of the returns by Steiglitz & Co., taken in connexion with the consignment, and bill of lading to the factors also gave them a special property in the goods now in controversy, still Captain Barker had a perfect right, subject to the lien of the factors, to vest the ultimate interest in Messrs. Curtis, Aspinwall, and Upton, in the most absolute manner. They claim as bonâ fide holders under an appropriation in Cronstadt, and Swett & Hammond cannot be heard to assert a title, as general creditors, to extract it from their hands. Sitting here for the purpose of adjusting equities between the parties, I should have no difficulty in decreeing, on a proper allegation, that the claim of Swett & Hammond for commissions, insurance, and other expenses, ought to be a charge upon the proceeds in court; but that subject to these, the proprietary interest in the proceeds belonged to the other claimants. It has been said at the argument, that this claim for commissions &c. ought not to be enforced, because the proceeds now in court cannot be traced back to the original shipment to Messrs. Steiglitz & Co., so as to establish them to be the returns of that shipment. But it appears to me, that the evidence clearly establishes this fact. Then again it is objected, that Messrs. Swett & Hammond have now in their possession the policies of insurance on this very property, and are entitled to deduct the amount of their claim from that fund, whenever the loss is paid to them upon the policies. Assuming that they might so do, still if their claim is attached as an equitable lien upon the present proceeds, they are entitled to relief here. They are not bound to wait for a recovery on the policies. The latter may be an additional security to them; but it does not supersede the right of attaching their claim to these proceeds. The only point of difficulty in now giving them relief arises from another consideration; and that is the shape of their original allegation as general owners, and not as persons having a mere lien on the property. But as no exception has been taken at the bar on this account, and the argument has been wholly on the merits, I consider it as in effect waived by the parties. It would be harsh, at this last stage of the proceedings, wholly to reject such an equitable claim, or to turn the parties round to institute new proceedings, when there has been a general acquiescence in disposing of it under the original allegation. If Swett & Hammond had, in their allegation of claim, set up this special interest in the proceeds, I should have thought it proper also to allow them costs; but as they have asserted a general claim only, as absolute owners, which has been successfully resisted, it is my duty not to admit them to costs, for they have failed in the substance of their claim.

In respect to the claim of Pflug to the cordage, if it stood upon the bill of lading alone, there would be strong reason to presume in favour of his sole proprietary interest. But the bill of parcels, and especially the letter

signed by Pflug put it beyond any real doubt, that the shipment was on the joint account and risk of himself and Captain Barker. He is entitled, therefore, only to a moiety of the proceeds, and the other moiety is to be disposed of according to the appropriation thereof made by Captain Barker.

Let it be referred to a commissioner to ascertain and adjust the claims of the parties according to these principles. Decree accordingly.

Case No. 10,656.

PACKWOOD v. CLARK et al.

[2 Sawy. 546.][1]

Circuit Court, D. Oregon. Feb. 16, 1874.

NOTES — FAILURE OF CONSIDERATION — SHERIFF'S CERTIFICATE OF PURCHASE OF REAL ESTATE.

1. The law presumes that a promissory note is given and indorsed for a sufficient consideration, and when it is alleged by the maker or indorser thereof that it was given or indorsed without consideration, or that the consideration therefor has failed, the burden of proof is upon the party making the allegation.

2. Where a note was given solely in consideration of the assignment of two certain sheriff's certificates of sale of real property, a plea of total failure of consideration to an action thereon is not supported by proof that only one of such certificates was so assigned.

3. Under the Code, a partial failure of consideration is not a defense to an action upon a promissory note, but the same must be set up as a counter claim, and in that case it must be pleaded and proved in the same manner as in a separate action thereon.

4. A sheriff's certificate of sale of real property is of value to the purchaser, and an assignment by him of the same is therefore a sufficient consideration for a promissory note.

This action was brought [by William H. Packwood against George H. Clark and others] to recover the sum of $3500 due upon a promissory note, with interest thereon from May 23, 1873.

John A. Reed, Walter Thayer, and O. P. Mason, for plaintiff.

H. T. Bingham, for defendants.

DEADY, District Judge. The complaint alleges that on the day and year aforesaid, one Arthur T. Rice made his promissory note and thereby promised to pay the sum and interest aforesaid to J. W. Virtue or order, at the national bank of Cook & Co., Chicago; and that defendants in their firm name aforesaid, prior to the delivery of said note, "duly indorsed the same;" and that afterwards said Virtue "for a valuable consideration, duly indorsed" the same to the plaintiff, who is now the owner and holder thereof.

That upon the maturity of said note payment thereof was duly demanded and refused, and the same was protested for nonpayment, and notice thereof given to said indorsers, etc.

The defendants by their amended answer admit the allegations of the complaint, with the qualification that said note was made payable to Virtue at the plaintiff's request, and by the former indorsed to the latter without consideration; and for a defense thereto, allege that they indorsed said note, and other similar ones, amounting in the aggregate to $29,700, solely in consideration of the performance of an agreement whereby the plaintiff and one T. J. Carter then and there undertook and promised to assign to the defendants the certificates of sale given by the sheriff upon the sale of the El Dorado ditch, on executions issued out of the circuit court, for Baker county, Oregon, to enforce two several judgments in said court against the Malheur and Burnt River Consolidated Ditch & Mining Company—one in favor of C. M. Carter for the sum of $24,442.22, and the other in favor of the plaintiff for the sum of $20,809.39.

That the consideration for said note totally failed, because: 1. Said certificates of sale at the date of said agreement "were of no value whatever;" and 2. Said certificates of sale, or either of them, were never assigned or delivered to said defendants.

The plaintiff in his reply denies that said certificates of sale were of no value, and that the same were not assigned to defendants, and avers that said certificates "were sold, assigned and delivered to defendants at the time of making said agreement."

Upon this state of the pleadings, the burden of proof is upon the defendants. Until the contrary is shown the law presumes that the note was given and indorsed for a sufficient consideration. Code Or. 338. The issue in the case arises upon the new matter in the answer controverted by the reply, and the defendants substantially assert the affirmative of it.

On the trial the defendants offered no evidence, but the plaintiff did. By consent the latter gave in evidence a copy of the certificate of sale given upon the Carter judgment, dated February 15, 1873, with the assignment thereon, dated May 23, 1873, signed by the plaintiff and T. J. Carter, from which it appears that the El Dorado ditch was, on said February 15, sold to plaintiff and said Carter, as the property of said ditch and mining company, for the sum of $43,000, gold coin.

The plaintiff also called T. J. Carter, who testified that the certificate of sale given in evidence was the only one that existed at the time of making the notes, or since, and that it was then and there assigned and delivered to the agent of the defendants in pursuance of the agreement.

The proof shows a part performance of the agreement. One of the certificates was assigned in pursuance of the agreement. And although it is impossible, as the case stands, for the court to say what is the relative value of this certificate to the other one mentioned

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

in the agreement, because it does not appear which is the elder judgment, the one in favor of Packwood or Carter, yet it is manifest that this one was of some value to the plaintiff and his co-obligee (Carter), because it is evidence of the payment of $43,000 for the El Dorado ditch, and their right to a sheriff's deed for the same, with this sum applied in satisfaction of both judgments, which were a lien thereon. The assignment transferred this right to the defendants. The balance remaining due on the two judgments was a mere trifle, and in effect the assignment of the one certificate of sale was as beneficial to the defendants as both would have been. Johnson v. Titus, 2 Hill, 608; Perley v. Balch, 23 Pick. 286.

Be this as it may, the proof does not sustain the defense of a total failure of consideration. A failure of consideration to be a defense to an action on a note, must be total. Reese v. Gordon, 19 Cal. 149; Harrington v. Stratton, 22 Pick. 513.

When some portion of the consideration still remains the defense can only come in by way of recoupment of damages for the partial failure. Spalding v. Vandercook, 2 Wend. 432; Batterman v. Pierce, 3 Hill, 171; Barber v. Rose, 5 Hill, 76; Reese v. Gordon, 19 Cal. 149; Harrington v. Stratton, 22 Pick. 513.

Under the Code, the damages, if any, arising from the failure to assign the second certificate of sale, may be recovered or allowed the defendants as a counter claim to the sum due upon the note. But in such case the defendants must plead and prove the counter claim in the same manner as if they had elected to bring a separate action therefor. Edw. Bills & N. 333; New Jersey Steam-Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 433; 8 How. Prac. 441; Burton v. Stewart, 3 Wend. 240; Perley v. Balch, 23 Pick. 286.

The issue taken upon the defense of total failure of consideration being found for the plaintiff, the conclusion of law is, that the defendants are indebted to the plaintiff as he hath alleged against them.

Case No. 10,657.

In re PADDOCK.

[6 N. B. R. 132.] [1]

District Court, E. D. Michigan. Jan. 16, 1872.

BANKRUPTCY—DEBT ILLEGALLY CONTRACTED—LIQUORS.

1. A debt contracted in whole or in part for spirituous liquors, being in violation of the laws of Michigan must be rejected, and the name of the claimant stricken from the list of creditors of the estate of the bankrupt.

2. Claimant ordered to pay the costs and an attorney's fee of ten dollars.

[Cited in Re Pease, 29 Fed. 595.]

[This case was formerly heard upon the question of payment to certain creditors of witness fees. Case No. 10,658.]

The issues arise upon the three several petitions of Theodore C. Etheredge, assignee of the estate of the said bankrupt [S. Paddock], to reject the debts of certain creditors which have been proven before the register, viz: of Dyer & Wilder, of Toledo, Ohio, for one hundred and ninety dollars; of Markscheffel Brothers, of the same place, for three hundred and fourteen dollars and seventy-nine cents, and of Marshall Brothers & Co., of the same place, for one hundred and forty-nine dollars and nine cents; for the alleged reason that the said debts were contracted for spirituous and intoxicating liquors sold in violation of the statutes of the state of Michigan. The said creditors put in their respective answers to the said petitions, admitting that the debts were contracted for spirituous and intoxicating liquors, but alleging that they were so contracted at Toledo, in the state of Ohio, and that by the laws of the latter state the same were legal and valid. Proofs were taken, and the facts appear to be as follows: the liquors were furnished to the bankrupt upon his orders given by him at Coldwater, in the state of Michigan, his place of business. Each bill of liquors so furnished exceeded fifty dollars in amount. There was no note or memorandum made in writing and signed by the bankrupt, of any of the orders except two, and they were unstamped. All the orders were taken by traveling agents of the sellers except one of the unstamped written orders, and one taken by one of the sellers in person. The orders taken by agents were in all cases subject to the approval of the sellers. There does not appear to have been any express direction or agreement as to how the liquors were to be forwarded, but as matter of fact they were placed by the sellers on the cars of the Michigan Southern and Northern Indiana Railroad at Toledo, and thence carried on said cars to Coldwater, where they were received by the bankrupt, and this was the only means of transportation of freights by common carrier between those places.

Mr. Pond, for petitioner.
Mr. Austin, for creditors.

LONGYEAR, District Judge. A preliminary objection was made on behalf of the creditors to the jurisdiction of the court, "for the reason that they are entitled to have the validity of their said claims adjudicated, and determined in a court of law, and by a jury." I do not consider this objection tenable in the present form of proceeding, for two reasons: First, because the creditors stand before the court in the attitude of plaintiffs, themselves invoking the jurisdiction to which they object; and, second, because by general order in bankruptcy num-

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ber twenty-six, ample provision is made for adjudication and determination of their claim in a court of law and by a jury, of which the creditors may avail themselves by taking an appeal to the circuit court under section eight of the bankrupt act, in case they were dissatisfied with the decision of this court.

The question for decision is, whether these debts under the circumstances stated, are to be deemed as having been contracted at Coldwater, in the state of Michigan, or at Toledo, in the state of Ohio. If the former, then it is conceded that they are illegal and void under the prohibitory liquor law of Michigan, and must be stricken out. If the latter, then it is also conceded that they are valid and must remain as debts against the estate of the bankrupt.

On the one hand it is contended that because the orders were subject to approval of the sellers at Toledo, and that by the usual course of business between the parties the liquors were to be delivered on the cars at Toledo, that was the place where the contracts were completed, and therefore they were Ohio contracts. On the other hand, while it is conceded that such would be the legal effect in the case of a valid order, it is contended that the orders were themselves void by the statute of frauds, and that no debt could be created by virtue of anything done under them until the liquors were actually accepted and received by the bankrupt, and that such receipt and acceptance having taken place at Coldwater, that is the place where the debts were in fact contracted, and therefore they were Michigan contracts.

The orders upon which the liquors were furnished consist of three classes: First, those which were given verbally to agents; second, the one given verbally to a principal; and third, the two which were given in writing.

First. As to the verbal orders given to agents. The statute of frauds of Michigan (2 Comp. Laws, p. 944, § 3184) enacts that "no contract for the sale of any goods, wares or merchandise, for the price of fifty dollars or more, shall be valid unless the purchaser accept and receive part of the goods sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorised." This is but a re-enactment of the English statute, and it has been held in England that a common order, like those here in question, given to the seller for the article required, is clearly equivalent to a contract for the purchase, and so within the statute. Brown, St. Frauds, § 293; Allen v. Bennet, 3 Taunt. 169. I think the circumstance that the orders were taken by the agents subject to the approval and acceptance of the principals, whose place of business was in Ohio, does not prevent the application of the Michigan statute. The orders being approved and acted on by the principals, constituted the contracts on the part of the purchaser, and having been made in Michigan, the contracts were Michigan contracts so far as this question is concerned. The statute does not require that the contract should be signed by both parties to make it valid, but it does require that it must be signed by the party to be charged thereby. The bankrupt's estate is sought to be charged by virtue of the orders as constituting the contracts for the purchase on the part of the bankrupt. The orders were given in Michigan, and each purchase was for more than fifty dollars. The statute of Michigan, therefore clearly applies unless avoided by something in the case other than the circumstance that the orders were taken by the agents subject to the approval of the principals.

It is contended that although there was no express direction as to how the liquors were to be forwarded, yet the mode in which they were forwarded being the only means of transit, and that being according to the usage of the parties, it must be presumed to have been so intended, and that therefore the delivery on the cars at Toledo was the completion of the contracts, and hence they were Ohio contracts. However that may be, in a case of a contract not within the statute of frauds, it is clearly not so in a case like the present of contracts which are within that statute. Here delivery alone is not sufficient. Acceptance and receipt of the goods by the purchaser are essential. The right of stoppage in transitu still remained to the sellers after such delivery, and the right to reject the goods still remained to the purchaser. In all such cases it is well settled that it is the actual acceptance and receipt of the goods by the purchaser alone that constitutes a completion of the contract, so as to take it out of the statute making it invalid if not in writing. Brown, St. Frauds, § 916; Story, Sales, § 276; Hil. Sales, 161; 2 Pars. Cont. 321, 322; Alderton v. Buchoz, 3 Mich. 322. The acceptance and receipt of the liquors by the bankrupt took place at Coldwater, in the state of Michigan. The contracts for their purchase, by virtue of these orders, were therefore completed in that state, and of course were Michigan contracts, and as such subject to the laws of that state.

Second. As to the verbal order given to the seller in person. This order was also given at Coldwater, in Michigan, and except that it was not subject to subsequent approval, it is in all respects like the verbal orders given to agents, and the same considerations apply to it as have been applied to them. It is therefore also a Michigan contract.

Third. As to the two orders which were given in writing. As we have already seen,

such orders are equivalent to contracts of purchase. As such they come clearly within the purview of the internal revenue law of the United States, and were subject to a stamp of five cents. 13 Stat. 298. By this same law, as amended by the act of congress of July 13, 1866, it is provided "That hereafter no deed, instrument, document, writing or paper, required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof shall be recorded, or admitted or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as prescribed by law." 14 Stat. 143, 144. Therefore, as to these two items there is no evidence before the court of any order or request of the bankrupt. No liability or indebtedness of the bankrupt can therefore be deemed to have accrued on account of these items until the liquors were actually received and appropriated by him, and as such receipt and appropriation actually took place at Coldwater, in Michigan, these must also be deemed Michigan contracts.

We see then that each and all the debts in controversy arose out of Michigan contracts, and as such it is conceded that so far as they were for spirituous liquors, in whole or in part, they are absolutely invalid and void by the provisions of the prohibitory liquor law, so-called, of Michigan. The debts of Dyer & Wilder and Marshall Brothers & Co. appear to be wholly for spirituous liquors, and are therefore invalid and void. The debt of Markscheffel Brothers appears to have been part for spirituous liquors and part for groceries. The items for liquors are first in point of time in the account. Payments had been made on the account from time to time, and the bankrupt's notes had been taken to balance the account. The debt, as proven before the register, was based upon these notes, except as to a small account wholly for spirituous liquors, purchased by the bankrupt after the notes had been given. The payments which had been made before the notes were given were more than sufficient to cover the items for liquors, and it was contended that inasmuch as the items for liquors were the older items in point of time, the payments must be deemed to have been made upon such items, and that therefore the balance of account for which the notes were given must be deemed to have been wholly for the groceries.

But here steps in another provision of the prohibitory liquor law of Michigan, as follows: "All payments for such liquors hereafter sold in violation of law shall be considered as having been received without consideration and against law and equity, and any money or thing paid therefor may be recovered back by the person so paying the same," etc. The payments which were made cannot therefore be deemed as applying to the items for liquors; neither could they be, even if they had been made with that express direction, which, however, does not appear to have been the case. There is, however, another complete answer to this claim. The balance for which the notes were given was of the whole account, of which the items for liquors constituted a part. The consideration, therefore, must be deemed to have been in part for spirituous liquors, and this makes the notes invalid and void, the same as if the whole consideration had been such.

Each of the debts in controversy is therefore held to be invalid and void by reason of its having been contracted in whole or in part for spirituous liquors in violation of the laws of Michigan, and the same must be rejected, and the names of the respective claimants must be stricken from the list of creditors of the estate of the bankrupt, and the said claimants must pay the costs of this proceeding, including an attorney's fee of ten dollars in each case.

A separate order as to each debt must be prepared and signed to carry out the above decision.

Case No. 10,658.

In re PADDOCK.

[6 N. B. R. 396.] [1]

District Court, E. D. Michigan. Oct. 6, 1871.

BANKRUPTCY—WITNESS FEES—RIGHT OF CREDITOR TO CLAIM FEES.

When a creditor presents his claim for probate, he at once subjects himself and his claim to the power and jurisdiction of the court, and becomes subject to its orders within the provisions of the bankrupt act [of 1867 (14 Stat. 517)], among which is the provision that the court may examine such creditor concerning the debt sought to be proved. He is, therefore, so examined as a party to the proceedings, and is in no sense a "witness"; hence the refusal of the assignee to pay witness fees under such circumstances must be sustained.

[In the matter of S. Paddock, a bankrupt.]

By HOVEY K. CLARKE, Register:

I do hereby certify that on the twelfth day of September last, the deposition of Horace G. Miller, taken before Cephas R. Dresser, one of the commissioners of the United States circuit court for this district, was filed in my office, to prove the claim of said Miller against the estate of said bankrupt; and on the twentieth day of September last the deposition of John G. Gistivit, taken before the same commissioner, was filed in my office, to prove the claim of said Gistivit against the said estate. I further certify that on September twenty-sixth, on the petition of the assignee of said estate, a copy of which is hereto annexed, I made an order requiring the attendance of said Miller and Gistivit before me, to submit to an examina-

[1] [Reprinted by permission.]

tion of their said claims, as required by the twenty-second section of the bankrupt act; that on this sixth day of October, said Miller and Gistivit appeared and submitted to the examination required by such order. I further certify that after such examination the said Miller and Gistivit asked for the allowance and payment to them by said assignee of the regular witness fees, to wit: to the said Miller, for one hundred and thirty miles travel, at ten cents per mile, thirteen dollars; one day's service, one dollar and fifty cents; and to the said Gistivit, for ninety-five miles travel, nine dollars and fifty cents, and one day's service, one dollar and fifty cents; which the assignee insists ought not to be allowed, for the reason that creditors who have proved their claims are required by the bankrupt act to attend for such examination and are not entitled to fees as witnesses; and an issue of law thereon arising, I have caused the question to be stated in writing, and herewith adjourn the same into court for the decision of the judge, as required by the fourth section of the bankrupt act.

LONGYEAR, District Judge. When a creditor presents his claim for probate, he at once subjects himself and his claim to the power and jurisdiction of the court, and both thereby become subject to the orders of the court, under and within the provisions of the bankrupt act, among which is the provision that the court may examine such creditor concerning the debt sought to be proved. Section 22. He is so examined as a party to the proceedings, and is in no sense a "witness" in the sense in which that word is used in the act of congress allowing fees to witnesses. Blatchford, J., has held expressly that witness fees cannot be allowed in such case. Bankrupts examined under section 26 are clearly not entitled to witness fees. In re Okell [Case No. 10,474]; In re McNair [Id. 8,907]. Blatchford, J., bases his decision, and, I think, with entire correctness, on the analogy of the claim to witness fees in the two instances, "the language of section twenty-two, in regard to the examination of the bankrupt and of a creditor, and the language of section twenty-six in regard to the examination of the bankrupt, being substantially identical." The assignee was therefore correct in refusing to pay to the creditors, Horace J. Miller and John D. Gistivit, fees as witnesses on their examination before the register concerning their respective claims, and such claim for witness fees must be disallowed.

[The case was subsequently heard upon the petition of the assignee to reject certain debts proven before the register. Case No. 10,657.]

PADUCAH, CITY OF (CITY NATIONAL BANK v.). See Case No. 2,743.

Case No. 10,659.

PAGAN et al v. SPARKS et al.

[2 Wash. C. C. 325.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

BANKRUPTCY — SUIT AGAINST BANKRUPT'S DEBTOR —DEFENSE—ASSIGNMENT OF MORTGAGE IN PAYMENT—PLEADING IN EQUITY—DEMURRER.

1. Lloyd & Sparks being indebted to Johnson & Smith, assigned a mortgage to them in payment, it being understood that the assignors were not to be answerable for the title of the mortgagor to the mortgaged premises. Smith died, leaving Johnson his surviving partner, who became bankrupt, and the plaintiffs are his assignees. They filed a bill, stating that the mortgagor had no title to the mortgaged premises, and that he was a bankrupt, which was known to the assignors and concealed at the time of the assignment. Upon a demurrer to a bill, every part of it must be taken as true.

2. The complainants are the proper persons to ask the relief sought for by the bill, which is to obtain payment of the original debt due by the defendants, notwithstanding the assignment of the mortgage.

3. The representatives of a deceased partner need not be made parties to a bill filed by the surviving partner, as they have no claim until the partnership debts are paid, and then it is upon the surviving partner, or his representatives.

4. It is no objection to the bill, that it does not contain an offer to reassign the mortgage. The court will order this to be done in their decree, if they deem it necessary.

The bill states that Johnson & Smith carried on business as partners, under the firm of Johnson, Smith & Co., the former living in London, and the latter in New York. That Johnson shipped, at different times, to Smith, large cargoes of goods, part of which Smith sold to Lloyd & Sparks, a mercantile house in Philadelphia, in January, 1798, to the amount of twenty thousand five hundred and forty-four dollars; of which ten thousand dollars were paid; and in discharge of the balance, Lloyd & Sparks, on the 26th of January, 1798, assigned one equal moiety of a mortgage, executed to them by one Dickerson, to Smith, his heirs, executors, &c., with exceptions of certain parts, in which Smith stipulated to take said assignment at his own risk, without any responsibility on the part of Lloyd & Sparks for the payment of the debts secured by said mortgage, and assigned to said Smith, it being understood between the parties, that the said Lloyd & Sparks were not to be responsible for any part of the premises thereby granted. This mortgage was given by Dickerson, to secure the payment of five bonds due from Dickerson, but the principal of the two assigned to Smith, and secured by said mortgage, amounted to ten thousand dollars. The exceptions in the assignment refer to the par-

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

ticular tracts of the mortgaged premises. The bill charges that Dickerson had no title to the lands mentioned in said mortgage, or if any, only to a small part of very little value; and that Lloyd & Sparks, when they executed the assignment, were well acquainted with that circumstance, but concealed it from Smith, who supposed the title to be good. That before either of the bonds assigned to Smith became due, Smith died, leaving Johnson his surviving partner. In January, 1799, Johnson became bankrupt, and the plaintiffs were regularly appointed his assignees in England. That about the close of the year 1797, Dickerson became insolvent, which Lloyd & Sparks well knew, and in 1798, he was regularly declared a bankrupt under the laws of the United States; and that his estate will not pay the expenses of the commission. In November, 1798, Lloyd died, leaving the defendants, (except Sparks,) his executors and devisees. That Sparks has become insolvent, and unable to pay the complainants' demand. The prayer is, that the executors and devisees of Lloyd, may be decreed to pay, and for general relief. Sparks demurs, and assigns for cause, that the bill does not show a title in the complainants under Smith, to the said mortgage, premises, and bonds.

WASHINGTON, Circuit Justice (PETERS, District Judge, absent). This demurrer cannot be sustained. Every part of the bill must, for the present, be considered as true. The debt now sought to be recovered, was originally due to Johnson & Smith; and, if the actions which are now impeached on the ground of fraud, had not occurred, the representatives of Johnson could alone have maintained a suit at law to recover the debt. But, under all the circumstances of this case, the complainants are without remedy at law, and in equity, they are the proper and only persons who can, on this side of the court, ask for the relief prayed by this bill, which, in effect, is to put out of their way the assignment to Smith, and to decree payment of the original debt by the representatives of the solvent, but not surviving debtor. They do not claim under, but in opposition to the assignment to Smith; and on this ground, their title, in equity, to the debt, is unquestionable. It was unnecessary to have made the representatives of Smith parties, because they can have no claim, except against the plaintiffs, for any balance which may remain after paying the partnership debts, and until the plaintiffs shall refuse to account for such balance, the representatives of Smith can have no claim, and ought not, unnecessarily, to be pressed into the controversy. Neither is it an objection, that no offer is made to reassign the deed from Lloyd & Sparks to Smith. If this should, in the further progress of the cause, be thought useful or necessary, it can be so ordered by the court. These last points are noticed, because they were urged in argument, in support of the demurrer, though not stated as causes of demurrer.

Demurrer overruled, with costs, and defendant ordered to answer.

Case No. 10,660.

The PAGE.

[5 Sawy. 299.][1]

District Court, D. California. Nov. 6, 1878.

SEAMEN—FISHING VOYAGE—IMPROPER EQUIPMENT—NEGLIGENCE OF MASTER—PAY FOR CATCH.

Where the master of a vessel engaged in a fishing adventure negligently omitted to procure salt, in consequence of which the voyage was terminated twenty-five days before the close of the season, *held*, that the men were entitled to compensation, and for this purpose were to be credited for the twenty-five days lost, with the same number of fish as they had caught for the twenty days preceding the breaking up of the voyage.

In admiralty.

D. T. Sullivan, for libellants.

J. T. Hoyt, for claimant.

HOFFMAN, District Judge. The articles for the voyage in question in this case have been drawn by the owner and signed by the men with very reprehensible carelessness. That they do not express the contract actually made with the seamen is admitted on both sides. They provide merely that the men shall be paid at the rate of twenty-five dollars per thousand for the fish caught by each of them respectively. The men contend that it was also agreed that they should receive twenty-five dollars per month as wages from the time of leaving this port until, as some say, their arrival at the fishing grounds; according to others, until the vessel reached Petropoloski; and according to others, until the cargo was discharged at that port. On the part of the claimant it is contended that the agreement was, that inasmuch as the vessel was to proceed beyond the fishing grounds to Petropoloski, there deliver her cargo, and return to the fishing grounds, the men were to receive twenty-five dollars per month for the time consumed in this deviation, which was to be made solely in the interest of the owner. I have come to the conclusion that this was certainly the contract intended to be made by the owner, and most probably so understood by the seamen—if not, the misconception was caused by their own carelessness. There is no proof whatever of any attempt to deceive the men. They are more intelligent than the majority of persons of their calling. They had an ample opportunity to read the articles before signing, and one of them admits hearing the owner ask the master if he had explained to the men "about the latitude"; an inquiry, the mean-

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

ing of which he did not understand at the time, but took no pains to ascertain. The owner testifies that latitude 51° north was fixed upon as the point where the wages were to begin, and they were to continue until that latitude was reached on the vessel's return from Petropoloski. He also states that he directed the master to explain this to the men, and that he himself explained it to them or some of them. In this he is corroborated by the testimony of a disinterested witness, who happened to be present.

But the most important corroboration, and that by which I am chiefly influenced, is that afforded by the intrinsic probability of the case. Fishing voyages from this port to the northern seas seem to present peculiar attractions for seamen. The number of the crew permits the formation of three watches, instead of two, as is usual. The men have thus eight hours off to four hours on. They live in the cabin, on the same fare as that of the officers, and necessarily on terms of much greater familiarity and equality than are ordinarily allowed. Their labor is to some extent voluntary, for they work for themselves as well as for the vessel; and their remuneration depends on their skill, their industry and their success. The terms of their engagement seem to be generally understood, and substantially the same in all enterprises of this description undertaken from this port. The men receive twenty-five dollars per thousand for the fish caught by them respectively. No wages are allowed for the voyage to or from the fishing ground. If the voyage be successful, the remuneration of the men, if they are diligent and skillful, will equal, and in many instances exceed, what they could earn as wages for a voyage of equal length.

In this case the vessel was not to proceed directly to the fishing grounds, but was to pass by them, go to Petropoloski, discharge a cargo, and then return to commence fishing. It was, therefore, just that for the time consumed in making this deviation the men should receive wages; and this is what the owner testifies was agreed upon. It seems in the highest degree improbable that he should have consented, or that the men should have supposed, that they were to be on wages from the moment of quitting this port until their arrival at Petropoloski, or at the fishing grounds—a stipulation which would, so far as appears, have been wholly without precedent in the fishing adventures from this port.

It is also urged, on the part of the libellants, that the voyage was abandoned by the master before the expiration of the fishing season, and they were thus deprived of the opportunity of making the full catch, upon which their compensation depended. It is not denied that the voyage was terminated before the close of the season. The master alleges that he did so in the interest of the owners, because of the inability of the men to catch fish. The men allege that the fishing was abandoned because the vessel had no salt with which to cure the fish. The evidence clearly points to the existence of some undeniable facts.

1. When the master determined to break up the voyage the supply of salt was exhausted. Shortly after the arrival of the schooner at the fishing grounds she encountered the bark Constitution, belonging to the same owner, the master of which, in pursuance of previous instructions by the owner, offered to give to the master of the Page as many fish as he chose to take, or supply him with as much salt as he required. Captain Morrissey decided to take fish, and he was accordingly supplied with about thirty thousand. These seem to have required additional salt, and the Page's stores were drawn on for the purpose; the quantity so consumed seems, however, to have been replaced by the Constitution. This occurrence took place about the 8th of July. The Page continued her fishing operations until the 31st, at which time her salt was wholly exhausted. The supply on board the Constitution was amply sufficient for both vessels, but it was stowed in the hold underneath the fish, and was at that time inaccessible. There is some conflict of testimony as to whether the master of the Page actually requested a supply of salt and was refused—but I think it established by the proofs that he could not have obtained it if he had desired. The vessel was thus compelled to relinquish the enterprise, and her liability to the men for so doing depends upon whether the master was in fault in not obtaining salt from the Constitution on the 8th, or subsequently, during the time that this latter vessel was willing and able to deliver it; by omitting to do so he virtually put it out of his own power to complete his catch, and thus deprived his crew of the opportunity of earning their compensation.

2. It clearly appears that the crew was very incompetent. The number of fish caught by them during the time that their operations continued, contrasts most unfavorably with the number per capita taken by the crew of the Constitution. Whether this was owing to their negligence or their want of skill does not clearly appear; it was probably due to both. Their conduct at Petropoloski, and especially their attempt to distort the considerate action of the master relative to some bear skins into a grievance, present them in no favorable light to the consideration of the court.

But I am nevertheless unable to justify the master in virtually defeating the enterprise by omitting to provide himself with salt, so soon after the vessel's arrival at the fishing grounds, and before the inefficiency or unskillfulness of the men had been fully demonstrated.

It does not appear that they represented themselves as skillful or experienced fishermen. It was the duty of the master to ascer-

tain what were the qualifications of the persons upon whose exertions the success of the adventure depended. If, without fraud on their part, their qualifications for the service proved to be less than the master expected, he had, on that account, no right to break up the adventure, and deprive them of the opportunity of earning what they could.

It may be urged that as it was the vessel's interest, and the chief object of the voyage, to catch as many fish as possible, the fact that the master relinquished the enterprise should be taken as proof that its further prosecution with the crew under his command would be a useless waste of time and money. But it is to be recollected that the vessel had already received from the Constitution nearly half a cargo of fish, on which the men were not entitled to any lay. She had also made a freighting voyage to Petropoloski, and back to the fishing grounds, for which the men were to receive no wages except for the period of eighteen days. She had thus carried out a cargo of freight, and was about to carry back half a cargo of fish, without any expense for seamen's wages, except for the period of eighteen days just mentioned. It may be, therefore, that under these circumstances the master relinquished the further prosecution of an enterprise which, if its whole profits to the ship had depended on the catch by the men, he would have continued.

Testimony was offered to show that the men assented to the abandonment of the voyage. This is strenuously denied by them, and the evidence in support of the assertion is inconclusive and unsatisfactory.

On the whole, I incline to the conclusion that the master had no right, under the circumstances, to abandon the voyage, and that the men are entitled to damages for his doing so. On the other hand, there can be no doubt that the men were very deficient in skill or diligence, or in both. They have no claim to any peculiarly favorable consideration by the court, and their recovery should be restricted to what they probably would have earned had the enterprise been prosecuted up to the time when it might have been reasonably and properly brought to a conclusion. Their claim to be paid as if the vessel had obtained by their exertions a full cargo of fish I reject as founded upon an hypothesis which would not have been in fact realized. The fishing season seems ordinarily to last until towards the end of August, or the beginning of September. If the master had remained until the 25th August, I think he would have afforded all the opportunity to fish to which the men were entitled, unless there had been a signal improvement in their efficiency, which there is no reason to suppose would have occurred.

I shall, therefore, allow to each of the libellants the damages he may be presumed to have sustained by reason of being deprived of the opportunity to fish for a period of twenty-five days. The number of fish that he might or would have taken during that time to be ascertained by computing his average catch per diem for the twenty-five days preceding the actual termination of the fishing, and allowing him a similar catch for the succeeding twenty-five days. Upon the catch of each man, as thus ascertained, he is to be allowed twenty-five dollars per thousand. For these amounts, together with balances admitted to be due the men on a settlement of their accounts, a decree will be entered.

A reference will be had to the commissioner to ascertain and report the total amount due each of the libellants respectively, unless the parties can agree upon the computation on the basis laid down in this opinion.

PAGE (BARGH v.). See Case No. 980.

Case No. 10,661.

PAGE v. BRACKENRIDGE et al.

[Cited in Whiting v. Bank of U. S., Case No. 17,576. Nowhere reported; opinion not now accessible.]

PAGE (BUCKLEY v.). See Case No. 2,094.

PAGE (CHICAGO, B. & Q. R. CO. v.). See Case No. 2,668.

PAGE (ELASTIC TRUSS CO. v.). See Case No. 4,325.

Case No. 10,662.

PAGE v. FERRY.

[1 Fish. Pat. Cas. 298.][1]

Circuit Court, E. D. Michigan. Oct., 1857.

PATENTS—SPECIFICATION—FAIR DISCLOSURE—CONSTRUCTION—INTENTION OF INVENTOR—UTILITY—IMPROVEMENT—IDENTITY.

1. A patent may be considered in the light of a deed from the government, and the patentee is bound to communicate his invention in so full and clear a manner, that it shall be within the comprehension of the public at the expiration of the term.

2. The specification is intended to teach the public the improvement patented; it must fully disclose the secret; must give the best mode known to the inventor; and contain nothing defective, or that would mislead artists of competent skill in the particular manufacture.

3. It is a question of fact for the jury, whether the description in the patent is so vague or uncertain that a competent workman, in the particular business to which the patent relates, could not, from the specification and drawing, construct the machine.

4. In the construction of a patent, the intention of the inventor, so as to effect the object designed, is to govern the construction of the language employed. The court will look to the manifest design in order to remove any ambiguity arising from the terms employed; but this ambiguity must not be such as would perplex

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

an ordinary mechanic in the art to which it applies.

[Cited in Hamilton v. Ives, Case No. 5,982.]
[Cited in Burke v. Partridge, 58 N. H. 351.]

5. The utility of an invention is an essential requisite to the validity of a patent. A useless invention, even if patented, is not and will not be of any profit to the public. But a general utility is not prescribed by the statute as the test of the sufficiency of the invention. The word is used in contradiction to what is frivolous, or what is mischievous to the public.

6. An improvement has essential reference to a subject-matter to be improved. It is not an original, but embraces, and either adds to or alters, the original.

7. The statute defines the character of an expert as one "skilled in the art or science" to which his opinion or judgment appertains, or in a business or art most nearly connected with it. A practical operator and not a scientific theorist is, properly speaking, such an expert.

8. An infringement can not take place unless the invention can be fully practiced by following the specifications. An infringement is a copy made after and agreeing with the principle laid down in the patent; and if the patent does not fully describe everything essential to the making of the thing patented, there will be no infringement by the fresh invention of processes which the patentee has withheld from the public.

9. If the defendant's machine, in its original structure, was in fact and in truth no infringement, and was not intended to be so, neither accident nor usage, as the natural wear of the material of which it was composed, could make it so. Mind must be associated with matter in the commission of the trespass.

10. When, therefore, in a patent for improvements in portable circular saw mills, the patent covered merely a combination of the use of rollers, or their equivalents, for guiding the circular saw, with a saw which had free end play, so as not, in any case, to have an end bearing against a shoulder in its ordinary evolution, *held*, that, if the defendant's machine was originally constructed and designed with the saw tight to the shaft, so as to operate without end play, and by its usage and by the wear of metal of which the shaft was made, such free action or end play was undesignedly produced, such free end play would not amount to an infringement of the plaintiff's patent.

11. But, if a machine is constructed so as to conform in all respects to the description in the patent, except as to one particular, or as to one motion and effect, yet is so constructed and intended to obtain that motion or effect in the usage of the machine, by the action or wearing of the parts, and it is so obtained, it is a piracy of the principle and a violation of the patent.

[Cited in American Diamond Rock-Boring Co. v. Sullivan Mach. Co., Case No. 298.]

12. "Substantial identity" excludes immaterial variations or fraudulent evasions. That is a substantial identity which comprehends the application of the principle of the invention. If a party adopts a different mode of carrying the same principle into effect, and the principle admits of a variety of forms, there is an identity of principle, though not an identity of mode.

[Cited in McComb v. Brodie, Case No. 8,708; Converse v. Cannon, Id. 3,144.]

13. The plaintiff is entitled to the actual damage sustained by the use of his improvement during the term of the illegal user, or the amount of profits actually received by the defendant, during the time he used the plaintiff's improvement.

This was an action on the case [by George Page against William M. Ferry, Jr.], tried by WILKINS, District Judge, and a jury, brought for the alleged infringement of letters patent [No. 2,174] for an "improvement in circular saw mills," granted to the plaintiff July 16, 1841, and extended for seven years from July 16, 1855. The invention consisted of combination of the free end play of the saw mandril with guide rollers at the periphery.

H. B. Northrup and G. V. N. Lothrop, for plaintiff.

James V. Campbell and Charles F. Walker, for defendant.

WILKINS, District Judge (charging jury.) This action is brought by the plaintiff to recover for an alleged infringement of a patent, for which letters patent were granted to him in 1841, in due form of law, under the seal of the patent office of the United States, conferring upon him, for the term of fourteen years, the exclusive right of making, using, and vending the invention. The action was brought in 1855.

He alleges, in the statement of his cause of action, that "he was the original inventor of a new and useful improvement in the portable circular saw, mill, described in his patent, which was not known or used before; and that the defendant, on the 1st day of July, 1855, wrongfully did use, and cause to be used, his said improvement in violation and infringement of his exclusive right."

To this the defendant has plead the general issue—denying these allegations; and this affirmation upon the one side, and denial upon the other, constitute the issue which you are sworn to try. The novelty is not controverted.

The patent, with the specification, has been given to you in evidence. The material parts of it, so far as this controversy is concerned, read in this wise:

"The shaft C has free end play within the boxes in which it runs, so as not, in any case, to have an end bearing against a shoulder; it may, in fact, be a cylinder of the same diameter throughout.

"The saw is kept in place entirely by the action of two friction rollers, which bear upon its two sides, near its periphery. The friction rollers are made adjustable by causing them to revolve on pins, which are attached to two plates of metal placed one upon the other, having tightening screws passing through slots in them, and entering the frame.

"The saw is made with teeth in a peculiar form, by which they are enabled to be fed into the timber more deeply than can be done with teeth, in the forms usually employed, and be driven with a speed not exceeding one-half of the ordinary velocity; and from this circumstance, combined with the manner of sustaining it at its edge, without strain from its center, and with the manner of setting the teeth, it (the saw) is kept

free from all tendency to heating and buckling, and is thereby well adapted to the sawing of ordinary logs, which, though frequently attempted by means of the circular saw, has been abandoned, from the impossibility of causing the edge of such a saw to run true for any length of time."

Such is the material description of the alleged improvement, which is more specifically set forth at the close of the specification, in this language:

"I claim the manner of affixing and guiding the circular saw, by allowing end play to its shaft, in combination with the means of guiding it by friction rollers, embracing it near to its periphery, so as to leave its center entirely unchecked laterally."

"I do not claim the use of friction rollers guiding the edge of the saw, but limit my claim to their use in combination with a saw having free lateral play at its center."

Such, then, is the specification, embracing the improvement—for which the patent issued on which this action is brought. An improvement has essential reference to a subject-matter to be improved. It is not an original, but embraces, and either adds to, or alters the original. In this case, the improvement of the circular saw is an addition to, and not an alteration, and consequently comprehends all the subject alleged to be improved—the saw and friction rollers. By it the plaintiff is bound. He can not, nor does he seek to, set up any other invention than that here described.

The act of congress [5 Stat. 117] requires that every applicant for a patent for any new invention or discovery, shall deliver a written description of his invention or discovery, and of the manner and process of making and constructing the same, in such full, clear, and exact terms as to enable any person, skilled in the art to which it appertains, to construct the machine; and furthermore, the law requires that he shall particularly specify and point out the improvement or combination which he claims as his own invention.

So far as the patent and specifications are concerned, the interpretation of the language employed by the patentee, is with the court; while on the other hand, whether or not the description is so vague or uncertain that a competent workman, in the particular business covered by the patent, could not, from the specifications and drawings, construct the machine, is a question of fact for your determination.

In the construction of a patent, the entire specification is to be taken together, as embracing the particular description which the law requires, of the discovery, the manner of construction, and the claim of the patentee.

The specification and claim emanate from the same pen—the one can not contradict the other.

In the case under consideration, no difficulty exists as to any part of the patent, except that which relates to shaft E; and in regard to that, the terms employed, taken in connection with the declared intention of the patentee, leave no obscurity as to the alleged invention.

The intention of the inventor, so as to effect the object designed, is to govern the construction of the language he employs. Inventors are not always educated or scientific men. Some most useful inventions have sprung from an illiterate source. Genius is not always blessed with the power of language. Courts look to the manifest design in order to remove any ambiguity arising from the terms employed. But this ambiguity must not be such as would perplex an ordinary mechanic in the art to which it applies.

The answers given by Mr. Batcheldor, to a few questions propounded by the court, as to the technical signification of the phraseology, are clear, and leave no difficulty as to the correct interpretation.

"End play" is the lateral play of the shaft within the boxes in which it runs. "Free play" is its unchecked action. "Free end play" is the unchecked lateral action of the shaft in its revolutions. There is a rotary motion and there is a lateral motion, and consequently, "a free lateral play at its center," is its unobstructed freedom in lateral motion at the center of the saw.

But this free action is further described with reference to a shoulder, as being so free as not to have an end bearing upon it; and also in the alternative, when without a shoulder, having a cylinder of the same diameter throughout; for, the language is "may," not "shall;" that is, allowing the shaft to be constructed either with or without shoulders, but calling for an end-play, to prevent heating or buckling. This freedom of revolution, then, at the center, entirely unchecked laterally, being used in combination with the friction rollers, embracing the periphery of the saw, is the improvement comprehended by the patent upon the circular saw. Or, in the language of the court, on the former trial, "the patent of the plaintiff covers merely a combination of the use of rollers, or their equivalents, with a saw that has no check to its lateral motion at the center, but has free end play, so as not, in any case, to have an end bearing against a shoulder in its ordinary revolutions.

Negatively, the invention is not the "English," the "muley," or the "upright" mill, used anterior to 1841, as testified by several witnesses, and as described and used by the witness Wells, who was engaged in manufacturing lumber in St. Clair county, by the old mode, and for the last three years, by Page's portable circular saw, with the one-eighth of an inch end play. It is not the circular saw, with rollers, but without end play to the shaft, which the witness Hallett attempted to run for about three months, and

which tended to heat the saw without vibration, "crowning on one side and dishing on the other. It is not the circular saw with guides, which, from its play and revolution, as testified to by some of the witnesses, was always attended with heat and buckling. Neither is it the saw which guides alone, but their combination with necessary and sufficient end play to the shaft, "so as to leave the center entirely unchecked laterally." Words could not make the meaning plainer. The specification calls for no alteration in the ordinary circular saw, but only undertakes to improve it by giving free lateral motion at the center of the saw, in combination with the usual guides; that is, lateral motion at that point, while unchecked in its ordinary revolutions.

The shaft, in close contact with the boxes, so checked as not to admit of such proposed freedom of movement is the defect in the old saw, which was designed to be removed, or corrected, in the improvement contemplated by the patent. The center of rotary motion is at the center of the shaft, and, consequently, free, unchecked lateral motion there, is free end play to the shaft. But a checked motion, by shoulders, or rings, or any other mechanical device, keeping the saw close and tight to the shaft, is not free end play. That would not be "leaving the center entirely unchecked laterally." The court is of opinion that the patent calls for just so much lateral motion, as is necessary for the successful operation of the saw; neither does the specification forbid shoulders, by the expression employed, "that the cylinder 'may in fact' be of one diameter throughout." "May in fact be" does not signify "shall be."

Two leading ideas are contemplated or comprehended within the invention: 1st. That the cylinder shall have free end play; and, 2nd. That the friction rollers should guide the saw. The shaft is to play freely within the boxes, so as not, in any case, in any event, under any circumstances, to have an end bearing against a shoulder. A shoulder is provided for, but its place on the cylinder, so as to give to the latter a free end play, is not defined; that is left discretionary, for the cylinder may, in fact, be of the same diameter throughout. Neither is the extent of the end play expressly defined. But the shaft on which the saw runs, must not, in any case, have an end bearing against a shoulder—that is, the saw, in its ordinary motion, or revolution, must not bear or rub against the shoulder; and whether this end play be one-sixteenth or one-eighth part of an inch, is immaterial, as neither is called for in the specifications. If the proper amount can be determined by a workman experienced in mill machinery, and the structure of mills, that, and that alone, is the necessary unchecked end play called for by the patent. The precise definition of the amount of end play in the specifications would confine the improvement patented to that extent, and consequently end play, either more or less, would be no violation, and the limit could not be worthy of a patent, because worthless. For, if the specification called for one-eighth, then one-seventh or one-ninth would be no violation, and the saw could be successfully operated with either. It is a settled rule of the law of patents, "that the specification need not describe that which is within the ordinary knowledge of any workman who may be employed to put up the apparatus, or construct the machine." Such a workman, however, must have a competent knowledge of the work. That is, technically, be what the law calls an expert—one experienced or skilled in the particular business to which his testimony appertains, or with which it is most nearly connected. It was not necessary—nay, it would have been fatal to the improvement patented—to have specifically limited the amount of the end play, of lateral motion, which must be free, "leaving the center entirely unchecked laterally," and under no circumstances "having an end bearing against a shoulder." But checked end play is not unchecked end play; limited, is not unlimited; free lateral motion, is not obstructed lateral motion; having an end bearing against a shoulder, is not, in any case, having no end bearing against a shoulder. Contraries are not identities.

Having, gentlemen, thus settled the construction of the patent, which is the duty of the court, there are other questions arising on the issue, more especially for your determination.

1st. In the patent laws of the United States, it is provided "that any person having discovered or invented any new or useful art, machine, manufacture, or composition of matter, not known or used by others, before his or their discovery or invention thereof, and not at the time in public use, or on sale with his consent, and shall desire to obtain an exclusive property therein, may make application in writing," etc. The utility of the invention is an essential requisite to the validity of the patent. A useless invention, even if patented, is not, and never will be, of any profit to the public. But the law prescribes a rule, by which you must be governed in applying this test to the invention now in controversy. It is this: Is it frivolous? Is it mischievous? Is it of any use? A general utility is not prescribed by the statute as the test of the sufficiency of the invention. The word is used in contradistinction to what is frivolous, or what is mischievous to the public.

New inventions in regard to some trifling article of dress, such as hoops, or crinolines, or, in the language of Judge Story, "a new invention to poison people," are not patentable. The one is frivolous, the other mischievous.

An invention not obnoxious to these objections, whether more or less useful, if it be of any use, is embraced within the spirit of

the law. A slight improvement of an old machine is a useful improvement. But, if the alleged invention should be absolutely hurtful or injurious, it is no improvement—it is not "a useful invention," and, it is your province to determine, from the evidence of witnesses experienced in the subject-matter, the validity of this objection.

It rests altogether upon the judgment of those who are acquainted practically with the structure and operation of similar machines, involving the same principle. A saw-mill machinist, a millwright, a practical operator, and not a scientific theorist, is, properly speaking, such an expert. A mere draughtsman is not a millwright, or a sawyer; neither is the latter a competent judge as to the structure of saw mills, unless he has been practically engaged in the business of constructing as well as managing saw mills, and can speak from well-grounded personal experience. The statute defines the character of an expert, as one "skilled in the art or science to which his opinion or judgment appertains, or in a business or art most nearly connected with that to which his judgment or opinion is applied." A skillful saw-mill builder is an expert in that business; and one familiar with constructing saw mills is, in that respect, an expert; and a skillful saw-mill machine maker is an expert in the structure of saw mills, as connected with his own pursuit.

But it is objected that the plaintiff ought not to recover in this action, because the specifications and drawings are vague and uncertain, conveying no exact or definite description of the invention claimed. The law confers upon the patentee a monopoly. For the violation of this exclusive privilege, damages are awarded; and he is further protected by the infliction of a penalty. Being a monopoly, justice to the public (to whom the invention will belong at the expiration of the patent) requires that it should be so described in the specifications, in such clear, full and exact terms, that persons of competent skill and knowledge, may construct and reproduce the machine, or thing described, by following the specification, with the aid of drawings. And such is the rule of law.

The patent may be considered in the light of a deed from the government, the consideration of which is the invention specified; and the patentee is bound to communicate it, by so full, clear, and exact a description, with drawings and models, that it shall be within the comprehension of the public at the expiration of the patent, for at that period his invention becomes public property. The exclusive privilege is not conferred merely as a reward of genius, and for the encouragement of useful inventions and improvements in arts and manufactures, but also embraces the public benefit.

Whether in this case, such a full, clear, and exact description is given as to enable a competent workman—as a millwright—to construct the machine, is a question of fact for your determination.

Some, perhaps all of you—probably, also, the learned counsel—would be utterly unable, from the specifications of the patent, to construct the circular saw mill called for; yet that circumstance should not vitiate the patent, or reflect upon your intelligence. Until enlightened, as we have been during the progress of this trial, it is not to be presumed that either the bar or the jury knew much about "friction rollers," "end play," checked or unchecked, "iron journals," "sliding collars," "shoulders," "mashers," or "buckling." The skill and knowledge deemed competent is that which is addressed to the subject-matter, and is not the highest skill, or the greatest knowledge, but that of practical workmen of ordinary skill in the particular business.

Where the object of the patent may be obtained by a competent mechanic, of ordinary skill, one acquainted with the structure of similar machines, or structures involving the same principle, by fairly following out the specifications and drawings, without other inventions or additions, or experiment, the patent is valid and unimpeached, and the rule of law is sufficiently met.

The specification calls for "free end play" within the boxes, so as not to have an end bearing against a shoulder, or for a cylinder of the same diameter throughout; and the claim is for the manner of applying and guiding the circular saw, by allowing end play to its shaft, in combination with the means of guiding the saw by friction rollers embracing it near its periphery, so as to have its center entirely unchecked laterally. This the court have construed, as comprehending the use of guides, or rollers, in connection with such an amount, or extent of end play as is necessary for the successful sawing of timber. The question then arises, how could a competent mechanic, or machinist, construct such a machine; or how ascertain the necessary amount of end play, without previous experiment or information obtained from sources independent of the specifications and drawings? To which the court responds, and so instructs the jury, in the language of Curtis on Patents, adopted by Judge McLean, on the former trial:

"The statute allows the patentee to address himself to persons of competent skill in the art; and it requires him to use such full, clear, and exact terms as will enable that class of persons to reproduce the thing described, from the description itself. The ordinary knowledge of every workman so employed, is expected to be used in making the machine."

Much time has been consumed by the testimony of experts touching the character of this portable circular saw mill, combined with end play, and there has been some conflict of opinion as to the necessity of end play, and the amount required. It is for you to say whether the class of persons indicated could

reproduce the machine with the necessary end play required, from the drawings and specifications, or from either. If so, you must hold the patent valid.

Several of the witnesses have, in your presence, constructed the machine from the frame up to the disputed point—the end play—and there left the matter in doubt, some averring that they could go no further. Others have gone on to the full completion of the machine according to the specifications, giving an amount of end play deemed necessary for successful operation. You must decide on whose judgment it is safest to rely. Their credibility is also with you; and the subject has been so thoroughly discussed, in both aspects, that it is deemed unnecessary to make additional comment.

Another objection has been urged, that the patentee has withheld in his description the best mode of effecting the object designed by his specifications, and for which the patent was granted. The patentee is bound to disclose in his specifications the best method of working his machine known to him at the time of his application. An infringement will not have taken place, unless the invention can be practiced completely by following the specifications. An infringement is a copy made after, and agreeing with the principle laid down in, the patent; and if the patent does not fully describe everything essential to the making of the thing patented, there will be no infringement by the fresh invention of processes which the patentee has withheld from the public. The specification is intended to teach the public the improvement patented; it must fully disclose the secret; must give the best mode known to the inventor, and contain nothing defective, or that would mislead artists of competent skill in the particular manufacture.

In consideration of the exclusive privilege conferred, and that the public may fully enjoy the benefit of his invention, all his knowledge in respect to the perfect practice of his invention, must be embraced in his specification. Whether it is so or not, is for you to determine from the evidence submitted.

Having received, gentlemen, the construction which the court has given to the specification, and the improvement, and the invention therein set forth; being satisfied of its utility, in the contemplation of the law; satisfied that the description is so clear and full that a competent workman, in the particular business to which the machine appertains, could construct the same from the specifications and drawings, or from either, and that there has been no concealment of any power or principles, or fixtures, within the knowledge of the patentee, by which it could be worked more perfectly; your next inquiry is, has the defendant infringed upon the plaintiff's right? This is the great question of fact.

On this branch of the case, many days have been consumed in the examination of numerous witnesses. The testimony elicited is especially for your consideration. It has been mainly the judgment of experts, one class holding that the circular saw used by the defendant does not involve the combination specified in plaintiff's patent, and that no end play is necessary, the saw being worked tight to the shaft; and another class maintaining the opposite opinion, that no end play is necessary to the successful operation of the saw. It is your duty to give preponderance to one side or the other, governed by the rules of law in applying the evidence. It is the lot of human nature to err. Human judgment is fallible. The best of men, equally skilled in any art or science, or pursuit, may honestly differ. In giving preponderance to testimony, a juror should scan closely the basis on which the judgment of the expert is founded, and the position he may occupy with reference to the question.

Again: in scrutinizing the testimony, it is of importance that you should keep in remembrance the character of the plaintiff's patent; that it is not the invention of a circular saw with friction rollers, but a certain improvement of a circular saw mill previously in use, and consequently inferring a knowledge of all the essential appurtenances of the old mill. In applying the testimony, then, to this branch of the case, inquire:

1st. What is the principle of the improvement invented by the plaintiff?

2d. Is there a substantial identity between the defendant's machine and that improvement?

The first inquiry the court has already settled, and by that you are bound. The second you must determine by a just comparison of the two mills, according to the evidence.

I have used the phrase, "substantial identity," as excluding immaterial variations, or fraudulent evasions. That is a substantial identity which comprehends the application of the principle of the invention.

If a defendant adopts a different mode of carrying the same principle into effect, and the principle admits of a variety of forms, there is an identity of principle, though not an identity of mode.

To apply this rule to this case:

The vital principle, here, is the employment of free end play to the shaft, in combination with friction rollers, "so as to leave the center entirely unchecked laterally"—that is, unchecked in its revolutions laterally. Now, this principle may be used without an exact identity, by mechanical equivalents or contrivances, and if so, there would be a substantial identity, or such an arrangement of mechanism as performs the same service, or produces the same effect in the same way, or substantially the same way. Whether such exists or not, or whether there is such identity, you must determine from the testimony of those who profess to be skilled in this species of mechanism—that is, by the judgment of experts.

As a question of fact, it suffices if the principle has been pirated. Morse's telegraph invention embodies the principle of transmitting intelligence, by the electric fluid, through metal wires, from place to place. Any other mode, if such could be devised, of communication through wires, without electricity, is not identical, though it might embrace equal velocity. So, lumber may be sawed by a circular saw mill, with a shaft at right angles with the saw, controlled by friction rollers embracing the periphery—yet, if the principle of free end play, or free lateral action, in combination with the rollers, is wanting, there is no identity, no trespass upon the plaintiff's right.

The consideration has been pressed, with much force, that there is no substantial identity between the alleged improvement of the plaintiff and the machine used by defendant, inasmuch as the lateral motion in the latter is checked and governed at the center of the saw, by collars and other contrivances having that purpose in view; that free, unchecked lateral motion, to the extent, even, of one-eighth of an inch, is not necessary and not used; and that whatever end play is used by the defendant is the result, not of design in the original construction, but the natural consequence of the usage of the shaft in sawing.

If a saw mill is constructed so as to conform in all respects to the description in the patent, excepting the end play—yet so constructed and intended as to obtain the necessary end play in the usage of the shaft, by the wearing of the metal—and it is so obtained—it is a piracy of the principle.

If the principle is worth any thing, no mere evasion should be countenanced. Perfect identity is not required in order to demonstrate an infringement of principle. The variation, if any, must be a variation of principle. But if the object designed—viz: free lateral motion, leaving the center of the saw entirely unchecked—is obtained by mechanical equivalents, it would certainly constitute an infringement.

The evil sought to be remedied, as declared in the specifications, is "to keep the saw from all tendency to heating or buckling," as adapted to the sawing of ordinary logs, and "sustaining the saw at its edge, without strain from its center." If that object be effected by any other principle than that of end play in combination with the guides, it would constitute no infringement of the patent.

To illustrate: The evidence exhibits the machine used by defendants as a circular saw with friction rollers embracing its periphery. So far, the machine is identical with the representation of the patent, but no violation of the principle. The patent claims to have improved upon this.

Yet, if it further appears that free end play to the shaft was used in combination with the rollers, so as to leave the center of the saw entirely unchecked laterally, whether effected by the structure of shoulders, or by sliding collars, rings or springs, or any other mechanical equivalent (that is, a mechanical structure of equal effect), the machines, in fact, would be substantially the same, in principle. But if the machine of defendant was originally constructed and designed with the saw tight to the shaft, so as to operate without end play or free lateral motion at the center of the saw—and by its usage, and by the wear of the metal of which the shaft was made, such free action was undesignedly produced, it would not amount to an infringement of plaintiff's patent. Or, in other words, if the original structure was, in fact and in truth, no infringement, no piracy, neither accident nor usage could make it so. Mind must be associated with matter in the commission of the trespass. It is the intention which gives the guilty hue to the act. The metal, whether hard or soft, responds only to the natural law. Constant friction will measurably wear, in time, the hardest iron; and if, in such a process, the real principle of the improvement is actually obtained, no guilt should attach to the owner, in the absence of all intention to so infringe.

On this question of identity, you have had, not a living, but a sure and true witness—dumb, but yet, like Balaam's beast, speaking eloquently, as you may interpret the language it employs. The identical shaft, the controversial topic itself, has been produced before you. It is either identity or it is not—one or the other. To each part a voice potential has been given. The boxes, the shoulders, the rings, the journals, unite in one testimony—and that the court will not, but you must, construe. The witness McCrea, made it, and has testified very fully in regard to its present appearance, as compared to its condition when it left his workshop. He has given his opinion, that, from the present appearance of the journal boxes, cylinder, and shoulders, there has been wear by usage. This is the substance of his opinion. As an opinion you are not bound by it—you can judge for yourselves by inspection, for it speaks for itself.

But the testimony of this tongueless witness covers other ground, and answers not only the question whether the principle involved in the patent has been used, but is explanatory of the cylinder, whether with or without shoulders, and how far, and to what purpose they are needed.

Purposely abstaining from all comment upon the testimony, I must leave this witness with you, gratified that his iron nerves have not been disturbed, nor his temper crossed, by professional examination.

The court has been requested to instruct you upon certain legal propositions, with a view to ultimate action before a higher tribunal. This is all proper, and the request has been fully complied with, in what has already been presented. But, gentlemen, the instructions are for you, in your position, and not merely for the counsel. They are

your guides—light given you by the constitutional functionary of the law, and designed to impress your minds, in your official action, with what the court believes to be truth and law. Able and learned counsel are essential helps to the right comprehension of an intricate issue, and frequently are right when they differ from the court; but the jury would cast away all chart and compass, if they rely upon opinions of counsel against the views of the court. That these instructions may be more effectually impressed, I invoke your fixed attention while I recapitulate them in synoptical and numerical order, for your better understanding:

1. The patent of the plaintiff is for an improvement in the circular saw and guides antecedently in use, and embracing the original structure; and this circumstance should control the construction of the patent, and the application of the testimony.

2. The principle of the improvement is, "free end play to the shaft," or free lateral motion, in combination with the guides, embracing the periphery of the saw, so as to leave its center entirely unchecked.

3. In producing this, the cylinder may be with or without shoulders; that is, of equal diameter throughout, or otherwise.

4. The end play may be given to such an extent as is deemed necessary by workmen of competent skill in constructing saw mills.

5. A checked end play is end play; but whether free end play or not depends upon the fact whether it is sufficient for the successful working of the saw mill.

6. If not sufficient for that purpose, it is not for the principle claimed in the patent. If the defendant's machine had only a checked and limited end play at its center, substantially controlling the end play of the saw-shaft, in combination with the guides or rollers, it is no infringement, unless the one is a mere mechanical equivalent for the other, or unless they are identical in principle.

7. The means by which the end play is checked in the ordinary revolutions of the shaft, may be considered as mechanical equivalents for the production of the end play that is sufficient for the successful operation of the saw, and is identical in principle; and of this the jury must judge, from the testimony of experts.

8. Substantial identity is such an arrangement of mechanism as performs the same service, and produces the same effect, in substantially the same way. It is identity of principle.

9. Any utility is sufficient to sustain the patent. A machine of no utility is not patentable.

10. The specifications must be so full, clear, and exact as to enable persons of competent skill and knowledge to construct and reproduce the thing described, without invention or addition of their own, and without experiments.

11. End play might be occasioned by the long usage of the machine, in the wear of material—and, if undesignedly so, there was no trespass or wrong in defendant.

12. If the old circular saw, with guides, in use prior to 1841, can manufacture ordinary saw logs to as great, or greater an advantage than plaintiff's machine, with reference to quantity and quality, then the utility of the plaintiff's alleged improvement has been successfully assailed, and he is not entitled to recover. If end play is not necessary it is useless.

Such are the responses of the court to the legal propositions presented as the foundation of the claim of the defense. They correspond with the views entertained at the former trial—most of them in the language of the presiding judge. The great difficulty was then, as it is now, in settling the question as to the amount of end play, as none was specified in the patent. But, under the views entertained by the court, the proposition, as a question of fact, is of easy solution by the jury. Two simple questions, if answered by you affirmatively, dispose of the difficulty:

1. Was the defendant's mill run with some end play? If so—

2. Was it sufficient for the successful operation of the mill, both as to the quantity and quality of the lumber manufactured?

As I have already observed, the great mass of the testimony consists of the opinions of the witnesses, admitted as evidence, under the rule of law, that they were experts; that is, experienced in the art or mystery to which they were called to testify. In medical science a physician is an expert; in navigation a sailor. But the judgment of the physician, or sailor may be—ought to be—rejected by the jury, if satisfied that it is unworthy of credence. You are the judges of the credibility of the witnesses, and on this issue, as in all trials where facts or opinions undergo the sifting process of investigation, you are imperatively called upon to dismiss from your minds that portion of the testimony on which you can not safely rely. Confidence is essential to faith, and as you would reject a fact unworthy of belief, so should you reject a baseless opinion.

The damages which you should assess in case you find for the plaintiff, have not been made the subject of controversy. But the court will state the rule, which you can apply to that portion of the testimony having reference to the superiority of the improvement to other saws, in cutting ordinary saw logs.

You should assess the actual damages the plaintiff has sustained, by the use of his improvement during the term of the illegal user, or the amount of the profits actually received by defendant, during the time he ran his mill with the improvement of the plaintiff. To apply this rule, take one day as the measure of time, and so many thousand of lumber as the result of that time. Having

fixed the day and feet, and price in the market at the time the saw was thus used, you can arrive at a satisfactory conclusion.

If you think the plaintiff has made out his case, let your verdict be "Guilty," and assess the damages accordingly. If he has not made out his case, your verdict must be "Not guilty."

And now I leave the case with you; but before I do so, allow me to superadd one or two observations as to your official duty:

Under your obligations as jurors, you are called upon to render a true verdict on the issue of record, and according to the testimony given you in court. Your verdict will not be true, but false, if you allow yourselves to be governed by outside influences and considerations, or by preconceived opinions. The very eloquent counsel for the defense, who last addressed you (Judge Campbell), well remarked, that however his client or his fellow citizens might suffer by your sustaining the patent, it was your duty to do so, if the law and the facts would warrant it. "Let justice triumph, though the heavens should fall."

Your verdict, to be true, must be based on the evidence, and not according to your private belief independent of the evidence, and be based on all the evidence. A juror, as a judge of facts, should be without bias—have no friendships—be free from all favor or affection, in order to be "no respecter of persons," to render righteous judgment.

Sometimes a juror will enter the judgment seat, with his mind bent upon a particular course, irrespective of the law or the evidence. Such a course is highly dishonorable. It stains the soul with perjury, and pollutes the fountains of justice with the poison of prejudice. The jury box, as the bench, is holy ground, and we must put off our shoes ere we tread the sacred threshold.

A juror holds a highly honorable and important position in the administration of the law, and as he would value his own just self-esteem, let him cleave with pertinacity to the simple issue, and to the evidence admitted as bearing upon it. This is the only safe ground for both court and jury.

An agreement by you is highly important to both parties. Strive to agree. Bring your minds to settle the first principle as mainly controlling the others, viz. has an infringement been established? for, if not, the other questions are of no importance. The expense of this litigation is great to the parties, and until a verdict is rendered, no final adjudication can be had on the points involved.

The jury found a verdict for the plaintiff.

[For another case involving this patent, see Phillips v. Page, 24 How. (65 U. S.) 167.]

PAGE (GALPIN v.). See Cases Nos. 5,205 and 5,206.

PAGE (HOPKIRK v.). See Case No. 6,697.

Case No. 10,663.

PAGE et al. v. HUBBARD et al.

[1 Spr. 335; [1] 19 Law Rep. 607.]

District Court, D. Massachusetts. Jan., 1857.

MARITIME LIEN—MATERIALS FURNISHED—NOTE TAKEN—PAYMENT BY NOTE.

1. A lien for materials furnished to a vessel built in Massachusetts, is not lost by the creditors' taking the debtor's negotiable promissory note, which is produced at the hearing, and offered to be cancelled.

[Cited in Carter v. The Byzantium, Case No. 2,473; The Kimball, 3 Wall. (70 U. S.) 46; The Napoleon, Case No. 10,011.]

2. How far the giving of a negotiable promissory note for a pre-existing debt is, by the law of Massachusetts, deemed payment of such debt.

[Cited in The Helen M. Pierce, Case No. 6,332; The Napoleon, Id. 10,011.]

Certain questions in this case were, by agreement of parties, and the sanction of the court of insolvency, submitted to the arbitration of Judge Sprague, of the United States district court.

J. A. Andrew, for plaintiff.

P. W. Chandler, for defendant.

SPRAGUE, District Judge. By agreement with the builder, who was also the owner, of the ship Baltic, materials were furnished for, and went into, the construction of that vessel, and were charged in account against the builder. This created a lien upon that ship for the price, by virtue of the Massachusetts statute of 1855, c. 231. [By that statute it is enacted, whenever by virtue of any contract with the owners of any ship money shall be due to any person for materials used in the construction of any ship, such person shall have a lien upon such ship to secure the payment of such debt, which lien shall continue until the debt is satisfied.] [2] Subsequently, the builder gave his two negotiable promissory notes to the creditor, to the amount of $3,500, which are now produced to abide the decision of this case. The creditor gave a receipt for each note, stating that it was received on account. The question is, was the lien lost or displaced to the amount of those notes? The statute says, that the "lien shall continue until the debt is satisfied."

Has this debt been satisfied, within the meaning of the statute? The creditor has received nothing, except another promise of the debtor to pay it. This second promise is, indeed, in writing and negotiable; but it is a promise to pay the same debt. It acknowledges value received, but the only value received was the materials which went into the ship; the debt, therefore, cannot properly be said to be satisfied, merely because there had been two promises by the debtor to pay it,

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

[2] [From 19 Law Rep. 607.]

the one by parol, and the other in writing, negotiable. But it is insisted, that by the law of Massachusetts, the taking of a negotiable note of the debtor is a payment of the account, and that the original debt is therefore satisfied, within the meaning of the statute. By the common law, as administered in England, and as it is believed in all the states, except Massachusetts and Maine, the taking of a negotiable note for a pre-existing debt, is not presumed to be payment, but only another promise held as collateral to the first.

The Massachusetts doctrine is different, and this difference has been created, not by any act of the legislature, but by decisions of the courts. It is very desirable that the law of contracts, so far at least as it affects the substantial rights of parties, should be uniform throughout the commercial world, and especially between the states of our Union, so that a creditor shall not lose his debt in a neighboring state, by an act, which, if done in his own, would impair no right.

The Massachusetts decisions, therefore, should be looked at with a disposition to reconcile them with the general commercial doctrine, and so as to create as little difference as a fair construction will admit. Looking at them with this view, I think that the difference may be found to affect the form of the remedy, rather than the substantial rights of the parties. In examining the Massachusetts decisions, we must not regard them as laying down any positive or arbitrary rule, but look carefully at the reasons assigned, and presume that the court did not intend that the doctrine should go farther than the reasons upon which it rests. The earliest reported decisions were pronounced by Chief Justice Parsons, in Thacher v. Dinsmore, 5 Mass. 299, and Maneely v. McGee, 6 Mass. 143, where he says, that this had been the course of decisions for many years. And the reason he assigns is this: that if an action be maintainable on the original account, the debtor may subsequently be sued by an indorsee of the note which had been given therefor, and thus the debtor be compelled to pay the debt twice; and therefore the creditor should sue only on the note; that is, that he should have his remedy for the debt only on the second promise. The case and the reason contemplate the mere substitution of the second promise for the first; and that the remedy would be as effectual upon the latter as upon the former.

The court do not contemplate that the creditor is to lose any right or security; but only that he shall not place his debtor in a situation in which he may be subjected to pay twice. The courts in England and in other states secure this object by requiring the production of the note to be cancelled, when the judgment is rendered on the original promise. Thus the same object is attained by both, though by different modes. But suppose the creditor holds collateral security for the original debt, and afterwards takes a negotiable note; it is clear, that by the jurisprudence of England and of the other states, the creditor will not thereby lose the benefit of his collateral security, unless such was the intention of the parties; and such intention would not be presumed from the mere fact of taking the negotiable note of the debtor. Is the Massachusetts doctrine different in this respect? I apprehend that it is not, but that the decisions may be fairly reconciled with it. Her courts say, that a negotiable note, given for a pre-existing simple contract debt, is presumed to be payment; but this being only a presumption of fact, may be repelled. They have further decided, that it may be overcome merely by circumstances; that is, by any circumstances that repel the presumption that the parties intended the second promise to be a payment of the first. The courts of Massachusetts adhere, as firmly as those of any other state, to the doctrine that the intention of the parties is to govern. Now, in determining whether the creditor intended that the original contract should be annulled, the fact that he held collateral security for its performance, is very material, and has so been considered by the courts of Massachusetts. And I believe they have nowhere said, that it is not sufficient, of itself, to rebut the presumption that the creditor intended the negotiable note to be a substitute for the original promise, so as to deprive him of his collateral security.

I have met with three cases in which security was held by the creditor. In Fowler v. Bush, 21 Pick. 230, a note payable by instalments being secured by mortgage, the negotiable note of the debtor was taken for the first instalment, and payment thereof indorsed on the original note, and the note and mortgage then sold to a third person. Here, if the first instalment had not been paid, the debtor would have been subject to a penalty, as the creditor might at once enter to foreclose. This and the entry of payment on the note, and the sale thereof then contemplated, were sufficient to show that the parties intended the new note should be payment. So in Huse v. Alexander, 2 Metc. [Mass.] 157, where a third person had given his own note as collateral security, and subsequently the creditor gave time to the debtor, and took his note with new security, the collateral promissor, who was but a surety, was held to be discharged. But in the case of Butts v. Dean, 2 Metc. [Mass.] 76, a debt was due on account; the creditor took security by the bond of a third person, conditioned, if the debt was paid within eighteen months, the bond should be void; afterwards the debtor gave to the creditor his own negotiable note for the amount of the account, bearing the same date with the bond, and the creditor gave him a receipt. It was held that it was not to be presumed that the creditor intended to relinquish his security; and therefore the note was not to be deemed payment of the

original debt. The remarks of Shaw, C. J., in delivering the opinion of the court in the case of Melledge v. Boston Iron Co., 5 Cush. 169, 170, are, so far as they go, in accordance with the views I have here taken.

It is true, that in the case of The Chusan [Case No. 2,717], Judge Story, treating of a case of admiralty lien, speaks of the Massachusetts doctrine as differing from that of New York, in a manner which would indicate that he supposed the lien would be lost by taking a note in Massachusetts, when it would not be lost by the same act in New York. But the contract there was made in New York, and he had no occasion to examine the jurisprudence of Massachusetts. I think the Massachusetts doctrine does not go further than to consider the taking of a negotiable note a substitute for the pre-existing debt, where that would not impair any security of the creditor. And to this extent it is unobjectionable, as it causes no inconvenience to the creditor, and may better protect the debtor. If it materially changed the right of the creditor, I think it would be an unfortunate departure from the general rule of law. I am of opinion that the lien, in this case, was not displaced or impaired by the taking of the notes, and that if the conditions of the statute were complied with, it could, after the expiration of the term of credit, be enforced in the admiralty, by process in rem.

NOTE. In the earliest case decided before the Revolution, and referred to by Chief Justice Parsons, in Thacher v. Dinsmore, 5 Mass. 299, the notes were not produced. In 6 Mass. 146, Parsons, C. J., speaking of the Massachusetts doctrine, says, "there is no inconvenience to the creditor." It does not extend to cases in which the notes taken are not negotiable. Greenwood v. Curtis, Id. 358; Trustees of Ministerial & School Fund v. Kendrick, 12 Me. 381; Edmond v. Caldwell, 15 Me. 340.

PAGE (HUKILL v.). See Case No. 6,854.

Case No. 10,664.

PAGE v. The McDONALD.

[The case reported under above title in 17 Leg. Int. 318, is the same as Case No. 11,239.]

Case No. 10,665.

PAGE et al. v. MUNRO et al.

[Holmes, 232.] [1]

Circuit Court, D. Massachusetts. Aug., 1873.

AFFREIGHTMENT—DEFENCES—DELAY IN DELIVERY—PROOF OF DAMAGE.

1. Unreasonable delay in the delivery of a cargo is no defence to a libel for the freight, without proof of damage to the defendant by reason of such delay.

[Cited in The Guilis, 34 Fed. 911; The Caledonia, 43 Fed. 686; same case on appeal, 15 Sup. Ct. 544.]

[2. The measure of damages is the difference in the market value at the time of the actual delivery, and the time when the merchandise by reasonable diligence should have been delivered.]

[See Schmidt v. The Pennsylvania, 4 Fed. 548.]

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

[This was a libel by G. C. Munro and others against Chauncey Page and others.]

Benjamin Dean, for appellants.

D. Thaxter and Sidney Bartlett, for libellants.

SHEPLEY, Circuit Judge. This is a libel in personam to recover freight according to the bill of lading on a cargo of yellow pine lumber shipped by Edward Kidder & Sons at Wilmington, to be delivered at Boston to defendants upon payment of freight at the rate of ten dollars per thousand feet. The lumber arrived and was delivered to the defendants in good order.

In defence, the answer sets up a verbal agreement to receive and load this particular cargo, and alleges that this contract was made under a false representation. The amended answer alleges unreasonable delay in the delivery in consequence of unnecessary and culpable delays of the vessel in Port Norfolk; and that she failed to make quick despatch because she was sent to sea with roten, old, and unseaworthy sails, and was delayed unreasonably thereby; and that the master so negligently and carelessly conducted the voyage that the vessel was greatly delayed.

It is not necessary to consider the evidence upon the issue of unreasonable delay in the delivery of the cargo; for there is no evidence in the case that sufficiently establishes the proof of any resulting damage to the defendants by reason of such delay. The general rule is, undoubtedly, that the carrier who unreasonably delays to deliver merchandise, such as is ordinarily bought and sold in the market, is responsible for a fall of price; and the measure of damages is the difference in the market value at the time of the actual delivery and the time when the merchandise by reasonable diligence should have been delivered. The Success [Case No. 13,586]. The defendants allege in their answer that there was such a fall in price and depreciation in the value of the lumber. They have proved only that they lost the sale of a portion of the lumber to the parties to whom they had contracted to sell. But they have not attempted to prove that the lumber was not as valuable when they received it as when they expected it. The libellants have proved that there was no depreciation in the market value. The evidence does not negative the hypothesis that the defendants may have made a profit by the delay. The decree of the district court was on the ground that

1 [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

there was no proof of actual damage; and the defendants have not availed themselves of the opportunity afforded them by the appeal to supplement the evidence on this point by proof of actual depreciation of value.

Decree of district court affirmed, with interest and costs.

Case No. 10,666.

PAGE v. RIVES.

[1 Hughes, 297.] [1]

Circuit Court, W. D. Virginia. March, 1877.

INTERNAL REVENUE — LEGACIES — DISTRIBUTIVE SHARE—MONEY RECEIVED UNDER COMPROMISE WITH EXECUTOR.

Where sums of money are received by claimants under a deceased person's will, under a compromise contract made by them with the executor of the will, sanctioned by a court having jurisdiction of the will and of the estate devised. *Held*, that the sums of money so received do not fall within the category of "legacies" or "distributive shares" in intestates' estates, which are subjected to an internal revenue tax by the United States.

This was an action of assumpsit, and was first brought in the state circuit court of Lynchburg. It was removed thence by certiorari to the circuit court of the United States, sitting at Lynchburg. It was brought for the recovery of a tax illegally assessed against the plaintiff [N. M. Page, executor of Samuel Miller] by the defendant [J. H. Rives] as United States collector of internal revenue, and paid by the plaintiff under protest. The plaintiff was assessed by the United States assessor of the Fifth Virginia district, on the 22d day of October, 1874, with an internal revenue tax of $18,000, being six per cent. on $300,000 paid to Robert W. Davidson, James Davidson, John Davidson, Samuel M. Davidson, and Bennett M. Davidson, the illegitimate children of his testator, Samuel Miller, by Mary D. Davidson, in pursuance of a compromise made with them by those representing the charity school established by the twenty-fifth clause of the will of his testator, which tax the plaintiff paid to the defendant, on the 10th day of November, 1874, under protest in writing. The plaintiff was also assessed at the same time, by the same assessor, with an internal revenue tax of $2000, being four per cent. on the sum of $50,000 paid to Jesse Miller, in pursuance of a compromise made with him by the same parties, which tax the plaintiff paid to the defendant, on the 10th day of November, 1874, under protest in writing. Both taxes were paid to avoid distraint or other forcible process to collect the same. January 11th, 1875, the plaintiff duly made claim upon the commissioner of internal revenue, for the refunding of said taxes, for the reason that the sum of $300,000 and the sum of $50,000, on which said assessments were made, were not, nor was either of them, nor any part of either, paid to said parties, or either of them, as a legacy under the will of Samuel Miller, deceased, nor was it paid to them, or either of them as a distributive share in his estate under the intestate laws of Virginia, and demanding to have the said sums of $18,000 and $2000 refunded to him. March 10th, 1875, the commissioner of internal revenue, after holding it under advisement, rejected said appeal for the reason "that the taxes were due and legally assessed and collected." Before either assessment was made, the plaintiff informed the collector, who reported the assessments, that in his opinion the tax was illegal, and that there was no authority in law to collect it, and filed with him a protest in writing, insisting on their illegality, and before the assessments were made he filed with the commissioner of internal revenue a protest in writing insisting on their illegality and assigning the reasons therefor.

In March, 1869, Samuel Miller, a resident of the county of Campbell, Virginia, died, leaving a will dated in April, 1859, which was duly admitted to probate. He was never married, and left no lawful issue. But the five above-named Davidsons were recognized by him as his illegitimate children. Soon after the probate of said will, a suit was instituted by said Jesse Miller against the executor of Samuel Miller and others, in the circuit court for the city of Richmond, under the style of Miller v. Page [6 Call, 28], alleging that said twenty-fifth clause of the will was invalid, and that the whole subject embraced in that clause had vested in him. The said Jesse Miller proved in said cause that he was sole heir at law and next of kin of said testator. A compromise was effected with said Jesse Miller by which he agreed to accept $50,000 in full of his said claim, and to assign and transfer to the board of the literary fund for the benefit of the same parties and upon the same trust mentioned and declared in the twenty-fifth clause of said will, all right, title, interest, and claim whatsoever, which he has or may have as heir at law or next of kin of said Samuel Miller, whether now existing or hereafter to arise, and whether capable of being asserted in said suit or otherwise. This compromise was approved by the court, and was carried into effect by proper decrees entered in said cause, and Jesse Miller being paid said sum out of the residuum bequeathed as aforesaid to said charity school, executed and delivered a deed for the benefit of the said school as provided by said compromise, and said suit was then dismissed.

The plaintiff in this suit then filed a bill in said court asking it to advise and direct him in the administration of said estate. All persons interested were made parties, and among them the said illegitimate children of the testator. After said suit was matured

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

and set for hearing, the said illegitimate children filed a cross-bill, charging that the said twenty-fifth clause of the will was invalid. But if valid, that the contingency had happened by which the said school was defeated and prevented from being carried out, and that the whole subject devised for the purpose had vesture in them under the limitation in their favor. Proper answers were filed to the cross-bill, and among them an answer on behalf of said school, denying that the contingency had happened by which the establishment of said school had been defeated and prevented, and insisting that said clause was valid, and claiming the bequest on behalf of said school. The causes on the original and cross-bills were regularly matured as to all parties, and being heard, the court decided that said clause was not valid under chapter 80 of the Code of 1860, but was valid by reason of the authority given to the executor to petition the legislature for the passage of any law which might be necessary more effectually to carry out the object of the testator in the establishment of said school; and that it was an executory devise contingent upon the passage of such a law, and directed the executor to apply to the legislature to procure its passage.

From this decision an appeal was taken on behalf of the school, and afterwards by the executor, to the supreme court of the state. Whilst these appeals were pending, and when they were about to be heard, certain persons residing in Kentucky filed their bill in the said circuit court against the plaintiff in this suit and others, alleging that they were heirs at law and next of kin of Samuel Miller, that said twenty-fifth clause was invalid, and that they were entitled to the whole subject bequeathed by that clause. This cause was regularly matured as to all parties, and heard, when the court decreed that said twenty-fifth clause was valid against the heirs of Samuel Miller, and dismissed their bills. From this decision they appealed to the supreme court of appeals, where the case was docketed under the style of Kinnaird v. Miller's Ex'r [25 Grat. 107]. About this time a proposition was made on the part of these illegitimate children for a conference, with a view to a compromise. After a protracted negotiation, a plan of compromise was agreed on between those representing the school and the said illegitimate children. It was agreed that the school should pay said children the sum of $300,000, and release to them the reversions in the special bequest to the said children to which the school was entitled in the event if either of them should die without issue; and this was to be accepted and received by said children "in full satisfaction of all right, title, interest, and claim whatsoever, which they or either of them have, or may be entitled to, under the said twenty-fifth clause, whether now existing or at any time or times hereafter to arise in any manner or upon any contingency whatsoever." As some of these children were infants, it was deemed advisable to submit the compromise to the said circuit court for approval. It was accordingly stipulated that the plan of compromise should be submitted to the court, and if approved and ratified by the court, then a petition was to be presented to the legislature, in which the said children were to unite with the executor for an act of incorporation to establish said school upon a safe and permanent footing. according to the scheme of said twenty-fifth clause, and to authorize the execution of a deed releasing said reversions, and authorizing a conveyance by said children to and for the charitable uses and purposes prescribed by the twenty-fifth clause of said will, of all their said rights, claims and interests now existing, or hereafter in any manner or upon any contingency to arise or accrue in and to the subject bequeathed by said twenty-fifth clause. The compromise was dated 11th of February, 1874, and the decree ratifying it was entered the 13th of February, 1874.

These successive steps were taken to give effect to said plan of compromise, and after it was signed by all the parties it was submitted to the court, and by it was ratified and approved by a proper decree to carry out its several covenants and stipulations. After this was done, the executor presented to the legislature a petition, in which the said children united, praying for an act of incorporation for said school, and for authority for all parties to execute the necessary deeds required by the plan of compromise. A copy of the plan of compromise and of said decree accompanied the petition. The prayer of the petition was granted, and the legislature passed an act to give effect to the compromise and to establish said school according to the scheme prescribed by the testator in said clause of his will. It conferred the power to execute the necessary deeds to carry out the compromise, and granted a charter of incorporation to the school by the name and style of the "Miller Manual Labor School of Albemarle." The school was thus placed on a permanent and enduring basis, and the legislature thus surrendered the power over the school which it could exercise under the eighth section of chapter 80 of the Code, and the corporation thus chartered became entitled to take and hold the legacy bequeathed by the twenty-fifth clause of said will for the uses and purposes of said school as declared therein.

After the passage of this act of incorporation, the appeal of the Kentucky heirs was argued in the supreme court of the state, and it decided that the said twenty-fifth clause was valid against the heirs at law of Samuel Miller, and affirmed the decree of the circuit court dismissing their bill. Immediately after this decision was entered, the two appeals taken to the decision of the circuit court in the case of the cross-bill filed by said illegitimate children, were dismissed by

an order entered by the appellate court. The dismissal of these two appeals affirmed the decree of the circuit court, which decree dismissed the cross-bill of the Davidsons, and decided that the said school was entitled to the whole legacy bequeathed by the twenty-fifth clause as an executory devise.

By the third clause in the plan of compromise, these children were not entitled to this sum of $300,000 until after these several steps were performed, to wit, the act of incorporation was to be procured, the deeds in pursuance of it made, the decision of the supreme court of Virginia, that the twenty-fifth clause was valid against the heirs at law of Samuel Miller, rendered, and the two appeals dismissed, and "thereupon the said sum of $300,000 shall be paid to the Davidsons." These several conditions were performed, and then the time arrived to pay the said sum to said children, and then the board of education, which by the charter holds the stocks and bonds constituting this legacy, requested the judge of the county court of Albemarle to select the stocks and securities to raise said sum, looking to the best interest of the school in making the selection. This was done by him, and the said sum of $300,000 was paid by the executor to these illegitimate children under and pursuant to the decrees in these cases, and all the deeds required by the plan of compromise and the act of the legislature have been duly executed and delivered, and properly recorded.

Samuel Miller in his lifetime treated these Davidsons as his children. They were born and reared on his farm within a short distance of his dwelling. He maintained and educated them. He gave one of them $10,000 in his lifetime. To two others he gave a valuable farm. He consulted Dr. Terrell about the provision he should make for them in his will, and by his will gave each of them about $35,000, with this limitation over in the twenty-fifth clause by which he gave them, in a certain contingency, the whole subject bequeathed in that clause. He gave to their mother, Mary D. Davidson, $15,000 in his lifetime, and a like sum by his will. The sum agreed to be paid Jesse Miller has been paid, and there is nothing in the hands of the executor belonging to him. He has never claimed as legatee under the twenty-fifth clause. In his bill he claimed that that clause was invalid under the laws, that as to the subject thereby bequeathed Samuel Miller died intestate, and that he was entitled to it as heir at law and next of kin.

The counsel for the executor contended that the subject taxed must be either "a distributive share in an intestate's estate," or "a legacy," under the will of Miller; that the sum of $50,000 paid to Jesse Miller was paid as a compromise; that he never claimed a "legacy" under the twenty-fifth clause of the will, but insisted that that clause was void, and that he was entitled to the whole subject bequeathed as heir at law and next of kin, and that as there was no such legacy, the tax on the $50,000 was not a tax on a "legacy," and was therefore illegally imposed. They further contended that the $50,000 paid to Jesse Miller was not a "distributive share" in the estate of the testator, because the court of appeals, in the case of Kinnaird v. Miller's Ex'r, 25 Grat. 107, decided that the twenty-fifth clause was valid against the heir and next of kin, and that he died intestate, and therefore that the $50,000 was not paid to Jesse Miller either as a "legacy" or as a "distributive share," and the tax imposed thereon was illegal and should be refunded.

The counsel for the executor further insisted that the tax on the $300,000 paid the Davidsons was illegal. This sum was paid them as a compromise. They had instituted a suit claiming that the contingency, mentioned in the twenty-fifth clause of the will, by which the subject bequeathed in that clause was limited over to them, had happened, and that they were entitled to it. The twenty-fifth clause of the will, after establishing the charity school, and bequeathing to it the property therein specified, contained this clause under which the Davidsons claimed: "Should the legislature of this commonwealth pass any act or law which will defeat or prevent the carrying out of the objects or purposes of this clause, as hereinbefore declared and set forth, then, and in that event, I do hereby give, devise, and bequeath the trust fund created by that clause, or so much thereof as may remain unappropriated, to the children of Mary D. Davidson (hereinbefore named) and their heirs forever."

It was contended by the counsel for the executor that the estate taken by the Davidsons was an executory devise; being a fee limited upon a fee, it can only take effect as an executory devise. Fearne, Rem. 503; 3 Lomax, Dig. 280, 281. That the limitation in favor of the Davidsons was void for remoteness. To constitute a good executory devise, the contingency must happen in a reasonable time, and that has always been held to be a life or lives in living, and twenty-one years afterwards. The rule goes further and holds that it is "not sufficient that the limitation be capable of taking effect within the prescribed period, it must be so framed as ex necessitate to take effect, if at all, within that time." 4 Ves. 227; 3 Gray, 152; 2 Rob. (Va.) 424.

The devise by the twenty-fifth clause to the board of the literary fund for the school is valid, under chapter 80 of the Virginia Code of 1860. That the board took a vested legal title, and that the legislature cannot divest the title, except when the will is made and takes effect under that chapter. The legislature reserves the right, under the 8th section of that chapter, "to repeal or suspend the authority thereby given" to make a will "at any time," and thus pass a "law that will defeat or prevent the carrying out of the objects and purposes of this clause." By the express terms of this chapter the legislature may pass such a law

"at any time," however remote. There is no limit in point of time within which the legislature may exercise this reserved right to pass a law that will "defeat or prevent" this clause. It is indefinite as to time. It may pass such a law a thousand years after the school has been in operation; and as the limitation in favor of the Davidsons is on the passage of such a law by the legislature, it is too remote, and therefore void. It is a limitation to take effect beyond the period prescribed by the rule against perpetuities within which an executory devise must vest.

The counsel for the executor further contended that if the devise to the board of the literary fund for the school did not take effect under chapter 80 of the Code, then it was good as an executory devise under that passage in the twenty-fifth clause of the will, which directs that "my executors are authorized and directed to petition the legislature of Virginia for the passage of any laws which may be requisite for more effectually carrying out the objects and purposes of this clause in regard to the school therein mentioned." Under this passage the devise to the board for the school is good as an executory devise, if not good under chapter 80, being limited on the passage of "any laws that may be requisite for more effectually carrying out the objects and purposes of the clause in regard to the school." Inglis v. Sailors' Snug Harbor, 3 Pet. [28 U. S. 99]; Literary Fund v. Dawson, 10 Leigh, 147. If this be so, then the estate of the Davidsons is an executory devise limited on a prior executory devise, and is therefore too remote and void, for whilst it is true that on every estate conferred by an executory devise another executory devise may be limited, yet it is equally well settled that, whenever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be taken to be executory devises. As, then, the devise to the Davidsons is limited on a prior executory devise, which has the full period allowed by the rule against perpetuities, within which the contingency may happen, and the prior devise vest, it necessarily follows that a limitation which cannot vest until after that period is too remote. A life or lives in being at the death of the testator, and twenty-one years after, is the period allowed by this rule of law for the happening of the contingency on which the devise for the school is limited. This is the full period allowed by law to cover all limitations. Any limitation to happen beyond that is too remote. Now the devise to the school, if it be an executory devise, has the whole of this period within which the estate may vest. If the contingency happens at the last moment of time within that period it is good; and as the limitation to the Davidsons must happen after that period, it is too remote and void. So far from the devise to the Davidsons being so framed that it must ex necessitate take effect within that time, it is so framed that it must ex necessitate take effect beyond that time, and is therefore too remote and void.

In no view, then, are the Davidsons entitled to any legacy under this clause of the will, and the $300,000 paid them, not being paid as a "legacy," it is not liable to taxation. Nor was it paid to them as a "distributive share," because, being illegitimate children, they would be entitled to no interest in the estate of Samuel Miller if he had died intestate. But in fact he died testate, as the court of appeals decided in Kinnaird v. Miller's Ex'r. For these reasons the sum of $50,000 paid to Jesse Miller, and the sum of $300,000 paid to the Davidsons, were not paid either as a "distributive share" or as a "legacy," and hence the tax imposed on these two sums, and paid by the executor, was illegally assessed and collected, and should be refunded, and we ask a judgment for the sum of $20,000 so paid by the executor.

W. J. Robertson, John A. Meredith, and Mr. Craighill, for executor.

Warren S. Lurty, for the United States.

BOND, Circuit Judge, accepted the view of the law presented by the counsel for the executor, and judgment was given against the collector.

Case No. 10,667.

PAGE v. SHEFFIELD.

[2 Curt. 377;[1] 18 Law Rep. 433.]

Circuit Court, D. Massachusetts. May Term, 1855.[2]

SEAMEN—WAGES—SHIPPING ARTICLES—REAL CONTRACT—MATE.

1. A mariner may allege and prove, that the shipping articles do not truly describe the voyage for which he was shipped; and may recover wages upon the ground that the voyage for which he contracted was different in length from that described in the articles, and that he was wrongfully discharged at the expiration of the voyage specified in the articles; and a mate is within the same rule.

[Cited in The Quintero, Case No. 11,517; Slocum v. Swift, Case No. 12,954; Worth v. The Lioness No. 2, 3 Fed. 925; The Elvine, 19 Fed. 528.]

[See The America, Case No. 286.]

2. Where two distinct contracts, for service on two distinct voyages, are made at the same time, and one only is reduced to writing, the other may be proved by parol.

[See The Alida, Case No. 200.]

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

[This was a libel for wages by Henry L. Sheffield against Kilby Page, part owner of the ship Uriel. From a decree of the district court in favor of libellant (Case No. 12,743), respondent appealed.]

F. H. Allen, for appellant.

R. H. Dana, Jr., and Geo. S. Hale, contra.

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

[2] [Affirming Case No. 12,743.]

CURTIS, Circuit Justice. This is an appeal from a decree of the district court, pronouncing for wages of the libellant as mate of the ship Uriel, on a voyage from San Francisco to Calcutta, and thence to Boston. The libellant shipped at San Francisco, and there signed articles which described the voyage to be from San Francisco to Calcutta. There is no question that the seamen were shipped for the run, and that the articles correctly describe their voyage. The master, the libellant, who was first officer, and the second and third officers, all signed the same articles. At Calcutta, the master discharged the libellant, against his will, and the district court allowed wages as for the entire voyage to Boston. Two questions have been made on this appeal: 1st. Whether oral evidence of a contract different from that contained in the articles is admissible? 2d. Whether, if such evidence be admitted, it is proved that the libellant shipped to go from Calcutta to Boston, as well as from San Francisco to Calcutta?

Two views may be taken under the first question. The first is, that there were two distinct subjects of agreement: the one being service on a passage from San Francisco to Calcutta; and the other, service from the latter place to Boston; that the master had engaged seamen to perform the first-mentioned voyage only; that the articles were designed to apply only to that passage, as a distinct voyage; and that the contract for the service of the libellant, though made at San Francisco for the other voyage from Calcutta to Boston, was left in parol, to be reduced to writing at Calcutta, when articles should be signed there by the seamen, who might there ship for the voyage home. In this point of view, the articles not being designed to contain the contract for the second voyage, and that being a separate contract, parol evidence of it would be admissible, though it were made at the same time as the other contract for the voyage described in the articles. M'Culloch v. Girard [Case No. 8,737]; Seago v. Deane, 4 Bing. 459; Lapham v. Whipple, 8 Metc. [Mass.] 59. Now, the act of congress of July 20, 1790 (1 Stat. 131), for the government and regulation of merchant seamen, requires the agreement in writing to declare the voyage or voyages for which the mariner shall be shipped; and, if carried out without such a written contract, besides being made liable for the highest rate of wages paid for three months previous, &c., a penalty of twenty dollars for each seaman or mariner is inflicted. Yet, assuming what we must assume, in considering the admissibility of this evidence, that it would prove that the services of the libellant were engaged, not only for the passage to Calcutta, but also for the passage thence to Boston, we have a case where the master must either take the ground that two distinct contracts were made, or else that he broke the law, and carried the libellant to sea without a contract in writing describing the voyage for which, in point of fact, he was shipped. If the case necessarily rested here, I should be very reluctant to allow the master, or the owner, to assume such a position; and if the parol evidence, when examined, would admit of such an interpretation, as to show two distinct contracts for two voyages, or that, though only one contract was originally made, it was severed by the acts of the parties signing the articles to adapt it to the contract of the seamen to serve from San Francisco to Calcutta, I should certainly lay hold of that interpretation as the one which reconciled the conduct of the master with the requirements of good faith and of positive law.

But there is another ground on which I think the evidence clearly admissible. Assuming, what is still to be assumed, to test the admissibility of the evidence, that there was but one contract, for an entire voyage from San Francisco, by way of Calcutta, to Boston, then the written articles did not describe the voyage on which the libellant went to sea, and the master was prohibited by law, under a penalty, from taking him to sea under such articles. Parol evidence is always admissible to impeach a contract, by showing it to be made in violation of law. It is competent for the libellant to show by parol, that these articles do not declare the voyage or voyages for which he was shipped, and that they thus violate the law; and when this has been shown, the written contract is no longer binding as respects the description of the voyage. If it were, the master would be allowed to take advantage of his own wrong; for it is his own wrong that the voyage is falsely described, and he cannot first violate the law by making a false description, and then set it up to estop the libellant from proving the true one. I am aware in White v. Wilson, 2 Bos. & P. 116, Eldon, C. J., expressed an opinion that a perquisite, claimed by the mate in addition to his wages, which was not specified in the articles, could not be recovered; and that similar decisions were made in The Jack Park, 4 C. Rob. Adm. 308; The Isabella, 2 C. Rob. Adm. 241; The Prince Frederick, 2 Hagg. Adm. 394; and by Judge Hopkinson in Veacock v. M'Call [Case No. 16,904]. But the English statute, unlike ours, does not inflict any penalty for a failure to reduce the seaman's contract to writing, and is a kind of statute of frauds merely. It is directory to the seamen, commanding them to sign articles, and does not, like ours, make it the duty of the master to have a contract in writing prepared, declaring the voyage. In The Prince Frederick, Sir C. Robinson declared the statute was intended for the protection of the owner. See, also, The Isabella and The Jack Park [supra]. 7 & 8 Vict. c. 112, which is the present English law on this subject, seems to have been

framed with a view to the protection of seamen, as, I have no doubt, these provisions of our acts of 1790 and 1840 were.

In the case before Judge Hopkinson,—Veacock v. M'Call [supra],—he seems to have followed the English decisions, as the supreme court of New York appear to have done in Bartlett v. Wyman, 14 Johns. 260, and Johnson v. Dalton, 1 Cow. 543, without considering whether the diversity between the English and American statutes should lead to diverse conclusions. It should be observed, however, that in all these cases the question was, whether the articles are conclusive as to the rate of wages, respecting the insertion of which in the articles the act of congress contains no express requirement, as it does as to the description of the voyage. The act of July 20, 1840, art. 10 (5 Stat. 395), provides, that all shipments of seamen, made contrary to the provisions of this and other acts of congress, shall be void; and any seaman so shipped, may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment. I do not understand the effect of this, either standing alone, or taken in connection with the act of 1790, to be, that the master may discharge a seaman or officer at any time, if he has not signed such articles as the act of 1790 requires. The seaman has the right either to continue the voyage or leave the service. If he does continue, or is ready to continue, and is prevented by the master, he is to be paid either the wages agreed on, or the highest paid to any seaman shipped for the voyage. But it seems to be the necessary consequence of this provision of law, that if the written articles made a shipment contrary to the act of 1790, by misdescribing the voyage, they are void, and, of course, cannot be set up for any purpose by the master or owner. It is true the third article in this act of 1840 declares, that the certified copy of the shipping articles, to be obtained by the owner from the collector before sailing, shall be deemed to contain all the conditions of contract with the crew as to their service, pay, voyage, and all other things; but by whom, and under what circumstances, is this copy so to be deemed? I am of opinion, only for the purposes and upon the occasions described in the same articles; that is, when laid before a consul, in a foreign port, when he may deem the contents necessary to enable him to discharge his duties. In a court of admiralty, the fact that the seaman was deceived as to the contents of the articles, that they contain what is unreasonable, or oppressive, or unlawful, that they were made in violation of an act of congress, and so are not binding, are all open to inquiry, and are not affected by this provision as to what the certified copy of the articles shall be deemed to contain.

Being of opinion, that oral evidence is legally admissible, I have looked into and considered it, and find that it proves the services of the libellant were contracted for, not only on the passage from San Francisco to Calcutta, but also thence to Boston or some port in the United States; that the discharge of the libellant at Calcutta was therefore wrongful, and the decree of the district court is affirmed, with damages at the rate of six per centum per annum and costs.

PAGE (SHEFFIELD v.). See Case No. 12,743.

PAGE (SPAULDING v.). See Case No. 13,219.

PAGE (STEARNS v.). See Case No. 13,339.

PAGE (THOMAS v.). See Cases Nos. 13,906 and 13,907.

Case No. 10,668.

PAGE v. TRUTCH.

[22 Int. Rev. Rec. 281; 5 Am. Law Rec. 155; 3 N. Y. Wkly. Dig. 167; 3 Cent. Law J. 559; 8 Chi. Leg. News, 385; 1 Cin. Law Bul. 224; 24 Pittsb. Leg. J. 11.]

Circuit Court, D. Oregon. July 31, 1876.

LIABILITY OF ATTORNEY FOR NOT GIVING A CORRECT CERTIFICATE OF TITLE.

1. An attorney who is employed by the lender to examine the title of property offered as a security for a contemplated loan by the borrower, is responsible to the lender for the correctness of his opinion, although the expense of the examination is paid by the borrower.

2. If the attorney certifies that the security is a good one, he thereby warrants that the title shall not only be found good at the end of a contested litigation, but that it is free from any palpable, grave doubt, or serious question of its validity.

3. An attorney who conducts a suit to foreclose a mortgage taken upon his certificate that the title was good, is not entitled to extra compensation because of labor and time consumed in such suit, in contesting the validity of such mortgage, upon a question within the scope of his certificate.

4. Whatever extra labor or time is bestowed in conducting the suit on account of such question being raised, is bestowed for the benefit of the attorney himself in maintaining his certificate, and he is only entitled to charge his client as for an uncontested case.

[This was an action of debt by W. W. Page against Joseph W. Trutch, to recover a fixed sum for professional services.]

G. W. Yocum and Hugh T. Bingham, for plaintiff.

John Catlin, for defendant.

DEADY, District Judge. This action is brought to recover the sum of $1,800 gold coin, with interest from April 20, 1876, for professional services rendered by the plaintiff to the defendant between November, 1874, and said date, in conducting a suit to foreclose a mortgage upon the north half of block 8 in the city of Portland. The answer of the defendant admits the services, but

denies that they are worth more than $500 in coin, and alleges that the plaintiff, in the conduct of said suit, received sundry sums of money from the defendant for which he has failed to account; and also that the loan for which said mortgage was given as security was made upon the certificate of the plaintiff acting as attorney for defendant to the effect that the property was "a good and valid security" for such loan, but that in fact there was a grave question as to the validity of said mortgage, and that the same was "a perilous and doubtful one," whereby the defendant was put to great costs, trouble and delay in collecting his money, and suffered great loss on account of the uncertainty of the title to said property, and the consequent depreciation in its market value. The reply admits the receipt of $86.-50 in currency for the plaintiff on defendant's account, but denies that plaintiff was employed by defendant to examine the validity of the mortgage, and that the security was doubtful or perilous. In pursuance of the stipulation of the parties, the cause was heard by the court on July 21st, without the intervention of a jury.

From the evidence the facts of the case appear to be as follows: In December, 1873, Mr. Edwin Russell, then manager of the Bank of British Columbia, in this city, and the agent of the defendant, then and now a resident of Victoria, V. I., loaned to D. D. Bunnell, guardian of the five minor children of Emsley R. Scott, deceased, the sum of $12,000 in gold coin, at 1 per centum per month interest, and took as security therefor a mortgage executed by said Bunnell, as guardian aforesaid, upon the north half of block 8 in the city of Portland, the same being the property of said minor children. That said Bunnell, before executing said mortgage procured the order of the county court of Multnomah county, authorizing him, as guardian aforesaid, so to do; that said Russell, before making said loan and accepting said security, employed the plaintiff to examine the title to said property and the authority of said Bunnell to execute said mortgage, and that said plaintiff, in pursuance of said employment, gave said Russell a certificate to the effect that the title to said property was in said minor children, and said Bunnell was duly authorized to make the loan and execute the mortgage as security therefor; and that said money was borrowed for the purpose of improving said property by building a market house thereon, which was done. That afterwards, in November, 1874, the interest being in arrears upon said mortgage, the plaintiff was employed by said Russell, acting as the agent of the defendant, to foreclose the same; that in pursuance of said employment he brought suit in the circuit court for the county aforesaid, where there was a decree dismissing the same upon the ground that the mortgage was invalid for want of power in the county court to license the guardian to mortgage his wards' property; that thereupon said plaintiff took an appeal to the supreme court of the state, which court upon consideration of the cause, gave a decree foreclosing said mortgage and directing a sale of the premises for the amount due thereon; and that afterwards in the spring of 1876, the plaintiff caused said property to be offered at sale upon an execution to satisfy said decree, at which sale there being no bidders, the defendant by his agent, Mr. Lloyd Brooke, bid in the same at $15,500, that being substantially the amount then due thereon. That the defendant has only received in satisfaction of the decree in said suit of Trutch v. Bunnell,[1] the property aforesaid, and that assuming the title to be good, it is not now and was not at the time of said sale worth more than $12,000 in gold coin. That it was worth to foreclose said mortgage, provided there had been no material objection to the validity of the same, not more than 5 per centum of the amount recovered, but there being good cause to question the validity of the same for the alleged want of power in the county court to authorize the guardian to execute the same, and the suit to foreclose being contested by the guardian ad litem on that ground, it was worth not more than $1,000. That the plaintiff, while acting as attorney for the defendant in said foreclosure suit, received from the clerk of said circuit court, out of the moneys paid to said clerk by the defendant as costs and expenses of said suit, the sum of $160 in currency, for which he has not accounted to the defendant.

On the argument, several questions of law and fact were discussed by counsel. The plaintiff insisted that in making the examination of the title of the mortgaged premises he was not acting as the attorney for the defendant, but for Bunnell. But upon the evidence it is clear that the facts and law are to the contrary. In his own testimony, the plaintiff, while he states that Russell was not to pay him for the examination and that Bunnell was, also admits that Russell would not make the loan except upon his certificate that the title was good and that the county court had power to authorize the loan, and that he gave him such a certificate; while Mr. Russell testifies explicitly that he employed the plaintiff, who was then attorney for the bank, to make the examination, and that upon his certificate he made the loan, but that it was understood that Bunnell was to pay all the expenses of the examination of the title, as it was the custom for the borrower to do. Add to this the frequent declarations of the plaintiff to the agent of the defendant, when doubts were expressed as to the success of the foreclosure suit, that he was responsible for the validity of the mortgage and would pay the defendant himself if he failed to make it out of the mortgaged premises, and there-

[1] [5 Oregon, 504.]

can be no doubt but that he was acting as the attorney of the defendant in making the examination of the title, and is responsible to him accordingly. The fact that the borrower, Bunnell, was to pay the expense of the examination does not affect the question a particle. If the plaintiff agreed to look to him for the compensation for his services, that did not make him any the less the defendant's attorney.

Practically, it is admitted that the compensation claimed by the plaintiff is an extraordinary fee, and his right to recover it is placed upon the ground of the serious character of the litigation involved in the foreclosure suit and the extra time, labor and risk incurred by him in conducting it. In reply to this it is argued for the defendant that as the loan was made by him on the plaintiff's certificate that the security was good, and he being responsible for that opinion, if any serious question arose in the course of the litigation concerning the validity of the mortgage, just so far the correctness of the certificate was impugned or brought into question, and whatever extra labor, time or risk the plaintiff incurred on this account, was in fact incurred for himself, and therefore the defendant ought not to be required to compensate him for it. The certificate is not to be considered a warranty against every frivolous and speculative question which the dishonesty of the debtor or the ingenuity of counsel may interpose against the enforcement of the security, but I think it ought to be held as a warranty or representation, not only that the mortgage would be found or held to be valid at the end of a protracted and expensive litigation, but that there was no palpable, grave doubt, or serious question concerning its validity.

Ordinarily, when a party loans money upon the certificate of an attorney that the title to the proposed security is good, he does not expect that in the enforcement of such security he may encounter a question which gives the debtor or other persons interested in the property a reasonable ground to contest his claim and put him to the risk and expense of a contested litigation. Upon this branch of the case my conclusion is, that the defendant having taken the security in question upon the opinion of the plaintiff that it was valid, whatever extra labor or risk the latter incurred in enforcing it on account of its alleged invalidity, was incurred in contemplation of law and good morals for himself and not the defendant, and therefore he is only entitled to compensation as for an uncontested suit to foreclose.

In disposing of this question I have not considered it necessary or proper to express an opinion upon the validity of the mortgage. Most of the gentlemen of the bar who were examined as witnesses in the case, expressed the opinion that it was invalid, and leaving out of consideration the effect of the certificate, fixed the compensation of the plaintiff proportionately high—one of them, Judge Strong, even going so far as to say that he ought to have 25 per centum of the value recovered; upon the principle, I suppose, that he considered the debt in such extreme peril that the attorney who recovered it, ought to be considered as a salvor and allowed salvage. But even supposing the plaintiff had not given the certificate, and that he is entitled to compensation accordingly, he could not recover the fee claimed. Whatever risk there might be in the litigation, there could not be any extraordinary labor or time attending it. There were no witnesses to examine or evidence to sift and marshal. The contest, so far as there was one, turned upon a single narrow question of statute law, upon which the arguments on either side are apparent and limited. The opinion of Mr. Justice Shattuck, before whom the case was heard in the court below, was that $1,000 was a reasonable compensation for the services, and such was the opinion of other leading attorneys at this bar. In a country where the justices of the supreme court only get a salary of $3,000 per annum, a fee of $1,000 for conducting a foreclosure suit involving $14,000 and one such question of law and two or three weeks work, at the outside, ought to be considered a liberal compensation. But the conclusion having been reached that the plaintiff is only entitled to recover as for an uncontested suit, it is not necessary to consider the matter in this light any further. Upon this point there is no conflict in the evidence. All the witnesses agree that for an uncontested foreclosure suit, 5 per centum upon the amount recovered is reasonable compensation for the services of the attorney. To ascertain what this amounts to, as there was no money collected on the decree, it became necessary to inquire into the value of the mortgaged property bid in by the defendant.

Upon this question the evidence is quite conflicting. It is given upon the assumption that the defendant acquired a good title to the property by the purchase at the sheriff's sale, and so it will be considered. The figures range from $25,000 to $10,000. From all the circumstances of the case, and the relation of the witnesses to the transaction and the subject of real property in this city, I am very certain that the minimum valuation is much nearer the mark than the maximum one. The property consists of four lots between Front and First and Jefferson and Madison streets. The improvement upon it is a one-story brick building about 40 feet wide and 200 feet long. It was built for a market house where there appears to be no demand for one. No one offered to bid upon the property at the sale, and it only brings in $50 per month rent. I have found the value of it to be $12,000, and my impression is that that sum is rather above than below its real

worth. Five per centum upon this sum is $600, which is the amount the plaintiff is entitled to recover, less the amount received by him from the defendant. The evidence upon the latter point is not satisfactory. But it appears from two receipts, given by the plaintiff to the clerk of the circuit court, that he received from the latter, out of the costs and expenses paid by the defendant in the foreclosure suit, the sum of $224.50 in currency. But the plaintiff shows by the receipt of the clerk of the supreme court that he had advanced $35.50 of this amount, and was entitled to receive it back. Besides this, I deduct $29 from these receipts, because I am not satisfied but that it was advanced by the plaintiff. This leaves $160 of the amount received by the plaintiff unaccounted for, which must be deducted from the sum due plaintiff for his services. Converting the $600 into currency gives $660, which sum, less the $160, is the amount for which the plaintiff is entitled to judgment, —$500.

PAGE (UNITED STATES v.). See Cases Nos. 15,986a, 15,987, and 15,988.

Case No. 10,669.

PAGE v. WRIGHT.

[4 Wash. C. C. 194.] [1]

Circuit Court, D. New Jersey. April Term, 1822.[2]

WILLS—DEVISE TO WIFE—ESTATE FOR LIFE.

After giving pecuniary legacies to his sisters, the testator devises as follows: "I give to my wife Mary all the rest of my lands and tenements whatsoever, whereof I shall die seised, in possession, reversion, or remainder, provided that she has no lawful issue. Item, I give to my wife Mary, whom I also make my sole executrix, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed." After revoking all former wills, he makes A. B. executor of his will, "to take and see the same performed, according to its true intent and meaning, and for his pains"—leaving the sentence unfinished. Mary the wife took an estate for life only.

[Cited in Warner v. Brinton, Case No. 17,179.]

This was an ejectment for a tract of land lying in the state of New Jersey, which was argued at last term by Richard Stockton for the plaintiff [lessee of James Page], and by Ewing and Wood for the defendant; and was held under advisement until the present term. The parties agreed on a case, which presented the single question whether, under the will of James Page, Mary his widow took an estate for life or in fee, in the real estate devised to her.

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

[2] [Affirmed in 10 Wheat. (23 U. S.) 204.]

WASHINGTON, Circuit Justice. This case turns altogether upon the construction of the will of James Page. After giving to each of his three sisters a pecuniary legacy, we find the following clauses, on which the question arises: "Item, I give and bequeath unto my loving wife Mary, all the rest of my lands and tenements whatsoever, whereof I shall die seised in possession, reversion, or remainder, provided she has no lawful issue. Item, I give and bequeath to Mary, my beloved wife, whom I likewise constitute, make, and ordain, my executrix of this my last will and testament, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed." After revoking all former wills, and confirming the present as his last will, he makes his "loving friend, Henry Jeans, executor of his will, to take and see the same performed according to its true intent and meaning, and for his pains"—leaving the sentence incomplete. Mary, the widow of the testator, died before the institution of this suit. The question is, whether Mary, the widow of the testator, took an estate for life only, or a fee simple in the real estate of the testator? If the former, the lessor of the plaintiff is entitled to judgment: otherwise not. In the devise to the wife there are no words of limitation added sufficient in law to pass a fee, and consequently, she can take only an estate for life, unless, from other parts of the will, brought to operate upon the subject matter of the devise to her, it can be discovered that the testator's intention was to give a fee. And upon this subject of intention, we are instructed by a number of cases, that it must be apparent, and not doubtful, ambiguous, or conjectural; it must so manifestly appear that the testator meant to give a fee, as to satisfy the conscience of the court in pronouncing that such was his intention. If it be doubtful, the rule of law must prevail. Cro. Car. 368; Frogmorton v. Wright, 2 W. Bl. 889; Moor v. Denn, 2 Bos. & P. 247; Bowes v. Blackett, Cowp. 235. There is in this case no introductory clause from which the intention of the testator to dispose of all his estate, real and personal, can be collected; nor is it to be admitted, that a clause intimating such an intention would so far attach itself to the devising clause, as to enlarge the estate into a fee. The English cases, both ancient and modern, are generally the other way. Frogmorton v. Wright, 2 W. Bl. 889; Child v. Wright, 8 Durn. & E. [8 Term R.] 64; Denn v. Gaskin, Cowp. 657; Doe v. Allen, 8 Durn. & E. [8 Term R.] 497; Merson v. Blackmore, 2 Atk. 341. In Hogan v. Jackson, Cowp. 299, where it was decided that the devisee took a fee, the case turned, not on the introductory clause, but on the whole will taken together, and particularly on the words "all his effects"; and in Grayson v. Atkinson, 1 Wils. 333, the inheritance was charged with the debts and legacies. Neither is there in this case any

charge upon the real estate devised to the wife for payment of the debts or legacies which could by possibility subject her to any loss in case her estate should determine at her death; and this is the criterion which all the cases lay down. Palmer's Lessee v. Richards, 3 Durn. & E. [3 Term R.] 356; Loveacres v. Blight, Cowp. 352; Denn v. Mellor, 5 Durn. & E. [5 Term R.] 558, and 2 Bos. & P. 247; Dickins v. Marshall, Cro. Eliz. 330; Canning v. Canning, Mos. 240, which is recognized as good authority in Moor v. Denn, 2 Bos. & P. 247.

We now come to those expressions in the will which were relied upon by the defendant's counsel to show an intention to give a fee to the wife. These are the words "all the rest of my lands and tenements," the words "reversion or remainder," and the words "by her freely to be possessed and enjoyed." If the words "all the rest" or "all the rest and residue" import a devise of all the interest or estate of the devisor in the lands which form the subject of the clause, there could scarcely be mentioned a will which contains a residuary clause, that would not pass a fee without words of limitation; and yet it may, I think, be safely affirmed, that there is no case to be met with that goes to that extent. In the case of Palmer's Lessee v. Richards, 3 Durn. & E. [3 Term R.] 356, the devise was of "all the rest, residue, and remainder of his lands, hereditaments, &c., his legacies and funeral expenses being thereout paid." The court decided that the devisee took an estate in fee, in consequence of the word "thereout," which made the legacies and funeral expenses a charge upon the land in the hands of the devisee; but it is expressly stated, that the words "all the rest and residue," and the word "hereditaments," would not have been sufficient in law to carry the fee. Moor's Lessee v. Mellor, 5 Durn. & E. [5 Term R.] 556, and the same case in the house of lords (2 Bos. & P. 247), is to the same effect; so is Canning v. Canning, Mos. 240. The cases which seem contrary to those just referred to, will be found, upon examination, to have turned upon other expressions in the will. In Tanner v. Wise, 3 P. Wms. 294, the residuary devise is of all the rest of his estate real and personal, which word "estate," it is admitted on all hands, is sufficient to carry a fee. Such too is the case of Murry v. Wyse, 2 Vern. 564. In Grayson v. Atkinson, 1 Wils. 333, Lord Hardwicke observes, that there can be no doubt but that the inheritance is charged with the debts and legacies; and it is very clear, that he was in no small degree influenced by the introductory clause, which (how consistent with other decisions before referred to, need not be noticed under this head) he was strongly tempted to connect with the residuary clause. It is clear, however, that he does not rest his opinion upon that clause alone. In Lydcott v. Willows, reported in Carth. 50, and more correctly in 2 Vent. 528, after giving an estate for life, the testator adds a residuary clause, in favour of his wife, of all his lands, messuages, tenements, and hereditaments not above disposed of, to have and to hold to her, and her assigns forever, which latter words were clearly indicative of an intent to pass a fee. As to the expressions "tenements, reversions, remainder," they had no influence upon the court in the cases of Palmer's Lessee v. Richards, and Denn v. Mellor. In Peiton v. Banks, 1 Vern. 65, which was a devise to A. for life, the reversion to B. and C.; equally to be divided; B. and C. were decided to be tenants in common for life only.

The cases relied upon by the defendant's counsel do not, in my apprehension, prove that those expressions, or either of them, are sufficient to enlarge the estate into a fee. Hogan v. Jackson has already been noticed; and it is perfectly clear that it did not turn upon the words "residue" or "remainder." In Norton v. Ladd, 1 Lutw. 294, the devise was to A. for life, and after her decease, the whole remainder of his lands to B., if he survived A. The court said that these words could not extend to the quantity of the land, as the whole had been before given to A. for life, and consequently there could be no remainder of that; but that it extended to the quantity of estate in the land, and so passed a fee to B. Without stopping to notice the discrepancy between the decision in this case, and those before adverted to, it is quite sufficient to exclude it from all influence upon the case now under consideration, to observe, that no devise of the testator's real estate, to which the words "rest," "remainder," and "reversion," can relate, is to be found in this will. They are obviously introduced without meaning, and are therefore to be considered as constituting an independent substantive devise of all the testator's lands and tenements. This is the more apparent from the very next clause in the will; in which the testator, as if he had at that moment perceived the absurdity of the relative terms just used, gives to his wife all his lands and tenements without reference to any previous disposition of any part of them. Bailis v. Gale, 2 Ves. Sr. 48, is open to precisely the same observation; besides which, it is very plain that the devise of the reversion, being to a child after a previous life estate, had no little influence upon the decision.

We come in the last place, to the examination of the terms "freely to be possessed and enjoyed," which were mainly relied upon by the defendant's counsel. These expressions are in no respect technical; nor do they import, in themselves, any thing more than that the devisee should possess and enjoy the estate free from all incumbrances and legal restraints which could, in any manner, limit or impair her use of the property during the continuance of the estate given her in it. The testator had previously bequeathed considerable pecuniary legacies to his sis-

ters, and in case of a deficiency of personal assets, he may possibly have doubted whether, without some provision of this sort, those legacies might not be considered as a charge upon his real estate. There is no doubt but that these expressions made her dispunishable of waste; nor is it at all improbable, that the testator intended, by these expressions, to free the property given to his wife from the condition imposed by the next preceding clause, which limited her interest in the estate to her having of issue, not only by himself, but by any future husband. Nor is the charge of fickleness, which this construction would imply, any argument against it; for we have already remarked upon those two clauses of the will, in close connection with each other, both relating to precisely the same subject; in one of which relative words without meaning are used, and in the other they are omitted. So likewise in the latter clause, the wife is constituted sole executrix of the will, and immediately after he appoints another executor, for whom he clearly intended to provide a compensation for his trouble, and yet stops short of saying what that compensation should be. But let the real intention of the testator have been what it might, it is very obvious that the expressions under consideration were merely personal to the devisee, and attach to the estate devised to her, be that what it might. They imply a benefit which might be annexed with equal propriety to a life estate, as to an estate of inheritance. In short, they import no apparent intention, as to the quantity of estate, in one way or the other; and are too ambiguous to justify a departure from the strict rule of law. This would be my opinion, were they the first instance in which those expressions had received an interpretation. But I consider the case of Goodright v. Barron, 11 East, 220, so far as it may be regarded as authority, as strongly applicable. In that case there is an introductory clause, "as touching such worldly estate wherewith it has pleased God to bless me, I dispose of the same in the following manner and form." The testator then gives a cottage and all belonging to it to his brother T. D. and his heirs; also, "I give to my wife Elizabeth, whom I make my sole executrix, all and singular my lands, messuages and tenements, by her freely to be possessed and enjoyed." The court decided, that these latter words meant no more than to make the wife dispunishable of waste, which, as tenant for life, she would have been liable for; and that the word "estate," in the introductory clause, could not be brought down and joined to the above expressions so as to show an intention to pass a fee. In Loveacres v. Blight, Cowp. 352, where the same expressions were used, there was a charge on the lands, which might have continued beyond the life of the devisees; besides which, there was a blank left, which the court thought itself authorized to fill up with the word "heirs," the devisees being immediately afterwards named the sole executors of the will. But what principally weighed with the court was, that the words "freely to be possessed and enjoyed" could not mean free of incumbrances, inasmuch as the testator had just before charged the estate with an annuity to his wife, and consequently they must have been meant to give a fee, if they had any meaning at all. In the will now under consideration, there is no introductory clause, no blank in the devise to the wife to fill up, and no charge whatever on the land. Upon the whole I am of opinion that Mary, the widow, took only an estate for life, and that judgment must be entered for the plaintiff.

The decision in this case was affirmed upon writ of error. 10 Wheat. [23 U. S.] 209.

PAGE, The BLANCHE. See Cases Nos. 1,-1,523–1,525.

PAGE, The BLANCHE. See Case No. 7,296.

PAGE, The C. E. See Case No. 13,540.

Case No. 10,670.

Ex parte PAGET.

[1 Pa. Law J. (1842) 367.]

District Court, D. Pennsylvania.

BANKRUPTCY — WHO MAY BE DECREED A BANKRUPT—OBJECTIONS TO DISCHARGE.

Any person who comes within the class of persons mentioned in the first section of the bankrupt act [of 1841 (5 Stat. 440)],—that is to say, any person owing debts not created in consequence of defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity,—may, on his own application be decreed a bankrupt, at all events. If he have made preferences in contemplation of bankruptcy, &c. concealed his property, or done or committed any other act in contravention of the second or fourth sections of the law, such matter is to be opposed to his final discharge, and not to the decree of bankruptcy.

Paget having filed his petition in ordinary form, to be decreed a bankrupt, &c. the application was resisted on the grounds, that he had fraudulently concealed his property, made preferences in contemplation of bankruptcy, confessed fraudulent and fictitious judgments, and done other acts which would prevent his having the benefit of the law. The question was, at what time these objections ought to be interposed; whether before the time for a decree of bankruptcy or afterwards, and in bar of the final discharge.

RANDALL, District Judge, decided, that as by the second and fourth sections these matters were made a bar to a final discharge and certificate, they ought to be interposed after the decree of bankruptcy; and that although this decree would divest the petitioner of all his property, and vest it in an assignee appointed by the court, for the benefit of all

his creditors equally, yet that (if the facts alleged were proved) the petitioner would be debarred of his discharge: In other words, that the petitioner would be subjected to the penalties of the act, but not have any of its benefits.

This case was decided some time ago; but Judge Randall's opinion having been lent to a friend, by whom it was mislaid, the reporter has been unable, till now, to report the case.

Case No. 10,671.

PAIGE et al. v. BANKS et al.

[7 Blatchf. 152.] [1]

Circuit Court, S. D. New York. Feb. 4, 1870.[2]

COPYRIGHT—ASSIGNMENT—INFRINGEMENT BY ASSIGNOR.

Where P. agreed to furnish to G., in manuscript, for five years, the reports of a court for publication, and that G. should have the copyright of such reports forever, and G. agreed to publish such reports and to pay P. $1,000 per volume for each volume he, G., should publish, and P. furnished to G. the manuscript for a volume of such reports, which G. published, and for which G. took out a copyright, as proprietor, in 1830, under the act of May 31st, 1790 (1 Stat. 124), and, in 1858, P. and G. each of them renewed the copyright of such volume, for his own benefit, for fourteen years, under the Act of February 3d, 1831 (4 Stat. 439), and then P. sued G. for an infringement of such copyright as renewed by P.: *Held*, that, under the agreement, G. had the perpetual right, as against P., to print, publish and sell copies of such volume, without giving to P. any further compensation, in respect thereof, beyond the $1,000.

[Cited in Yuengling v. Schile, 12 Fed. 106.]

In equity.

This was a final hearing, on pleadings and proofs, of a bill in equity brought [by Edward W. Paige and Samuel W. Jackson, executors, etc., of Alonzo C. Paige, against David Banks, Jr., and others] for the alleged infringement of copyrights. Although the scope of the bill was wider, the case at the hearing was limited to the question of infringement by the sale of what is known as the first volume of Paige's Chancery Reports.

Duncan Campbell, for plaintiffs.

Elbert E. Anderson, for defendants.

BLATCHFORD, District Judge. On the 7th of October, 1828, Alonzo C. Paige, the testator of the plaintiffs, entered into a written agreement with William Gould and David Banks, of whose rights under said agreement the defendants are the assignees, which agreement was as follows: "Articles of agreement made this 7th day of October, in the year 1828, between Alonzo C. Paige, of the city of Schenectady, of the one part, and William Gould and David Banks, of the other part, witnesseth, that the said Alonzo C. Paige (the said William Gould and David Banks performing the agreements to be done and performed as hereinafter contained), during the term of five years from the twenty-eighth day of April last, if the said Alonzo shall so long remain reporter of the court of chancery, shall and will furnish the said Gould and Banks, in manuscript, the reports of the said court for publication, and that the said Gould and Banks shall have the copyright of said reports to them and their heirs and assigns forever; and the said William Gould and David Banks covenant and agree to and with the said Alonzo, that they will publish said reports in royal octavo volumes of between six and seven hundred pages, on paper and type suitable for such a work, that they will deliver to the said Alonzo twelve copies free of expense, that they will sell said reports to the members of the bar of New York at a sum not exceeding six dollars per volume, bound in calf, for each volume they shall so sell, within one year next subsequent to the publication of such volume; and the said Gould and Banks agree to pay to the said Alonzo one thousand dollars per volume for every volume they shall publish, and at the same rate for less than a volume, within six months after the publication of each volume. It is understood that the said Alonzo C. Paige is to read and correct the proof-sheets of said reports as the same are furnished him. In witness whereof the said parties have hereunto set their hands and seals the day and year first above written. A. C. Paige. (L. S.) D. Banks. (L. S.) William Gould. (L. S.)"

Under this agreement, Mr. Paige furnished to Gould and Banks the manuscript for a volume of reports which was subsequently published by them and is now known as volume 1 of Paige's Chancery Reports. Gould and Banks took out a copyright of that volume, as proprietors thereof, under and by virtue of the laws of the United States, by depositing the title of the same in the proper clerk's office on the 5th of January, 1830. This copyright was taken out under the act of May 31st, 1790 (1 Stat. 124), and was limited in duration, by that act, to fourteen years, with a right of renewal, by taking certain prescribed steps, for fourteen years more. By the 16th section of the act of February 3d, 1831 (4 Stat. 439), provision was made for the continuance ipso facto of then existing copyrights, in certain cases, for such additional period of time as would, together with the time which should have elapsed from the first entry of such copyright, make up the term of twenty-eight years. Waiving the question as to whether Mr. Paige or Gould and Banks were the lawful proprietors of the copyright of the first volume of the Reports, during the term from January 5th, 1844, to January 5th, 1858, the proprietorship of the copyright in such first volume during a term from January 5th, 1858, to January 5th, 1872,

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

[2] [Affirmed in 13 Wall. (80 U. S.) 608.]

is claimed for Mr. Paige, as well as for Gould and Banks. It is claimed that Mr. Paige, by proper steps taken, renewed the copyright of such first volume under the act of 1831, for his own benefit, for the term of fourteen years from the 5th of January, 1858, and that the assignors to the defendants, by like proper steps, renewed such copyright under said act, for their own benefit, for the same term. The defendants have, since the 5th of January, 1858, sold copies of such first volume published by them, and made profits thereon.

The right of the defendants as against the plaintiffs depends upon the construction to be given to the agreement before recited. If Mr. Paige, by that agreement, debarred himself from obtaining, as against the defendants, a copyright for such first volume, the plaintiffs cannot recover in this suit. By that agreement, Mr. Paige agreed to furnish to Gould and Banks, in manuscript, during the term of five years from April 28th, 1830, the reports of the court of chancery for publication, and that Gould and Banks should have the copyright of said reports to them and their heirs and assigns forever. Gould and Banks agreed to publish said reports in a specified style, to furnish Mr. Paige with a specified number of copies free of expense, to limit the selling price of each volume under certain circumstances, and to pay to Mr. Paige one thousand dollars per volume for every volume they should publish, and at the same rate for less than a volume, within six months after the publication of each volume. It is to be noted, in respect to this agreement, that Gould and Banks are not limited by it to the publication of any specified number of copies of each volume. Mr. Paige is to furnish the reports, in manuscript, for publication. The publication is to be made by Gould and Banks. The number of copies to be published of each volume is unrestricted. Mr. Paige is to be paid one thousand dollars for each volume published. The publication spoken of everywhere in the agreement is the publication of a volume. When such volume is once published, Mr. Paige is to have, within six months after the publication thereof, that is, within six months after the first printed copy is made public, the one thousand dollars. No matter how many copies of the volume shall be, after that, printed or sold by Gould and Banks, Mr. Paige is never to have any more from them, as compensation, in respect of such volume, then the one thousand dollars. These provisions clearly give to Gould and Banks, as against Mr. Paige, the perpetual right to print, publish and sell copies of such first volume, without giving to Mr. Paige any further compensation, in respect thereof, beyond the one thousand dollars, unless some other clause in the agreement restricts such right on the part of Gould and Banks. It is claimed that such right is restricted by the provision that Gould and Banks shall have the copyright of the reports to them and their heirs and assigns forever. It is contended that, under that provision, the whole agreement is to the effect, that Gould and Banks are to have, as against Mr. Paige, the exclusive right to publish and sell the volumes of reports no longer, at most, than during the term known to the law, under the act of 1790, at the date of the agreement, as the term for which a copyright could be obtained, that is, 28 years, or not beyond the 5th of January, 1858. But the provision in respect to copyright was inserted in the agreement for the sole purpose, manifestly, of making it clear that Gould and Banks were to be understood to be such assignees of Mr. Paige, as the author of the books, as could, under the act of 1790, secure to themselves a copyright. There is no provision in the agreement for the taking out of a copyright by Mr. Paige, and for the transfer thereof to Gould and Banks. The provision in the agreement in respect to copyright cannot be held to cause the agreement to confer any less rights on Gould and Banks, if such provision be availed of by them, than if they do not avail themselves of it. If they had not chosen to take out any copyright, as proprietors, of any volume of the reports, they would have had, as against Mr. Paige, the perpetual right to print, publish and sell the reports. If they had not chosen to avail themselves of the provision of the agreement in regard to copyright, in respect to the first volume, the construction of the agreement would have been in no manner dependent upon the existence or contents of such provision. Nor can it be dependent thereon when, as against others than Mr. Paige, Gould and Banks have availed themselves of the privilege of copyrighting such volume. So, also, Gould and Banks, not being restricted as to the number of copies of each volume which they might publish, might have printed at once, at the outset, copies enough of the first volume to supply the probable demand during the duration of any possible copyright therefor. If they had done so, they would, under the agreement, have had as much right to continue to sell those copies, after the 5th of January, 1858, as they would have had to sell any copies of such first volume during the term of any copyright thereon; and they have an equal right, as against Mr. Paige, to print copies of such first volume after the 5th of January, 1858, and to sell such copies. Taking the whole agreement together, it is manifest, that it reserves to Mr. Paige no right to prevent Gould and Banks, or their assigns, from printing, publishing and selling, at all times after its date, as many copies of any volume of the reports as they choose, without paying to him more than one thousand dollars for such volume, and that it conveys to them the right, as against Mr. Paige, to print, publish and sell, at all times after its date, as many copies of any volume of the reports as they choose.

There must be a decree dismissing the bill, with costs.

[On appeal to the supreme court, the decree of this court was affirmed. 13 Wall. (80 U. S.) 608.]

Case No. 10,672.

PAIGE v. LORING.

[1 Holmes, 275.] [1]

Circuit Court, D. Massachusetts. Oct., 1873.

BANKRUPTCY—FRAUDULENT PAYMENTS—RECOVERY BY ASSIGNEE—TRIAL—INTEREST REMITTED.

1. Under the thirty-fifth section of the bankrupt act [of 1867 (14 Stat. 534)], an assignee in bankruptcy may recover money paid to a creditor by the bankrupt, as a fraudulent preference, within four months before the petition in bankruptcy, if at the time of the payment the creditor had reasonable cause to believe that it was made in contemplation of insolvency, and to give him a preference over other creditors; although he had no reasonable cause to believe the debtor then to be insolvent in fact.

[See Alderdice v. State Bank of Virginia, Case No. 154.]

2. Evidence of a statement made by the defendant to a witness, of the contents of a letter of the defendant not called for, is competent.

3. It is not error to allow the plaintiff to remit an excess of interest found in the verdict, and then affirm the verdict, so amended.

[In error to the district court of the United States for the district of Massachusetts.]

Error to the district court of Massachusetts. An action was brought in the district court, under the thirty-fifth section of the bankrupt act, by [John A.] Loring, as assignee in bankruptcy of one Charles E. Paige, Jr., to recover money alleged to have been paid to the plaintiff in error by the bankrupt, as a fraudulent preference. At the trial in the district court, the verdict was for the assignee [case unreported], and plaintiff in error brought the suit to this court by writ of error.

Edward Avery and George M. Hobbs, for plaintiff in error.

John A. Loring, for defendant in error.

SHEPLEY, Circuit Judge. The principal question presented by the exceptions in this case arises upon the construction given by the court, in the charge to the jury, of the first clause of the thirty-fifth section of the bankrupt act. The defendant asked the court to instruct the jury that, under the first and second counts in the plaintiff's declaration, plaintiff must prove that C. E. Paige, Jr., was insolvent in fact, and that the defendant had reasonable cause to believe him to be so; and that it was not enough for the plaintiff to show under these counts that there was danger of insolvency as a coming result, or likely to ensue, but he must show that C. E. Paige, Jr., was insolvent in fact. Upon this prayer, the court instructed the jury, that, if they found that C. E. Paige, Jr., was insolvent, or contemplated insolvency, and paid debts to his father, and his father, the defendant, had reasonable cause to believe this, and that the son intended thereby to prefer him, the plaintiff could recover. Taken in connection with the request, and with the other portions of the charge, the court substantially instructed the jury that if Paige, Jr., was insolvent, or contemplated insolvency, and paid debts to the defendant, and the defendant had reasonable cause to believe that he was insolvent, or contemplated insolvency, and intended thereby to prefer him in fraud of the act, the plaintiff was entitled to recover.

This instruction makes it sufficient that the party receiving the fraudulent preference should have reasonable cause to believe that the debtor was contemplating insolvency. Defendant contends that it is necessary that he should have reasonable cause to believe him to be insolvent in fact, and that reasonable cause to believe him to contemplate insolvency is not sufficient to invalidate the fraudulent preference.

The literal reading of the thirty-fifth section would seem at first to sustain the instruction asked for by the defendant. "If any person being insolvent, or in contemplation of insolvency, within four months before the filing of a petition by or against him, with a view to give a preference to any creditor, or person having a claim against him, &c., . . . makes any payment, . . . the person receiving such payment, . . . having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance, is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it," &c. Was it intended by the omission of the words "in contemplation of insolvency," in the latter part of the section, that property paid by a debtor to his creditor in contemplation of insolvency, and with an intent to give a fraudulent preference, should not be recovered back, when the creditor receiving it had knowledge of all this, and reasonable cause to believe it, simply because while he had reasonable cause to believe the payment to be made in contemplation of insolvency, he had not reasonable cause to believe the debtor to be insolvent in fact?

This construction would not give effect to the manifest intent of the statute, which is expressed by the words "that such attachment, payment, pledge, assignment, or conveyance, is made in fraud of the provisions of this act." "Contemplation" is not used in this first part of the first clause, in the thirty-fifth section, in the sense of meditation merely. It refers to the condition of a debtor who knows he will be unable to pay his debts as they become due, or who does not expect or intend to do so. Contemplating this, the

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

debtor cannot pay one creditor to the exclusion of others, without a fraud upon the bankrupt act. Having reasonable cause to believe that the debtor contemplates this, the creditor cannot receive the payment without the liability to refund it, if the debtor is declared bankrupt, and the assignee brings the action, both within the time limited by the statute. In Gibson v. Warden, 14 Wall. [81 U. S.] 248, the court say, "To bring a case within the first clause, the act must have been done by a person insolvent, or in contemplation of insolvency, with a view to give a preference to a creditor or person having a claim against, or who is under a liability for, the bankrupt; and such person must have reason to believe that the transaction is in fraud of the statute." This appears to be the true construction of this clause, and it supports the instruction as given by the district judge.

Exception was taken to the ruling of the district judge upon the admissibility of certain evidence. The plaintiff called J. C. Harding as a witness, who testified that he was present at an interview between the defendant and the creditors of his son. Witness told defendant he had ruined his son's credit by writing a certain letter. Defendant took up a letter which he said was a copy of, or a letter the same as, a letter he had written to the New York creditors, and read it to witness. Witness was asked to repeat what the defendant read to him as the contents of the letter. Defendant objected, no notice having been given to produce the letter. The court permitted the witness to state his recollection of what the defendant read to him. The testimony was rightly admitted. The witness was not asked to state the contents of the letter, but what the defendant stated to him to be the contents of the letter. It does not appear that the witness read the letter or knew its contents, except as the defendant stated them, and non constat that he stated them correctly. It was this statement that the witness was asked to repeat.

The jury returned a verdict for the plaintiff for the sum of thirty-five hundred and forty dollars and twenty-five cents, with interest from the date of the several payments, and then, in their verdict, gave the dates and amounts of the several payments making the aggregate sum. On motion for new trial, the court ordered a new trial, unless the plaintiff should, within one week, remit all interest prior to the date of his writ. The plaintiff thereupon, in open court, remitted as required, and the motion for new trial was overruled. To this ruling and order defendant excepted. There was no error in allowing the plaintiff below to remit the excess of interest, and in affirming the verdict after this was done. The right and duty of the court thus to amend the verdict, and give judgment according to the right of the cause and matter of law, as it shall appear to the court, is declared by the act of 1789, c. 20, § 32 [1 Stat. 91], and affirmed in Roach v. Hulings, 16 Pet. [41 U. S.] 321, and Parks v. Turner, 12 How. [53 U. S.] 45.

Judgment of the district court affirmed.

Case No. 10,673.

In re PAINE.

[9 Ben. 144; [1] 17 N. B. R. 37.]

District Court, S. D. New York. May 10, 1877.

BANKRUPTCY — PRIOR EXECUTION — LEVY — SALE — TITLE OF ASSIGNEE.

1. An execution in the hands of a sheriff, in New York, at the time a petition in voluntary bankruptcy is filed there, binds the leviable personal property of the bankrupt, as against any title to it which the assignee in bankruptcy can acquire, and although no levy was made on the property, under such execution, before such petition was filed.

[See Bartlett v. Russell, Case No. 1,080.]

2. In such a case, the sheriff will not be allowed to take the property, if the assignee in bankruptcy has it, but the latter will be directed to sell it separately, leaving the execution creditor to apply to the court in respect to the proceeds.

[In the matter of John B. Paine, bankrupt.]

Vanderpoel, Green & Cuming, for sheriff.

E. Bartlett, for assignee.

BLATCHFORD, District Judge. On the 11th of October, 1876, one McCord recovered a judgment against the bankrupt in the supreme court of New York, for the sum of $2,954.20 gold and $499.48 currency. On the 14th of October an execution on such judgment was placed in the hands of the sheriff of the city and county of New York. The bankrupt owned, at the time, certain wooden ware, which was stored in the cellar of a building No. 54 Maiden Lane, in the city of New York. The sheriff did not levy or attempt to levy on such wooden ware, nor did he know of its existence, nor did he enter the building in which it was. On the 19th of October, the bankrupt filed a voluntary petition in bankruptcy in this court. In the schedule of the bankrupt's personal property, annexed to such petition, the fact was stated that there was wooden ware belonging to the bankrupt at 54 Maiden Lane. The sheriff now presents to this court a petition setting forth the foregoing facts and claiming that the execution became and was and is a lien upon all of the aforesaid property, from the time of the delivery of the execution to him for service, as against the debtor and his assignee in bankruptcy, and that the sheriff is entitled to take said property and sell it and apply the proceeds upon the execution, and praying that this court will make an order acknowledging said lien and

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

authorizing the sheriff to take said property under the execution and sell it and apply the proceeds, as far as they will go, to the satisfaction of the execution. The assignee in bankruptcy resists the application, on the ground that, as the sheriff made no actual levy on the property before the petition in bankruptcy was filed, the sheriff has no lien on it by virtue of the execution and no claim to any priority in payment out of its proceeds.

The statutes of New York (2 Rev. St. pp. 365, 366, §§ 13, 14, 17) provide as follows: "Sec. 13. Whenever an execution shall be issued against the property of any person, his goods and chattels, situated within the jurisdiction of the officer to whom such execution shall be delivered, shall be bound only from the time of the delivery of the same to be executed. Sec. 14. If there be several executions issued out of a court of record against the same defendant, that which shall have been first delivered to an officer to be executed shall have preference, notwithstanding a levy may be first made under another execution; but if a levy and sale of any goods and chattels shall have been made under such other execution, before an actual levy under the execution first delivered, such goods and chattels shall not be levied upon or sold by virtue of such first execution." "Sec. 17. The title of any purchaser in good faith, of any goods or chattels, acquired prior to the actual levy of any execution, without notice of such execution being issued, shall not be divested by the fact that such execution had been delivered to an officer to be executed, before such purchase was made." These statutory provisions have been construed by the courts of New York. In Slade v. Van Vechten, 11 Paige, 21, it was held, that where an execution is in the hands of the sheriff at the time of a general assignment of the property of the defendant in the execution for the payment of his debts, the lien of the execution upon the personal property liable to seizure and sale thereon is paramount to the title of the general assignee; and that the general assignee is not a bona fide purchaser within the meaning of the foregoing provisions which protects the title of bona fide purchasers who have purchased between the delivery of the execution to the sheriff and an actual levy upon the property. To enable a subsequent purchaser or assignee of the debtor's property to overreach the prior legal lien of the execution thereon, before levy, and to protect his title under section 17 of the statute, he must show that he is a bona fide purchaser without notice, within the intent and meaning of said section. A subsequent purchaser, who obtains the legal title to property merely in satisfaction of a pre-existing indebtedness, is not entitled to protection, as being a bona fide purchaser who has no notice of a prior lien on the property. Ray v. Birdseye, 5 Denio, 625. See, also, Roth v. Wells, 29 N. Y. 489, 490; Williams v. Shelly, 37 N. Y. 375.

Under the statute of New York, the goods and chattels of this debtor, situated within the jurisdiction of the sheriff, were bound as against the debtor, from the time of the delivery of the execution to the sheriff to be executed. They were so bound, without any levy being made under the execution. This binding created a lien and was a lien. The bankruptcy statute does not invalidate such a lien, but recognizes and allows it. Sections 5066, 5075. The bankrupt's goods and chattels passed into the hands of the assignee in bankruptcy subject to this lien. He took them as security for the precedent debts of the general creditors of the bankrupt, and not as a purchaser of them in good faith without notice of the issuing of the execution. He took no greater title in them than the bankrupt had at the time the petition in bankruptcy was filed, and that was a title subject to the lien of the execution. Under sections 5044, 5046, and 5047 of the statute, he took "the like" rights and remedies which the bankrupt had when the proceedings in bankruptcy were commenced, but no greater rights or remedies.

I am referred to the case of In re Tills [Case No. 14,052] as holding a contrary view. The point of that decision is, that the seizure of the goods of an execution defendant by the United States marshal, under a warrant of seizure on an adjudication in bankruptcy on a creditor's petition, is such an execution of process as will divest the lien of a prior unlevied execution. The case arose in Missouri and was decided according to the statutes of Missouri and their interpretation by the state courts of Missouri. It was held, that the law of Missouri was, that where there were two executions, the later one, if there was a levy under it, gave to it priority over an earlier one, under which no levy was made till after the levy under the later one; that the delivery of an execution to the sheriff gave a lien which bound the debtor's goods in the hands of the debtor, and of any one to whom he might voluntarily convey them, but such lien would bind neither the goods nor their proceeds in the hands of an officer who had seized them under process from a court of competent jurisdiction at the instance of another creditor; and that a seizure of the goods by the marshal under a warrant in involuntary bankruptcy, after adjudication, had the same effect as the levy of an execution, to divest the lien of a prior unlevied execution.

In the case now under consideration not only was the adjudication of bankruptcy made on a voluntary petition, but the statute of New York, before cited (section 14), differs entirely from the law of Missouri, for it expressly provides, that, "if there be several executions issued out of a court of record against the same defendant, that which shall have been first delivered to an

officer to be executed, shall have preference, notwithstanding a levy may be first made under another execution." Therefore if an adjudication on a petition in voluntary bankruptcy, or an assignment following such adjudication, could be regarded as equivalent to the issuing and levy of a second execution, the first execution would, under the statute of New York, have preference. The execution in this case secured, therefore, a lien which the laws of New York would enforce, notwithstanding the goods should have been afterwards seized under a later execution from a court of record. The bankruptcy proceedings can have no greater force or effect than a levy under such later execution would have; and, therefore, the lien of the execution in this case is one which must be allowed in the bankruptcy proceedings.

The case of In re Weeks [Case No. 17,350] is very much like the present one, and the decision there was in accordance with the views I have expressed. The petition in that case was one in voluntary bankruptcy, and the statute of Illinois was like the New York statute and different from the Missouri statute.

In the case of In re Rust [Id. 12,171] it was held, in the Northern district of New York, under the bankruptcy act of 1842, that the mere delivery of an execution to the sheriff did not give to the judgment creditor a lien which would prevail over the title acquired by the assignee in bankruptcy to the personal effects of the defendant in the execution, under a decree of bankruptcy against him. The case was one in involuntary bankruptcy.

But, while the lien of the creditor by virtue of the execution will be acknowledged, it is not proper that the sheriff should be allowed to take or sell the goods. He never made any levy on them or acquired any property in them. The goods must be sold by the assignee separately from other goods, and then the execution creditor can make such application to this court in respect to the proceeds as he shall be advised.

Case No. 10,674.

PAINE v. CALDWELL.

[1 Hask. 452; 6 N. B. R. 558; 5 Am. Law T. Rep. U. S. Cts. 311; 29 Leg. Int. 284; 6 Alb. Law J. 291.] [1]

District Court, D. Maine. Dec., 1872.

COURTS—FEDERAL JURISDICTION — BANKRUPTCY—RESIDENCE—SERVICE ON ATTORNEY.

1. The district court, in equity, has no jurisdiction over a citizen of Massachusetts, neither found within nor having property within this district, to relieve from a preference in fraud of the bankrupt act at the suit of an assignee in bankruptcy appointed in this district.

[Cited in Re Litchfield, 13 Fed. 868; Romaine v. Union Ins. Co., 28 Fed. 636.]

2. Nor does the recovery of a judgment in the courts of Maine and the collection of it in fraud of the bankrupt act [of 1867 (14 Stat. 517)], by a citizen of Massachusetts, neither found here, nor having property here, but acting through a resident attorney, upon whom service was made in this suit, give this court jurisdiction.

Bill by the assignee of a bankrupt, to recover from [Henry L. Caldwell] a citizen of Massachusetts the amount of a judgment recovered by him in the courts of Maine against his debtor, the bankrupt, and collected in fraud of the bankrupt act through an attorney resident in Maine, upon whom process was served. The respondent appeared, and pleaded that the court had not jurisdiction over him, inasmuch as he was a citizen of Massachusetts, neither found within, nor having property within the jurisdiction of the court. As to the sufficiency of the plea, the cause was heard.

[2] [Albert W. Paine, pro se, contended that the bill was sustainable by virtue of the provisions of the bankrupt act, the first section of which gives to the district court original jurisdiction in all matters and proceedings in bankruptcy, extending to "all cases and controversies arising between the bankrupt and the creditor, to the collection of all the assets of the bankrupt * * * and to all its acts, matters and things to be done under and by virtue of the bankruptcy, until the final distribution and settlement of the estate, and close of proceedings in bankruptcy." The second section also giving concurrent jurisdiction with the circuit court, "of all suits at law or in equity, which may or shall be brought by the assignee, * * * against any person claiming an adverse interest, * * * touching any property or rights of property of the bankrupt," &c. The studied manner in which these sections are framed to include every cause of action; without limitation, seems to leave no doubt of the intention of congress to embrace claims such as now involved.

[The clause providing for such "jurisdiction in their respective districts" in the first section means very clearly the same as the similar clause in the section, which provides that said "courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending," shall have the jurisdiction mentioned, the whole tenor of which seems to add force to the argument, adduced from the other language already cited, to limit the right of the assignee in all suits to that district "where the proceedings in bankruptcy shall be pending." These clauses do not in any way limit the right of action to any cause short of "all cases" in the first section, and " any person" in the second. When the statute

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission. 6 Alb. Law J. 291, contains only a partial report.]

[2] [From 6 N. B. R. 558.]

has failed to make such limitations, there is no warrant for the court to do it.

[Consistent with the construction have been all the decisions thus far known to have been made on this subject under the act. What seems to be conclusive on the point in issue is the uniform rule which the courts have established, that the assignee cannot maintain suit in any other of the district courts, except only in that "where the proceedings in bankruptcy shall be pending." The converse would seem to follow as matter of course. In re Richardson [Case No. 11,774]; Markson v. Heaney [Id. 9,098]; Shearman v. Bingham [Id. 12,733]; In re Penn [Id. 10,927]. See, also, Bump, Bankr. (3d Ed.) 162–182, 244–256.

[The general language of the act, which by its unmistakable language gives the jurisdiction claimed, can only be ruled away on the supposition that congress might not intend to give the assignee any remedy against parties out of the district, or that they forgot to provide for it. Both hypotheses are inadmissible. The language must then control, and if thereby any inconvenience or hardship results, congress and not the court must furnish the remedy. Attention was also called to the fact stated in the bill, that the money sued for, having been collected on an execution recovered in the state court of Maine within the district, by an authorized attorney of that court, the court would sustain their jurisdiction by the service made upon the attorney, and the case of Marco v. Low, 55 Me. 549, and cases therein referred to was cited.] [2]

Almon A. Strout, for respondent.

FOX, District Judge. The question presented is one of jurisdiction. Can the district court sustain a bill in equity brought by an assignee in bankruptcy in this district against a citizen of Massachusetts not found in this district and who has no property therein, the bill being instituted to recover back the amount received from a preference in fraud of the act by the respondent obtaining a judgment against the bankrupt before the supreme court of this state and collecting the same within four months of the commencement of proceedings in bankruptcy, the bankrupt being known by the respondent to be insolvent? Service of the subpœna was made on the respondent in Massachusetts, and he appears and objects to the jurisdiction of the court.

By the judiciary act it was provided "that no person shall be arrested in one district for trial in another in any civil cause before the circuit or district court, and no civil action shall be brought before either the circuit or district courts against an inhabitant of the United States by any original process, in any other district than that whereof he is an inhabitant or shall be found at the time of serving the writ."

In Picquet v. Swan [Case No. 11,134], Judge Story, in a very elaborate opinion, announced as the result of his examination "that by the general provisions of the laws of the United States, the circuit courts could issue no process beyond the limits of their districts; that independent of positive legislation, the process can only be served upon persons within the same districts."

In Toland v. Sprague, 12 Pet. [37 U. S.] 329, the supreme court of the United States held, that merely by an attachment on trustee process of the estate of a defendant who resided in Gibraltar, the circuit court did not acquire jurisdiction over the party; that the circuit court of each district sits within and for that district, and is bounded by its local limits, and that whatever may be the extent of their jurisdiction over the subject matter of suits in respect to persons and property, it can only be exercised within the limits of the district. Congress has not in terms authorized any original civil process to run into any other district, with the single exception of subpœna for witnesses, and the court say, "we think that the opinion of the legislature is thus manifested to be, that the process of a circuit court cannot be served without the district in which it is established without the special authority of law therefor."

In Herndon v. Ridgway, 17 How. [58 U. S.] 424, the supreme court decided that the district court in Mississippi, which probably had the jurisdiction of a circuit court, could not entertain a bill to compel parties to interplead who are not found in the district; that jurisdiction over parties is acquired only by service of process within the state, or by a voluntary appearance.

These authorities are conclusive that this court, prior to the passage of the bankrupt act, did not have the jurisdiction claimed for it; and I do not understand it to be very strenuously contended by the complainant in his learned argument, that the district court derived the authority from the judiciary act or any other law of congress, than the bankrupt act itself. He argues, that this authority is found in the first and second sections of the act, conferring, as he says, on this court exclusive jurisdiction in all matters pertaining to the estate of the bankrupt, subject to a concurrent jurisdiction in certain matters with the circuit court under the provisions of the second section. For the purpose of this inquiry it may be conceded, that the district court in which the proceedings in bankruptcy are originated, has within its district exclusive jurisdiction over the estate of the bankrupt, although many of the state courts, under the present as well as under the former act, have sustained actions brought by assignees for the recovery of debts due to the estate, as well as for the conversion of property by transfers in fraud of the bankrupt act. Beals v. Quinn, 101 Mass. 262;

[2] [From 6 N. B. R. 558.]

Forbès v. Howe, 102 Mass. 427; Peiper v. Harmer [8 Phila. 100].

This concession does not control or even afford us much aid in reaching a conclusion upon the question now before us, as the claim here is not that the district court has exclusive jurisdiction of bankrupt matters within its own district, but that it is not limited by its own district, and may extend beyond its territorial limits and by its process bring before it parties from the most remote state in the Union. Such authority should be conferred by positive direct legislation, and cannot be derived from inference or implication, or from any general indefinite expressions found in the law.

The first section of the bankrupt law confers and defines the jurisdiction of the district court, "that the several district courts of the United States be, and they hereby are constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy."

In the opinion of the court, the words "in their respective districts," found in this provision of the act are not without effect; they must receive their usual ordinary signification, and it is believed, manifest a purpose and intent in congress to restrict and limit the authority and jurisdiction of the district courts in bankruptcy within their own districts in accordance with the practice as it then was, and not to confer upon them a jurisdiction throughout the United States in utter conflict with all prior legislation and the settled policy of congress. The jurisdiction in bankruptcy is conferred on the district courts by the expression, "they shall have original jurisdiction in their respective districts;" this is the grant; by it alone it has jurisdiction and authority; and whilst its authority does extend to all matters in bankruptcy, and there is no limit to the subject matter over which the court has jurisdiction, it is expressly confined and restricted in its exercise to the limits of its own territory, and enjoys no other or greater power or authority outside of its district than it had before the bankrupt act was passed; and it seems necessary to utterly reject and expunge from the provision these words of limitation, prescribing its own district as its bounds and extent of its jurisdiction, before it can be declared that by this grant, a jurisdiction is bestowed on the court co-extensive with the Union.

It is said that these words do not limit the jurisdiction, but only require that the court shall act within its own district; that in the exercise of its jurisdiction it has control over all matters and proceedings in bankruptcy, and after a specific enumeration of certain matters, that the first section of the act declares "that the jurisdiction shall extend to all matters and things to be done under and by virtue of the bankruptcy until the final distribution and settlement of the estate and the close of proceedings in bankruptcy." This language must be taken in connection with that before cited, and is controlled by it, and cannot be considered as extending the jurisdiction of the court beyond its district. If the construction put by the court upon the grant to the district courts "of original jurisdiction in their respective districts" is erroneous, I am still of opinion, that this language, broad and comprehensive as it is, extending its jurisdiction to all matters and things to be done under the bankruptcy, should not be held to authorize it to summon before it parties from without its district.

If congress had intended to grant such unlimited authority to the district courts, as to authorize this court sitting in Maine to issue its process and summon before it a citizen of California or Oregon, it is believed that clear, positive, unambiguous language would have been employed, manifesting by an express grant beyond all question that such was the intent, and not by any general uncertain legislation here authorize a practice in utter conflict with the policy of all prior legislation. The language employed in the first section was proper and necessary to confer on the district court full and complete jurisdiction over the estate of the bankrupt; it is none too broad and comprehensive in its relation to the subject matter, and there does not appear to be any occasion for giving to it a construction which will extend the jurisdiction of the courts so much beyond its well established boundaries.

In repeated instances it will be found that general language of this nature has been employed by congress in conferring upon the federal courts jurisdiction, and in every instance have the courts held, notwithstanding the generality of the language, that they were restricted to their own respective districts. In Picquet v. Swan [Case No. 11,134], before cited, Judge Story says, "The process acts have prescribed the forms of process and modes of service to be according to the state jurisprudence; but they do not appear to me to be intended to enlarge the sphere of jurisdiction of the circuit courts. I cannot judicially say that the general phraseology of these process acts ought to receive a more extensive interpretation so as to break down or interfere with the policy of the judiciary act, founded as it seems to me on principles of public law, public convenience and immutable justice."

In Toland v. Sprague [Case No. 14,076], it was claimed that congress, having adopted the forms of writs and modes of process in the several states, had thereby authorized the circuit court of Massachusettts to take jurisdiction by trustee process against a non-resident not found in the district; but the supreme court held, that the acts of congress, adopting the state process, adopt the form and mode of service only so far as the persons are rightfully within the reach of such process,

and did not intend to enlarge the sphere of the jurisdiction of the courts.

The case of Ex parte Graham [Case No. 5,-657], was a writ of habeas corpus to discharge from imprisonment the petitioner, who had been arrested in Pennsylvania on a warrant against him in a prize cause issued by the circuit court of Massachusetts. Judge Washington says:

"The question turns upon the authority of the district or circuit court of one district to issue its process into any other district to compel the appearance of a person residing or found within the latter jurisdiction before the court from which the process issued, or to stand committed for any alleged contempt of that court. It is admitted that these courts, in the exercise of their common law and equity jurisdiction, have no authority generally to issue process into another district, except in cases where such authority has been specially bestowed by some law of the United States. These provisions (Act 1789 [1 Stat. 73]) appear manifestly to circumscribe the jurisdiction of those courts, as to the person of the defendant, by the limits of the district where the suit is brought, and that the process of those courts was considered by the legislature to be bounded by the same limits is obvious from the subsequent acts passed. But it has been argued, that these restraints are incompatible with the essential jurisdiction of an admiralty court, more especially in prize causes. That the laws of the United States authorize the distinction which is contended for, has not, and it is confidently believed cannot be shown. It is true that the 9th section of the judiciary act gives to the district court exclusive original cognizance of all causes of admiralty and maritime jurisdiction without limitation; and it is not less true that the 11th section of the act gives to the circuit court original cognizance of all suits of a civil nature at common law and in equity, where an alien is a party or the suit is between a citizen of the state where the suit is brought and a citizen of another state, equally unlimited except as to the amount. But the jurisdiction of these courts, though unlimited as to the subject matter of which they have cognizance, by any express declaration of the legislature is nevertheless limited in point of locality, as well by the general principles of law which our courts acknowledge as rules of decision, as by the express provisions of the 11th section. As to the first, it will be acknowledged that there is no law of congress which limits the jurisdiction of the courts by the nature of the suits of which they have cognizance. By what law then is it that actions of ejectment, dower, &c., can be brought only in the district where the land lies? If the defendant be served with process in the district where the suit is brought, neither the 11th section nor any other provision in the act of congress has restrained the jurisdiction of the court in the supposed cases. The only answer to the question is, that the want of jurisdiction is the result of certain general principles of law acting upon the particular subject. In like manner, the jurisdiction of these courts when sitting in admiralty or prize causes is limited by those general principles which apply to courts of admiralty in England and the United States, as well as in other countries. Though bounded only by the nature of the causes over which they are to decide, and not in any respect by place, it is nevertheless essential to the exercise of this jurisdiction by any particular court, that the person or thing against whom or which the court proceeds should be within the local jurisdiction of such court;" etc.

This extract from the opinion of that learned judge sets forth so clearly by illustration and argument that the authority now claimed for the district court does not exist, that I have preferred to present it at length in the very words of the court, rather than in any way to detract from its effect by any abridgment of it. The judiciary act gave to the district court exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, without qualification or limitation of any kind; this language was as comprehensive as any to be found in the bankrupt law, and yet, the court had no doubt that its jurisdiction was limited and bounded by the locality of the district, and this decision should control the result of the present suit.

It is urged that if the district court does not possess this power and authority, an assignee is without remedy to enforce his claims in behalf of the estate against nonresidents of his district and not found therein. But such, I apprehend, will not prove to be the case, as it is shown that the state courts are ready to exercise jurisdiction over their own citizens in suits against them in behalf of assignees in bankruptcy; and in most cases the authority of the circuit court, in the district where the delinquent resides, could be appealed to by the assignee, as he would ordinarily be a citizen of another state; and if these should not afford the needed redress, congress could very easily supply the deficiency by conferring on the several district courts authority to sustain suits by assignees from other districts auxiliary to the original proceedings in bankruptcy.

I am satisfied that the authority here claimed for the district courts to issue their process against parties in remote districts would be attended with the most dangerous consequences, and would frequently prove an instrument of oppression and extortion; and if it did exist and was frequently called into exercise would soon overthrow the bankrupt act. Assignees having nothing personally at risk, as the expense would ordinarily be a charge upon the estate, would, I have no doubt, very frequently institute proceedings in their own district against citizens of other

remote districts, with whom the bankrupt may at some time have had dealings, trusting to the defendant's willingness to pay a considerable amount in the way of compromise rather than be subjected to the expense and vexations of a protracted law suit at a distance and in a place where he may be a stranger and unknown, and in which, if he proved successful, he would necessarily incur large expenditures which are not recompensed in any taxation of costs. In some instances the defendant might be arrested by the marshal of the district where he resides and thrown into prison, and there detained a long time to await the result of a controversy in a distant district, and to which he was debarred from giving his personal attendance by reason of his imprisonment. The whole proceeding in the exercise of such a jurisdiction would be attended with difficulties, which as Judge Washington in the case before cited says, "nothing but an act of congress can remove." I hold in the language of Mr. Justice Story, that this limitation of the jurisdiction of the court "is founded on principles of public law, public convenience, and immutable justice;" and I trust the day may never come when any such baneful authority will be conferred on this or any other court.

No decision has been cited sustaining the position of the complainant, and the opinion of Benedict, J., in Re Hirsch [Case No. 6,529], is apparently against it. In Markson v. Heaney [Id. 9,098], Dillon, J., alludes to the point, but refrains from giving any opinion upon it.

The bill sets forth that the fraudulent preference obtained by respondent was by means of a judgment recovered by him against the bankrupt, before the supreme court of the state, and which was paid within four months of the commencement of bankruptcy proceedings. Service of the subpœna in the present suit was made on the attorney who acted for the defendant in obtaining this judgment, and it is argued that the defendant, having resorted to and availed himself of the courts in Maine to obtain this fraudulent judgment, continues subject to the authority of the courts in this state including the district court in bankruptcy, and cannot withdraw from the state with the fruits of his judgment without remaining amenable to the courts in any ulterior proceedings arising from his original suit.

The complainant through his learned counsel relies on Marco v. Low, 55 Me. 549, in which it was decided that the supreme court of Maine could, as a court of equity, enjoin the respondent from further prosecuting in that court, as a court of law, a writ of entry in favor of the respondent against the complainant, notwithstanding the respondent may not have resided or personally been within the state since the commencement of the bill. With that decision I entirely concur, and the principle on which it rests has been repeatedly sustained by the federal courts.

In Freeman v. Howe, 24 How. [65 U. S.] 460, it is stated in the opinion of the court, "The principle is, that a bill filed on the equity side of the court to restrain or regulate judgment or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under mesne or final process, is not an original suit, but auxiliary and dependent, supplementary merely to the original suit out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties." So Judge Story, in Dunlap v. Stetson [Case No. 4,164], says: "Such suits are not original, and are properly sustainable in that court which gave the original judgment and has it completely under its control."

This jurisdiction attaches only to the court in which the original suit is, or was pending, and the present is the first attempt, so far as this court is advised, to claim that a citizen of another state, who has recovered in a state court an inequitable judgment, thereby conferred on the federal courts, in the district in which the judgment was recovered, jurisdiction over him with authority to sustain a bill in equity against him in behalf of the defendant in the original suit, although not found in the district, and afford such redress as equity and good conscience might ordinarily require, if the original suit had been instituted in the federal court instead of the state court.

Bill dismissed.

PAINE (FOX v.). See Case No. 5,014.

Case No. 10,675.

PAINE v. The NEPTUNE.

[The case reported under above title in 5 N. Y. Leg. Obs. 293, is the same as Case No. 10,120.]

PAINE (RUDD v.). See Case No. 12,108.

PAINE (SIMON v.). See Case No. 12,873.

Case No. 10,676.

PAINE et al. v. WRIGHT et al.

[6 McLean, 395.] [1]

Circuit Court, D. Indiana. May Term, 1855.

JURISDICTION—CITIZENSHIP — RELIEF AGAINST ILLEGAL TAXATION — FOLLOWING STATE DECISIONS—TAX ON RAILROAD PROFITS.

1. Where a portion of the stockholders are citizens of other states, they may seek relief in the circuit court against an illegal taxation of their property by a state, although there be no allegation that the tax is in violation of the constitution or laws of the United States. And in such case, the corporation doing its business in the

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

state, in order to obtain relief, may be made defendants.

2. The circuit court will give relief under the laws of the state, the same as the state court. And if the construction of the tax law has been fixed by the supreme court of the state, such decision will constitute a rule of decision for the circuit court.

[Cited in Stansell v. Levee Board of Miss. Dist. No. 1, 13 Fed. 851.]

3. A tax can be just and equal on railroad corporations only by taxing the profits.

4. The investments in such an enterprise are materially different from investments in real estate.

In equity.

Barbour, Porter & Yandis, for complainant.

Walpole, McDonald & Henderson, for defendants.

OPINION OF THE COURT. This bill is filed by a great number of persons represented to be citizens of other states than Indiana, and stockholders in the Indianapolis and Bellefontaine Railroad Company, to an amount exceeding sixteen thousand dollars, against the president and directors of said company, whose place of business is in the state of Indiana, and William Wright, treasurer of Marion county, in Indiana.

The controversy arises on the amount of taxes assessed on the stock or property of the railroad company. The secretary of the company returned, under oath the stock of the company, amounting to $335,367 90 in value, on which the legal tax was assessed by the auditor, and a duplicate made out for the taxes of 1853, which was handed to the treasurer of the proper county, and which tax the complainants allege was fully paid to the collector. The county auditor was directed, subsequently, by the auditor of state, to institute an inquiry whether a full return of stock, under the tax law of the state, had been made; and, on inquiry, the county auditor reported that instead of the value of the stock returned by the secretary of the company, which omitted the land owned by the company by a misapprehension of the law, he should have returned $799,000 in stock, &c., for taxation; and that the auditor decided there should be added to the sum returned $383,733, and that an additional tax on the sum omitted should be assessed, which added to the tax at first assessed, the sum of $2,533 19. The bill prayed that the treasurer might be enjoined from the collection of the above sum of $2,533 19, as an illegal assessment.

An objection to the jurisdiction of the court is made in the answer. The complainants are citizens of different states, none of them being citizens of Indiana, so that on that ground there would seem to be no just exception to the jurisdiction. The complainants sue as stockholders of the railroad; and they make the treasurer of Marion county, who collects the tax, defendant, and also the president and directors of the railroad company. No substantial objection is perceived to this form of suit. The stockholders own a large amount of stock, and they allege that an illegal tax has been imposed on the stock of the company, injurious to the stockholders, and on this ground they ask relief against the collector of the tax, and that he may be enjoined from collecting the same. It is true the railroad could not, in its corporate name, bring a suit in this court against the collector, because the business of the company is transacted in the state of which the defendant is a citizen. But the complainants, being citizens of other states, may claim the protection of their stock against an illegal taxation, and make the corporation a defendant, and enjoin it from paying over the tax; and the corporation being made a defendant, being a party on the record, the same relief may be given to it as if it had been made a complainant. This principle is exemplified in a case where a plaintitff, being a citizen of another state, sues in the federal court, making the person against whom the relief is prayed, and others, citizens of the same state, who are jointly interested in the relief prayed. The rule is, that the court having jurisdiction, relief may be given to the parties on the record, whether plaintiffs or defendants, as the principles of equity shall require. The corporation, however, should have answered, admitting the facts stated in the bill, and praying that equity may be done. This, however, under the view taken by the court, is not material.

This case is brought under the original jurisdiction of this court, on the ground that the controversy arises between citizens of different states. It does not come before us in the exercise of an appellate power, but as a court having concurrent jurisdiction with the state court, in giving effect to the laws of the state. And the question is, whether the tax law for 1853 requires the tax to be assessed upon the entire property of the railroad company, or upon what, in common language, constitutes the stock upon which dividends are paid. The 32d section of the tax law, 1 Rev. Stat. 113, makes it "the duty of the president, secretary, agent, or other proper accounting officer of every railroad, to furnish to the auditor of the county, where their principal office is situated, a list of all the stock in said company, and its value, attested by the oath of the officer making the same; and shall furnish a statement dividing the aggregate amount of all the stock of such company amongst the several counties in proportion to the value of the superstructure, buildings, and real estate of such company in each county; and if any such company shall not have in this state its principal office for the transaction of its financial business, it shall be the duty of the president, cashier, secretary, treasurer, engineer, or constructing agent of such company to furnish the auditor of the county, where the

work first enters the state, a statement, under the oath or affirmation of the officer making it, specifying the amount and value of all real estate owned by such company within this state, the amount expended in the construction of said work within the lines of the state, and the amount invested in machinery and rolling stock of every kind; which said machinery and rolling stock shall be assessed for taxation in the same proportion to its total amount, that the length of line of the work in this state completed, bears to the entire length of the line of said work completed." From the language of this section, there would seem to be no doubt that the legislature intended to tax the entire property of the railroad company; and that a list, to be furnished to the auditor of the county, "of all the stock in said company, and its value, attested by the oath of the officer making the same," was intended to include the whole property of the company. And this is the construction given to this section by the supreme court of Indiana, in Dunn v. Hamilton, Auditor of Marion County, in 1854. That decision of the supreme court of the state constitutes a rule of decision for this court. It has long been so settled in the federal courts. By the 37th section of the tax act, if the company shall fail to make a return of its property for taxation as required, "the proper county auditor shall proceed to make out such list from the best information he can obtain," &c. Now, if an imperfect list shall be made, the power here given will enable the auditor to act, by making out a new return, or correcting the errors of the one returned. This is within the purview of the above section.

Railroads have contributed more to the facilities of intercourse, the interest of agriculture, to build up towns and extend our internal commerce, than all other improvements. But, in the construction of these works, heavy expenditures have been incurred, and large debts contracted by way of loans of money and otherwise, so that the companies are ill able to bear the pressure of a heavy taxation. The expense of running the cars, making repairs, and meeting contingencies is very great; and when to this shall be added the interest on debts incurred, little or no profit can be realized to the stockholders for some years after the road is in operation. Lands, of necessity, are often received in payment of stock. These lands are taxed, the same as lands held by an individual, on the plausible ground that the lands of a corporation should be taxed the same as the lands of an individual. But these lands are never held by the corporation for the purposes of culture, but to be converted into money, or for the occupancy of the road. They do not, in general, as the lands of an agriculturalist, afford a profit by an increase of value. But the corporation is taxed for the lands, and also for the structures made by borrowed capital. This, in effect, is a taxation on borrowed money, and is an addition to the interest.

In all enterprises intimately connected with the public interest, such as railroads, banks, &c., which require a large investment of capital, there is no mode of taxation so equal or just as a tax upon the profits. Such investments are subject to many contingencies, which do not affect real estate. No estimate can show the expenditure required on a railroad, nor the losses of a bank. As common carriers, the railroad is responsible for injuries done to persons and property, through the neglect or want of skill in its agents; and experience has shown that juries are inclined most liberally to compensate all who suffer, by finding liberal, if not extravagant damages. Banks are liable to imposition and losses through the failures of borrowers, counterfeit notes and drafts, which no one can foretell. These casualties place at greater hazard the monies invested in railroads and banks than in real estate; and, although these establishments may be owned by individuals, yet they are so intimately connected with the public interest and welfare, that stockholders are distinguishable from the owners of other property. Taxation should be so laid on each classification of property, as to operate equally. Now, nothing can be more unequal than the above taxation of railroads. The cost of the work affords no criterion in regard to the profits. This depends upon location and other circumstances, which have no connection with the cost of construction; and yet all of them afford more or less public accommodation. These great improvements are made, generally, with the means afforded by capitalists of other states or countries, and we are enriched by the expenditure. These roads will not be kept in good repair, and be safe for passengers, unless the stockholders shall receive a reasonable interest for their advances. And this, and an entire equality of taxation, can only be attained by a charge on the profits. From indications not to be mistaken, these great lines are in danger of being embarrassed, if not destroyed, by taxation.

Believing that the tax in this case is not unconstitutional under the federal or state constitutions, and seeing that the tax law has been construed by the supreme court of Indiana against the right set up by the complainants, the bill is dismissed at the complainants' cost, and the injunction is dissolved.

PAINT, The J. G. See Case No. 7,318.

PAINT, The JOHN G. See Case No. 7,346.

PALESTINE, The. See Case No. 2,563.

Case No. 10,677.

The PALLEDO.

[3 Ware, 321.] [1]

District Court, D. Maine. July, 1865.

SEAMEN—WAGES — DISOBEDIENCE — MEANS USED BY MASTER TO OVERCOME SAME.

1. The disobedience of a seaman is a very serious fault, and if persevered in is a forfeiture of all claims for wages.

2. If the master attempts to overcome the refusal of duty, he must be careful what means he employs. But the general conduct and behavior of the seamen may be fully inquired into.

[Cited in Thompson v. Herman, 47 Wis. 607, 3 N. W. 581.]

In admiralty.

Mr. Smith, for libellant.
Mr. Clifford, for respondent.

WARE, District Judge. In December last, the libellant shipped on board the Palledo. for a voyage from Portland to Matanzas and back to her port of discharge in the United States, and sailed on the 20th of that month. While on the outward voyage, on the 25th, at 4 o'clock p. m., when he was relieved from the wheel, he was ordered by the master to coil a hawser, which lay in the boat, to which order the libellant replied, "that he thought he had been long enough on the deck, and that it was his watch below; that he had been on deck nearly all the night before, and every night before since he left Portland." Capt. Marwick, and the mate, Leland, then seized him and threw him down on some lumber, and the master struck him two or three blows with his fist, and then ordered the mate to go to his cabin and bring a pistol, and ordered the mate several times to shoot him. Leland pointed the pistol at his abdomen, being three or four yards distant from him, and snapped it, but the cap only exploded without communicating fire to the charge. The master then ordered the mate to go to the cabin for another pistol, and while he was gone, he, the libellant, got into the rigging. The libellant then came down and took an axe, and told the master that if the pistol missed fire he would not miss his mark. That previous to this time he had offered no resistance and no disobedience to the master's orders. The answer admits the order, but adds that the libellant utterly refused to obey it, with profane and insulting language, saying he would be damned if he did, and all the officers on board could not compel him to obey; that he then ordered the mate to go to the cabin for a pistol, but that it was known to him and all the officers that the pistol was not loaded, and that he ordered it merely for the sake of intimidating the man, and did not intend any personal injury, and he denied throwing him down or inflicting any blow.

The libel is brought to redress this injury, and a number of witnesses have been examined on one side and the other. In his answer, the master says, that to his knowledge, and that of all the officers, the pistol was not loaded, and brought up only for the purpose of intimidation, and this is, I think, satisfactorily supported by the evidence. I think the master had a right to do this, but it was certainly full of hazard, for if a pistol was used on this occasion, the natural presumption would be that it was loaded. It is only on clear and satisfactory proof that the contrary would be admitted. When McCarty was ordered to coil the hawser, at the time when he was relieved from the wheel, it is clear from all the evidence that he refused. He does not deny it himself, but says he did it in a respectful manner, and with the excuse that he had been at work all the day, and most of the previous night, on deck, and this is partially supported by other evidence; on the other hand, it is testified that he answered in profane and disrespectful language, that he would be damned if he did, and all the officers could not make him. During the outward voyage they had rough weather, and all hands were pretty constantly at work, but it does not appear that McCarty was called on more than others, and that there was no peculiar hostility to him, that he was put to no harder service, or received worse treatment than the rest of the crew. A deliberate refusal to do duty has always been considered as one of the highest offences by the maritime law. If persevered in it puts an end to all authority and order on board of the vessel, and not only puts at hazard the ship, but the safety and lives of all on board. The power to command must reside somewhere, and the law has placed it in the master. He may exercise it properly, or harshly, and unjustly, and for this he is answerable, when he returns to port. But except in very peculiar cases, he must, at the time, be obeyed, and to enforce his orders the law gives him authority to use force. In exercise of this, regard must be had to the occasion and to the circumstances of it, and especially to the character and conduct of the seamen. Evidence on this subject has been pretty largely gone into, and without going over it in detail, the result is by no means favorable to the libellant. On the contrary, the balance, by a strong preponderance, is, that he was an uncomfortable and troublesome man; that he was, if not a practiced pugilist, not unwilling to try himself in that way; that he had great confidence in his strength and skill; and that his manners and carriage were such as might be expected from such a person. All this was well known to the master, and was proved at the trial. If he was thrown down, the injury was not severe, and no permanent damage resulted. On the whole, my opinion is that

[1] [Reported by Geo. F. Emery, Esq.]

the master acted with such moderation that he ought not to be answerable in damages.

The libel is dismissed, but without cost to either party.

Case No. 10,678.

In re PALMER.

[2 Hughes, 177; [1] 14 N. B. R. 437.]

Circuit Court, E. D. Virginia. May 31, 1876.

BANKRUPTCY — DISCHARGE—AMOUNT OF ASSETS—ATTEMPT TO EVADE STATUTE—FRAUD UPON THE LAW.

1. P., a bankrupt, whose assets are not sufficient to entitle him to his discharge, obtains the necessary consent thereto of more than one-fourth in number and one-third in value of his creditors, who proved their claims, and to whom he is bound as principal debtor. Desiring to obtain also the consent of M., another creditor, "to strengthen his application for discharge," he gives him a note for forty dollars, with security, and, in consideration thereof, M. signs the paper consenting to P.'s discharge. R. & Co., another creditor, oppose the discharge because of the above transaction with M. *Held*, that this transaction was a violation of section 29 of the bankrupt act [14 Stat. 531], and the discharge must be refused.

[Cited in Re Antisdel, Case No. 490; Re Douglass, 11 Fed. 406.]

2. The right of a bankrupt to his discharge depends entirely upon the statute, and he can only demand it when he has complied with all of the prescribed conditions. If he has not complied with them all, his position is that of one who is unable to bring himself within the provisions of an act granting discharge from debts upon certain conditions.

3. The courts are as much bound by the provisions of the act as the bankrupt himself, and if it appear, in the regular course of proceedings, that an applicant for a discharge has failed in any particular to perform his duty as a bankrupt, the application must be refused.

[Cited in Re Antisdel, Case No. 490.]

4. It is not the necessity of the act which makes it a fraud upon the law, but the statute itself.

5. Perfect equality among creditors is the fundamental principle upon which the bankrupt law proceeds; anything which defeats that is a fraud upon the law.

6. The obligation incurred to one creditor, as the price of his assent (to a discharge), is as much a fraud upon those who had before signed the certificate of assent as upon those who had not.

7. The act of preference placed the bankrupt outside the statute, and made it the duty of the court to withhold the discharge.

8. The court is not to inquire whether the act complained of has been productive of harm, but whether it has been done. If done, one of the conditions precedent to the discharge has not been performed, and the case is not brought within the statute.

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

E. V. Palmer filed his petition in bankruptcy on June 30th, 1874, in the United States district court for the Eastern district of Virginia, at Richmond. His application for discharge was opposed by one of his creditors, Rogers & Co., they alleging that his assets were not equal to thirty per centum of the debts proved against him, upon which he is bound as principal debtor. The deficiency of assets was certified by the register to the court in the certificate of conformity, which also states that in all other respects the register finds the proceedings in conformity with the requirements of the act. Thereupon the bankrupt procured and filed a paper, executed by one-fourth in number and one-third in amount of his creditors who had proved their debts, consenting to his discharge without his being required to pay or have assets equal to thirty per centum of the claims proved against his estate, and the register reports that the following named creditors have proved their debts, i. e., Rogers & Co., for five hundred and fifty-five dollars and ninety-seven cents; Gibson & Crilly, for fifty-one dollars and sixty-two cents; Carrington & Morton, for eighty-two dollars and thirty-four cents; Charles White, seventy-five dollars; L. S. Baugham, five hundred dollars; total, one thousand two hundred and sixty-four dollars and ninety-three cents. That of these the first two oppose the bankrupt's discharge, because the assets are not equal to thirty per centum of the debts proved against him; but the three latter, who are more than one-fourth in number, representing more than one-third in amount of all the debts proved against the bankrupt, have united in assenting to his discharge. The report was dated February 9th, 1876, and on the same day Rogers & Co., by their counsel, James N. Dunlop, indorsed upon it an objection to Palmer's discharge, the ground of which was, that the signature of one of the creditors to the consent paper just referred to was procured by pecuniary considerations, or obligations contrary to the bankrupt law, and upon their application the bankrupt, Palmer, one of the signing creditors, Morton, and the bankrupt's agent or attorney, Atkinson, were examined by the register, and gave the following evidence tending to sustain the charge of Rogers & Co.:

The bankrupt, Palmer, in answer to a question as to whether he had obtained any creditor's assent to his discharge by any promise or any other consideration made to them in regard to the payment of their debts, admitted that when Morton was asked to sign the consent paper, he said he did not think he ought to lose all of his debt; that he (the bankrupt) did then promise one-third, and gave him his note for that amount, indorsed by Mrs. Baugham; but he also said that he had always intended to pay this debt when he was able; and, in answer to the register's question, "whether he did not know, when he gave Morton this promised note, that it was in violation of the bankrupt act, and would militate against his discharge," he said he did not know it.

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

One of the signing creditors, H. S. Morton, testified that he had been requested by Mr. T. Atkinson to sign the consent paper in controversy; but that he had replied that he was hand and glove with Mr. Dunlop (counsel for Rogers & Co.) in opposing the discharge. That Atkinson then told him that they had a sufficient number of consents to the paper anyhow; that he (witness) then said that if Palmer wants his creditors to consent to his discharge, he ought to be prepared to pay them something on their debts; that Atkinson repeated that they had names enough to the paper, but that he would go and see Palmer, with whom he soon afterward returned, and said, "We will give you fifty cents on the dollar;" that, after some inquiry as to the exact amount of the debt, witness agreed to take Palmer's negotiable note, with Mrs. Baugham as indorser, for forty dollars, which he there and then filled up and gave Palmer to have indorsed, and signed the consent to the discharge; and that most unquestionably the promise of the note with the indorser was the inducement to him to consent to the discharge, without which he would not have agreed to it, as he had already told Atkinson that he had appeared in court with Mr. Dunlop for the purpose of resisting Palmer's application. On cross-examination this witness stated further that Atkinson had told him, when he first called to ask him to sign the consent paper, that they had a sufficient number of names to the paper without his; but that he wanted to get as many as he could, and that Palmer had often expressed a desire to pay witness's claim, and would pay it as soon as he could get out of his trouble. Witness also said that at the same time he signed the consent paper, he filled up a blank form of a negotiable note, and gave it to Palmer to sign and get the indorsement, and that this note was subsequently returned to him duly executed, and that he would never have consented to the discharge but for this consideration.

T. Atkinson, after testifying as to some matters not bearing upon this issue, and not alluded to on the hearing, corroborated Mr. Morton's statements generally, and furthermore said that he was aware when he applied to Mr. Morton that there were enough signatures to the consent paper without his, but that he desired his name to strengthen the application.

Upon this record Palmer went to a hearing upon his petition for discharge. The case was heard by Judge Hughes, February 10th, 1876, who made the following order: "The signature of Henry S. Morton to the paper consenting to the discharge of the bankrupt was unnecessary, a sufficient number of creditors having already signed it. The bankrupt having already become entitled to his discharge, an opposing creditor should not be allowed to defeat it by exacting or accepting a new promise for his claim. The discharge is granted. R. W. Hughes, District Judge."

From this order Rogers & Co. appealed to the supervisory jurisdiction of the circuit court, alleging the procurement of Morton's consent to the paper was a violation of the provisions of the bankrupt act, and that the district court should therefore have refused to grant the discharge. They filed their petition February 19th, 1876.

James N. Dunlop, for petitioners.
Chastain White, for bankrupt.

WAITE, Circuit Justice. No discharge can be granted under section 29 of the bankrupt act, "if he (the bankrupt), or any person in his behalf, has procured the assent of any creditor to a discharge, or influenced the action of any creditor, at any stage of the proceedings, by any pecuniary consideration or obligation." In this case the assets of the bankrupt were not equal to thirty per centum of the claims against his estate, upon which he was liable as principal debtor. In order to obtain his discharge it became necessary for him to procure the assent of one-fourth of his creditors in number and one-third in value. 18 Stat. 180.

The case shows that the debts proved amounted to one thousand two hundred and sixty-four dollars and ninety-three cents, and that the creditors were five in number. On the 3d of February, 1876, the bankrupt procured the required assent of two of his creditors having claims to the amount of five hundred and seventy-five dollars. He had then all that was necessary in number and value of creditors to entitle him to a discharge, notwithstanding the deficiency of assets. Before asking a hearing upon his petition for discharge, however, on the 7th day of February, he made application to another creditor, having a claim of eighty-two dollars and thirty-four cents, for his assent, and, in order to procure it, executed to him a note for forty dollars, with an indorser as security. On the 9th of February, he went to a hearing upon his petition for discharge, presenting a paper signed by three creditors assenting thereto. It was objected that the assent of one of the creditors had been procured for a pecuniary consideration or obligation. The court overruled the objection, and granted the discharge, upon the ground that the assent of the creditor to whom the compensation was paid or obligation given was unnecessary, as a sufficient number of creditors had already signed. The judge, in delivering his opinion, remarked that "the bankrupt having already become entitled to his discharge an opposing creditor should not be allowed to defeat it by exacting or accepting a new promise for his claim."

The testimony shows clearly that the bankrupt made application to the creditor for

his assent. This application was at first refused, but finally granted upon the execution of the note. There was no fraud or concealment on the part of the creditor. The bankrupt was desirous to obtain his signature, and for that purpose was willing to assume the required obligation. The right of a bankrupt to his discharge depends entirely upon the statute. He can only demand it when he has complied with all the conditions prescribed. The courts are as much bound by the provisions of the act as the bankrupt himself. If it appears in the regular course of proceedings that an applicant for a discharge has failed in any particular to perform his duty as a bankrupt, the application must be refused. His discharge is not forfeited, for he never had it. His position is that of one who is unable to bring himself within the provisions of an act granting discharge from debts upon certain conditions. Here it is unquestionable that a pecuniary obligation was incurred to obtain the assent of one creditor, before any attempt was made to use the assents which had before been given. It is not the necessity for the act which makes it a fraud upon the law, but the act itself. Perfect equality among creditors is the fundamental principle upon which the bankrupt law proceeds; anything which defeats that is a fraud upon the law. The obligation incurred to the one creditor, as the price of his assent, is as much a fraud upon those who had before signed the certificate of assent as upon those who had not. The act of preference placed the bankrupt outside the statute, and made it the duty of the court to withhold the discharge. The court is not to inquire whether the act complained of has been productive of harm, but whether it has been done. If done, one of the conditions precedent to the discharge has not been performed, and the case is not brought within the statute.

The order of the district court granting the discharge in this case is reversed, and the cause remanded, with instructions to refuse a discharge upon the showing made.

The following was the decree: "This cause came on this day to be heard upon the petition of M. M. Rogers and —— Rogers, partners, under the style of Rogers & Co., for a review of the order of the district court, entered on the 10th February, 1876, granting the bankrupt a discharge, and was argued by counsel, upon consideration whereof, it being the opinion of the court, for reasons set forth in a note in writing, filed with the papers in the cause, and ordered to be made a part of the record, that the bankrupt is not entitled to be discharged upon the showing made, the court doth adjudge, order, and decree that the order of the district court granting the discharge in this case be reversed, and the cause remanded, with instructions to refuse a discharge (upon the showing made), and that the petitioners recover of E. V. Palmer their costs by them about their petition in this behalf expended."

Case No. 10,679.

In re PALMER.

[18 Int. Rev. Rec. 84; 5 Chi. Leg. News, 557.]

District Court, E. D. Pennsylvania. 1873.

EXTRADITION—TREATY WITH GREAT BRITAIN—WHAT IS MURDER.

1. The lowest grade of inexcusable homicide is within the generic term murder, as used in the treaty of extradition, of 1842, between the United States and Great Britain.

2. The extradition of a fugitive being demanded under this treaty, the tribunal where he is found will not inquire as to the grade of guilt, and not being competent to acquit or convict, the warrant must issue.

3. Where a judge had ordered a warrant of extradition to issue, the secretary of state, upon a review of the case, refused to issue the warrant. and the accused was discharged.

This was a petition by the British consul at Philadelphia for the extradition of Benjamin Palmer, upon the charge of murder. By the depositions taken in the cause it appeared that Benjamin Palmer shipped on the bark J. B. Duffus on April 15, 1873, as boatswain or second mate. That on June 8, 1873, while the bark was at sea, the morning being squally, and the ship not steering well, the master ordered Palmer to lower the spanker. At the time this order was given it was Palmer's watch on deck. In his watch, among others, was John McDonnough, who, when the order was given, went to the throat halyards. The sail was lowered about half way down, when it jammed upon the mizzen mast. Palmer got on the spanker boom to clear the sail, when suddenly the gaff, weighing about five hundred pounds, got clear and was coming down by the run, he being immediately under it. The master seeing the danger, quickly called to him, "Look out, Mr. Palmer, the gaff is coming on you." Palmer instantly jumped from the boom on to the starboard side of the ship. McDonnough had left his position at the throat halyards, and was standing abreast of the mizzen rigging in the alleyway between the rail and the after house, on the starboard side of the ship. As Palmer jumped he and McDonnough came together; one of Palmer's feet struck McDonnough in the stomach and so injured him that shortly thereafter he died. As to whether or not Palmer kicked McDonnough, the depositions were somewhat contradictory. The master testified that as Palmer jumped "to save himself from going overboard, he caught the mizzen rigging with his hands, that brought his feet about opposite the stomach of McDonnough; the boatswain's feet came in con-

tact with McDonnough about his stomach." Four of the crew, however, agreed that the distance between where Palmer struck the ship when he jumped, and where McDonnough stood, was several feet; that the toe of Palmer's boot struck McDonnough, but whether it was accidental or purposely done, they could not say, except one man, who said it was "accidental out of passion." All of the witnesses agreed that Palmer had no quarrel with McDonnough, that he always acted kindly toward all the men, and that after McDonnough was hurt he endeavored to restore him.

The depositions being reported to the court, Silas W. Petit, Esq., and John R. Read, Esq., as counsel, appeared for the government of Great Britain, but made no argument, as the court did not desire to hear any, except on behalf of the accused.

J. Warren Coulston, Esq., counsel for Palmer, argued: (1) The proof in all cases under a treaty of extradition should be not only competent, but full and satisfactory, that the offence has been committed in the foreign jurisdiction, sufficiently so to warrant a conviction, in the judgment of the magistrate, of the offence with which he is charged, if sitting upon the final trial and hearing of the case. No magistrate should order the surrender short of such proof. Ex parte Kaine [Case No. 7,597]. (2) The court must pass upon the weight as well as the competency of the testimony, and a fugitive is to be surrendered upon such evidence only, as, being submitted to the jury, would probably secure his conviction of the offence alleged. In re Henrich [Id. 6,369]; In re MacDonnell [Id. 8,772]. No judge would sustain a verdict of guilty of any offence under the testimony in this case. (3) The treaty requires the specific application of the definitions to be conformable in particular cases to the jurisprudence and legislation of the respective places where the parties may be arrested; and likewise requires the application of local rules of decision, as to the sufficiency of the evidence. Muller's Case, 5 Phila. 292, etc. (4) The evidence is not sufficient to sustain the charge of murder. In the worst aspect of the case, it could only be manslaughter, which, under the laws of Pennsylvania, may be either voluntary or involuntary. Manslaughter is voluntary when it happens upon a sudden heat, involuntary when it takes place in the commission of some unlawful act. (5) It is clear that the extradition treaty between the United States and Great Britain (8 Stat. 576) does not apply to manslaughter. If this be doubtful, the court should follow the analogy of the act of congress of March 3, 1825 (4 Stat. 115), providing for the punishment of the crime of murder on the high seas, on board of an American vessel. It has been held that this act does not include the offence of manslaughter. U. S. v. Armstrong [Id. 14,467].

CADWALADER, District Judge. The homicide in question having occurred upon the high seas, in a British vessel, was committed within British jurisdiction. Whether it was an excusable homicide, and if not, what was the grade of guilt, are questions for the decision of a British tribunal. This does not preclude the observation that if a crime has been committed, it was of the lowest grade of inexcusable homicide. The offence in question was, nevertheless, if punishable at all, within the generic description of murder, as the word is used in the treaty of 1842. And, as no tribunal in the United States can exercise jurisdiction to convict or acquit, the warrant of extradition must be granted, if the application for it shall be insisted on. It may not be improper to add that, if the offence had been cognizable here, I would have admitted the accused party to bail during the hearing, because the peculiar circumstances of the charge would have justified such an exception from the ordinary course of procedure in cases of homicide.

I consider the application for extradition as made by Sir Edward Thornton, the diplomatic representative of the British government, though it is made in the name of the consul. It occurs to me that the consul may perhaps desire to communicate with Sir Edward Thornton before deciding whether to insist on the application for a warrant. The case may therefore stand over until Wednesday next, unless the accused party objects to the delay.

And afterwards, on Wednesday, the 25th day of June, A. D. 1873, the said consul praying that a warrant of extradition issue, it is issued accordingly, and is hereto subjoined. And all the said depositions, examinations, warrants, orders, and other documents, are therewith returned and certified by the said judge, at Philadelphia, in the said district, on the day last aforesaid.

"United States of America, Eastern District of Pennsylvania—ss.: To the Marshal of the United States: In the matter of Benjamin Palmer, charged with murder, on the British bark J. B. Duffus, on the high seas. This case having been heard before me, on petition of George Crump, Esq., acting counsel for her Britannic majesty at the port of Philadelphia, that the said Benjamin Palmer be committed for the purpose of being delivered up to justice, under the provisions of the treaty made between the United States and Great Britain on the 9th day of August, A. D. 1842. I find and judge that the evidence produced against the said Benjamin Palmer is sufficient in law to justify his commitment on the charge of murder, had the crime been committed within the United States. Wherefore I order that the said Benjamin Palmer be committed pursuant to the provisions of said treaty, to abide the order of the president of the United States in the premises. Given under my hand and the seal of said court, at Philadelphia, this twenty-fifth day of June,

A. D. 1873. (Signed) John Cadwalader, Judge. (Seal.)"

NOTE. After the evidence in the case had been certified to the secretary of state, the case was reargued before him by the counsel for the prisoner. The secretary of state finally refused to issue the warrant of extradition, and Benjamin Palmer was released from imprisonment. While the case was pending in Washington, the British minister, Sir Edward Thornton, raised the question whether the secretary of state has the right to refuse a warrant of extradition, after a judicial tribunal had certified, under the treaty, that the evidence was sufficient to sustain the charge made against the accused, and has called the attention of his government to the matter for the purpose of obviating the difficulty in the future, if possible.

Case No. 10,680.

In re PALMER.

[1 N. B. R. 213;[1] Bankr. Reg. Supp. 46; 6 Int. Rev. Rec. 45.]

District Court, S. D. New York. July 5, 1867.

COURTS—JURISDICTION—BANKRUPTCY—RESIDENCE.

A petition in bankruptcy filed in the Southern district against a debtor who resides and carries on business in the Northern district of New York, will be dismissed for want of jurisdiction.

[Cited in Fogarty v. Gerrity, Case No. 4,895.]

Goodwin & Faurot, attorneys on behalf of certain creditors in New York City, filed a petition in bankruptcy in the district court for the Southern district of New York, against James M. Palmer, who resides and has carried on business at Canandaigua, in the Northern district of New York. On the return of an order to show cause why a warrant should not issue before Judge Blatchford, on the 23d of July, the debtor's counsel raised the objection that the court in the Southern district had not jurisdiction. The facts of residence being admitted, and argument had, his honor held that his court had no jurisdiction, and dismissed the proceedings. The attorneys for petitioning creditors filed a petition here in order to have the question decided upon argument, there being a difference of opinion among the profession upon that point. They had, at the same time, filed a petition in the same case in the Northern district anticipating this decision.

Case No. 10,681.

In re PALMER.

[3 N. B. R. 283 (Quarto, 74);[2] 2 Am. Law T. 107, 1 Am. Law T. Rep. Bankr. 139.]

District Court, D. Wisconsin. 1869.

BANKRUPTCY—FRAUDULENT PREFERENCE — CHATTEL MORTGAGE—KNOWLEDGE OF INSOLVENCY.

A, B & Co., creditors, after having received information of the insolvency of C, accepted a chattel mortgage on his stock, subject to a prior mortgage and possession of D, another creditor. The evidence showed that C was insolvent, as represented to A, B & Co. C having been adjudged bankrupt, it was *held*, that A, B & Co.'s mortgage was fraudulent, and could not be paid out of the sale of the goods it purported to convey.

In bankruptcy.

MILLER, District Judge. Lathrop, Ludington & Co. presented their petition to the court, praying an order for the payment, by the assignee, of their debt against the bankrupt. The petition was answered by the assignee, alleging that the chattel mortgage given by the debtor to secure this debt was given in preference to these creditors, and was received by them in violation of the bankrupt law [14 Stat. 517]. It appears that the bankrupt was indebted to these creditors about one thousand four hundred dollars overdue, and to secure payment of the debt, he gave them six promissory notes, on the 24th day of October, 1867, payable in certain amounts monthly thereafter for six months, and also a chattel mortgage on his stock of goods expressed therein, "subject to two prior mortgages to A. E. Hill, on file in town clerk's office, and with condition that said Hill is to take, and does now take, and hold actual possession of said chattels mortgaged, as agent for said mortgagees, and holds possession as well under this as under his own mortgages."

The petition in bankruptcy was filed February 1, 1868. The mortgaged stock of goods was sold by the assignee pursuant to an order of court. The two mortgages to Hill, by order of court, have been satisfied out of the proceeds of sale. The debt of Hill amounted to about fifteen hundred dollars, of which a great portion was overdue at the date of this mortgage. And Hill at that time had the key and full possession of the store. George W. Chapman, the agent of Lathrop, Ludington & Co., knew of the lien of Hill on the goods, and of his possession, and accepted the mortgage, subject to the condition above recited. But he testifies that from Palmer's statement of his (Palmer's) affairs, he did not believe him insolvent, nor had reasonable cause to believe his insolvency.

Bruce testifies that, in the city of New York, in the fall of 1867, he informed Ludington that Palmer could not last to exceed six months, and advised him to have his claim collected as fast as possible. Very soon after that conversation, Chapman came to Oconomowoc, and accepted the mortgage. Chapman believed Palmer had adequate means for the full payment of his debts on time. Palmer gave the notes and mortgage to Lathrop, Ludington & Co. for the purpose of gaining time, not being then able to pay over one hundred and seventy-five dollars of the debt, and a great portion of his debts were then overdue. The petition in bankruptcy, filed

[1] [Reprinted from 1 N. B. R. 213, by permission.]

[2] [Reprinted from 3 N. B. R. 283 (Quarto, 74), by permission.]

three months after the date of the notes and mortgage to Lathrop, Ludington & Co., shows Palmer to have been in a state of insolvency when the mortgage was given, and proves that the notice of Bruce to Ludington was correct. Palmer testifies that he might have paid his debts in time, if Lathrop, Ludington & Co., had not crowded him. The bankrupt act prohibits the giving of preferences by an insolvent debtor to any of his creditors, and declares such preference void where the person receiving a preference has reasonable cause to believe the debtor insolvent. Insolvency is defined to be the state of a person who has not property sufficient for the full payment of his debts. Wheat. Law Dict. In Buckingham v. McLean, 13 How. [54 U. S.] 167, the court declares insolvency to mean an inability to pay as debts should become payable, whereby the debtor's business would be broken up. The evidence shows that Palmer was in a state of insolvency when he gave the notes and mortgage to Lathrop, Ludington & Co.; Ludington was notified of Palmer's embarrassed condition immediately anterior to the date of the securities. This claim was overdue, on which time was extended from one to six months. The agent was apprised of Palmer's inability to pay a large amount of overdue debts, and he accepted the mortgage, subject to Hill's prior mortgages, and absolute possession and control of the stock. It is evident from Palmer's schedules, annexed to his petition in bankruptcy, that when he gave the notes and mortgage to Lathrop, Ludington & Co., he was largely insolvent, and which the sale of his goods and property by the assignee clearly demonstrates. The mortgage in this case not being made by Palmer in the usual and ordinary course of his business, the fact is, by the bankrupt law, declared prima facie evidence of fraud, which the mortgagees have not removed or overcome. They and their agent had reasonable cause to believe Palmer insolvent when they accepted the mortgage.

The petition of Lathrop, Ludington & Co., for payment of their claim by the assignee out of the proceeds of the sale of the goods and merchandise covered by the mortgage, is denied.

Case No. 10,682.

In re PALMER.

[3 N. B. R. 301 (Quarto, 77).] [1]

District Court, D. Kansas. 1869.

BANKRUPTCY—DISCHARGE — OPPOSITION BY CREDITOR—DEBT NOT PROVED—STATUS OF OPPOSING CREDITORS.

A firm, M., W., R. & Co., duly appointed B. & C. their attorneys, and proved debt in bankruptcy. Thereafter S. & H., a law firm, duly entered appearance for W., R. & Co., creditors, and filed specifications in opposition to bankrupt's discharge, signed (in the handwriting of S.) B. & C., and S. & H., attorneys for the opposing creditors. W., R. & Co., had proved no debt. *Held*, the objecting creditors had no status on which to oppose discharge. S. & H. had no power to act for M., W., R. & Co. and the firm of W., R. & Co. had proved no debt.

The bankrupt, Charles N. Palmer, having filed his petition for discharge, of which due notice was given to all creditors who had proved their debts, Sawyer & Herman, attorneys, entered their appearance as attorneys for Weaver, Richardson & Co., and, in due time, filed specifications in opposition to the discharge, signed Sawyer & Herman, and Brown & Case, attorneys for opposing creditors. No debt was proved by Weaver, Richardson & Co., but a debt was proved by Mott, Weaver, Richardson & Co. The signatures to the specifications were in the handwriting of Sawyer, of the firm of Sawyer & Herman. They presented a power of attorney by Mott, Weaver & Richardson, constituting Brown & Case their attorneys. It was insisted for the bankrupt that he was entitled to his discharge, and that the specifications should be treated as a nullity, because they were not filed by a creditor who had proved his debt, and because the attorney who signed and filed them had not been authorized, by power of attorney, to appear for the creditors named in the specifications.

Z. E. Britton, for bankrupt.

Sawyer & Herman and Hurd & Stillings, for opposing creditors.

DELAHAY, District Judge. No legal appearance has been entered by the objecting creditors. Parties seeking a status in court to oppose the discharge of the bankrupt, must prove themselves creditors by proving up their claims as required by the provisions of the bankrupt act. This, Weaver, Richardson & Co. have not done. No debt has been proved by them. But the specifications would have been improperly filed if their debt had been proved. The power of attorney was made to Brown & Case, and does not confer the power of substitution. It gave Sawyer & Herman no power to act for the creditors. They had no authority to sign it as attorneys, and Sawyer had no authority to sign the name of Brown & Case. The paper, then, is a pure nullity, not made in behalf of one who has proved a debt against the estate, and not signed by any one legally authorized to act for any creditor. There is, therefore, nothing in the case which the court can regard as an objection to the discharge of the bankrupt, and as he seems to have complied with all the provisions of the act, it is granted.

1 [Reprinted by permission.]

Case No. 10,683.

PALMER v. ANDREWS.

[1 McAll. 491.][1]

Circuit Court, D. California. Jan., 1859.

LIMITATION OF ACTIONS—MODES OF TAKING CASE OUT OF STATUTE—LORD TENTERDEN'S ACT—CALIFORNIA STATUTE.

There were three modes of taking a case out of the statute of limitations, prior to the passing of the act of 9 Geo. IV. c. 14 (Lord Tenterden's act). 1. Acknowledgment by words only. 2. A promise by words only. 3. Part payment of principal or interest. That statute substituted for acknowledgments and promises by words only, a writing embodying the same, and signed by the party to be charged, leaving part payment as it was before the act. The statute of limitations of this state must receive a similar construction.

[Cited in Kirk v. Williams, 24 Fed. 447, 449.]

This action was brought on a promissory note; the statute of limitations was pleaded, and to this a part payment before the maturity of the note, was replied. Held, that the replication was good. A jury was waived in this case and the cause submitted on the pleadings to the court.

J. B. Townsend, for plaintiff.

Love & Watson, for defendants.

McALLISTER, Circuit Judge. The grounds of the defense as stated in the brief of defendant's counsel are, that the part payment set up by plaintiff is insufficient to take the case out of the statute of limitations, which has been pleaded; and secondly, that the note sued on is not a promissory note. To sustain the position that part payment in this state is insufficient to take the case out of the statute of limitations under the law of this state, reference is made to the case of Fairbanks v. Dawson, 9 Cal. 89. To support the proposition that the note sued on is not a promissory note, the case of Garwood v. Simpson, 8 Cal. 101, is relied on. The court will consider these objections in their inverse order.

1. As to the character of this document, the objection is, that although a fixed sum is mentioned, inasmuch as it is to be paid with "current rate of exchange," it ceases to be a promissory note. It seems these words can have no meaning in this note, for it is difficult to perceive how the sum fixed can be rendered uncertain by them in a note executed and payable in the same place. Upon the ground of authority, too, a note payable for a fixed sum with interest is held good as a note. Pars. Merc. Law, 87. The court cannot therefore consider the note sued on in this case as void as a promissory note, for the reason assigned. In the case of Garwood v. Simpson, cited by defendant's counsel in support of his proposition, that the note sued on in this case is no note, the instrument, the subject matter of controversy in that case, was in the form of a bill of exchange. No certain or fixed sum was named; uncertain as it was, it was made payable out of a particular fund.

The second ground taken is attended with more difficulty; because it is sustained by a decision of the supreme court of this state. In the case of Fairbanks v. Dawson, 9 Cal. 89, two of the judges (the third dissenting) decided that under the 31st section of the statute of limitations of this state, a part payment made before a contract has expired by limitation is insufficient to take the case out of the statute. The decision of the supreme court of this state is entitled to the greatest respect; but where the decision was by a divided court, and the question involved, to a certain extent, a commercial one, this court does not feel constrained to subject its views of the law to the control of the authority absolutely, but will look into the reason of the case.

The learned judges admit, in alluding to the statute of 9 Geo. IV. c. 14 (Lord Tenterden's act), "that the difference in the language of the British and California statutes is very slight, while their substance and meaning are the same." Although such is the fact, the court put a very different construction upon the California statute, from that which they were willing to concede to the British. This was not owing to any difference in the language of those portions of the two acts which related to "acknowledgments and promises," for it is admitted that the substance and meaning of both are the same; but the court placed their construction upon the import of the words in relation to acknowledgments and promises in the California statute, upon the omission of the legislature to insert in it the clause in the British statute, "that nothing therein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever." The court, in Fairbanks v. Dawson, say, in relation to this clause, "It is clear that the legislature of this state intended to put part payment on the same footing with acknowledgments." Upon the implied intention of the legislature inferred from their omission to introduce the declaratory clause as to part payment, which was in the British statute, the court put a different construction upon the words "acknowledgments and promises." Now, in relation to the construction of the language in the California statute, it seems its obvious meaning is so clear, it is unnecessary to resort to any implication. The words are, "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this statute. unless the same be contained in some writing signed by the party

[1] [Reported by Hon. M. Hall McAllister, Circuit Judge, and Hon. Ogden Hoffman, District Judge.]

to be charged thereby." This language is taken from the statutes of limitations which prevailed in other states. Similar words are used in the Massachusetts act. In Williams v. Gridley, 9 Metc. [Mass.] 483, the court quotes them, and the words are, "No acknowledgment or promise shall be evidence of any new or continuing contract whereby to take any case out of the operation of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing, signed by the party chargeable thereby." And they say, "It is quite obvious that this enactment has introduced a material change in the effect to be given to the statute of limitation of personal actions. It has prospectively legislated out of the judicial forum those numerous and somewhat perplexing cases of alleged new promises, either express or implied, sustained by oral admissions and statements by the party sought to be charged. Thus far, the statute is plain as to the construction to be given to it."

About the construction, then, of that portion of the statute of Massachusetts which relates to acknowledgments and promises, and which is similar in language to our statute, the supreme court of Massachusetts had no doubt. The construction was, in its opinion, plain, and its sole object was to do away with acknowledgments and promises sustained only by oral admissions. The Massachusetts statute contained a clause similar to that in the British statute; but it never struck the court or the defendant's counsel, that the insertion of such a clause varied the construction of the plain import of the language in relation to oral promises. All that the defendant's counsel suggested in relation to that clause was, first, that evidence of such payment can be only shown by some written acknowledgment; second, that oral admissions of the party were incompetent to prove part payment. The court did not suggest that the clause in question had anything to do with the provision as to oral admissions, but regarded the clause as leaving the part payment as it was before the passage of the act, and the fact of part payment having been made might be proved, like any other fact. To the same effect is the case of Sibley v. Lumbert, 30 Me. 253.

An examination into the law as it existed at the time of the passing of our statute, and of the mischief the new act was passed to remedy, will aid in the proper construction of the act. This examination has been made by the present chief justice of England in the case of Cleave v. Jones, 6 Exch. 573, in commenting upon the statute 9 Geo. IV. c. 14 (Lord Tenterden's act), the language of which is "the same in substance and meaning" with that of the California statute. Anterior to the passing of that statute, according to the construction of the 21 Jac. I. c. 16, three modes were in practice to take a case out of the operation of that statute; first, an acknowledgment by words only; second, a promise by words only; third, part payment of principal or interest. The two former modes were verbal acknowledgments and declarations. The statute requires them to be in writing, and to be signed by the party charged; but it leaves out, by not including, part payment. True, it does not, by express enactment, except part payment, as did the British statute; but the maxim expressio unius est exclusio alterius, applies. Where the legislature have expressly spoken upon two of three modes of taking a case out of the statute, which were well known to commercial law, and are silent as to the third, the fair inference is, that they intended to leave it as it was.

Lord Campbell, in the case cited from the exchequer, considers part payment an acknowledgment by conduct. Now, whether we consult the ordinary meaning of the words acknowledgment or promise, or their lexicographical meaning, they indicate not the conduct but the verbal acts of men. The words in our act are, acknowledgment or promise. The two words, therefore, indicate the intention to refer to the same character of transaction, founded alike on parol. It is reasonable to suppose that a totally different meaning was not intended to be annexed to the words thus copulated. But to guard against all danger of such construction being put upon them, the British statute expressly inserted the clause as to part payment. The omission to take in the California statute the same precaution, is not a sufficient warrant for this court to extend, by judicial construction, the legislation of the state by implication to a different mode of taking a case out of the statute of limitations, upon the ground that, by omitting expressly to except it, their intention was to repeal it by the use of the words (acknowledgment and promise) which, as we have seen upon the highest judicial authority in England, from the time of 21 Jac. I., had always attached to them the meaning of being founded on words only.

In the view entertained by the court, judgment must be entered in favor of the plaintiff. Such an one will be drafted by the attorney for plaintiff, and submitted for approval and signature to the judge.

Case No. 10,684.

PALMER v. BLIGHT.

[2 Wash. C. C. 96.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1807.

BILL OF EXCHANGE—ACTION—PRODUCTION OF BILL—EXCUSE—PART PAYMENT—ENTRY ON BILL.

1. In an action by the endorser of a bill of exchange, against the drawer, it is sufficient to account for the non-production of the bill, that it was lodged with the commissioners of bankruptcy, under a commission issued against the drawer, and still remains with them.

2. It is not necessary that a receipt for the money paid by the endorser to the endorsee shall be entered on the bill.

This was an issue, sent from the commissioners of bankrupts, to try whether any thing, and how much, is due from the bankrupt to the plaintiff. A great part of the plaintiff's demand arose upon bills of exchange, drawn by bankrupt in favour of plaintiff, and remitted to him in Jamaica, to sell, and to remit the proceeds to bankrupt. He endorsed and sold many of them, and remitted the proceeds, together with those of other bills drawn by plaintiff, and sold for the benefit of bankrupt, by his order. The bills being protested, were returned to and paid by the plaintiff, as is proved by plaintiff's deposition, taken in this cause, by his clerk, and by a settled account between bankrupt and plaintiff, before their respective bankruptcies. Some of these bills having been accepted by the drawee in England, who has become a bankrupt, were sent over and laid before his commissioners, in order to support the plaintiff's claim for a dividend on his estate. They still remain there for that purpose. Others of the bills were produced at the trial, some with receipts endorsed of the payment by plaintiff; some with blank endorsements, and some with the plaintiff's endorsement to the persons to whom the amount was proved to have been paid, and without receipts or blank endorsements by them.

Mr. Rawle, for defendants, contended, that the plaintiff must either produce the bills, or prove them lost, or otherwise account satisfactorily for his not having possession of them; and, that he ought, either to show them with the receipt for their payment by plaintiff endorsed, or with blank endorsements, subsequent to the special endorsements.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

BY THE COURT. It is true, the bills should be produced, or otherwise accounted for, by proving them to be lost, or in a situation not to be again brought against the defendants; and the evidence in this case, shows them to be before the commissioners in England, for the purpose of obtaining a dividend on the estate of the drawee. The evidence, if believed by the jury, proves that they were all paid by plaintiff; which is sufficient, though a receipt for the money was not endorsed on the bills, and though they were not endorsed in blank by the holders, to whom the money was paid.

The plaintiffs obtained a verdict.

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

Case No. 10,685.

PALMER v. BURNSIDE.

[1 Woods, 179.] [1]

Circuit Court, D. Louisiana. Nov., 1871.

MORTGAGES—LOUISIANA—SALE UNDER JUNIOR INCUMBRANCE—SUBSEQUENT SEIZURE BY SENIOR INCUMBRANCER—CONFUSION—MERGER.

1. Where real and personal property are purchased under proceedings on a junior incumbrance to which a senior incumbrancer is not made a party, an attempt made by the senior incumbrancer to bring the property to sale to satisfy his claim, is not an attack upon the title of the purchaser under the junior incumbrancer, nor any invasion of his rights.

2. Where a senior incumbrancer wrongfully carried away personal property subject to his own and a junior incumbrancer, his debt was not extinguished by "confusion" to the extent of the value of the property carried off.

3. Confusion and merger are synonymous terms.

4. A debt cannot be merged in a tort—nor can any part of it be extinguished by a credit or set-off claimed for unliquidated damages arising from a trespass.

At chambers. In equity. This cause was heard upon the motion of complainant for a preliminary injunction.

W. W. King, for complainant.

John A. Campbell and Thos. Allen Clarke, for defendant.

WOODS, Circuit Judge. The bill states in substance that in the year 1866, Mrs. Margaret Deas obtained a judgment against Mrs. Louisa D. Minor for $4,500; that an execution issued on this judgment was levied on a certain plantation in the parish of Ascension, the property of the judgment debtor, and on the 22d day of May, 1868, the plantation was sold by the United States marshal by authority of the writ, to one James E. Zunts. A monition was sued out by Zunts for the confirmation of his title. This proceeding was finally determined by the supreme court of the United States against Zunts, and the sale was annulled, and the heirs of Mrs. Minor, who in the meantime had departed this life, were restored to the possession of the property. While Zunts was holding possession under the sale to him, he sold the plantation to Burnside, one of the defend-

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

ants, who took possession of the plantation, and placed stock and farming implements upon it, and cultivated it. After the sale to Zunts was set aside, Burnside removed from the plantation the stock which he had taken there, and, it is alleged, also took away most of the stock which was upon the plantation at the time of Zunts' purchase, and many farming tools and implements. Burnside acquired the judgment of Mrs. Deas on the 23d of June, 1871, and an order was made by this court to sell the property levied on to pay the judgment. The heirs of Mrs. Minor enjoined the sale under this order of the court. While this injunction was in force, Dunlap & McCance, junior mortgage creditors, seized and sold the plantation under process from the state court subject to the prior mortgage of Mrs. Deas. At this sale Palmer, the complainant, became the purchaser for $28,500. The injunction restraining Burnside from proceeding to sell the plantation upon the order of sale was dissolved on the 13th of January, 1872, and Burnside is now threatening to proceed upon his order of sale to have the plantation sold by the United States marshal under said writ, to satisfy the judgment in favor of Mrs. Deas, to which he has been subrogated.

The complainant Palmer prays for an injunction to restrain Burnside from proceeding to sell the property under his writ. The cause has been heard upon the motion for the injunction. The complainant says that having purchased at a judicial sale, the sale cannot be treated as a nullity. But it seems clear that the bringing to sale of the property on an older and superior lien is not treating the sale to Palmer as a nullity. No right that he acquired under that sale is denied or interfered with. He has the same rights that the heirs of Mrs. Minor had in the property, and no more. That is what he purchased. They could not object to a sale on the mortgage lien of Mrs. Deas, nor can he. He purchased subject to all the rights conferred on Mrs. Deas, and her assignee by her judicial mortgage. One of them was the right to bring the property to sale to pay the debt. The exercise of this right is no attempt to disregard the rights of Palmer acquired under his purchase, nor is it an attempt to attack the sale to him collaterally. The validity of his purchase is recognized. No right of his under it is disputed. Burnside is only trying to exercise his own rights, which are superior to those of Palmer.

The authority cited by complainant (Hen. [La.] Dig. 1031, § 1) to support this objection to the proceeding of Burnside, does not seem at all applicable to the question in hand. The proceeding to sell on Burnside's execution is not a revocatory action. Its purpose is not to test the validity of Palmer's title, but admitting his title to be all that he claims for it, to enforce a superior lien, and one which he admits to be superior and subject to which he purchased. As well might the purchaser at private sale from a mortgagor claim that a proceeding to foreclose his mortgage was an attack on his title.

It is next alleged that Burnside claimed a part of the proceeds of the property made at the instance of Dunlap & McCance, at which complainant became the purchaser, and he cannot therefore sue to annul the sale. There are two answers to this position: (1) The record submitted in evidence on this motion does not show that Burnside is claiming a part of the proceeds of the sale. His affidavit shows that he is only claiming the proceeds of a boiler and engine which he says was his own property, and which were seized and sold with the property of Mrs. Minor's heirs, and, (2) This proceeding of Burnside is not a proceeding to set aside the sale to Palmer as already shown.

It is further alleged, in support of the motion for injunction, that a large quantity of live stock and farming implements were upon the plantation of Mrs. Minor, upon which the claims of Burnside and Dunlap & McCance were liens; that Burnside, when he surrendered possession of the plantation to Mrs. Minor's heirs, carried away a large portion of this stock and farming implements, and that his debt has been extinguished to the amount of the value of this property, by what is termed in the civil law confusion, and therefore Burnside ought not to be allowed to proceed with the sale, until this property is accounted for, and the value thereof credited upon his claim. The term "confusion" as used in the civil law is synonymous with "merger" as used in the common law. It arises where two titles to the same property unite in the same person. Article 2214 of the Civil Code provides that "when the qualities of debtor and creditor are united in the same person there arises a confusion of right which extinguishes the two credits." So at the common law, A. owes B. B. makes A. his heir. The debt of A. is merged.

But a tort does not create a debt. If the asportation of the personal property on the plantation by Burnside was tortious, it did not create a debt against him, which could be merged. He got no title to the property. He was a mere tort feasor, and became no more the debtor of the owners of the chattels than if he had committed an assault and battery upon them. So no part of his debt was extinguished by his wrongful act, nor did he acquire any title to the property taken. It is still subject to the lien of his mortgage, and of the mortgage of Dunlap & McCance under which complainant purchased. The entire debt, secured by his judicial mortgage is yet unpaid. No part of it is merged, no part of it is extinguished or can be extinguished by a credit or set-off arising from unliquidated damages for a trespass.

It is next asserted by the complainants (1)

that succession property cannot be taken in execution; and (2) that the execution under which the marshal originally seized and sold the property under Burnside's judicial mortgage has been executed and returned; that the writ is functus officio, and no new proceedings can be had upon it. These points were made to the court as objections to Burnside's motion for his vendi or order of sale, and were overruled by the court. As this was done after full argument, we have no disposition to interfere with the ruling of the court. We think that ruling was correct.

The case appears to us a very plain one. The complainant purchased the property at sheriff's sale with notice of and subject to the judicial mortgage of Burnside. He was entitled, under section 683, Code of Practice, to retain in his hands, out of the price for which the property was adjudicated to him, the amount required to satisfy the privileged debts and special hypothecations to which the property sold was subject. He now holds as part of the purchase price, the money to pay the privileged debt of Burnside. He can stop the sale by paying Burnside his money. This, it appears to me, would be a more just and equitable method of staying the sale than by invoking the writ of injunction. He ought not to be allowed to keep the property and keep the price, especially when the price is demanded by parties having older and better rights than his, and which, by the terms of his purchase, he has agreed to pay. I do not understand that the complainant by his purchase of the plantation at sheriff's sale became entitled to anything more than what was advertised and offered by the sheriff. His purchase gives him no title to the judicial mortgage of Dunlap & McCance, or any claim to the unsatisfied residue of that mortgage. He has what he bought and all he bought. He has no ground to complain of the pursuit by Burnside of his rights, and no good claim to ask the intervention of this court to stay the proceedings of Burnside.

The motion for injunction must be over ruled.

Case No. 10,686.

PALMER v. CALL.

[4 Dill. 566,[1] 11 West. Jur. 696.]

Circuit Court, D. Iowa. 1877.

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

1. Under the Code of Iowa, equity suits are not triable at the appearance term, and such suits may, under the act of March 3, 1875, § 3 [18 Stat. 471], be removed to the circuit court of the United States at the second term.

2. Under that Code, the same rule as to the time of removal applies to suits to foreclose mortgages, at least when there is no rule of court requiring such suits to be tried at the appearance term.

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

On motion by plaintiff [Henry L. Palmer] to remand cause to the state court. This is a bill to foreclose a mortgage. The suit was brought in the state court, and at the return term, in February, 1877, the defendant [Asa C. Call] filed "an answer, and, by consent of parties, the plaintiff has until July 7, 1877, to answer the interrogatories in the answer and to reply, and, by consent, the cause is continued." At the next term the defendant filed his petition and bond in due form, under the act of March 3, 1875, to remove the cause to this court—the plaintiff being a citizen of New Jersey, and the defendant a citizen of Iowa. The removal was ordered. The plaintiff moves to remand the cause, on the ground that the application for the removal was made too late.

J. D. Springer, for the motion.

George E. Clarke and Charles A. Clarke, contra.

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

DILLON, Circuit Judge. The act of congress of March 3, 1875, in respect of the removal of causes to this court from the courts of the states, provides that the application for the transfer shall be made "before or at the term at which the said cause could be first tried, and before the trial thereof." Section 3. The act extends equally to actions at law and suits in equity.

The Code of Iowa of 1873 provides when actions at law and suits in equity shall be triable. Sections 2740-2745. Law actions "shall be tried at the first term after legal and timely service of process has been made." Id. § 2744. The next section (2745) enacts that "the appearance term shall not be the trial term for equitable actions, except those brought for divorce, to foreclose mortgages," etc.

A previous section (2742) provides a mode of trying "equitable actions other than actions to foreclose mortgages, for divorce," etc., upon written evidence, if any party shall at any time during the appearance term move therefor. If no such motion is made, equitable actions, with the exceptions stated in the statute, may be tried at the next term, upon oral evidence taken in open court and upon depositions taken as in law actions. McClay v. Bunkers, 46 Iowa, 700. If tried in the latter mode, the provision of the Code is that the case goes on appeal to the supreme court as upon "legal errors duly presented." If tried in the former method, all the evidence goes to the supreme court, and the cause is there heard de novo.

The constitution of the state (article 5, § 4) gives the supreme court appellate jurisdiction

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

only in chancery, and makes it a court for the correction of errors in actions at law. It was one of the objects of the different codes of the state of Iowa, from the Code of 1851 to the Code of 1873, to assimilate, as far as the constitution would permit, the mode of pleading, procedure, and trial in actions at law and suits in equity. The constitutional provision did not allow the distinction betweeen law and equity to be entirely abrogated, and the complicated provisions in the Code of 1873 (sections 2740-2745), as to the modes of trial of law and equity suits, were devised to produce uniformity as far as it was supposed it was competent to do it. It was attempted to assimilate suits to foreclose mortgages, for divorce, etc., as to mode of trial and mode of review on appeal, to actions at law. Id. §§ 2741-2743. The supreme court of the state has held that section 2742, as far as it attempts to provide that suits essentially of equitable cognizance shall at all events be heard in the supreme court on legal errors instead of de novo, is in conflict with the constitution. Sherwood v. Sherwood, 44 Iowa, 192. It admits of doubt whether, under the constitution of Iowa, the legislature has the power to authorize the supreme court to hear chancery causes, on legal errors, as in law cases, or otherwise, than on appeal proper, that is, de novo on the proofs taken in the court below.

Suits to foreclose mortgages are in the nature of equitable cognizance (Code Iowa, §§ 2509, 3319), and the practical, if not the necessary, effect of the decision in Sherwood v. Sherwood, will be to assimilate the mode of trial, or hearing, in mortgage foreclosures, to the mode of trying or hearing other equitable suits. Until the supreme court of the state shall decide that the plaintiff in a foreclosure bill can compel the issues to be made up and the defendant be forced to a final hearing at the first term, or the nisi prius courts shall so provide by rule, we shall hold, as respects the time for applying for a removal, that the appearance term is not the trial term in such a case, any more than it is in other equitable suits. Id. § 2745. The provision of this last section is that equitable actions generally shall not be tried at the appearance term. The object of this provision was, doubtless, that time should be given, if any party to the suit so elected, to take the proofs in writing. Another section of the Code provides that "no party shall be required to take depositions when the court is in actual session." Code, § 3730. The statute attempted to make an exception as to foreclosure suits, and to assimilate such suits to law actions as respects the mode and time of trial, proofs, and appeal. The legislature cannot, as we understand the opinion of the supreme court, constitutionally provide for a mode of trial in equity causes which shall absolutely deprive the parties of the right to have all the proofs taken in writing, so that on appeal a hearing may be had de novo. There is, therefore, no reason why, in a contested foreclosure case, the parties should not have the same time or opportunity to prepare for trial that is given in other equity causes. Undoubtedly, it is competent for the legislature to provide that foreclosure suits shall be tried at the first term; but the provisions by which this has been attempted having, as to manner of final hearing on appeal, been held to be in conflict with the constitution, it would seem to us to be a reasonable, if not necessary, result of this, that if issues of fact are raised in a foreclosure case, they do not stand for trial at the appearance term, unless by consent, or, possibly, by virtue of a rule of court to that effect. "The exception found in section 2742, which forbids parties to divorce and other chancery actions, claiming a trial upon written evidence, must be regarded as of no effect." Per Beck, J., in Sherwood v. Sherwood. The constitutional right in a chancery cause to a hearing anew on appeal, appears to us necessarily to involve the right of either party, unless he waives it, to have the proofs taken in writing, or, if taken orally, to be reduced to writing on the hearing. In this respect foreclosure suits stand on the same footing as other chancery causes. It may be that section 2742 can have effect, so far as that the right to thus have the testimony taken in writing may be waived by not making the election at the first term to have it so taken, but in the absence of a rule of court, either party has the whole of the first term to exercise this election, and his failure to exercise it does not make the cause one which is triable at that term.

Such, at least, would seem to be the case where there is no rule of court to the contrary. It was manifestly the intention of the legislature to provide that where a cause was triable de novo on appeal, the appearance term should not be the trial term; but where, as in divorce and mortgage foreclosure suits, it provided that there should not be a trial de novo on appeal, then, as in law actions proper, the intention was that the first term should be the trial term. But, as in these latter classes of suits the constitution gives the right to a trial de novo on appeal, unless it is waived, we feel justified in holding, in the absence of a rule of court to the contrary, that the first term is not the trial term in equity suits where an issue of fact is made which requires the production of evidence. By the spirit, if not the letter, of the statute, either party has the whole term in which to make his election to have the testimony in writing (section 2742), a right which is inconsistent with the proposition that the first term is the trial term, and a right which appertains, under the constitution, to foreclosure causes the same as to other equity causes, unless it is waived (if it is competent to waive it), by a failure to insist upon it at the appearance term.

There is some difficulty in construing and literally appplying all the provisions of the

Code on this subject, in consequence of the unconstitutionality, in part at least, of those provisions which relate to the mode of hearing on appeal, and possibly as to the mode of proof; but the conclusion we have reached gives a definite rule as to the time for the removal of all equity suits under the act of 1875, and has the merit and advantage of certainty and uniformity.

As an answer was filed at the appearance term and the cause continued by consent before the issues were completed, we hold that it was not too late to apply to remove the cause at the next term, no rule of the state court appearing which requires such causes to be tried at the first term. Motion denied.

[NOTE. Subsequently there was a decree in favor of the complainant. 7 Fed. 737. From this decree an appeal was taken to the supreme court, where a motion was made to advance the case on the docket. Motion denied. 106 U. S. 39, 1 Sup. Ct. 2. The decree of the circuit court was subsequently affirmed. 116 U. S. 98, 6 Sup. Ct. 301.]

As to the time in which application must be made to remove actions at law in Iowa, under the act of March 3, 1875, see Atlee v. Potter [Case No. 636]; McCullough v. Sterling Furniture Co. [Id. 8,741].

Case No. 10,687.

PALMER v. CASSIN.

[2 Cranch, C. C. 66.] [1]

Circuit Court, District of Columbia. Dec. Term, 1812.

EVIDENCE—CONCLUSIVENESS — ASSIGNMENT—DECLARATIONS OF ASSIGNOR.

The declarations of the assignor, made after the assignment of a chose in action, will not be received to defeat the action brought in his name.

[This was an action by Palmer, for the use of Glover, against Cassin.]

The defendant pleaded the statute of gaming, and offered Palmer's confessions in evidence,—confessions made subsequent to the assignment and since the suit brought.

THE COURT (nem. con.) refused to receive them. Palmer could not release the action, and the court will not suffer him to defeat it by his declarations.

The defendant then confessed judgment.

Case No. 10,688.

PALMER v. CUYAHOGA COUNTY.

[3 McLean, 226.] [2]

Circuit Court, D. Ohio. July, 1843.

RIVERS—OBSTRUCTION TO NAVIGATION—CONSTITUTIONAL LAW—RIGHT OF CONGRESS TO REGULATE COMMERCE BETWEEN STATES.

1. The provision in the ordinance of 1787, that certain navigable waters "shall be common highways and forever free," &c., does not prevent the improvement of the navigation of said waters by a state. The ordinance referred to these waters in their natural state.

[Cited in Jolly v. Terre Haute Draw-Bridge Co., Case No. 7,441; Escanaba & L. M. Transp. Co. v. City of Chicago, 107 U. S. 690, 2 Sup. Ct. 195; Wallamet Iron Bridge Co. v. Hatch, 19 Fed. 354; Holyoke Water-Power Co. v. Connecticut River Co., 20 Fed. 79; Huse v. Glover, 119 U. S. 547, 7 Sup. Ct. 315; Rhea v. Newport N. & M. V. R. Co., 50 Fed. 20.]

[Cited in City of Chicago v. McGinn, 51 Ill. 273. Cited in brief in People v. U. S., 93 Ill. 32. Cited in Carondelet Canal & Nav. Co. v. Parker, 29 La. Ann. 430; Attorney General v. Manistee River Imp. Co., 42 Mich. 634, 4 N. W. 486. Cited in brief in Dugan v. Bridge Co., 27 Pa. St. 308. Cited in Wisconsin River Imp. Co. v. Manson, 43 Wis. 264.]

2. If they shall be improved by slackwater navigation or otherwise, a reasonable toll for the increased facility, would not violate the ordinance.

3. No state can obstruct a navigable stream which extends to other states, or is connected with a river or lake which falls into the sea.

[Cited in U. S. v. Bain, Case No. 14,496; Holyoke Water-Power Co. v. Connecticut River Co., 20 Fed. 79.]

[Cited in Holyoke Water-Power Co. v. Connecticut River Co., 52 Conn. 575.]

4. The power to regulate commerce among the several states is paramount, in the federal government. and cannot be restricted by a state.

[Cited in Jolly v. Terre Haute Draw-Bridge Co., Case No. 7,441.]

5. It might be difficult to state, in this respect, the difference between the general power of a state not subject to the ordinance, and one that is subject to it.

[Cited in McLean v. Hamilton County, Case No. 8,881.]

[Cited in People v. U. S., 93 Ill. 32.]

6. The Connecticut Reserve, ceded to the United States after the adoption of the ordinance, is subject to that instrument equally, as other parts of the territory northwest of the Ohio.

In equity.

Mr. Foote, for defendants.

OPINION OF THE COURT. This is an application for an injunction to prevent the construction of a draw-briuge over the Cuyahoga river, by the defendants, on the ground that it will obstruct the navigation of the river, and will be injurious to the real property of the complainant in the vicinity of the bridge. This application is made under the fourth article of the compact in the ordinance of 1787, which declares, "that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states, that may be admitted into the confederacy, without any tax, impost or duty therefor."

As this provision of the ordinance was somewhat elaborately considered, in the case of Spooner v. McConnell [Case No. 13,245],

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

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

it will not be necessary now to discuss the subject at large. The ordinance had reference to "navigable waters" in their natural state. No tax, impost or duty shall be imposed for their use; and as they are to remain "common highways," there can be no obstruction to their use. Now this provision does not prevent a state from improving the navigableness of these waters, by removing obstructions, or by dams and locks so increasing the depth of the water as to extend the line of navigation. Nor does the ordinance prohibit the construction of any work on the river, which the state may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass, with little or no delay, and without charge. A temporary delay, such as passing a lock, could not be considered as an obstruction prohibited by the ordinance.

A state, by virtue of its sovereignty may exercise certain rights over its navigable waters, subject, however, to the paramount power in congress to regulate commerce among the several states. These powers are not concurrent, but are separate, and independent of each other. And in regard to the exercise of this power by a state, there is no other limit than the boundaries of the federal power. It would be difficult to maintain the power in any state to obstruct any of its navigable waters which extend through other states, or are connected with the sea, or with waters falling into the sea. And it might be more curious than useful to inquire in what the powers of the states generally differ, in this respect, from the powers of the states bound by the ordinance.

A toll charged for the improvement of the navigation of a river, is not within the ordinance. In such a case the tax would not be, for the use of the river in its natural state, but for the increased commercial facilities. A drawbridge across a navigable water is not an obstruction. As this would not be a work connected with the navigation of the river, no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary, to raise the draw; and as such a work may be very important in a general intercourse of the community, no doubt is entertained as to the power of the state to make the bridge. It is one of those general powers possessed by a state for the public convenience, and may be exercised, provided it does not infringe on the federal powers, or violate the limitations in the ordinance.

In the argument, the defendants' counsel insist that the Cuyahoga river being within "that territory called the Western Reserve of Connecticut, and which was excepted by the state of Connecticut, out of the cession made by it to the United States, in 1786, is not subject to the ordinance. That neither the right of soil or jurisdiction in the reserve was ever vested in the United States, until the deed of cession by Connecticut to the United States, which was long after the date of the ordinance." That this reserve was, to some extent, subject to the legislation of Connecticut, for several years after the date of the ordinance, is admitted. But, when this territory and the jurisdiction over it were ceded to the United States, it became subject to the ordinance, the same as every other part of the northwestern territory. Rights acquired under the former laws are governed by those laws. But on its cession to the Union, all the laws of the territory, and especially its fundamental law, became the law of the reserve. By consenting to come under the jurisdiction of the federal government, they became parties to the articles of compact contained in the ordinance.

The injunction is refused.

Case No. 10,689.

PALMER et al. v. DALLET et al.

[3 Pa. Law J. 416.]

Circuit Court, E. D. Pennsylvania. 1844.

APPEAL—ADMIRALTY—EFFECT OF DECREE OF DISTRICT COURT.

The decree of the district court, where no question of law is involved, is entitled to the same weight as a verdict in a suit at law, not to be disturbed unless it is contrary to the clear result of the evidence on the facts in issue.

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

In admiralty. The complainants filed a libel in the district court on the 17th of June, 1841, claiming the sum of $284.90 with interest, being the amount paid by them for repairing damages to their brig, occasioned by collision with the Orion, at the Chester piers, in January, 1840. From various causes the hearing was postponed until November, 1842, when after argument by Haly, for the libellant, and William G. Smith, for the respondent, the district judge (Randall) dismissed the libel, without costs. [Case unreported.]

From this decree the libellant appealed to the circuit court, where the cause was again heard, and the following opinion delivered by

BALDWIN, Circuit Justice. This is an appeal from a decree of the district court sitting in admiralty, dismissing the libel of the appellants for damages occasioned by a collision between the two vessels at Chester, in January, 1840, in which both sustained considerable injury. The evidence taken in the district court and returned on the appeal was voluminous, and, as is usual in such cases, there was much discrepancy between the statements of the occurrence by the persons on board of the respective vessels. The evidence on each side taken by itself was sufficient to justify a decree, but taken together presented a doubtful case. The testimony of

the witnesses who were present, and saw the collision from other vessels, was in favor of the respondents, but not of that decisive character as to make out a clear case in their favor. There were some strong circumstances in evidence in favor of the libellants, but their effect was so far neutralized by evidence on the other side as to leave it doubtful whether the vessel of the respondents was an offending one at the time of the collision. The case was one which I should have left to the jury had it been a suit at law in this court, and should not have granted a new trial on whatever side they would have given their verdict.

In deciding on appeals from the district court, where no question of law is involved, I have always considered the decree of the district court as entitled to the same weight as a verdict in a suit at law, not to be disturbed unless it is contrary to the clear result of this evidence on the facts in issue, though in my opinion a decree of a different kind would have better met the justice of the case. The reasons for this course are stronger in appeals than jury trials, for, if the decree is reversed, the consequence is not merely a new trial, but a final decree on the merits for the other party. The present is a case of this description. It turned wholly on the evidence, and on a careful examination of it, in and out of court, I think the merits so doubtful that the decree below ought not to be disturbed. It is accordingly affirmed, with costs.

PALMER (DALY v.). See Case No. 3,552.
PALMER (DAVIS v.). See Case No. 3,645.
PALMER (DENNER v.). See Case No. 3,788.

Case No. 10,690.

PALMER et al. v. ELLIOT et al.

[1 Cliff. 63.] [1]

Circuit Court, D. New Hampshire. May, 1858.

PARTNERSHIP — DORMANT PARTNER — LIABILITY — PAYMENT — PRESUMPTION AS TO RECEIPT OF NOTE.

1. Where two persons by virtue of a private agreement, became partners as to third parties, the contract specifying no firm name, but allowing each partner to purchase goods on his own individual credit, and designating one of the two to transact the business, while the connection of the other was kept secret, *held*, that the dormant partner was not liable, on a note, for goods put into the concern by the one who conducted the business, and signed with his name, where the signature was not intended as that of the firm, and the payee was ignorant of the relation of the parties.

[Cited in Courve v. Case, 79 Wis. 356, 48 N. W. 480.]

2. In Massachusetts, when a debtor gives his own negotiable bill or note for a pre-existing debt, it is prima facie evidence of payment.

[Cited in Bantz v. Basnett, 12 W. Va. 785.]

3. But this presumption may be rebutted by circumstances showing that such was not the intention of the parties,—or if the paper accepted is not binding upon all the parties previously liable,—or where there is fraud, concealment, misapprehension and great unfairness in giving the security.

[Cited in Ex parte First Nat. Bank, 70 Me. 380.]

4. Under such circumstances the holder is at liberty to surrender the note to the party who gave it, or place it on the files of the court for that purpose, and will then be entitled to recover on the original contract.

This was an action of assumpsit [by Julius A. Palmer and others against William H. Elliot and Stanford Hovey] and was submitted upon an agreed statement of facts. With the exception of one or two particulars the material circumstances were the same as in the case of Bigelow v. Elliot [Case No. 1,399]. The points of difference were these: the declaration in this case contained three counts, two of which were the same as those in the case above mentioned, namely, one being for goods sold and delivered, and the other upon an account annexed, which embraced six charges. Of these, the first and third were included in the note declared on in the third count. The note was given by the last-named defendant, and bore his signature alone. All the goods were purchased by him, and the plaintiffs gave to him exclusively the credit for the amount included in the note, they having no knowledge of the other defendant's interest in the store or the goods, or of the existence of any private agreement between the two defendants. Moreover, the last-named defendant purchased the goods and gave the note without consultation with his associate, and without his knowledge. As in the other case, the second defendant, Hovey, the maker of the note, was defaulted, and Elliot pleaded the general issue.

It was contended that the defendants were not partners, but the court held this point to be decided by the case above referred to, and held that the plaintiffs were entitled to recover so much of the amount claimed as was not included in the note set forth in the third count.

Clark & Smith, for plaintiffs.
Morrison & Stanley, for defendants.

CLIFFORD, Circuit Justice. On the present state of facts it is impossible to say that Hovey, in signing the note, used the name affixed to it as a partnership name. He professed to act for himself, and pledged his own credit; and it clearly appears, from all the circumstances disclosed in the agreed statement of facts, that he signed the note, using the name affixed to it as his own personal designation, and it was so understood by the plaintiffs at the time the goods were sold and the note given. Two or more persons carrying on a trade or business may adopt the name of one of their number as a partnership name, or they may even adopt a

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

fictitious name, and the use of such name by one of the company in transacting the proper partnership business will bind the firm. When the firm name is the same as that of one of the individuals composing the firm, a material distinction arises, which it becomes important to notice, especially if that individual member of the firm is also separately engaged in a similar pursuit. In such cases the mere proof of the signature to a bill or note, unaccompanied by any circumstances tending to show that the name affixed to it was used and signed as the firm name, is not in general sufficient to entitle the plaintiff to recover against the firm, and some courts and text-writers have held that it is not even prima facie evidence that it was a transaction appertaining to the partnership business. Pars. Mer. Law, 177; Manufacturers' & Mechanics' Bank v. Winship, 5 Pick. 11; U. S. Bank v. Binney [Case No. 16,791]; Miner v. Downer, 19 Vt. 14. Other cases assert the doctrine that when it does not appear that the individual whose name is used has been engaged in business on his private account, and it appears that the name is the firm name, it will be presumed that it was used for the firm. Trueman v. Loder, 11 Adol. & E. 589; Bank of Rochester v. Monteath, 1 Denio, 402; Bank of South Carolina v. Case, 8 Barn. & C. 427; Palmer v. Stephens, 1 Denio, 479; Miller v. Manice, 6 Hill, 114. Applying these principles to the facts of this case, it is quite certain that the plaintiffs cannot recover upon the third count, as the agreed statement clearly shows that the defendant who signed the note used the name, not as a partnership name, but as the one properly describing himself; and, as both parties so understood it, the law cannot give any other character to the transaction. Moreover, these defendants had not adopted any firm name whatever, and, what is more, it was expressly agreed between them that each should purchase goods in his own name and on his own separate individual credit, and it does not appear that either had ever departed from the course which both alike had contracted to pursue. Another consideration presented is, whether the plaintiffs may not recover the whole amount claimed under the general counts. Both of the items of charge included in the note are sued for in those counts. Whether they can so recover or not, depends upon the question whether the note in suit was received by the plaintiffs in payment of that part of the account for which it was given. At common law a promissory note, given for a simple contract debt, does not operate as a discharge of the original obligation, or constitute a payment of the original debt, unless it affirmatively appears from the evidence that such was the intention of the parties at the time it was given, and that is the rule which prevails in most of the states composing our Union. But this contract was made in the commonwealth of Massachusetts, and the courts of that state have adopted a different rule. It is there held that, when a debtor gives his own negotiable bill or note for a pre-existing debt, it is prima facie evidence of payment; and the reason assigned for the rule is, that otherwise the debtor might be obliged to pay the debt twice. Maneely v. McGee, 6 Mass. 143; Thacher v. Dinsmore, 5 Mass. 299. Her courts also hold that if such bill or note is given for a part of the debt, it is deemed payment of such part, even though the debt is collaterally secured by a mortgage. Ilsley v. Jewett, 2 Metc. [Mass.] 168; Fowler v. Bush, 21 Pick. 230; 2 Greenl. Ev. § 520. Some exceptions and qualifications have been admitted to this rule in the jurisdictions where it prevails, which it becomes important to notice in this investigation. All the cases allow that the reception of the bill or note is nothing more than prima facie evidence that it was received in payment, and they generally admit that such prima facie presumption may be rebutted and controlled by any circumstances which show that such was not the intention of the parties. It was so held in Watkins v. Hill, 8 Pick. 522; and such appears to be the settled doctrine in all the jurisdictions whose courts of justice have departed from the common-law rule upon the subject. Butts v. Dean, 2 Metc. [Mass.] 76; Reed v. Upton, 10 Pick. 522; Jones v. Kennedy, 11 Pick. 125; Comstock v. Smith, 23 Me. 202; Gilmore v. Bussey, 12 Me. 418. Some courts have gone further, and held that the presumption of payment may be controlled, not only by the agreement of the parties, but by proof of a contrary usage, or by any circumstances inconsistent with the presumption. Varner v. Nobleborough, 2 Me. 121; Descadellas v. Harris, 8 Me. 298. In the course of the numerous decisions which have grown out of the departure from the common-law rule, certain exceptions or qualifications to the rule have been recognized and established by the courts in jurisdictions where the opposite rule prevails, to which it may be useful to advert on the present occasion, so far as they have an immediate bearing upon the question under consideration. One of those exceptions is, that if the negotiable paper, whether bill or note, was accepted in ignorance of the facts, or under any misapprehension of the rights of the parties, the rule that it shall be held prima facie to have been received in payment of the pre-existing debt does not apply. French v. Price, 24 Pick. 13. So, if the paper accepted is not binding upon all the parties previously liable, it is held that the presumption of payment may be considered as repelled. Melledge v. Boston Iron Co., 5 Cush. 158; Fowler v. Ludwig, 34 Me. 461. Reference to one other of these exceptions will be sufficient at the present time. All the well-considered cases agree that, if the transaction is tainted with fraud, or if it appears that there was any concealment, misapprehension, or unfairness, in giving or passing the new security, proof of such facts,

or any one of them, will be sufficient to repel the presumption, and to entitle the creditor to recover upon the original contract. Assuming the law to be as stated, of which there can be no doubt, it is obvious what the result must be in this case. Both of the defendants, in contemplation of law, were originally liable for the charges in the account which were included in the note described in the writ; and the note itself, as there described, furnishes plenary evidence that it was only executed and signed by the defendant, who is defaulted. And if so, it proves to a demonstration that all the parties originally liable are not bound by the new security; and, what is equally decisive of the question, the agreed statement shows that the plaintiffs, in accepting the note, acted in utter ignorance of their rights in the premises, and without any knowledge whatever of the actual relations which existed between these defendants. Without more, these two facts are sufficient to repel the presumption that the note was received in payment of that part of the account for which it was given. But it also appears that it was given under circumstances of concealment and great unfairness on the part of the defendant who gave it, if not of actual fraud, and therefore falls within the exception admitted by all the well-considered cases upon the subject. Under the circumstances, the plaintiffs are at liberty to surrender the note to the party who gave it, or to place it on the files of the court for that purpose, and then they will be entitled to judgment for the amount specified in the agreed statement, excluding the note, and for the amount of the charges for which the note was given, with interest on the same from the date of the writ, and for their costs.

Case No. 10,691.

PALMER v. FISKE et al.

[2 Curt. 14.] [1]

Circuit Court, D. Maine. Sept., 1854.

NEW TRIAL — EXCESSIVE DAMAGES — MISTAKE OF JURY—MISTAKE BY WITNESS—NEWLY-DISCOVERED EVIDENCE.

1. A verdict in an action on the case for an injury to the plaintiff's mill, by causing the water to flow back thereon, will not be set aside for excessive damages, unless the court can see that the jury fell into some important mistake of computation, or departed from some rule of law given to them for their guidance, or made deductions from the evidence plainly not warranted by it.

[Cited in Hunt v. Pooke, Case No. 6,895; Fuller v. Fletcher, 6 Fed. 130.]

2. Errors of judgment of the engineer appointed by the defendant, in not delineating on the plan certain objects which might have tended to support the defence, do not afford ground for a new trial.

3. Evidence must be not only in fact newly discovered and not cumulative, but the party must have used due diligence to discover it before the trial, to induce the court to grant a new trial.

[Cited in Plymouth v. Russell Mills, 7 Allen 441.]

[Action of trespass on the case by Courtland Palmer against John Fiske and others.]

Evans & Paine, for the motion.

Shepley & Rowe, contra.

CURTIS, Circuit Justice. This was an action on the case for unlawfully obstructing the waters of the Penobscot river, to the injury of the mills of the plaintiff. It appeared at the trial, that some of the defendants were interested in mills on that river, which, before the time of the alleged nuisance, had been operated by means of a dam, whose effect was not complained of. This dam having been destroyed by a flood, the defendants built another in its place, and the plaintiff alleged that this new dam so obstructed the water, as to be injurious to his mills above. The jury found a verdict for the plaintiff, and assessed the damages at the sum of $10,650. Upon the coming in of the verdict, the defendants moved for a new trial, because the damages were excessive; and, subsequently, for newly discovered evidence. These grounds are distinct from each other, and must be separately considered. And first as to the excessive damages. Under the ruling of the court, damages were to be assessed by the jury for the injury suffered by the plaintiff during the year 1849; and as it appeared that six saws were, during that year, under lease to Gulliver & Gilman, the jury were instructed, that no damages could be recovered on account of obstruction of those parts of the mills, the declaration not being so framed as to enable the plaintiff to recover for an injury to his reversion. It appeared that the mills contained sixteen single saws, two gangs, equal to four saws, and small machinery, reckoned by the only witness who spoke upon this subject, as equal to four saws. The whole was equal, according to this computation, to twenty-four saws; so that striking out the six which were under lease, the machinery in the hands of the plaintiff, for the obstruction of which he could recover damages in this action, was equal to eighteen saws.

The important testimony, bearing directly on the question of damages, came from Roberts, Mayo, and Dean. Roberts hired the entire mills in 1848, and paid a rent of $20,000 for that year. He testified, in substance, that during the year 1848, he was so much troubled by backwater, that he hired other mills in the spring of 1849; that the backwater was the cause of his declining to hire these mills in 1849; that during that year a sluice way was made for carrying off the edgings, and this relieved the difficulty in part, and that he returned to these mills in 1850, and hired them for $14,000. That this difference between $14,000 and $20,000 was

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

principally owing to backwater. Mayo, who was the plaintiff's agent for managing the mills, testified that in 1848 he got about $20,000 net rent for the mills, and in 1849 about $4,000; that in 1850, after building the sluice way and making some other improvements, he rented the mills for $14,000; and that he knew of no cause for this difference except backwater. Dean, the agent of the Stillwater Canal Company, whose locks are in the immediate neighborhood of these mills, and who said he was well acquainted with them, gave an opinion that the annual value of each saw was diminished by backwater $200 per annum. It was argued at the trial, on behalf of the plaintiff, that as he got $20,000 for the mills in 1848, and only $4,000 in 1849, his damages were $16,000. On the other hand, as the mills rented in 1850 for $14,000, it was urged that the damages for 1849 could not be greater than $6,000, even if the diminution of rent was attributable solely to the act of the defendants, which was denied. It is manifest the jury did not adopt either of these views, for they allowed the plaintiff something more than $6,000, exclusive of interest, and much less than $16,000. It is clear, also, that they did not adopt the opinion of Dean, for they have fixed the annual injury to each saw in the possession of the plaintiff at a much higher sum than $200.

Now what I have to determine upon this motion is, not whether I should have found this verdict, but whether I can clearly see that the jury must have fallen into some important mistake in computing the damages, or must have departed from some rule of law, or have made deductions from the evidence, which are plainly not warranted by it. To assess the damages in this case, was not only within the exclusive province of the jury, but it was a matter to be deduced by them from evidence, which, when carefully examined, did not afford any precise data upon which to found a computation. Take, for instance, the view presented by the plaintiff, that he was entitled to $16,000, because he got $20,000 in 1848, and only $4,000 in 1849, for the use of these mills. It was for the jury to consider whether this difference was attributable solely to the act of the defendants, or partly to other causes, such as the scarcity of logs, the state of the water, and the consequent difficulty of getting logs to the mills at the usual times, as well as the obstructions of the water below the plaintiff's mills, by other causes than the defendants' dam. Upon the evidence in the case, it was certainly competent for the jury to find, as they have found, that the mills were not lessened in value $16,000 in 1849, by the tort of the defendants. On the other hand, it was to be considered by them whether $14,000 for which the millls were rented in 1850, was the true annual value in 1849, notwithstanding the backwater, and that if the plaintiff got but $4,000 that year, it was not attributable to the defendants. They might have come to that conclusion upon the evidence; but I am not prepared to say they could come to no other conclusion consistently with the evidence. In 1849, expensive improvements were made; the railway and sluice were built, and great quantities of edging were cleared out and obstructions removed. It was this altered state of things which, as Roberts testified, induced him to hire the mills in 1850, and pay for their use $14,000, and the jury may therefore have considered, that the value in 1850 was not a fair criterion by which to test the value in 1849. They may have thought that in 1849 the plaintiff's mills were choked up by edgings and saw dust, deposited by reason of backwater caused by the defendants, and that the $4,000 which plaintiff actually got for the use of the mills that year was all they were worth; that it was necessary to make large expenditures, and new permanent works to restore their value even in part, and that the increased rent of $14,000 obtained in 1850 was fairly attributable to an increased value of the mills by reason of these expenditures. So, too, they may have thought the opinion of Dean, that the annual value of each saw was diminished by backwater $200, was not a sound opinion; that it was but an opinion, which they were not bound to adopt; and that the actual diminution of rents was a fact of greater weight and more to be regarded than any opinion. It is impossible for me to know what view was actually taken by the jury of the evidence; but to set aside their verdict I must be able to see clearly that no view, consistent with the evidence, could have been adopted by them, in rendering this verdict; and this I do not see. There was evidence tending to show that the damages were somewhere from $6,000 to $16,000; there was other evidence tending to show that the damages did not exceed $4,000; the jury have found them, together with about three years' interest, to be $10,650. They were instructed to strike out the six saws let to Gulliver & Gilman, and allow such damages as would compensate the plaintiff for the diminution in the annual value of the residue of the mill in 1849, occasioned by any backwater unlawfully raised by the defendants. This instruction is not objected to. In a matter so indeterminate, and so necessarily dependent on the judgment of the jury, and where I cannot say they had no evidence on which to rest their conclusion, or from which they might have fairly deduced the sum they fixed, I cannot disturb their verdict, though it is for a larger sum than my judgment would have led me to find.

The motion for a new trial for newly discovered evidence rests upon several distinct grounds. The first may be stated, generally, as follows: In preparation for the trial, the defendants allege, that they employed an engineer to make a plan of the river, and lay down on it all material points and objects, which in his judgment could have any bearing on the case. He made a plan which was

used at the trial. It is now alleged that, through an error of judgment, he failed to lay down on his plan certain obstacles to the passage of the water, which, if they had been properly delineated, would have had a tendency to prove that the state of the water at the plaintiff's mill was not attributable to the defendants' dam.

I do not think this can be brought within the rules as to newly discovered evidence. In the first place the objects were in existence, and must have been seen by any one who examined the river, as the defendants' engineer did, just before the trial. It is not, that the objects themselves are newly discovered, but that their bearing and importance in the cause have become differently appreciated. But this cannot entitle a party to a new trial. It is urged that having employed a skillful surveyor and given him proper instructions, if he failed to exhibit on the plan important facts, the defendants are in no fault and ought not to suffer. But it must be remembered that the bearing and effect of these objects upon the case is matter of opinion and judgment; that whether it would be for the interest of the defendants to exhibit them was also a matter of opinion and judgment; that the defendants chose to rely in all such particulars upon the judgment of the engineer whom they employed. They had the benefit of his honest judgment, and acted on it. It is too late for them now to say he judged unwisely. Suppose counsel, having the means of proving a fact, judges it to be immaterial, or not useful to his client, and therefore does not exhibit the evidence of it. No one has supposed his client could have a new trial because it turns out that he was mistaken. Besides, this evidence, if admitted, would be clearly cumulative. There was much evidence in the case having the same tendency, and one of the principal grounds of defence was rested on it. Verdicts are not set aside, to let in even newly discovered evidence, the only effect of which would be, to strengthen an argument founded upon evidence which was submitted to the jury. The testimony of Cummings and Heald is also relied on. No explanation is given why their testimony or depositions were not produced at the trial. In May last, they resided in Michigan; but when they removed from Orono, where they had previously lived, does not appear. For aught that is shown, they were within reach of the process of the court at the time of the trial. They used a part of the saws in the plaintiff's mill in 1849. Very slight inquiry would have informed the defendants of this fact before the trial, if some of them did not know it. If they were then residing in Orono, they were in the immediate vicinity of some of the defendants. If they had then removed to Michigan, there could have been no difficulty in addressing them and making the necessary inquiries, and learning from them what they could testify. One of the defendants has made affidavit that their testimony is newly discovered. When and how it was discovered, and whether the defendants, or some of them, did not know before the trial, all that put them on inquiry after the trial, is not stated. The circumstances are very strong to show that they did; and that though it is doubtless true, that their evidence was in fact discovered after the trial, yet with the use of due diligence it might have been had at the trial. But if this were otherwise, their evidence is merely cumulative or not material. So far as it has a tendency to show that 1849 was a bad year for mills on that river, or that other causes than the defendants' dam affected the value of the plaintiff's mill in that year, their testimony is cumulative. They speak to facts much relied on by the defendants at the trial, and concerning which evidence was offered. So far as their depositions relate to the terms on which they had the use of a part of the saws, it is not in conflict with the evidence of Mayo. They say that under a verbal license from Mayo they used as many of the saws as they thought fit, up to September, 1849, and during the residue of the year, agreed to use more saws, paying so much a thousand for what they sawed. They do not say that Mayo got more than $4,000 from the mill that year, nor that the income did not depend on the amount sawed, nor that they had such a lease of the mills as to turn the plaintiff's estate into a mere reversionary interest, or that his claim should be, for forcing him to let at a reduced rent. On the contrary, they confirm the statement of Mayo, that the income depended on the amount sawed, and that consequently the damage from backwater was suffered by the plaintiff, and not by these persons who used the saws under the parol license of the character they describe.

These are the principal grounds of the motion; some other less important matters, such as the clause in the lease to Roberts concerning edgings, which it was admitted was at the trial and not read by the defendants, and which would have been of very slight importance if read, need not be noticed in detail. The result is, that the motion for a new trial is denied, and judgment is to be rendered on the verdict.

PALMER (GASSETT v.). See Case No. 5,265.

Case No. 10,692.

PALMER et al. v. GRACIE et al.

[4 Wash. C. C. 110.] [1]

Circuit Court, E. D. Pennsylvania. April, 1821.[2]

AFFREIGHTMENT—CHARTER PARTY — CONTROL BY OWNER—LIEN ON CARGO.

1. When the owner of the ship which is chartered, employs, pays and supports the master and crew, retains the control and navigation of the vessel, by means of the master, and is answerable for his conduct; a special ownership does not pass to the charterer, although the terms of the instrument are "let and hired," and although the freight is a gross sum, and consequently the owner has a lien on the cargo for the freight. This is the general rule: to which there may be exceptions.

[Cited in Certain Logs of Mahogany, Case No. 2,559; Richardson v. Winsor, Id. 11,795.]

[Cited in brief in Harding v. Souther, 12 Cush. 314. Cited in Robinson v. Chittenden, 69 N. Y. 528.]

2. If the charterer at the foreign port refuses, or is unable to load the ship back, the master may take a cargo from others, on such terms as he can; and the owner will have a lien on such cargo, not for the freight stipulated in the charter party, but for the freight agreed upon with the master; and if the bills of loading stipulated to carry the goods freight free, the master acting bona fide, the owner is bound; and his remedy is on the charter party, against the charterer.

[Cited in Shaw v. Thompson, Case No. 12,726.]

3. If the charterer buy the cargo at the foreign port, under an agreement with A., the person who loaned him the money to buy it with, to give him a lien on the goods for his security, and indorse the bills of loading to him; A. is the owner of the goods, and the bill of loading being that no freight is to be paid, A. is not bound to pay any freight.

This was an action of indebitatus assumpsit, to recover back $10,000 paid by the plaintiffs' agents to the defendants, as freight, upon certain goods brought in the ship America, from Calcutta to Philadelphia, which the plaintiffs insist were not liable to pay freight. The facts of this case are stated at large in the opinion of the court.

For the plaintiffs, it was contended: (1) That the goods shipped by Chambers, being pledged by him to the plaintiffs, as a security for the money advanced by the plaintiffs for the purchase of them, the plaintiffs stand before the court in the character of mortgagees, with a mere equity of redemption, or resulting trust remaining in Chambers, for any surplus after the pledge was fully discharged: consequently, the goods were not subject, as the property of Chambers, to the stipulations of the charter party. No freight was due by the plaintiffs for the carriage of these goods, because the bill of lading signed by the master, the agent of the owners, acknowledges that the freight had been paid at Calcutta, or, in other words, it stipulated that the goods should be transported free of freight. Freight is bottomed on contract, and where that is express, as it is in this case, none can be implied. The master, in a foreign country, has power to bind the owners, in relation to the use of the ship, and to take goods or freight, on such terms as he can obtain them; and if he is so situated that he must either return empty, or take in a cargo upon very reduced terms, or even for no freight at all; if he act honestly, with a view to the interest of the owners, they are bound by his contract. It is not pretended that this transaction was tainted with fraud, or unfairness of any kind. If the plaintiffs had not enabled Chambers to fill up the ship, she must have returned half filled only, to the ruin of the charterer, and the consequent destruction of his ability to pay the sum stipulated in the charter party. That this advance would not have been made, except on the terms that were agreed upon, is undeniable. It was then to the advantage, certainly not to the injury of the owners, that this contract was entered into by the master. Abb. Shipp. 131. (2) The defendants had no lien upon these goods for the whole, or any part of the sum stipulated by the charter party to be paid by Chambers, because, by the terms of that instrument, the possession of the vessel was transferred to the charterer, and where the owner has not possession of the ship, he can have no lien upon the goods for freight. In this case, the sum to be paid by the charterer was a gross sum, which was to be paid for the hire of the ship, rather than as freight for the carriage of goods; for the stipulated sum must have been paid by Chambers; although the ship had returned empty. Parish v. Crawford, 2 Strange, 1251, has been overruled repeatedly. James v. Jones, 3 Esp. 27; Mackenzie v. Rowe, 2 Camp. 482; Paul v. Birch, 2 Atk. 621; Hutton v. Bragg, 2 Marsh. 339; Phillips v. Rodie, 15 East, 547; Holt, Shipp. 177; Frazer v. Marsh, 13 East, 238; Trinity-House v. Clark, 4 Maule & S. 288; 7 East, 227; Hussey v. Christie, 9 East, 426. (3) If these goods were liable for freight, they were only so for such a proportion of the whole sum, as those goods bore to the outward, as well as the homeward cargo; or, in other words, to about one-fourth of the whole sum.

For the defendants it was answered: (1) That these goods were shipped as the property of Chambers, on his account, and at his risk. He and the captain then could by no contrivance exempt them from the terms of the charter party. The master can in no case vary from, or change the terms of the charter party. Those powers which he may exercise as master, under an implied authority, do not exist where they contravene the terms of the charter party which are obligatory upon him and all others who deal with him, particularly those who, like the plaintiffs, had notice of the charter party. The captain can-

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

[2] [Reversed in 8 Wheat. (21 U. S.) 605.]

not release or depart from the charter party, if it be made by his owners. Beau. L. M. 138; Abb. Shipp. 245; Hunter v. Prinsep, 10 East, 378, 389. (2) The owners hired, fed and paid the crew, and were liable for their conduct. They retained a part of the cabin and hold of the ship. The entire management, control and navigation of the ship remained with the captain as agent of the owners. Where these circumstances concur, the weight of authority, in favour of the right of lien for freight, greatly outweighs those cited on the other side. Holt, Shipp. 169–176; Parish v. Crawford, 2 Strange, 1251. Phillips v. Rodie, and Birley v. Gladstone [3 Maule & S. 215] cited on the other side. Fletcher v. Braddick, 2 Bos. & P. (N. R.) 185; Saville v. Campion, 2 Barn. & Ald. 503; Oliver v. Greene, 3 Mass. 133; Kleine v. Catara [Case No. 7,869]; McIntyre v. Bowne, 1 Johns. 239; 2 Johns. 346; [Hooe v. Groverman] 1 Cranch [5 U. S.] 236; Hooe v. Groverman, 1 Cranch [5 U. S.] 215.

Upon the cases cited by the plaintiffs' counsel, it was remarked, that none of them, except Hutton v. Bragg, 2 Marsh. 339, touch the question of liens, but merely the responsibility of the owners, for an alleged misconduct in the captain.

WASHINGTON, Circuit Justice. This is an action of assumpsit to recover back money paid by the plaintiffs to the defendants, which, it is alleged, they ought not in equity and good conscience to retain. The facts of the case are the following: On the 23d of October, 1818, the defendants, by charter party under seal, let, and Hugh Chambers, the other party, took and hired the ship America, of which the parties of the first part were owners, to freight, for the voyage afterwards described. The defendants covenant that the ship shall be staunch and strong, well and sufficiently fitted, manned and furnished with all things needful for her on her intended voyage, and provisioned for eighteen months, and fully and properly armed with large and small arms, with sufficient ammunition for the same; and that she shall, on or before the 15th of November following, be in readiness at the port of Philadelphia, to receive and take on board, and shall there, when tendered within reach of her tackle, receive and take on board all such lawful goods as the charterer may think proper to ship, not exceeding what she can reasonably stow over and above her tackle, &c. and the privileges reserved for the master, and first and second officers, and the lading of the dollars to be shipped by the owners; that she shall, on being loaded and dispatched, set sail, on or before the 30th of November, from said port, and proceed to Madeira, and shall there make a true delivery of such parts of her cargo, as shall be there deliverable, to such persons as the same shall have been consigned to; and the same being so unloaded, the said ship shall take on board all such goods as shall be tendered within reach of her tackle, by or for account of the charterer, not exceeding as aforesaid; and as soon as loaded, she shall set sail, and directly proceed on her voyage and put into the port of Bombay, and shall at the option of the charterer or his agents, be allowed also to put into Calcutta, and deliver her cargo, and take in returns there and, at the said ports of Bombay and Calcutta, shall unload all such goods as shall remain on board, and relade such goods as the charterer, his agents or assigns shall think fit to take on board, not exceeding as aforesaid; and the lading for account of said owners, in respect of the returns of said funds, in dollars, to be shipped by them; and the said ship shall, with her said return cargo, sail and proceed back to Philadelphia, and there deliver to said charterer, or his assigns, the full and entire cargo laden on board at Bombay and Calcutta, for his account; and then the voyage shall end. It is further agreed, that the owners shall load on board said ship, for said voyage, $15,000, to be invested in goods in India, in like manner as the rest of the cargo in general, and that they shall be chargeable with freight on the returns thereof, at the rate of $50 per ton, and that the commission to be allowed the supercargo shall be five per cent. on the amount of the investment in India. The charterer to furnish the needful cabin stores for the supercargo, master, and officers of the ship for said voyage, and the owners are to allow and pay the sum of $1,500; and also the cabin shall belong to the charterer, excepting the state rooms, in which the master and officers shall sleep. It is further agreed, granted, and reserved, that the master shall have a privilege of six cubic tons freight free; the first officer a like privilege of three cubic tons, and the second officer a like free privilege of two cubic tons. The charterer covenants that he will pay all the port charges and expenses of the ship abroad and at Philadelphia; until she shall have discharged her return cargo, excepting the sea stores, wages of the master, officers and crew, and the repairs and outfits of the ship, with all which she is chargeable; one hundred and twenty working days in all are allowed for the loading and unloading said ship at the ports of loading and delivery, and for every detention over and above said one hundred and twenty days, the charterer to pay $75 per day; and the charterer further covenants, that he will cause the ship to be loaded at Philadelphia on her being in readiness to receive her cargo there, and re-loaded at Madeira, and at Bombay and Calcutta, in the manner above expressed, and that he will pay to the owners, on the return of the ship to Philadelphia, and before the discharge of her cargo, in approved notes, not exceeding ninety days from the time she shall be ready to discharge, the clear sum of $30,000, and the further sum of

$2,000, if she shall have proceeded to Calcutta, for the hire and freight of said ship for said voyage. The ship sailed from Philadelphia, and on her arrival at Madeira, she discharged her cargo, or a part of it, and took in a quantity of wine on account of different shippers, and then proceeded to Bombay, and afterwards to Calcutta, at which places, respectively, she landed parts of her outward cargo. The charterer finding himself at Calcutta involved in an unprofitable, if not ruinous enterprise, and having no funds to enable him to load the ship back to Philadelphia, took on board goods belonging to different shippers, for which the master signed bills of lading, stipulating for the payment of freight at various rates, as were agreed upon between him, or by the charterer and the shippers. These shipments, together with the cargo from Madeira, which could not be disposed of, occupied rather more than half the tonnage of the vessel. For the purpose of getting her filled for her return voyage, Chambers applied to, and obtained from the plaintiffs, an advance of £8,042. 8s. 4d. sterling, which was invested in a cargo sufficient to occupy the other half of the tonnage of the ship, and which he pledged to the plaintiffs as a security for the payment of two bills of exchange, drawn by him on Grants and Stone of this city, amounting together to the above sum; and to render the pledge adequate to its object, it was agreed between Chambers and the plaintiffs, that the cargo should be consigned to Messrs. Willings of this city, freight free, to dispose of for the purpose of reimbursing the plaintiffs their advance, in case the bills should not be paid. In pursuance of this agreement, the master signed bills of lading for the goods, as shipped by Hugh Chambers on his account and risk, to be delivered to Messrs. Willings, "freight for the same being settled here;" which bills of lading, together with an invoice of the goods shipped by said Chambers, and consigned as above, were indorsed by Chambers, and enclosed by the plaintiffs to Messrs. Willings, in a letter bearing date the 19th of September, 1819. In this letter, they state that this consignment had been handed to them by Chambers, as a pledge for the payment of the above bills, and request of the Messrs. Willings to deliver over the goods to Chambers in case the bills should be paid, or they should be satisfied that they would be so when at maturity; otherwise to retain the goods, and dispose of them for their security and reimbursement. They add, that their sole object in making the advance to Chambers was to enable him to earn something towards the amelioration of a most ruinous voyage; and that they have no chance of reimbursement but out of the proceeds of the goods, and then only under the conditions on which they have been shipped, viz. that they pay no freight. On the arrival of the America at the port of Philadelphia, the defendants applied to Chambers for the performance of his covenant to deliver them approved notes for the stipulated freight, to which he answered, that he was unable to do so; upon which the defendants claimed freight upon the above goods, before they would deliver them to the consignees. This the consignees refused to pay, unless they should be compelled to do so in order to obtain possession of the goods, which they demanded. The demand being refused, the Messrs. Willings paid to the defendants $10,000 on account of Palmer, but under protest, and obtained possession of the goods; it being understood between the parties that the right of the defendants to retain the goods for the freight, should be subject to judicial inquiry and decision.

The jury under the agreement of the counsel, and by the direction of the court, have found a verdict for the plaintiffs for $10,510, being the sum and interest paid on account of the plaintiffs to the defendants by the Messrs. Willings, subject to the opinion of the court upon the whole evidence. If that opinion should be with the plaintiffs, then judgment to be entered for them; if for the defendants, judgment for them: and it was further agreed, that in the latter case, the judgment shall be considered as concluding the plaintiffs only as to the matter, that the defendants had a right to retain the goods on board the America, consigned to the Messrs. Willings for the payment of freight in the charter party, but not as to the quantity of freight which the said goods ought to pay, or be liable for. It was further agreed, that, at the option of either party, a case shall be made, to have the effect of a special verdict.

The only question in the cause is, whether these goods were bound to pay freight for their carriage from Calcutta to this port? And this will depend upon the correct determination of the two following questions, into which the general one may be considered as resolving itself: (1) What is the general rule of commercial law as to the operation of a charter party in transferring a special ownership and possession of the ship to the charterer; and how does the rule, whatever it may be, apply to this charter party? If unfavourable to the interest of the charterer, then (2) are there any, and which circumstances in this case, to exempt the plaintiffs from the consequences of the rule?

1. The necessity of pursuing the first subject of inquiry to its legal result, depends upon this; that the lien of the owner for his freight depends upon his possession of the goods chargeable with it, and this again depends upon his possession of the ship in which the goods were carried. If by the operation of the charter party such ownership passed to the charterer, as it is contended it did by the plaintiffs' counsel, then the defendants had no right to detain the goods for the freight, nor to retain the money paid

by the plaintiffs for the purpose of obtaining possession of what was unlawfully withheld from them; and, consequently, the plaintiffs are entitled to recover back the money so paid with interest. If, on the other hand, the possession remained with the owners of the ship, notwithstanding the charter party, as is contended by the defendants; then they had a right to detain the goods for the freight, and judgment must be given in their favour, unless there are circumstances in this case to exempt the plaintiffs from the consequences of the rule.

In the examination of the first question, the court will pass in review all the cases which were cited at the bar; and if they cannot be reconciled, we shall endeavour to extract from them the rule which seems to be the best supported by the principles of commercial law. The cases relied upon by the counsel for the defendants, in support of their right to retain the goods until the freight should be paid, will first be examined. Parish v. Crawford, 2 Strange, 1251, was that of a charter party, by which Crawford, the defendant, hired the ship to Fletcher, for the voyage in question, for a certain sum, for freight, and Fletcher was to have the benefit of carrying a cargo; the owner appointed the master, and covenanted for his good behaviour, and for the condition of the ship, and the moidores, for the non-delivery of which the action was brought against the general owner of the ship, were taken on board by the master, to whom the freight was paid. The court decided, that the ownership of the vessel was not parted with by the charter party, as the owner covenanted for the condition of the ship, which was navigated and managed by a master appointed by himself, for whose good behaviour he was answerable. This case has been disparaged by the plaintiffs' counsel, who contend, that it has been overruled in England by other cases which have been decided long since the American Revolution. The cases which it is supposed have overruled it, are James v. Jones, 3 Esp. 27, and Mackenzie v. Rowe, 2 Camp. 482; but as neither of these cases state the terms of the charter party, it is impossible to say, whether they interfered in any manner, and how far, with the decision in the principal case. In Phillips v. Rodie, 15 East, 547, the ship was hired for a certain voyage, out and home, for so much freight per ton, with a covenant to pay for dead freight, if the charterers should not fill the ship as they covenanted to do. The owner covenanted to carry, and to deliver the goods shipped, and to bring back the return cargo. It was decided that the goods, which were brought back on the return voyage, were liable for the freight due for their carriage, (which they could not be, if the possession of the vessel passed by the charter party;) but that they were not bound to pay for dead freight and demurrage. Birley v. Gladstone, 3 Maule & S. 215, was, in principle, the same as Phillips v. Rodie, the charter party containing the usual covenants by the owner, as to the condition of the vessel; the taking in, carrying and landing the outward cargo, and bringing back a return cargo; freight payable by the ton. The decision was the same as in the preceding case. Fletcher v. Braddick, 2 Bos. & P. (N. S.) 185, was the case of a ship chartered to government. By the charter party, the owner let the ship to hire to the commissioners of the navy, to serve as an armed vessel, for six months, or longer if desired. The defendant, the owner, covenants to furnish the crew, the master, mate and surgeon; and to pay and victual them; to have her fully repaired and supplied with stores; the master to obey the orders which should be given to him by the commander, to be put on board by the government; freight, payable so much per tonnage of the vessel; the owner to keep her so fitted and provided that the public service should not suffer, and to cause her to be cleansed, if required. It was decided that the ship belonged to the owner, notwithstanding the charter party. "She was navigated," says the judge, "by a master and crew provided and paid by the owner, and it is difficult to say that she is not his ship; with regard to all the world, except the commissioners." "The master and crew had possession of her, and the owner is not exonerated on account of his agreeing to take a commander on board; it is doubtful if he had anything to do with her navigation." Saville v. Campion, 2 Barn. & Ald. 503. By the charter party, the owner covenants that the ship, being tight, &c. manned, &c. and properly victualled, the master should receive and take on board the goods of the charterer, and sail to Madeira, and receive and take on board other goods there; from thence she should proceed to Calcutta, and there the master should deliver the goods, and receive and take on board other goods, and then return to London, and there deliver the homeward cargo; that such passengers, as might be required by the charterer, should be conveyed in the ship, and that all the cabins, except one, should be at his disposal. The charterer agreed to send goods alongside the ship, and to receive them from alongside; there was a special clause providing that the charterer might appoint a person to go out and home as supercargo, and to take upon him the authority of the master, in the stowage of the cargo, but in no other respect to interfere with his duties without leave. The owner claiming a lien upon the cargo for the freight, the court decided that the charter party contained nothing in its language or its objects, which imported that the charterer was to have possession of the ship; that it was a contract for the carriage of goods, and not for the ship itself; therefore the ship owner was in possession of the vessel and goods, and as such, had a right of lien for the freight.

For the plaintiffs, the following cases are relied upon: Paul v. Birch, 2 Atk. 621. By the charter party the ship was hired to the charterer, for a certain voyage, at a certain sum per month, and the goods to be put on board were made liable to the owner for the freight. The charterer was at liberty to put on board such master and mariners as he pleased. At the outward port, the charterer took on board a cargo from different shippers, at a certain freight per ton. Lord Hardwicke decided, that as between the owner and the charterer, the charter party was such a specific lien on the goods, as to subject them to the payment of the freight which they had incurred for their carriage. Vallejo v. Wheeler, Cowp. 143, was a case of barratry, which turned upon the question, who was the owner for the voyage? Darwin, the charterer, appointed the master, and the opinion of the court was, that the charterer was owner pro hac vice. In the case of Frazer v. Marsh, 13 East, 238, the owner, by charter party, let the vessel to the then master, for a number of voyages, at a certain sum, who afterwards ordered her stores, which the plaintiff furnished, and for which the action was brought against the original owner. But the court decided, that during the continuance of the lease, the relation of master and owner ceased, as between the parties to the charter party, the latter having divested himself by that instrument of all control and possession of the ship, for the time being, in favour of another, who had all the use and benefit of it; and that therefore the owner was not liable for the acts of the charterer, who ceased to be his servant. Trinity-House v. Clark, 4 Maule & S. 288, involved a question of ownership, and consequent responsibility for tolls and other dues incurred by a ship chartered by the defendant to government, for a transport, during the service for which she was chartered. The charter party grants, and to hire and freight lets the ship, to take on board soldiers, &c. to land them, and to receive others as should be directed, the ship to continue in service for a specified time, or longer if required; that she shall be provided and manned in the way specified, and provisioned during her employment; freight, so much per ton, to be paid on a certificate of the navy commissioners of the good behaviour of the captain, and of his obedience to orders; a cabin reserved for the master and mate, and a place for the crew. The court were of opinion that upon the terms of the charter party, and the purpose, the possession passed to the crown during the term of service, and that the owner was not liable. Hutton v. Bragg, 2 Marsh. 339, is the case which the plaintiff's counsel have mainly relied upon. The owner of the ship let her out to a freighter, for a voyage from London to the Cape of Good Hope, and thence back to London. It was stipulated that the master should reserve the cabin for his sole use, and for the accommodation of his crew and stores, and that the freight, which was a gross sum for the whole voyage, was to be paid by bills, drawn during the voyage, or upon the return of the vessel. The return cargo consisted partly of goods shipped by different persons, for which the master signed the usual bills of lading, the goods to be delivered on paying freight to the charterer; and partly, of seventy pipes of wine, shipped on account of the owners, and consigned to them, which the owner insisted upon his right to retain, until the freight was paid. The court decided against the lien of the owner, on the ground that he had not possession of the wine because he had parted with the possession of the ship; "the master and crew were bound," say the court, "to obey the orders of the charterer, and the sum to be paid was rather as rent for the hire of the ship, than freight."

Upon these cases, it may be proper to make the following observations. Paul v. Birch decides nothing in relation to the general question, inasmuch as the right of lien was maintained upon the ground of its being specially reserved by the very terms of the charter party, and it would be strange if it had been otherwise, as the master and crew were appointed by the charterer, and were consequently his servants. Such too were the cases of Vallejo v. Wheeler, and Frazer v. Marsh. Trinity-House v. Clark can scarcely be distinguished, either by the terms of the charter party, or the purpose for which the vessel was hired, from the case of Fletcher v. Braddick; and they may therefore be considered as neutralizing each other. Hutton v. Bragg proceeded, in some measure at least, (as well it might) on the circumstance, that the master and crew were bound to obey the orders of the charterer; and in this respect it resembles the two cases before noticed of Paul v. Birch, and Vallejo v. Wheeler. On the other hand, the cases of Parish v. Crawford, Phillips v. Rodie, Birley v. Gladstone, and Saville v. Campion are bottomed upon the circumstances that the owner appointed, fed, and paid the master and crew, and bound himself for their good behaviour, and that the entire management and navigation of the vessel during the voyage was vested in the master so appointed and paid. And it seems to be perfectly reasonable that the master, who is employed and paid by the owner, and for whose conduct the owner is responsible, should be considered as his servant, and subject to his orders; unless there be particular stipulations in the charter party which may fairly be construed to dissolve this connection between them. But if the connection continues, the possession of the master is to be considered as being that of owner.

Upon comparing the above cases with each other, it would seem that those which favour this construction greatly outweigh in number, as well as in sound commercial principles, those which are brought to oppose

them; nevertheless, it may be concluded, from what is said by a late work written by Holt on the law of shipping, that the question which we have been discussing, is yet unsettled in England; and that it is to be decided by the terms of the charter party, and what appears, under all the circumstances, to have been the intention of the parties. Whether it is desirable that a question of such magnitude, as it respects the commercial world, should be left to rest upon such uncertain, and constantly varying grounds, may well be doubted; we cannot however but rejoice, that the general question is, as we believe, settled in this country, subject no doubt to exceptions, which a departure from the usual form of these instruments may reasonably warrant. The case of Hooe v. Groverman, 1 Cranch [5 U. S.] 236, decided by that court, to which we at least must bow, seems to us to be conclusive upon this point. The charter party granted, and to freight let, the whole of the tonnage of the ship, on a voyage to be made from Alexandria to Havre de Grace, and back to the port of Alexandria, &c. The owner covenants for the sailing of the vessel, taking in and delivering in good order the outward and homeward cargoes, the vessel to be kept in good order during the voyage by the owner, and to be well furnished with a crew, &c. The captain was appointed and paid by the owner,—the freight a gross sum. The case turned upon the question, whether the owner was responsible for some misconduct of the captain on the voyage? It is true, that the chief justice, in delivering the opinion of the court, laid some stress on the circumstance, that the whole tonnage, and not the whole of the vessel was let; but if this had been the ground of the decision, it would not have differed materially from the present case; as in this, neither the whole of the ship, nor of the tonnage was let, the owner having reserved for the master and the officers a part of the cabin, and as much of the hold as would accommodate the privileges of the master and two other of the officers, as well as the investment to be made by the owner in India, to the value of $15,000; and although the owner is to pay freight for his part of the cargo, yet the contract, in relation to that subject, amounts substantially to a reservation of so much of the ship's hold, as would accommodate his part of the cargo; and an agreement to deduct from the stipulated freight, as much as the carriage of such cargo would amount to at the rate agreed upon. The chief justice however proceeds to say, that there are other circumstances to show that the direction of the vessel during the voyage was intended to remain with the owner; such as his covenants to carry and deliver the cargo. He therefore was to be considered as owner, and consequently answerable for the injury sustained by the conduct of his captain. Marcadier v. Chesapeake Ins. Co., 8 Cranch [12 U. S.] 49, was a case of barratry. The ship, except the cabin, and part of the hold for the accommodation of master and crew, was granted, and to freight let, for the voyage. The owner consented to man, victual and navigate the vessel at his own charge during the voyage, and to receive on board any goods which the charterer should tender, stow and secure it, and proceed to the place of its destination, and there discharge it. The court decided, that the ownership and possession did not pass to the charterer. In delivering the opinion, the court lay it down, that "a person may be constituted owner, who by the terms of the charter party hires the ship for the voyage, and has the exclusive possession, command and navigation of her; such was Vallejo v. Wheeler. But where the general owner retains the possession, command and navigation, and contracts to carry the goods on freight, the charter party is a mere affreightment, sounding in covenant." McIntyre v. Bowne, 1 Johns. 239, was also a case of barratry, and the court stated that it turned upon the question, who was owner for the voyage. The ship was granted, and to freight let for the voyage. The master and crew were provided by the owner, and victualled and paid by him; part of the cabin, and also a part of the hold, were reserved for the master and mate. The owner covenanted to carry and deliver the cargo. The court decided, that by the covenant to carry and deliver the cargo, the owner was rendered liable for the master's conduct. The owner retained the control and management of the ship, and was bound to keep her furnished with a sufficient crew. The court say that, under such circumstances, the charter is rather a covenant to carry the goods, and the ownership does not pass to the charterer. But where the whole management is given over to the charterer, he becomes owner pro hac vice. Kleine v. Catara [Case No. 7,869] presented a question of freight; the charter party was in its terms like those stated in the above three cases, and the decision and reasoning of the learned judge was in perfect conformity with them.

The concluding counsel for the plaintiff saw the application of these cases to the present, and endeavoured to resist their force by drawing a distinction between cases of responsibility and of lien; contending that the former depends upon the question of ownership, and the latter upon that of possession. That the general owner may continue so for the purpose of charging him with the consequences of the misconduct of the master employed and paid by him, notwithstanding the possession passed by the charter party to the charterer. This argument cannot be maintained upon authority, and is, in our apprehension, quite unreasonable. There are two species of ownership; general or absolute, and special. The first may exist without possession, but the latter never can; and wherever the cases speak of ownership with

a view to the subject of liability or of lien, they always refer to a special ownership. The charterer is sometimes said to have the ownership, and at other times the possession; the two expressions being constantly used as convertible. And it would be a strange subversion of the rule, qui sentit onus, debet et sentire commodum, were the distinction contended for to be established. It may be admitted that the absolute owner may part with the special ownership and possession of his vessel for a time, and also with the services of a master and crew appointed, paid, and maintained by himself; in which case, he would lose his general right of lien on the cargo; but he would, at the same time, be exempted from responsibility for the conduct of those he had so employed and hired to the charterer. But if he navigates and manages the ship by his servants so appointed, and is answerable for their conduct, he is justly to be considered as liable to make compensation for their misconduct, and is entitled, on the other hand, to the privilege of retaining the cargo as a security for the freight due for its carriage.

Great reliance was placed by the plaintiffs' counsel, first, on the legal import of the words "let and hire," in this charter party; and secondly, on the circumstance, that the freight to be paid was a gross sum for the voyage out and home. As to the first, it must be admitted that in some of the cases, these expressions are noticed with considerable emphasis, particularly in that of Trinity-House v. Clark. It is nevertheless apparent that the decision did not turn upon that circumstance, and that it was merely thrown in as a make weight. The court considered the services of the master and crew, as well as the ship, to have been hired; and it is distinctly stated and strongly enforced, that the purpose for which the ship was hired called for the possession, since it required such a control over her to be vested in the officers of the crown, as possession only could give. In Hutton v. Bragg it is clear that the decision does not proceed on those expressions, although they are laid hold of by the court in Saville v. Campion, to prevent a direct collision between that case and Hutton v. Bragg. These expressions are to be found in Parish v. Crawford, Fletcher v. Braddick, and in the four American cases before noticed; and it is to be presumed that they were used in the charter party in Phillips v. Rodie, as it is stated generally that the ship was hired. Yet in all these cases it was decided, that the ownership and possession did not pass to the charterer. In Frazer v. Marsh, these expressions were in the charter party; but they were not relied upon by the court, nor did the decision turn, in any degree, upon them. In short, it may confidently be laid down, upon general principles of law, that these and similar expressions are not sufficient to make that a grant, which the parties intended should operate only as a covenant. The case of Jackson v. Myers, 3 Johns. 388, contains a satisfactory exposition of the law on this subject. The other argument, founded upon the circumstance that a gross sum was to be paid for freight, is not, in our opinion, supported by the cases. In some of them, this circumstance passed without observation from the court, and even where it was noticed, it was not relied upon as the ground of the decision. Frazer v. Marsh, turned upon the severance of the connexion between the owner and the master; and in Parish v. Crawford, that circumstance had no effect upon the point decided. But we hold the case of Hooe v. Groverman [supra] to be conclusive.

Upon the whole, we are of opinion, after an attentive and laborious examination of all the cases, that the general rule is, that where the owner employs, pays and supports the master and crew, retains the control and navigation of the vessel, by means of the former, and is answerable for his conduct, a special ownership and possession do not pass to the charterer, although the ship is let and hired to him, and although the freight reserved be a gross sum; consequently, that the owner has a lien on the goods for such freight as he may be entitled to claim. We do not pretend to say that there may not be exceptions to this rule; that the particular purpose, for example, for which the ship is hired, and peculiar provisions in the charter party, may not form such exception. We only mean to state the general rule, and to show that in its application to this case, the possession did not pass to the charterer. We give no opinion as to what circumstances would be sufficient to create an exception.

2. The next question is, are there any, and what circumstances in this case, to exempt the plaintiffs from the operation of the general rule? or, in other words, were the goods shipped by Chambers, liable to pay freight? Freight is a compensation for the carriage of goods; and it is in all cases bottomed upon contract, either express or implied. The former happens when the charter party or bill of lading stipulates for the payment of freight generally, or fixes the sum to be paid or the rate by which it is to be computed. If there be no express stipulation on the subject, then the law raises an implied contract to pay such freight as is reasonable, and usual, for similar services.

The next stage at which we arrive, in the investigation of this question, leads to the inquiry whether the freight stipulated to be paid by the charter party, can be diminished or departed from, by the bill of lading? As between the charterer and the master, we have no hesitation in answering, that it can not. A contrary doctrine would permit the charterer to act under, and against his own agreement; to have his goods carried in virtue of the obligation imposed by

the charter party upon the owner, and yet to violate that very contract, by changing the consideration upon which it was founded. But if the charterer should think proper to abandon the contract, so far as it was intended for his advantage, and refuse, or be unable to load the vessel in whole or in part; the master is under no obligation to return empty, but may load her on freight, for the benefit of the owners, or may take in goods from other shippers, to fill her up, if the charterer has loaded her only in part. The goods so taken in, and safely transported, are liable to pay freight; and the charterer is clearly liable upon his covenant to the owner. Whether he is entitled to credit for the freight earned upon the goods of the other shippers, is a question which need not now be decided. We have said that the goods of the shippers, other than those of the charterer, are liable to pay freight; but the question is, what freight? We answer, that which was agreed upon between the shippers and the master, of which the bills of lading are the evidence. So, if the charterer, being unable to load the ship, put her up as a general ship, and she is loaded in whole, or in part, by other persons, the goods so taken in are liable, at the port of delivery, to pay such freight, and such freight only, as was agreed upon between the charterer, or the master and the shippers. The charterer is not confined by the charter party to use the vessel in the carriage of his own goods. She is bound to receive on board all lawful goods which he may tender; whether they belong to himself, or to others with whom he has contracted. But as these sub-shippers are not bound by the charter party, because they were not parties to it, and can be bound to pay freight only in virtue of some contract, express or implied; that which is agreed to be paid, and no other, can be demanded, either by the charterer or by the owners of the ship. The lien of the latter can never be extended beyond the terms of such subcontract; if it could, we should be presented with an anomalous case of a right to freight, arising, not only without a contract to support it, but in opposition to an express contract, by which its amount is fixed.

The consequences of the doctrine contended for by the defendants' counsel, would be truly disastrous to commerce, and even to the true interest of ship owners. For if a charterer, or the master as representing him, at a foreign port, being unable to load the ship, may not take the goods of other persons on freight, upon such terms as the nature of the trade will bear, and upon which he can procure them, then it is most obvious that in many, if not in most instances, he will not have it in his power to enter into such contracts at all. For who would ship goods on the ground of a special contract with the charterer, or the master, if the charter party could overreach and change such contract, and impose other terms than those which were agreed upon, and such as the shippers would have rejected, had they been proposed and insisted upon? The consequence then would be, that the ship would return empty, to the injury of the charterer as well as of the owners, by disabling the charterer from fulfilling his contract, and by depriving the owners of a security for the freight, in part at least, upon the goods brought in, in case of the charterer's inability to pay the freight. The contrary doctrine appears to the court to be not only reasonable and just, and accommodated to the true interests of commerce but it is fully supported by the case of Paul v. Birch, and by Hyde v. Willis, 3 Camp. 202.

We come now to the very case before the court. Can the master, with the consent of the charterer, take in a cargo from other persons, free of freight? The question is put in this form, to meet the very case before the court, and to confine our decision to it. It would seem to be answered by the principles already stated as applicable to an agreement for a diminished freight. These are, that to sustain a claim for freight, there must be a contract express or implied; and that, if it be of the former description, the latter can not arise. And we are clearly of opinion, that, if the master, acting bona fide, with an honest view to the benefit of all concerned, and particularly with the consent of the charterer, and in compliance with his contract with third persons, agrees to take on board a cargo, free of freight, such cargo is not liable to pay freight, nor can the owner detain it until freight is paid. Even if the stipulation in this case, that the freight should be paid before the goods are landed, is equivalent to an express reservation of a lien, still there can be no lien, if there be no freight due; and we may say, in the words of Lord Hardwicke, in Paul v. Birch, where the lien was created by express words, that if the goods are so liable, "the shippers would be in the hardest case imaginable, for they would be liable to any private agreement between the occupier of the ship and the original owner." And again, we might address to the owners the advice which the same distinguished judge gives in the same case, "that they should have taken care that the hirer was a substantial man." That this was a perfectly fair and honest transaction, intended for the benefit of the charterer, and, so far as it might thereby increase his ability to comply with the speculations of the charter party, incidentally to benefit the owners, is perfectly clear; as without such an arrangement, these goods would not have been shipped, and the recourse of the owners must at last have been personally against the charterer.

The last question is, who was the real owner of these goods? The bill of lading and invoice state them to have been shipped by Chambers, and on his account. But, in

point of fact, they were so shipped, subject to a pledge of them to the plaintiffs for securing the money with which they were purchased, agreed upon at the time the advance was made, and without which stipulation it would not have been made. The plaintiffs, therefore, had, in the first instance, an equitable title to these goods, in the possession of Chambers as their trustee; and the indorsement and delivery of the bill of lading to them, passed the legal interest. Thus possessed and entitled, the plaintiffs consigned them to their agents in Philadelphia, who had a right to demand them as the property of the plaintiffs, shipped under an express agreement with the master and charterer, that no freight should be paid for them. The defendants then had no right to detain these goods for freight. We acknowledge that this is a hard case upon the defendants; and, it must be admitted, a contrary decision would render it equally so upon the plaintiffs. But in a question de damno evitando, he who by himself, or his agent, has occasioned the loss, ought to bear it. To permit the plaintiffs first to be seduced by the defendants' agent, and the charterer, to put the goods on board, under a solemn contract to carry them free of freight, and then to tolerate a violation of that contract, by subjecting them to freight, would be a very unsuitable course of proceeding to be adopted by a court of justice.

The court is therefore of opinion that judgment ought to be rendered for the plaintiffs.

The judgment in this case was reversed on writ of error. See [Gracie v. Palmer] 8 Wheat. [21 U. S.] 605.

PALMER (GUIDET v.). See Case No. 5,859.

PALMER (HASBROOK v.). See Case No. 6,-188.

Case No. 10,693.

PALMER v. LOW et al.

[2 Sawy. 248.] [1]

Circuit Court, D. California. Oct., 1872.[2]

MEXICAN LAND GRANT — LIMITATION — ADVERSE POSSESSION—CALIFORNIA STATUTE—DEFENSE.

1. A grant made by an alcalde of San Francisco, after the transfer of California to the United States, is a Mexican title within the meaning of the proviso to the sixth section of the statute of limitations of the state of California, as amended in 1855.

2. The claim of the city of San Francisco to the pueblo lands, not having been finally confirmed on the eighteenth of April, 1863, the statute of limitations had not commenced to run at that date against a party claiming title under an alcalde grant, to a lot within the limits of the pueblo.

3. Where the plaintiff, in an action to recover land, relies upon title acquired by virtue of an adverse possession for the period prescribed by the statute of limitations, but alleges his seizin generally in his complaint, without setting out the statute, or the nature of his title, the defendant need not plead an exception to the statute upon which he relies, but may upon the trial, show by evidence that he is within the exception without pleading it.

4. The word "defense," in section 6 of the statute of limitations of California of 1863, refers to the same cases as the word "defense" in the proviso to section 7 of the statute of limitations of 1855.

[This was an action by Daniel Palmer against Joseph W. Low and others.]

Barstow, Stetson & Houghton, for plaintiff.

Houghton & Reynolds, for defendants.

SAWYER, Circuit Judge. Loring and Jones entered upon one hundred vara lot, No. 39, in the city of San Francisco, embracing the premises in question, in the year 1851, or 1852, inclosed it, and built a house thereon. The plaintiff deraigns title from them. Plaintiff and his grantors were in the adverse possession of the premises from the entry of Loring and Jones at the date mentioned till ejected by defendants May 8, 1867, under a writ of possession issued in the case of Donner v. Palmer [45 Cal. 180], to which suit neither the plaintiff nor either of his grantors was a party. The defendants hold the title thereto under a grant from George Hyde, alcalde, dated July 19, 1847, to George Donner, and the Van Ness ordinance, the act of the legislature of California of March 11, 1858, and the acts of congress of July 1, 1864, and of March 8, 1866, confirming said title. St. Cal. 1858, p. 53; 13 Stat. 333; 14 Stat. 4.

The plaintiff claims that the adverse possession in himself and his grantors from 1851 or 1852, till his said ouster by defendants, May 8, 1867, vested in him a perfect title under the statute of limitations, upon which he is now entitled to recover, and cites Arrington v. Liscom, 34 Cal. 381, and Cannon v. Stockmon, 36 Cal. 540, in support of his position.

The claim of San Francisco to the municipal lands within its boundaries had not been finally confirmed "by the government of the United States, or its legally constituted authorities," at the date of the passage of the amendment to the statute of limitations, April 18, 1863, or of said act of congress of July 1, 1864.

Under the proviso to section 6 of the statute of limitations, as amended in 1855 [St. 1855, p. 109], the statute did not begin to run against parties claiming title under Spanish or Mexican grants, until their final confirmation by the United States government, or its legally constituted authorities. This act was in force till superseded by the amendments passed April 18, 1863. As there had been no final confirmation by the United States government, or its legally constituted authorities, of the claim of the city

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

[2] [Affirmed in 98 U. S. 1.]

to its municipal lands on April 18, 1863, the statute of limitations, at that date, had not begun to run against the defendant's title under his alcalde grant, if that grant is a Spanish or Mexican title, within the meaning of the said proviso. That it is such title there can be little doubt. The pueblo derived its title from the Mexican government, and that title required confirmation by the board of land commissioners in the same manner as private grants; and the grantee of the alcalde obtains his title through the pueblo, or else from the alcalde through powers conferred upon him by the laws of Mexico. It has already been judicially determined in this court by Mr. Justice Field, of the supreme court, that such grants are within the exception of said proviso. Montgomery v. Bevans [Case No. 9,735]. See, also, Merryman v. Bourne, 9 Wall. [76 U. S.] 602. The statute, then, had not commenced to run against defendant's title at the date of the passage of the act of April 18, 1863.

As to all the cases in respect to which the statute had not commenced to run at the date of the passage of that act, the act gave five years from the date of its passage before the bar of the statute should attach. St. 1863, pp. 325, 326, §§ 1, 6. The earliest day, therefore, at which the statute could begin to run against the defendant's title was April 18, 1863, and the bar of the statute would not attach till five years thereafter, or April 18, 1868. The defendants entered and dispossessed the plaintiff on May 8, 1867, or nearly a year before the time limited expired, and they have ever since continued in possession, claiming under their title. It follows, that no title had vested in plaintiff under the statute of limitations by virtue of his long adverse possession at the date of the entry of the defendants under their title, and the plaintiff has shown no title other than a naked possession, and this cannot avail against the real title exhibited by defendants, who are in possession under it. The plaintiff further insists that the general statute of limitations is five years; that the defendants rely on an exception of claimants under Spanish grants, and that they cannot show themselves to be within the exception without pleading it. If it be conceded that it is necessary, generally, to plead an exception relied on to take the case out of the general provisions of the statute, the rule is clearly inapplicable to this case. The plaintiff himself did not set up the statute as the basis of his title. He simply alleges his seizin in the ordinary way, before and at the date of the ouster, without setting out his title. He did not himself plead the general statute. Concede it not to be necessary for him to plead the statute himself in order to entitle him to show title by adverse possession under the statute, and it would seem to follow that the defendants should not be held to a stricter rule than the plaintiff. If the plaintiff does not set out his title, the defendant has no opportunity to meet it by plea. If the plaintiff does not set up the statute as the basis of his title, the defendant cannot know that he relies on it, nor be required to meet it by pleading the exception upon which he relies. The plaintiff's title being for the first time developed in the evidence, and not in his pleadings, it is admissible for the defendant to meet it by evidence. As a general rule, matter of estoppel must be pleaded. In Jackson v. Lodge, matter of estoppel was admitted without pleading, and the court say upon the question, "the matter of estoppel was properly in evidence; for the defendant upon the case made by the complaint, was not called upon and had no opportunity to plead it. The plaintiff did not set out his title. It was only developed in the evidence, and, therefore, could only be met by counter evidence. 36 Cal. 38, and authorities cited; Lain v. Shepardsoh, 23 Wis. 224, 228.

One more point earnestly pressed by plaintiff is so absurd in its consequences, that it would not require notice, but for the awkward manner in which the word "defense" is used in the sixth section of the act of 1863. It is not very apparent from the reading of section 6 alone, to what the word "defense," as therein used, is intended to apply. The proviso is as follows: "Provided further, that any person claiming real property, or the possession thereof, or any right or interest therein, under title derived from the Spanish or Mexican governments, or the authorities thereof, which shall not have been finally confirmed by the government of the United States, or its legally constituted authorities, more than five years before the passage of this act, may have five years after the passage of this act, in which to commence his action for the recovery of such real property, or the possession thereof, or any right or interest therein, or for rents or profits, out of the same, or to make his defense to an action founded upon the title thereto."

It is insisted that, as this action to recover the land was not commenced till more than five years after the passage of the act of April 18, 1863, the defendants in possession under an otherwise valid title cannot set up that title to protect their possession in an action to recover the land by a party who has no title, but who was once in possession as a trespasser upon their title, because it is a Spanish title, and the statute says the claimant under a Spanish title may have "five years after the passage of this act in which to * * * * make his defense to an action founded upon the title thereto;" that as he may have five years within which to make his defense, by implication he cannot make a defense after the lapse of five years. It is impossible to believe that the legislature intended the construction of this

proviso claimed by plaintiff. If so, then, no man in possession of lands holding under a valid Spanish or Mexican grant finally confirmed, more than five years ago, can use his title as a defense to any action hereafter brought against him to recover the possession, and this would now include a large portion of the lands in this state. Such a construction is simply preposterous. The meaning of the clause is very obscure, at best. If read according to the natural grammatical arrangement of the language, it is the "action founded upon the title thereto" to which a party may make his "defense" within five years, not his "defense founded upon the title thereto," "to an action" founded upon some other title. If this is the true construction, then the clause has no application to this case, for here the "defense," and not "the action," is founded on a Mexican title. Although this is clearly the grammatical construction, it does not seem as though it could be the idea designed to be conveyed, for in that case, the provision would be, that any party claiming under a Spanish title must make his defense within five years to any action brought against him founded upon the same Spanish title, and would apply to no other cases, which seems little better than nonsense. In order to give a proper construction to this section, it will be necessary to read and consider it in connection with sections 1 and 2 of the same act, amending sections 6 and 7 of the prior act, and sections 6 and 7 as they stood in the act of 1855; also, as they existed in the act of 1850 [Stat. 1850, p. 343] before amended in 1855. Section 7 of the statute of limitations, as adopted in 1850, has always been obscure. The obscurity resulted from an attempt to modify the language of the statute from which it was copied, so as to adapt it to the different conditions in this state of the law to which it related. The supreme court of California endeavored to ascertain the meaning of this section in Richardson v. Williamson, 24 Cal. 301. It was there held that section 6 alone applied to actions for the recovery of land, and section 7 to personal actions depending upon title to land, and this decision has been followed in other cases; also, that the proviso relating to Spanish titles appended to each of the sections 6 and 7 in 1855, related to the same subject matter respectively provided for it in the body of the respective sections to which they were appended. By the act of April 18, 1863, it was manifestly the design to restore sections 6 and 7 to their original condition by omitting the provisos appended in 1855, leaving actions depending upon different sources of title thereafter to stand upon the same footing. But in order not to extend the time in those cases, where the statute had already commenced to run, or give a less time to those claiming under Spanish titles than to those claiming under other titles, after the change in the policy of the law, section 6 of the amendatory act was adopted. And in this section, instead of making separate provisions for the provisos to sections 6 and 7 of the former act, an attempt, though apparently not a very successful one, was made to cover them both by a single provision; and the word "defense" in this provision was designed to apply to the same cases, only as the same word used in section 7, and its proviso as it before stood. Bissell v. Henshaw [Case No. 1,447]. For the construction put upon section 7 in the former acts, by the state courts, see Richardson v. Williamson, supra, wherein it was held that it did not relate to actions for the recovery of land.

The word "defense," as used in section 6 of the act of 1863, now under consideration, might cover one other case, but it is doubtful whether it was in the minds of the legislators when it was drafted. Suppose the defendants had not entered and ejected plaintiff on May 8, 1867, or afterward, and the latter had continued in the adverse possession of the premises until more than five years after final confirmation of the defendant's title, so that a title had vested in plaintiff beyond all question, by virtue of such adverse possession, and the plaintiff being in possession and desirous of having some record recognition of the fact, had brought his action against the defendant out of possession, claiming under his Spanish title, to determine his adverse claim in pursuance of section 254 of the state practice act. In that case, the defense to the action to determine and quiet the title acquired by adverse possession would rest upon the Spanish title, and that defense might be embraced by the term as used in the act, if the defense referred to, and not the action mentioned, is to be construed as founded on the title. But whether right or wrong as to these suggestions relating to the construction of the clause in question, I am satisfied that it was never intended to prevent a party in possession under a valid title not barred before entry under his title from setting up that title as a defense in an action brought against him to recover the possession. The defendant is in no default. He entered into possession under his title before it was barred, and while it was a subsisting valid title, and he has been in ever since. He had no occasion to bring an action to recover a possession which he already had. He could not have maintained it if he had. He was not bound to bring an action against the plaintiff to quiet his title, for the plaintiff had no shadow of title against him. His possession and title were united in himself. Besides, if he was satisfied with his possession under title, there was no duty cast upon him, by law or otherwise, to bring an action against persons out of possession to determine any claim they might set up. Plaintiff had simply been a naked trespasser on defendant, upon whom the latter had re-entered under his title. There was nothing more for defendant to do,

and he has in no respect been negligent or dilatory. He certainly could not lose his title by quietly possessing and occupying his own, in accordance with such title. He could not be required to bring an action when he had no longer any cause for complaint.

There must be judgment for defendants, with costs.

[This judgment was affirmed by the supreme court, where it was carried on writ of error. 98 U. S. 1.]

PALMER v. The OSPREY. See Case No. 3,-763.

Case No. 10,694.

PALMER v. PRIEST et al.

[1 Spr. 512.] [1]

District Court, D. Massachusetts. Jan., 1860.

PAYMENT—RECEIPT OF NOTE.

Where a material man who had trusted two owners of a vessel, afterwards received the negotiable note of one of them, and subscribed at the foot of the account the words "Rec'd payment," *held*, that this was, prima facie, payment of the account.

In admiralty.

C. T. & T. H. Russell, for libellant.

A. H. Fiske, for respondent.

SPRAGUE, District Judge. This is a suit by material men against the owners of a vessel, for repairs. It appears that the two defendants, Priest and Dodd, were the owners, and that the repairs were done on the credit of the vessel and owners. Priest was the ship's husband, but the libellant did not originally trust to him alone. The account bears date July 15th, 1856, on which day the negotiable promissory note of Priest was given, and the account was receipted by a writing at the foot, "Rec'd payment," and was signed by the libellants. The note was payable six months from date, and by the indorsement seems to have been negotiated, but is now produced by the libellants ready to be delivered up to the respondents.

Was the account paid and the original claim discharged by the taking of the note? If it was, the libellants can have their remedy only on the note. If it was not, they may sue on the original account, and the respondents are liable in this suit.

In Page v. Hubbard [Case No. 10,663], I had occasion to consider the Massachusetts doctrine upon this subject. The facts of that case, however, were different from the present. There the builder had a lien upon the vessel—here no lien is set up, or mentioned in the pleadings, and this suit is in personam. There, too, the receipt given, stated only that the notes were taken on account, here the receipt states that payment had been received. These differences are quite material. As to the first ground of difference, the general principle stated in the case of Page v. Hubbard [supra], might indeed cover the present, viz., that when the taking of the note would not materially affect the rights of the creditor, but merely substitute a second promise for the first, both being by the same parties, there it might be presumed that it was the intention of the parties that the first should be extinguished; but, that, if it would materially affect the right of the creditor, such ought not to be the presumption. This would seem also to apply to a case where there were other persons liable for the original debt, beside the person who signed the note, and in this case, if nothing appeared but the giving of the note by Priest, I should have great hesitation in saying that it would discharge the original claim of the creditors against both their debtors, and compel them to rely on one only, especially as it does not appear that Dodd has paid anything to Priest, or would now be in any worse condition, if liable to the libellants, than he would have been, if that note had never been given. It would seem from the case of French v. Price, 24 Pick. 13, and other cases there referred to, that the supreme court of Massachusetts were inclined to hold that knowingly taking the note of one of several debtors would prima facie discharge the others. In the case now before me, there is an express declaration made by the creditors at the time they received the note, that it was received in payment of a pre-existing debt. This declaration was in writing, being a receipt signed by them and delivered to Priest. If that declaration were literally true, it would certainly discharge the original claim.

In Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253, a plea that a note was given "for and in discharge of" a pre-existing claim of goods sold and delivered, was held good, although, as the court viewed it, it was the note of one of two debtors.

In Kearslake v. Morgan, 5 Term R. 513, a plea that the negotiable note of the defendant was given to and received by the plaintiff "for and on account of" the sums of money previously owing from the defendant to the plaintiff, was held good. But in that case the note was not produced, and might have been in the hands of an indorsee. Where, then, it appears to the court, that the note of a sole debtor, or of one of several debtors, or of a third person, was by mutual agreement taken in discharge or payment of a pre-existing debt, the original claim is thereby extinguished, and the creditor can rely only on the note.

The receipt, in this case, is evidence that such was the agreement between these parties. It is not necessarily conclusive. It may be controlled, either by direct evidence or by circumstances. But here there is neither direct evidence, nor any circumstance in

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

any degree impairing the force of the receipt, and the libellants have therein declared that the note was received in payment. This is more direct and positive than in The Chusan [Case No. 2,717], where the receipt was of a note "for the above amount," or in Butts v. Dean, 2 Metc. [Mass.] 77, where the receipt was, "for balance of account to date." Libel dismissed.

Case No. 10,695.

PALMER et al. v. UNITED STATES.

[1 Hoff. Land Cas. 216.] [1]

District Court, D. California. Aug. 3, 1857.

MEXICAN LAND GRANT—TRIAL—REASONABLE TIME FOR PREPARATION.

In cases pending under the act of March 3, 1851 [9 Stat. 631], some indulgence should be extended by the court to the district attorney, in order that he may have a reasonable time in which to prepare them for trial.

[This was a motion by claimants [Joseph C. Palmer and others, claiming the rancho Punta De Lobos] that the case be set for hearing at an early day.

E. L. Goold, for the motion.

P. Della Torre, U. S. Atty., opposed.

OPINION OF THE COURT. A motion is made to set this case for a hearing at an early day, which is opposed by the district attorney. The transcript was filed in this court on the 30th of January, 1856. The cause was placed on the calendar, but was not reached until April 13th, 1857, when it was set for a hearing on the 6th of May ensuing. On the 6th of May, the court was not in session, and, the rule requiring the examination in court of witnesses in cases where fraud was alleged having been suspended, depositions were taken on various days up to May 15th, when the claimant's attorney gave notice to the district attorney of his readiness to submit the case. On Monday, May 18th, the district attorney obtained from the court one week further time to take testimony. On Monday, the 25th of May, the district attorney desiring a further postponement of the case, a week's time was granted by the court. On Monday, June 1st, the claimant's counsel moved the hearing of the cause; but having, from a misconception of the practice, omitted to prove certain mesne conveyances before the commissioners, though the originals duly acknowledged were produced in court, the cause was again, at the instance of the district attorney, postponed for two weeks. On the 15th of June, the claimant's counsel again moved the hearing of the cause. This motion was opposed by the district attorney. No affidavit, however, was presented by him, nor statement of any testimony he expected to procure. No names of witnesses were given; but the importance of the case was referred to, and the hope expressed that some testimony to establish the fraud suggested might be obtained in the course of a few weeks.

The court, desirous of affording every facility for the ascertainment of the real merits of the case, again postponed the cause; and as the judge was about to be absent from the city, six weeks were allowed, and the cause fixed for July 27th. On the 27th of July, the hearing was again moved by the claimant's counsel, and a further postponement was asked by the district attorney. On being inquired of by the court, he declined to specify any time at which he could be ready to submit the case, but intimated that he required a delay of some months. He did not give the court to understand that he was in possession of any facts susceptible of proof, or that he knew of any witnesses by whom the case, on the part of the United States, could be made out. He contended, however, that the cause had lost its place on the calendar, and should be postponed until regularly called in its order, and he expressed the hope that by that time he would be able to procure some testimony on the part of the government. No evidence, either oral or documentary, has been taken or filed on the part of the United States since the cause has been pending in this court, or within the last two years.

It will not be disputed that the intention of congress was to secure the speedy settlement of land claims in this state. It was accordingly provided by section 9 of the act of 1851 that after the service of the answer to the petition for a review of the decision of the board, the cause should stand for trial at the next term of the court thereafter, unless, on cause shown, the same should be continued by the court. I think the claimants have, under the circumstances of this case, an unquestionable right to have the case heard and disposed of. I shall, therefore, set it for hearing on Monday next, the 10th day of August—with liberty, however, to the district attorney, on or before that day, to show cause for a continuance by affidavit, stating the facts intended to be proved, the names of the witnesses, the time within which they can be produced, and the reasons for their not having been heretofore examined.

I am aware that, in suffering the cause to be again postponed, even on the showing indicated, I may seem to be allowing too great indulgence; but the large number of these cases, which renders it impossible for the district attorney to devote his exclusive attention to any one, the difficulty of procuring information as to the facts, the importance of this particular case, and the circumstance that the law officer of the government has but recently entered upon his office, have induced me to give to that officer all the opportunities for the preparation of these

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

cases which, without disregarding the rights of the claimants, I can extend to him.

[NOTE. At the next call of the case a continuance of four weeks was allowed the government. At the expiration of this time the district attorney was again not ready, and asked for another continuance. This was denied, and the case set for hearing. Case No. 10,696. A decree was entered rejecting the claim. Id. 10,697. This was affirmed upon appeal to the supreme court. 24 How. (65 U. S.) 125.]

Case No. 10,696.

PALMER et al. v. UNITED STATES.

[1 Hoff. Land Cas. 227.][1]

District Court, D. California. Sept., 1857.

DISTRICT ATTORNEY — ATTENDANCE ON ANOTHER COURT—CONTINUANCE.

The fact that the circuit and district courts are simultaneously in session, is not sufficient cause for the continuance of a land case.

This was a motion by claimants [Joseph C. Palmer and others, claiming the rancho Punta De Lobos] to set the cause for hearing.

E. L. Goold, for the motion.

P. Della Torre, U. S. Atty., against it.

OPINION OF THE COURT. Since the delivery of the opinion of the court on the motion made August 3d by the counsel for claimants, that the cause be brought to a hearing [Case No. 10,695], the district attorney showed cause on the tenth day of August for a continuance. The showing, though not strictly within the rules usually applied to such cases, was treated by the court as sufficient, and four weeks further time, the period asked for by the district attorney, was allowed. Monday, Sept. 7th, being a holiday, the court was not in session, and on last Monday, Sept. 14th, the claimants' counsel again moved the hearing of the cause. No cause for a continuance was shown by the district attorney. He did not intimate that he expected, within any assigned period, to obtain testimony on the part of government, nor that he was in possession of any facts susceptible of proof which might affect the case. He, however, urgently pressed upon the attention of the court that he was in daily attendance upon the circuit court now in session, and desired that this cause should be postponed until the next regular call of the docket of land cases. He further urged that the law did not contemplate that both the circuit and district courts should be in session at the same time, and that the government could not be expected to provide two officers to be in attendance upon the courts when their holding their sessions at the same time was not contemplated by law. As to these suggestions, it is to be observed that the act of 1855 [10 Stat. 631], which authorizes the circuit judge to form part of and preside over the district court when hearing land cases, requires him so to do only "when in his opinion the business of his own court will permit," clearly implying that the legislature contemplated that both courts might be in session simultaneously. And in the fee-bill of 1853 the marshal is in terms allowed a per diem for attending the circuit and district courts "when they are both in session, or for attending either of said courts when but one is in session." It cannot therefore be said that simultaneous sessions of both courts are not contemplated by law. But the exercise of the discretion of the court as to continuing this cause does not depend upon technical considerations such as this. The court has already intimated to the district attorney that it would suspend for the present, while his engagements continued imperative, the regular call of the docket of land cases. This, though a great hardship to claimants, seemed unavoidable, as they could not reasonably expect the district attorney to prepare for hearing a certain number of new cases, when his duties in the circuit court engrossed his whole time. But the case at bar has already been regularly called, and has been, from May 6th, set for a hearing seven different times. On the fifteenth of June, six weeks further time was allowed to the district attorney. At the expiration of that period he was again allowed four weeks further time, though the application was strenuously opposed by the claimants, and now, without any showing other than that he is engaged in the circuit court, an indefinite postponement is asked until the next call of the calendar. This postponement is not asked because, the district attorney is unable to appear and argue the cause in court, for no desire to argue the cause orally was intimated, and the general practice has been to submit these cases on written briefs. If, however, an oral argument be desired, the court will assign a day when the district attorney is not in actual attendance on the circuit court. A convenient time for filing briefs will of course be allowed. The real object of the motion is to postpone the submission and to keep it open for further proofs. I think the claimants have a right to insist that their cause be heard, especially as no testimony whatsoever, on the part of the United States, has been taken since the cause has been in this court, and there seems no reason to suppose that at the expiration of a month from this date the government will be more ready to submit the case than it was a month ago.

So many cases are already before this court for determination, requiring minute and careful investigation, that it is not probable that this cause will be taken up by the court and finally disposed of before the expiration of a considerable time. If at any time before the entry of the final decree, new matter should be brought to light or testimony be newly discovered, it will of course be in the power

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

of the district attorney to move that the cause be reopened for the purpose of hearing it. The court has felt the utmost reluctance in refusing this application. We would have much preferred that a cause involving so great an amount should be heard only when both sides announce themselves in readiness. But we have felt that the claimants have rights as well as the government, and that under all the circumstances we are not at liberty to grant the continuance asked for.

The cause must therefore be set for argument on Saturday, Sept. 29th, at the opening of court on that day, and if no oral argument be desired, it will be considered as submitted with liberty to either side to file briefs.

[NOTE. At the hearing a decree was entered in favor of the government and rejecting the claim. Case No. 10,697. This was affirmed upon appeal to the supreme court. 24 How. (65 U. S.) 125.]

Case No. 10,697.

PALMER et al. v. UNITED STATES.

[1 Hoff. Land Cas. 249.] [1]

District Court, D. California. Sept., 1857.[2]

MEXICAN LAND GRANTS—GRANT AFTER DECLARATION OF WAR—BONA FIDES OF GRANT.

1. The power of the Mexican government to grant lands in California was unimpaired by the declaration of congress that war existed, and the prosecution of that war by the executive, and did not cease until the actual conquest of the country.

2. The declaration in the projet of the treaty between the United States and Mexico that no grants of land had been made by the latter subsequent to May 13, 1846, which declaration was stricken out by the senate, cannot bar the rights of persons claiming lands under grants made since that day, and before actual conquest; those rights being held sacred by the laws and usages of civilized nations, and not affected by treaty stipulations.

3. The date of the actual conquest of California not necessary to be judicially ascertained, so far as the decison of this case is involved.

4. The claim must be rejected, on the ground that the bona fides of the grant have not been sufficiently established by the evidence.

Claim for two leagues of land in San Francisco county, rejected by the board, and appealed by claimants.

[The case was previously twice heard upon motion by [Joseph C. Palmer and others, claiming the rancho Punta de Lobos] to set the case for hearing. Cases Nos. 10,695 and 10,696.]

E. L. Goold, for appellants.

P. Della Torre, U. S. Atty., and Edmund Randolph, for appellees.

OPINION OF THE COURT. Before proceeding to an examination of the merits of this case, a general objection to the validity of the grant must be considered. The grant purports to have been executed on the 25th of June, 1846, subsequently to the declaration of war between the United States and Mexico. It is contended, on the part of the United States, that on general principles of public law, grants made flagrante bello, when conquest has been set on foot, and actual occupation is imminent and inevitable, have no validity against the subsequent conqueror. The question has not heretofore been presented to this court. It has been discussed with much ingenuity and ability. It is urged that in the conduct of war and the determination of its objects, the political department is supreme; and that the judiciary are bound by the view taken of the war by the political branch of the government; that although congress has alone power to declare war, to the executive is given the right of shaping it to its ends or of declaring its objects.

To ascertain its objects resort must, therefore, be had to executive acts, and as the executive acts in this case unequivocally indicate that a principal object of the war was to acquire California, that acquisition was thus brought within the scope of the war, and must be so regarded by the courts. To this point the case of Harcourt v. Gaillard, 12 Wheat. [25 U. S. 523], is cited. Such being the object or scope of the war, it is urged that the intended conquest of California embraced not only the establishment of sovereign rights in the territory, but also the acquisition of the public property within it. That the proprietary rights to be acquired by the conquest are as essential, though not as important a part of the fruits of conquest, as the political rights, the commercial and other advantages proposed to be obtained, and that no part of these objects of the conquest is to be ignored. The conquest of California, including the acquisition of the public domain, having been thus shown to have been the object, or brought within the scope of the war, it was urged that any grants of public land made after the conquest was projected, and when it was about to be effected, though before it actually occurred, must be deemed to be in fraud of the rights of the incoming conqueror, and invalid as against him.

The foregoing statement is believed to present the outline of the argument submitted on the part of the United States. Both the premises and the conclusion must be examined. If the conquest of California was the object of the war, it must be so considered, because that object was avowed by competent authority when war was declared, or because it was made the object of the war after its commencement by the political branch of the government. It may be ad-

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[2] [Affirmed in 24 How. (65 U. S.) 125.]

mitted that this government had long regarded California, or the Bay of San Francisco, as an important and desirable acquisition. The instructions of the president to Mr. Slidell indicate the wish of the executive to obtain it by purchase and cession, as Louisiana and Florida had been acquired. It by no means follows that the intention to obtain it by force of arms or conquest can be attributed to congress, still less that such was its object or motive in declaring war. The law by which war was declared recognizes it as previously existing by the act of Mexico, and it is known that hostilities arose from the invasion by Mexico of a territory claimed by the United States to be within their limits. Such was not, therefore, the object for which war was declared, or its existence recognized, nor could it constitutionally have been.

It is observed by Chief Justice Taney, in Fleming v. Page, 9 How. [50 U. S.] 614: "The genius and character of our institutions are peaceful, and the power to declare war was not conferred upon congress for the purpose of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens. A war, therefore, declared by congress can never be presumed to be waged for the purpose of conquest or the acquisition of territory." As a limitation upon the power of congress this distinction may practically be unimportant. As every war in which the country may be engaged must be regarded by all branches of the government, and even by neutrals, as a just war; and as nations can readily cloak a spirit of rapacity and aggression under professions of justice and moderation, it is at all times easy, should our country be animated by such a spirit, to declare an aggressive war to be undertaken in self-defense, and an intended conquest to be desired only as a compensation for past or security against future injuries. But the distinction is important when a court is asked to presume that conquest was the object of the war. Under our government, at least, such a presumption cannot be indulged. The conquest of California being thus shown not to have been the object for which war was declared, we may next inquire whether by the acts of the executive under its power to conduct the war, it became such, or was brought within its scope, in the sense in which the phrase was used at the bar?

In his annual message to congress in December, 1846, the president distinctly states that the war originated in the attempt of Mexico to reconquer Texas to the Sabine. After adverting to the considerations which had induced the executive to interpose no obstacles to the return of Santa Anna, the latter being more favorably disposed to peace than Paredes, who was then at the head of affairs, the president observed: "The war has not been waged with a view to conquest, but having been commenced by Mexico, it has been carried into the enemy's country, and will be vigorously prosecuted there with a view to obtain an honorable peace, and thereby secure ample indemnity for the expenses of the war, as well as our much injured citizens, who have large pecuniary demands against Mexico." Similar declarations are frequently and emphatically reiterated by the president in various communications to congress, and in the correspondence between the American commissioner and the Mexican authorities. The object of the war, therefore, as indicated by executive acts and declarations, was not conquest, or if conquest, it was that of a safe and honorable peace.

It is true that after the military occupation of California, and after our arms had been everywhere successful, and perhaps at the commencement of hostilities, the executive and the nation may have confidently anticipated that by the treaty of peace we would acquire California. As Mexico was known to be impoverished and distracted by dissensions, it was obvious that the only indemnity she could afford us for the expenses of the war was the cession of a portion of her territory. The instructions of the secretary of state to Mr. Trist show that the extension of the boundaries of the United States over New Mexico and Upper California, for a sum not exceeding $20,000,000, was a condition sine quâ non of any treaty. The extraordinary successes of our arms, the fact that we already held possession of a great part of the territory of the enemy and virtually of his capital, our great expenditures of blood and treasure, entitled us to retain a portion at least of our conquest, as the only indemnity we could obtain. But we were willing to restore a considerable part of our acquisitions, and to pay for that retained by us a large amount of money. But such views and intentions on the part of the executive as to the condition on which the war should cease, are very different from waging it with a view to conquest. The war then cannot, in any just sense, be deemed to have been declared by congress, or conducted by the executive, with a view to conquest. The power of the president in the conduct of the war was that of commander in chief of the army and navy. He had authority to direct and control military operations. As part of the treaty-making power, he could determine where and on what conditions a treaty of peace should be made. But he had no power to impress upon the war a purpose different from that with which it was commenced, and which, as Chief Justice Taney declares, congress could not constitutionally entertain. "The law declaring war," observes the same great authority in the case above cited, "does not imply an authority to the president to enlarge the

limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by treaty or conquest, and may demand the cession of territory as the condition of peace, to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power, or the legislative authority, and is not a part of the authority conferred upon the president by the declaration of war. His duty and his power are purely military. As commander in chief he is authorized to direct the military and naval forces placed by law at his command, and to employ them in the manner he may deem most effectual to harrass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of the United States, nor extend the operations of our institutions and laws beyond the limits before assigned them by the legislative power."

It is true that in the case in which these observations are made, the point to be determined was whether enemies' territory, which in the course of hostilities had come into our military possession, became a part of the United States and subject to our general laws. But they are important to this case as defining the power of the president in war to be merely that of the military commander in chief; that territory can be acquired only by the treaty-making and legislative authority, and consequently, the fact that hostilities are by the military power directed against a particular portion of the enemy's territory, cannot be said to make the acquisition of that territory the object of the war. It is therefore apparent that the war with Mexico cannot be regarded by the judicial department of this government as commenced or conducted with the object of effecting the conquest of California. The most that can be said is, that its military occupation was effected as a means of crippling and subduing the enemy, and with the expectation on the part of the executive that we would retain and finally insist upon the cession of the territory so subjugated by our arms, as an indemnity for our injuries and expenses. The nature and amount of indemnity to be required, the extent of territory to be ceded, depended upon the will of the senate and the executive as the treaty-making power; and until that will was expressed in the treaty, the intention to effect the permanent acquisition of all California cannot be attributed to the political power, any more than a similar intention with regard to those conquests which at the close of the war were restored.

If, then, it were a principle of public law that all alienations of public domain by a sovereign are invalid as against an enemy who has commenced or is prosecuting a war, with the object of conquering the territory within which the property is situated, or who has set on foot expeditions for the purpose with sufficient power to attain the end, as proved by the event, the facts of this case would hardly admit of its application. But assuming the facts as contended for by the United States, we proceed to inquire whether such a rule of law exists. The right of Mexico to dispose of her public domain in California before the war is admitted. It is not denied that that right ceased as against the United States when the latter effected the conquest of the country and subverted the Mexican authority. If it ceased before the actual conquest and displacement of the Mexican authority, it must be because the determination of the United States to effect the conquest, and the making preparation to carry out its determination, gave to the latter some inchoate or inceptive right to the territory subsequently conquered, and the title consummated by the conquest relates back by a kind of fiction to the date of its inception. We have been unable to discover any trace or intimation of such a doctrine in any writer on the laws of war. The rights derived from conquest are derived from force alone. They are recognized because there is no one to dispute them; not because they are, in a moral sense, right and just. The conquest of an enemy's country, admitted to be his, is not, therefore, the assertion of an antecedent right. It is the assertion of the will and the power to wrest it from him. Even where a conquest is effected to obtain an indemnity justly due, it is not the assertion of any antecedent right to the particular territory conquered, but only of the general right to a compensation for injury. The right of the conqueror is therefore derived from the conquest alone. It originates in the conquest, not in the intention to conquer, though coupled with the ability to effect his purpose, nor even in the right to conquer as a means of obtaining satisfaction for injury. It is the fact of conquest, not the intention or the power to conquer, which clothes him with the rights of a conqueror. The rights acquired by the conquest are temporary and precarious until the jus post liminii is extinguished; and if a reconquest is effected, the rights of the sovereign who has temporarily been displaced revive, and are deemed to have been uninterrupted. The term title by conquest expresses, therefore, a fact and not a right. Until the fact of conquest occurs. the conqueror can have no rights. To affirm that a title acquired by conquest relates back to a period anterior to the conquest, is almost a contradiction in terms. Until, then, the conquest is effected, the rights of the existing sovereign remain unimpaired. He can therefore dispose of the public property at his discretion; nor can that right be effected by the determination of an enemy to conquer the territory, and by his preparations for the purpose, though the event may demonstrate the conquest to have been practicable.

The case of Harcourt v. Gaillard [supra],

has been cited by the counsel of the United States in support of the doctrine contended for by them. The distinction between that case and the case at bar is obvious. In Harcourt v. Gaillard the question was as to the validity of a grant by a British governor of land within a territory claimed to belong to the United States. As our government had asserted and maintained by arms its title to the disputed tract, the judicial department were not at liberty to declare the claim to be wrongful, and to recognize the right of any other sovereign over the territory in question. The title of the United States was in no sense acquired by conquest. Her title was antecedent to the war—it was merely maintained by arms and recognized by the treaty of peace. The question presented was, in the language of the court, "one of disputed boundaries, within which the power that succeeds in war is not obliged to recognize as valid any acts of ownership exercised by his adversary." Had the claim been that of conquest alone, the case would have presented, say the court, more difficulty. "That ground would admit the original right of the governor of Florida to grant, and if so, his right to grant might have continued until the treaty of peace, and the grant to Harcourt might in that case have had extended to it the principles of public law which are applicable to territories acquired by conquest, whereas the right set up by South Carolina and Georgia denies all power in the grantor over the soil." The distinction is made still more apparent in a subsequent part of the opinion of the court: "War is a suit prosecuted by the sword; and where the question to be decided is one of original claim to territory, grants of soil, made flagrante bello by the party that fails, can only derive validity from treaty stipulations. It is not necessary here to consider the rights of the conqueror in case of actual conquest." 12 Wheat. [25 U. S.] 528. The latter is precisely the question to be considered in the case at bar. The argument of the counsel for the United States can, therefore, derive no support from the case referred to. It is proper, however, to observe that the case of Harcourt v. Gaillard was not cited by counsel as directly in point. It was thought to establish that all grants of territory brought within the scope of the war are invalid; that the case of disputed boundaries presents but an illustration of the general principle, while the case at bar furnishes another. It has seemed to me, however, that the principle of that decision relates exclusively to the case of disputed boundaries, and that the distinction is clearly drawn between that case and one like the present; that between them the obvious difference exists that the former is a case of "original claim to territory," while the other is one of "actual conquest."

It is said on the part of the United States, that if a belligerent can, after a declaration of war, grant any portion of his property, he can grant the whole, and thus might, by granting himself away, escape responsibility. The case supposed is an extreme one. It can rarely occur that a nation will seek safety by self-destruction. But in such case the adversary might refuse to recognize such a voluntary suicide as affecting his rights. For the purpose of obtaining satisfaction he might justly treat the nationality sought to be extinguished as still existing. But at all events, his rights could be enforced against the successor or grantee of the extinguished sovereignty. The question would then be purely political; for the new sovereign, whether to carry on the war or accede to the demands of the enemy of his grantor; and for the latter, whether to prosecute the war against the new sovereign. Little aid, however, can be derived from the consideration of such extreme and improbable cases. It is further urged that the doctrine contended for on behalf of the United States is in the prize law. It may perhaps be admitted that a theory of maritime prize formerly obtained, which assumed that a belligerent has a vested right by the declaration of war in all sea-borne private property of the other belligerent; that no such property can be the subject of lawful sale; that all contracts of sale touching belligerent property of any sort, though valid on land, are invalidated by the mere fact of such property being embarked on the ocean, and that if transferred to a neutral after the declaration of war, it is a lawful prize to the other belligerent. Such is not now the received law of nations. It is now admitted that the bona fide sale of the ships of belligerents to neutrals in time of war is lawful and valid unless made in transitu.

In The Johanna Emilia, 29 Eng. Law & Eq. 562, Dr. Lushington says: "It is not denied that it is competent for neutrals to purchase the property of enemies in another country, whether consisting of ships or anything else. They have a perfect right to do so, and no belligerent right can override it." Such is the doctrine maintained by our government. See opinion of Attorney General Cushing, October 8, 1855. If a sale to a neutral of a ship in transitu is held invalid as against a belligerent, it is not by reason of any inchoate right or lien acquired by the latter by the mere declaration of war, or because the right of the enemy to dispose of his property is invalidated by the declaration of war, but because a sale of a ship in transitu is taken as proof of collusion and fraud, and as showing that no absolute transfer has in fact been made. The soundness of even this rule is doubted by the attorney general in the opinion referred to. A sale of a ship not in transitu, by a belligerent to a neutral, is valid as against a subsequent captor, no matter how imminent the danger of capture would have been had she remained enemy's property, and no matter what may be the number of hostile fleets fitted out to cruise against her and similar property of the bel-

ligerent. It appears, then, that the law of nations with regard to prize of war does not recognize the principle contended for. It is urged, however, that this principle lies at the foundation of the doctrine of post liminii. It is argued that a state of war implies the reciprocal denial by each belligerent of all rights of the other. That each relies upon force alone—force to retain or force to take. They are thus in æquali jure.

The principle, therefore, by which, on a reconquest, the original title revives, and is deemed to have been uninterrupted, is founded on the presumption that the displaced sovereign intended a reconquest when he was displaced, and his title on a reconquest relates back to the time when he is presumed to have formed such intention. If, then, (it is argued) the title by reconquest relates back to the time of the formation of the intention to reconquer, the title by conquest must relate back to a similar period—for a state of war implies the negation of all antecedent right on either side. The only difference between the cases being, that in the case of a reconquest, the intention to reconquer is presumed until the jus post liminii is extinguished; while in the case of conquest, that intention must be shown by the political acts and declarations of the conqueror. The argument is ingenious, but the premises are, I think, erroneous. It is assumed that a new title is acquired by a sovereign who recovers territories from which he has temporarily been driven. On the contrary, he holds it by his original title, which could only have been displaced by a permanent conquest. But the fact that he recovers the territory proves that what seemed a conquest was but a temporary dispossession. The invader, therefore, acquired no rights, nor did the original sovereign lose any. He continues to rule, not by a newly acquired title which relates back to any former period, but by his ancient title, which, in contemplation of law, has never been divested. Nor is it true that war is the reciprocal denial of all rights by the belligerents, with respect to the territories of either. A conqueror does not deny that the territory seized was at the time of the conquest the territory of his enemy, any more than the attaching creditor denies the property attached to be that of his debtor. On the contrary, he asserts it to be his. He seizes it as the property of his enemy, and because it is his. He asserts no antecedent title in himself. He declares, not that the territory was his, but that he will make it his by conquest. The title or right acquired by a conquest is not the same as that of the original possessor. It is temporary and precarious, and ceases the moment the conqueror is expelled: if, indeed, a title by conquest can be said ever to have existed, when the event has proved that the attempted conquest could not be maintained. The title of the original owner is wholly unaffected by the temporary dispossession, and even during his dispossession it is treated as valid and subsisting until the jus post liminii has been extinguished. The extinction of the post liminii is necessary to ripen the temporary and merely possessory right of the conqueror into such an ownership of the territory as neutrals can recognize.

If these views be correct, the case of a reconquest does not present the instance supposed of a title relating back to the period of the formation of the intention to reconquer. But the further discussion of this subject would require more time and space than can be devoted to it. It might, I think, be demonstrated, that a rule which supposes all rights of a sovereign, with respect to territory subsequently conquered, to cease as against the conqueror, not when war is declared, but when the war is prosecuted with the object of conquest, when expeditions are fitted out for the purpose, and when the conquest is "imminent and inevitable," is not susceptible of practicable application as a rule of international law. That those rights must continue until the date of actual conquest, or of the treaty of cession, or else must cease at the declaration of war; and that an attempt to estimate the "imminency" of the conquest at any intermediate period, or to try the validity of the exercise of sovereign rights, by calculating the chances of war at a particular moment, would be impracticable and illusory.

On the whole, we are of opinion that the right of Mexico to grant her public domain in California continued until the conquest of the country by the United States.

It is further urged, on the part of the United States, that grants made after the 13th of May, 1846, are not protected by the treaty of peace, because such was not the intention of the parties. That the Mexican commissioners who negotiated the peace, and who represented the claimants as well as the Mexican government, solemnly, and after special inquiry, declared that none such existed. That the treaty was negotiated on the faith of this declaration. It is admitted that such a declaration was made and embodied in the projet of the treaty submitted to the senate. Had this declaration been contained in the treaty as adopted and ratified, it might very possibly have been regarded as a covenant or stipulation that such grants should not be deemed valid by the United States. But the clause containing it was struck out by the senate; not by the general vote which struck out the whole of the tenth article of which this declaration formed a part, but by a distinct vote upon the question whether this particular clause should stand as a part of the treaty. The court cannot assume therefore, that the treaty was assented to by the United States on the faith of this declaration by Mexico; else, why strike it out? It may, not unreasonably, be supposed that the senate refused to allow the declaration to remain, because they were willing that grants

made after the 13th of May, if any such there were, should be submitted to the courts, and rejected or confirmed, as might be just.

But, assuming that the treaty was concluded on the faith of this declaration, the rights of an individual to his property cannot be affected by it. The stipulation in the treaty by which the property of the inhabitants of the ceded territory was secured, conveyed to them no additional rights. "An article to secure this object, so deservedly held sacred in the view of policy as well as of justice and humanity, is always required and never refused." [Henderson v. Poindexter] 12 Wheat. [25 U. S.] 535. "When such an article is submitted to the courts, the inquiry is whether the land in controversy was the property of the claimant before the treaty." U. S. v. Arredondo, 6 Pet. [31 U. S.] 712. If, then, the land in controversy was the private property of the claimant when the country was acquired, it must have remained such, though no treaty had been made. The United States do not claim to have acquired the ownership of any other property than the public property of the enemy, nor could they justly have demanded that Mexico should assent by the treaty to the confiscation of any property, the right to which was vested in private individuals. If, then, the United States have been willfully or accidentally deceived, as to the amount of property held in private ownership in the ceded territory, they may have a right to demand a return of some portion of the pecuniary equivalent paid by them. The fraud or mistake of the Mexican commissioners can have no effect upon a private right, held sacred by the laws and usages of all civilized nations, which was not derived from the treaty, and which, had it been known to exist, the United States would have been bound to respect. These observations are made with reference to the general proposition maintained at the bar, viz.: that the declaration by Mexico that no grants had been made subsequent to May 13, 1846, invalidated all such grants to the same extent as if a stipulation to that effect had been embodied in the treaty.

We proceed to consider the merits of the case at bar. The claim was rejected by the board for want of proof of the mesne conveyance through which the claimants derive title. That defect has been supplied by evidence taken in this court. In support of their title the claimants have produced: (1) A petition, in the usual form, addressed to the governor by Benito Dias, for the land called "Punta de Lobos," and dated April 3, 1845. On the margin of this petition is an order for information, dated May 24, 1845. (2) The "informes" of the officers, as required by the governor. (3) The formal grant signed by Pio Pico, governor, and José Matias Moreno, secretary, and dated June 26, 1846. The claimants have also produced a private letter from Juan Bandini, secretary of the governor, dated on the same day with the order for information to Benito Dias, in which he expresses to the latter his regret that he had not first obtained the certificates of other officers and sent them with the petition, "in which case he would have had the pleasure of sending him all his matters concluded." The signatures to these documents are proved by the testimony of Pio Pico himself, and by other witnesses, nor has any attempt been made to call in question their genuineness. It is suggested, however, on the part of the United States, that they were signed subsequently to their date, and after the final subversion of the Mexican authority in California. Benito Dias, the original grantee, was examined as a witness by the claimants, he having assigned all his interest in the grant. He states that the grant was in his handwriting, and that he wrote it and sent it to the governor for signature, in consequence of a letter from Bandini, secretary of the governor, stating that the grant must be obtained immediately, as the country was in a critical state; that this was done on the 20th or 21st of June, at San Francisco; that he received the grant on the 5th or 6th of July, at Monterey; and that it was handed to him by Antonio Maria Osio, who received it from Celis, the courier of Dias, to whom it had been delivered by the governor. That the grant was signed by Pio Pico, at Santa Barbara, or Buena Ventura, the courier whom Dias had dispatched to Los Angeles having met the governor on the road at one or other of those places. Bernardino Soto, a witness in behalf of the claimants, swears that about two or three days before the taking of Monterey, which was on the 7th of July, 1846, he and his father were taking tea at the house of Dias, in Monterey, when Don Antonio Osio came in and handed Dias a letter. That Dias read its contents, appeared to be much pleased, and said it was a grant for the "Punta de Lobos." The witness is enabled to fix the date of this occurrence by the circumstance that he and Dias had been sent from Santa Clara to get supplies for the troops at Monterey; that he left Santa Clara on the 4th of July, which is a great feast day with the Californians, and that he arrived at Monterey the same night, when, as he relates, Dias received the title. Dias further states, that a short time afterwards he showed the title to Manuel Dutra, with whom he left it as security for a loan of $40. Bernardino Soto confirms this statement, and testifies that about two or three days after the taking of Monterey he, with Don Gabriel de la Torre, were in the house of Dutra, when Dias applied for the loan of some money, and on being asked for security he produced the title. Dutra gave him some money, and Dias left the title in his hands; after he had gone, Dutra began to read the paper, and

asked the witness if he knew the tract called Punta de Lobos, to which he replied that he did. Manuel Dutra testifies to the same facts. He states that he had the title in his possession for more than a month, when, on being repaid, he returned it to Diaz, who stated that he wanted it for the purpose of selling the land to Thomas O. Larkin. That Bernardino Soto and Gabriel de la Torre were present and informed him where the Punta de Lobos was. Gabriel de la Torre gives substantially the same account, except that he denies having told Dutra where the land was situated, as he did not know, nor did he hear Soto tell Dutra its situation. It is further shown by the claimants, that on the 19th of September, 1846, Benito Diaz conveyed all his interest in the land to Thomas O. Larkin. The deed to the latter is produced. I do not understand it to be disputed that at that date the grant was in existence. It further appears by the evidence of Col. Stevenson that Pio Pico finally left the country on the 8th of August. The hypothesis of fraud, therefore, supposes that the grant was signed at some date between the 25th of June and the 8th of August.

The United States have produced as a witness, Vicente Gomez. He swears that he, Benito Diaz, and Cayetano and Luis Arenas, were present when Pio Pico signed the grant. That it was signed after the Americans took possession of Monterey. To rebut this testimony the claimants have examined, since the appeal, Cayetano and Luis Arenas. Both of these witnesses deny having been present on the occasion referred to by Gomez. They state that they never saw Pico sign any papers after the 7th of July; that they never saw the title to Punta de Lobos, and do not even know where the land lies. José L. Luco and Juan M. Luco, witnesses called by the claimants, swear that Gomez, in conversation with them, denied all knowledge of the Punta de Lobos grant, and that he had given the testimony contained in his deposition. José L. Luco also swears that Gomez' character for veracity is bad, and that he would not believe him on oath in matters relating to land titles. Jas. C. Crane and John H. Watson are the only remaining witnesses introduced by the United States. These witnesses swear that in the spring of 1851, Benito Diaz stated to them that the grant of Punta de Lobos was made after the hoisting of the American flag at Monterey, and was antedated. These declarations, if made at all, were made several years after Benito Diaz had parted with all his interest. No previous inquiry as to them has been made of Benito Diaz, when examined as a witness. I know of no rule of law by which the testimony could be admitted. Benito Diaz was, however, reëxamined in this court, and stated, with reference to these declarations, that he knew Crane and Watson; that he never had any conversations with the latter, as he did not speak Spanish, except on one occasion when Crane acted as interpreter; that he had always told Crane that the title was good, except that once "after Gomez had made statements about the title, Crane asked him if it was not made in August, to which he laughingly replied: Yes, yes, just as Gomez says." The above comprises all the testimony adduced by the United States in opposition to the claim.

No attempt has been made on the part of the United States to show the signatures of Pico and Moreno to be forgeries. It is insisted, however, that the grant is antedated, and that it was in fact signed after the conquest of the country. It is stated, as we have seen, by Benito Diaz, that the grant was written by him in San Francisco, on the 20th or 21st of June, and sent by a courier to the governor for signature. On examining the original grant on file in the surveyor general's office, we find that the date is in writing and not in figures, and the words "veinta y cinco de Junio," are obviously written by the same hand, with the same ink and at the same time as the rest of the instrument. There can be no doubt that Benito Diaz, or whosoever drew the grant, filled in the date at the time he drafted the instrument. No trace can be discovered of any blank having been left to be filled up when the grant was signed, and the writing and the color of the ink are palpably different from those of the signatures of either Pico or Moreno. The certificate stating that a record of the title has been taken "in the corresponding book," is also in the same hand-writing as that of the body of the grant. The statement of this fact must therefore have been made by Diaz, like the insertion of the date, by anticipation. If the statement be true, where is the "corresponding book?" It has not been produced. If Moreno can remember that he signed the grant on the 25th of June, on the road at a distance from his office, he could doubtless remember the fact that he recorded it, and perhaps he could explain how it happened that when accompanying the governor on a distant journey, at a period of great public disorder, he took with him a book of records usually kept among the archives of his office. He might at least tell what has become of the book. On these points no explanation is offered by the claimants; on the hypothesis of fraud, however, a natural explanation suggests itself.

When the grant was fabricated, it was not considered that it could be proved that Pio Pico was not in Los Angeles at the date of the grant. The certificate of record was accordingly added and Moreno's signature procured. When, however, it became necessary to allege that the grant was signed upon the road, to meet the objection that Pico was not in Los Angeles at its date, it was too late to alter or erase the certificate of record, notwithstanding that the making of such a record was inconsistent with the other circum-

stances under which it was requisite to show the grant to have been executed. If then the date was affixed to the instrument before it was signed, it affords no evidence of the true time of its signature. Matias Moreno, however, testifies "that he saw the grant on the 25th of June, when he signed it." The witness does not explicitly state that he signed the grant on the day that it bears date. He uses the expression above quoted, which was doubtless intended to convey that idea. Pico himself was also examined, but he answers with singular reserve. On being asked if the signatures were genuine, and the instrument executed for the purposes therein mentioned, he merely replies "I believe the signatures are genuine." He does not state when they were affixed, nor for what purpose. If the grant was signed on the 25th of June, the coincidence is extraordinary. It is, of course, not impossible, but it is in the highest degree improbable, that Benito Diaz, when he drew it in San Francisco on the 20th or 21st of June, under the expectation that it would be signed at Los Angeles, should have guessed so accurately the day on which his messenger would find the governor, and the day on which the latter would sign the grant. And particularly, when the governor was in fact met upon the road at a considerable distance from the place where Diaz expected he would be found. It is also strange that the grant, drawn at San Francisco on the 20th or 21st of June, should have reached the governor on the 25th, on the road between Santa Barbara and Santa Buena Ventura, a journey which must usually have required seven or eight days to accomplish, while it was not returned to the grantee until the 4th or 5th of July, and this, too, at Monterey, at least two days journey nearer than San Francisco to Santa Barbara.

In this connection the nature and subject matter of the grant deserve attention. In his petition to the governor, Benito Diaz, after specifying the boundaries of the tract selected, adds—"observing that the ruins of the presidio of San Francisco, and the castle, which are within the tract, shall remain exempt from the petition, unless it may be that the governor may choose to grant me the said ruins, promising, if that be done, to build a house," etc. By the marginal order of May 28th, the governor refers the petition, not only to the respective judge, but to the military commander for his opinion as to what may be convenient. The judge reports that the land is vacant, but as to the military points he can give no opinion, not knowing their ejidos or the lands appertaining to them. The military commander reports in favor of granting the land "not including in the concession the two military points of the presidio and castle which are included in the petition." The grant, after reciting that the petitioner had applied for the land called "Punta de Lobos," concedes to him in full property "the before mentioned land—el espresado terreno." And the third condition states its exterior boundaries without reserving the military points within them. He thus grants not only the fortifications, contrary to the advice of the military authority whose opinion he had solicited, but he does not even insert the condition proposed by the petitioner himself, viz: that a house should be built for the government if the ruins were granted.

But the question arises, had the governor authority to make such a grant? The second article of the law of 1824 declares the object of the law to be "those lands of the nation which not being private property nor belonging to any corporation or town, may be colonized." The intention of Mexico obviously was to promote the settlement of the country, by the gratuitous distribution of its vacant and unappropriated public land. We accordingly find that the principal information desired by the governor, and communicated by the "informes," is whether the land solicited is "valdio," or vacant. If then the law and the governor's authority only extended to "vacant" lands, it must be admitted that the sites of fortifications, occupied as such, are not within the law. It is, however, urged that these fortifications were abandoned and gone to decay, and that their sites had thus reverted to their previous condition of vacant lands. That they had no garrisons, is admitted; but the extent to which the buildings had fallen into decay, is not clear. It is not disputed that some eight or ten cannon remained at the fort, and that its walls as well as the buildings at the presidio, since used as barracks by the United States, must have existed in a greater or less degree of preservation. But the question, whether these points were occupied or vacant, does not depend on whether garrisons were maintained in them, or the degree of preservation of the structures. If the place had been selected and appropriated by the government as a military post—if considerable and expensive structures had been made for military purposes, the occupation of the land would seem to be complete, though every soldier had been withdrawn and the works themselves fallen into decay. The fifth article of the law of 1824 provides that the government of the federation may make use of any portion of the lands of the nation to construct warehouses, arsenals, &c., it may deem expedient, with the consent of congress. It is to be presumed, therefore, that the appropriation and occupation of these military sites must have been made by the government of the federation. Until, then, the federal government determined to abandon them, no governor of a department would be at liberty to treat their sites as vacant public land, because, through accident, neglect or the disturbed condition of public affairs, their garrisons might have been withdrawn, or the fortifications in some degree dismantled. The fort or castle occupied a position unmis-

takably indicated by nature as the site of a defensive work for this harbor. It had been selected as such, perhaps, by the Spanish conquerors, and the United States have since, at the same point, erected the most extensive fortifications on this coast. It is not conceivable that under a general power to distribute vacant lands to actual settlers, it could have been intended to clothe the governor with discretionary power to give to a private individual a spot so necessary to the national defense, which had long been used for the purpose, and on which the cannon of the nation still remained.

If, then, we are right in supposing that the governor had no authority to grant the fortifications of the country to private individuals, the fact that this grant purports to do so becomes a significant and suspicious circumstance. Indeed, it would seem incredible that a governor, intending bona fide to exercise the authority entrusted to him for the good of the nation, should, at a time of war and imminent peril, have consented to grant to a private person the site of so important a fortification; that he should have done this on the road where, by accident, both he and his secretary were found; that he should have signed a paper previously drawn up for him by the grantee, and dated at a place, and, in all probability, at a time different from those at which it purported to be executed; that he should have done this contrary to the advice of the military authority whose opinion he had solicited, and without securing the important benefits to the government which the petitioner had himself offered, viz. the erection of a house; and, finally, that no record or official note of so important a transaction should anywhere be found in the archives of the government. Had Pio Pico himself given any satisfactory explanation of these circumstances, our suspicions might have been dispelled. But the witness mentions no one of the facts sought to be established by the claimants, except only that the signatures are genuine, and of this he only expresses his "belief." If the date was affixed to the grant by Dias himself, when he drew it on the 20th or 21st of June, Moreno's testimony that he signed it on the 25th must be false, unless we suppose an almost impossible coincidence to have occurred. If Moreno, the governor's secretary, has sworn falsely, the whole case is tainted by the fraud. The grant appearing to have been dated by Dias himself, before its execution, Moreno's testimony being rejected, and the governor being silent on the subject, the only evidence to show its execution before the change of sovereignty is that of Dias himself, Bernardino Soto, Manuel Dutra and Gabriel de la Torre. No one of these witnesses pretends to have seen the grant before the 5th or 6th of July. Dias, in his first deposition, states that he received the grant two or three weeks after its execution. It is only when examined in this court, that he remembers having received it on the 4th or 5th of July, within nine or ten days after its execution. Gabriel de la Torre, Dutra and Soto swear that they saw the grant a few days after the taking of Monterey, when Dutra was asked to lend $40 upon it. The only witnesses who saw it on the 5th or 6th of July are Dias and Soto.

The conclusion, then, that the grant was executed before the 7th of July, must be founded on the testimony of Dias and Soto alone. We are deeply sensible of the fact that their testimony is positive and circumstantial; that Soto's character has not been impeached, and that the statement of Gomez, that Pico signed the grant in August, in the presence of himself and the two Arenas—is contradicted by the latter—that Gomez' character is impeached—and his testimony, therefore, entitled to but little consideration. But the inquiry recurs: Can we, on the faith of Dias' and Soto's testimony alone, confirm this claim, under all the circumstances? We are of opinion that we cannot. In the investigation of this class of cases, we have been painfully impressed with a sense of the entire unreliability of many of the regular and, so to speak, professional witnesses by whom they are supported, and, in some rare instances, attacked. When, therefore, a grant is presented, of which the archives contain no record, for land of which no possession has been taken, and to which no claim of ownership has been asserted during the former government, the suspicion that it has been fabricated since the change of government is irresistibly suggested. That such has been the case, in some instances, is notorious. That such a fraud was easy while the former governors of this country were alive and accessible, is obvious.

When, therefore, the grant is like the present, one of an extraordinary character—when it appears that the governor, even if he did not exceed his authority, acted with entire disregard of the interests of his country—we have a right to demand a full and satisfactory explanation of the circumstances. When we find Moreno testifying to a fact which is in the highest degree improbable, the governor not only withholding explanation, but silent or evasive as to the real point in controversy—the grantee himself giving a loose and inaccurate statement of the time when he received the grant, although four years afterwards, the date and the circumstances are fresh in his memory—when, in addition to all this, we consider the notorious facility with which testimony like that in support of this claim can be procured—we are unable to resist the conclusion that the bona fide character of this grant has not been established. Whether the bare reception of a paper purporting to convey a title at a time when the grantor had lost all practical dominion over the land conveyed, when no possession was taken, or could have been taken, by reason of the subversion of the grantor's authority by a conquest of the country, conveys

such a right of property as the conqueror, by the principles of public law, is bound to respect, may be doubted. That question it is not now necessary to discuss.

[On appeal to the supreme court, the decree of this court was affirmed. 24 How. (65 U. S.) 125.]

PALMER (UNITED STATES v.). See Case No. 15,989.

Case No. 10,698.

PALMER v. WARREN INS. CO.

[1 Story, 360;[1] 4 Law Rep. 98.]

Circuit Court, D Massachusetts. Oct., 1840.

MARINE INSURANCE— EXCEPTIONS IN POLICY— CONSTRUCTION.

1. Words of exception in any instrument are to be construed most strongly against the party, for whose benefit they are intended, and this rule is applied to words of exception in policies of insurance.

[Cited in Airey v. Merrill, Case No. 115; Wright v. Sun Mut. Ins. Co., Id. 18,095; Phenix Ins. Co. v. Wilcox & Gibbs Guano Co., 65 Fed. 728.]

[Cited in brief in Dole v. New England Mut. M. Ins. Co., 88 Mass. [6 Allen] 378. Cited in Parkhurst v. Gloucester Mut. Fish. Ins. Co., 100 Mass. 306; Chandler v. St. Paul F. & M. Ins. Co., 21 Minn. 88. Cited in brief in St. Louis Ins. Co. v. Kyle, 11 Mo. 288. Cited in Hoffman v. Aetna Fire Ins. Co., 32 N. Y. 414. Cited in brief in Bradley v. Mutual Ben. Life Ins. Co., 45 N. Y. 424; Torrence v. Conger, 46 N. Y. 344. Cited in United States Mut. Acc. Ass'n v. Newman, 84 Va. 59, 3 S. E. 805; Carson v. Jersey City Ins. Co., 43 N. J. Law, 304.]

2. But this rule of interpretation is subservient to another,—"Verba intentioni, non è contra, debent inservire."

[Cited in brief in Wales v. China Mut. Ins. Co., 90 Mass. [8 Allen] 383. Cited in Bradley v. Nashville Ins. Co., 3 La. Ann. 708; McLaughlin v. Atlantic Mut. Ins. Co., 57 Me. 172; Wilkins v. Tobacco Ins. Co., 30 Ohio St. 337.]

3. Policies of insurance are always construed liberally, and rarely, if it is possible, subjected to any critical strictness, or any technical interpretation.

[Cited in Bradley v. Nashville Ins. Co., 3 La. Ann. 708.]

4. Where a policy of insurance on time contained the following clause: "Excluding during the term, all ports and places in Mexico and Texas, also the West Indies, from July 15th to October 15th, 1839, each at noon;" and the vessel sailed from New York for, and arrived at St. Jago de Cuba, within the excluded period, and was lost on her return in December following,—it was *held* that the underwriters were liable, the loss not happening within the excepted period, and the clause in the policy not being an exception or exclusion of voyages, but only a suspension of the risk during such time, as the vessel should be at the excepted ports.

[Cited in Dole v. New England Mut. M. Ins. Co., Case No. 3,966; New Haven Steam Saw-Mill Co. v. Security Ins. Co., 9 Fed. 784.]

[Cited in Odiorne v. New England Mut. M. Ins. Co., 101 Mass. 554. Cited in brief in Cory v Boylston F. & M. Ins. Co., 107 Mass. 144; Webb v. Protection and Aetna Ins. Cos., 14 Mo. 7.]

Assumpsit on a policy of insurance. The case came before the court upon an agreed statement of facts to the following effect: The plaintiff, on the 1st day of May, 1839, procured a policy of insurance to be underwritten by the defendants, viz.: "Two thousand dollars, on one half of the brig Spy, for the term of one year from this 1st day of May, 1839, at noon, excluding during the term all ports and places in Mexico and Texas, also the West Indies from July 15th to October 15th, 1839, each at noon; the brig valued at $4,500, at a premium of 11 per cent., to add one half per cent. each passage; her cargo is coal, stone, or lime; or that she proceeds to or from a port in North Carolina, within Ocracock Bar." The policy contained the usual risks and clauses in the Boston policies. The declaration was for a loss by the perils of the seas. It was agreed by the parties, that the question, as to the liability of the defendants, should be decided by the court, before the case was submitted to a jury on the merits.

On behalf of the plaintiff, it was contended that the question was solely one of construction upon that clause of the policy, excluding the West Indies. That it should be construed as an exception of certain risks during a certain time, and not as an exclusion of particular voyages. And, that the exception only operated as a suspension of all risk on the part of the insurance company during the time, at which the vessel was at particular ports and places. That, inasmuch as this was an exception, that is, a particular intent against a general intent, it was to be taken strictly against those, who set it up, and in favor of the general intent. 2 Barn. & C. 207; 6 Barn. & C. 847, 850; 6 Cromp. & J. 224. It was contended, also, that the doctrines relating to deviation were not applicable to the present case, there being no insurance on a particular voyage, or particular voyages. The purpose was to effect a complete and comprehensive insurance against all voyages, with certain exceptions, and the burden of proof is on the insurers to bring themselves within the exception, in order to render the plaintiff liable. Roget v. Thurston, 2 Johns. Cas. 248; Phil. Ins. 459, 482, 731, 733.

On behalf of the defendants it was contended, that the effect of the exclusion was to terminate and avoid the policy, from the time, when the brig went to the West Indies in the prohibited months. 1 Phil. Ins. 43; 2 Kent, Comm. 552. That an exception in any contract is always to be taken most strictly against the party, acting under the most knowledge, and having the power to come under the exception, or not. That the clause of exception amounted to a warranty, which had been broken. That no precise form of words is necessary, but any direct or incidental allegation, affecting the risk, will constitute a warranty; and that, whether it is express or implied, it must be strictly com-

[1] [Reported by William W. Story, Esq.]

plied with. Pawson v. Watson, Cowp. 785; Mackie v. Pleasants, 2 Bin. 363; 1 Phil. Ins. 347. That there was a deviation in the present case, growing out of a change and increase of the risk; and even if it should appear, that the risk was not increased, still the mere change constituted such a deviation, as to avoid the policy. That, when there is any exception or exclusion in a policy, the insured must show, that the excepted risk did not contribute to the loss. Roget v. Thurston, 2 Johns. Cas. 248.

Rufus Choate, for plaintiff.
Theophilus Parsons, for defendants.

STORY, Circuit Justice. The questions involved in the argument of the present case are of considerable novelty, and certainly are not unattended with difficulty. The policy is upon the brig Spy, for a year, "excluding during the term all ports and places in Mexico and Texas, also the West Indies from July 15th to October 15th, 1839, each at noon." During the year 1839, the vessel performed a voyage from Boston to St. Joseph's (Florida), and from thence to the Havana, and thence to New York. On the 12th of September, 1839, she sailed on a voyage from New York to St. Jago de Cuba, arrived there about the 1st of October, and sailed from thence on her return voyage to New York, on the 25th of October, and was wrecked on the 15th of December following, on a beach in Eaton's Bay, in Long Island Sound. The loss, for which the suit is brought, is that occasioned by this shipwreck.

Now, upon this posture of the case, the question is, whether the insurance company are liable for the loss; and this depends upon the interpretation, which is to be put upon the terms of the policy. The loss occurred in the progress of the return voyage from the West Indies, within the year, for which the insurance was made, and without the limitation of the time, excluded by the policy (between July 15th and October 15th, 1839). The terms of the policy are susceptible of various interpretations. The clause of exclusion may be construed, first, to be a condition or warranty on the part of the insured, that the brig, during the year, shall not be employed in any voyages to or from any port or places in Mexico, Texas, or to or from the West Indies between July 15th and October 15th; upon which construction, it is clear, that the underwriters would not be liable for the loss, which has occurred. And this would be equally true, whether we should treat it as a case of non-compliance with the condition of warranty, or as a deviation from the voyages insured. Or, secondly, the clause may be construed as allowing such voyages to and from Mexico, Texas, and the West Indies, during the excluded period, but exonerating the underwriters from all risks and liabilities for losses in the course thereof; which, in the events, which have happened, would be equally fatal to the recovery in this suit, since the loss was in the course of the voyage from the West Indies, which was begun, although not completed, within the excepted period. Or, thirdly and lastly, the clause may be construed, as merely excepting from the operation of the policy certain risks and losses, viz. all risks and losses in ports and places in Mexico and Texas, and in the West Indies between July 15th and October 15th, 1839. In this last view, the policy would be completely operative, and cover the present loss, since it would not fall within the excepted risks. The defendants, in effect, contend, that the true import of the terms of the policy requires and justifies one or the other of the two first interpretations. The plaintiff, on the other hand, insists, that the third and last is the only true and sound interpretation. It has become the duty of the court, therefore, in a case, in which it is admitted on all hands, that there is no authority directly in point, to endeavour to ascertain, as far as it may, the real intention of the parties in the language used, and to give such an interpretation, as seems most consonant to that intention and to the general principles of law.

In the argument, it has been thought of some importance, in the construction of the clause, to ascertain, if there is any ambiguity in the language used, what is the rule of law, as applicable to this case, by which instruments of all sorts, and particularly policies of insurance are to be construed. I take the rule to be clearly established, as a general rule, that words of exception in any instrument, are to be construed most strongly against the party, for whose benefit they are introduced; and this rule has beeen expressly applied to words of exception in policies of insurance, as well in England, as in this court. Blackett v. Royal Exchange Assur. Co., 2 Cromp. & J. 244; Donnell v. Columbian Ins. Co. [Case No. 3,987]. See, also, Earl of Cardigan v. Armitage, 2 Barn. & C. 197, 206; Bullen v. Denning, 5 Barn. & C. 847, 850, 851. "Verba fortius accipiuntur contra proferentem." Now, for whose benefit are these words introduced? Clearly for the benefit of the underwriters, as they are to relieve them from risks, for which they would otherwise be liable under the general words of the policy. They are not, in form, or in substance, the words of the insured; but words of exception, used by the underwriters, to exempt them from a liability from the general rule, which would otherwise attach upon them during the whole term of time, for which the policy was to endure. The language of the supreme court of the United States, in construing an exception in the policy of insurance in Yeaton v. Fry, 5 Cranch [9 U. S.] 335, is strongly in point, as to the proper construction of the present policy. The court there treated the words of the exception, as the words of the underwriters, and not of the

insured, because they took a particular risk out of the policy, which, but for the exception, would be comprehended in the contract. So far, then, as the rule is to prevail upon the present occasion, it is unfavorable to the defendants. But it by no means follows, that it supersedes all other rules of construction; for there is another rule to be observed: "Verba intentioni, non è contra, debent inservire." Co. Litt. 36. Another suggestion has been made, founded upon the grammatical sense of the words. It is said by the counsel on behalf of the plaintiff, that the clause in question is to be construed as an exception, and, therefore, equivalent to "excepted risks." This is met, on the other side, by the remark, that the word used is "excluding," and not "excepting," and that, in a grammatical sense, to exclude means to shut out, and not to except; and, therefore, excluding is rather prohibiting. It is certainly true, that in lexicographies, the word "exclude" has not ordinarily given to it, as one of its meanings, to "except." But nevertheless we shall find, that one of the senses given to the word "except," is to "exclude." And in common parlance, the words are often used as equivalents. Policies of insurance are generally drawn up in loose and inartificial language, and, indeed, in the language of common life, and, therefore, are always construed liberally, and rarely, if it is possible, subjected to any nice, or narrow, or critical strictness, or any technical interpretation. We look rather to the intent, than to grammatical accuracy in the use of language. If a policy of insurance were underwritten for a year on a ship, excluding the month of October, we should say, that it was but an exception of that month. If a policy was on all the cargo on board a ship, excluding the fruit on board, we should deem it a mere exception of the fruit. On the other hand, if the words were, excepting the fruit on board, we should as readily say, that the fruit was excluded from the risks stated by the policy. But in neither case should we say, that fruit was prohibited from being taken on board in the voyage. It does not appear to me, therefore, that any difficulty in the interpretation of the clause arises from any grammatical inaccuracy in the use of language. It will make no difference, in my judgment, in the present case, whether the word "excluding," in this policy, is interpreted in its more common sense of shutting out, or in the sense of "excepting," although I have no doubt, that the latter is the true and appropriate sense in the clause of the policy under consideration.

I confess, that I have felt some difficulty in arriving at a satisfactory conclusion as to the true and proper interpretation of this clause. I have no doubt, that the word "excluding" is not here used in any sense, which makes the clause amount to a warranty, or to a condition, or to a prohibition. The language does not, in my judgment, justify such a construction. It is not the fair import of the terms, and to arrive at it, we must force them out of their natural signification by an artificial straining. In Yeaton v. Fry, 5 Cranch [9 U. S.] 335, 341, a similar attempt was made to construe an exception in the policy to be a warranty; but it was rejected by the supreme court of the United States. My difficulty is of another sort. It is, whether the clause amounts to an exception of voyages, or an exception of risks. Construe it as an exception of voyages, and it will read, as if writtten thus: "Excepting during the term all voyages to and from all ports and places in Mexico and Texas, also the West Indies, from July 15th to October 15th, 1839, each at noon." On the other hand, construe it, as an exception of risks, and it will read, as if written thus: "Excepting all risks in all ports and places in Mexico and Texas, also in the West Indies, from July 15th to October 15th, each at noon." After some hesitation, I have come to the conclusion, that the latter is the true and the natural and the easiest interpretation of the clause; and that it will satisfy the intention of the parties, so far as we can gather it from the words, or apparent objects of the policy.

My reasons for this conclusion I will now proceed shortly to state. In the first place, it is a well known fact, that greater risks ordinarily occur in ports and places in Mexico and Texas, either from the character of the harbours, or that of the government, than in other ports. The same remark applies to the West Indies, during what are commonly called the hurricane months, which are between the middle of July and the middle of October. It is not unnatural, therefore, to expect, under such circumstances, either that such risks should be excluded, or that a higher premium should be paid. I entirely, therefore, accede to the argument, so strongly pressed in the present case, that the exception did cause a diminution of the premium, and without it the company would not have underwritten at all, or not without a higher premium. The words, then, in effect, in my view, are words of exception or exclusion of what would otherwise be comprehended in the general terms of the policy. The policy is for the term of a year. The natural construction, then, of the exception is, that it excepts something already included. It is, then, an exception or exclusion of time, and not an exclusion of voyages; for no voyages are mentioned. The words are "excluding during the term." If the intention had been, in the first part of the clause, to exclude all voyages to or from ports and places in Mexico and Texas, we should naturally have expected the word "voyages," to be inserted in this very connexion. But if it was intended only to exclude time, then the words stand well enough without any additional words; and their import is to exclude during the term all the time, passed in ports and places in Mexico and Texas. But even if this part

of the clause should be construed to exclude voyages to and from Mexico and Texas during the year insured, it would not follow, that the other part of the clause is to receive the same interpretation. In the case of Yeaton v. Fry, 5 Cranch [9 U. S.] 335, 341, the supreme court of the United States, upon a policy containing a clause, "all risks, blockaded ports and Hispaniola excepted," held the clause to be divisible, and applied the construction of it thus: that a voyage to Hispaniola was not insured, but a voyage to a blockaded port was, unless known to be blockaded, although it was in fact blockaded. The risk of loss from a known blockade was excepted, and not the voyage to the port itself. The same exposition might be applied here. But, as the brig did not, in fact, go on any voyage to Mexico or Texas, it is unnecessary to insist on that. We may read the clause, then, as if it were, "excluding during the term the West Indies from July 15th to October 15th, each at noon." Now, here it is clear, that voyages to and from the West Indies are not excepted generally; but the West Indies for a specified time only. The natural interpretation, then, of this clause is, that it excepts from the protection of the policy the time passed in the West Indies from July 15th to October 15th. I say, this is the natural interpretation; for the insurance is for a year, the exception carved out of it is for three months, and these three months not universally, but only when the vessel is in the West Indies. If the vessel is not in the West Indies, the policy covers the whole term; so that West India ports or places, or West India risks, only seem within the construction of the clause of the policy. Suppose the brig had sailed on a voyage to the West Indies on the 1st of July, and had been lost on the 10th of the same month; what words are there in the policy (supposing there to be no warranty, condition, or prohibition, which I have already said there is not), which would prevent the owner from a recovery of the loss under this policy? I confess I can perceive none. The loss would be without the excepted period, and not within it. Besides; it seems to me, that policies on time are properly to have the same construction throughout, unless there be an irresistible presumption the other way. The very object of a policy on time is to avoid any designation of voyages, or chances of deviation; and to leave the party at liberty to proceed on any voyages or adventures, which he may choose. Exceptions, therefore, in the policy, if they admit of any other reasonable interpretation, ought not to be construed as cutting down the policy to particular voyages, excluding all others; but to be deemed exceptions of time and risks in particular ports or parts of voyages. Now, every word in the present policy is perfectly satisfied by the interpretation, which I have given to it, without any straining of the words from their ordinary meaning, as words of exception or exclusion. But if we construe the clause the other way, as excluding all voyages to and from the excepted ports in Mexico and Texas, and all voyages to and from the West Indies begun before, or continued after the excepted period, we are necessarily obliged to interpolate many words into the clause, and to deflect the words from their common signification. In short, we are to construe a policy, purporting to be a policy on time, to be also a policy on voyages, and the exception to be, not of time and risks, but of voyages to and from the excepted ports and places, as well as an exception of the time passed in them. It appears to me, that this is not a reasonable or justifiable construction. But, suppose the meaning of the excepted clause is ambiguous, and admits of either construction, which is then to be adopted? The rule adverted to, decides this. The exception is to be construed most strictly against the underwriters, and most favorably to the insured.

Upon the whole, therefore, notwithstanding I have had some difficulty on the subject, my mind reposes on the construction, which I have stated, as the true, the natural, and the appropriate meaning of the policy.

PALMER (WARREN SAVING BANK v.). See Case No. 17,207

PALMER (WILCOCKS v.). See Case No. 17,638.

PALMER (WYTHE v.). See Case No. 18,120.

PALMER (YOUNG v.). See Case No. 18,-170.

Case No. 10,699.

The PALMETTO.

[1 Biss. 140.] [1]

District Court, N. D. Illinois. Dec., 1856.

COLLISION—VESSEL AT WHARF—PROPER PLACE FOR ANCHOR—CITY ORDINANCES.

1. In a stream as narrow and crowded as the Chicago river, a tow of nine loaded canal boats is, under ordinary circumstances, too heavy for a tug; and although the tow is almost exclusively under the control of the tug, if the latter, being the agent of the boats, is overtasked, the boats must answer for the fault.

2. It is the imperative duty of all craft navigating the river, to avoid coming in contact with vessels moored to the wharf, and in case of collision, the presumption is that the former is in fault, and, if they from carelessness, negligence, or want of skill, collide with a moored vessel, contributory fault of the stationary vessel does not excuse them.

3. A vessel lying at the wharf must have her anchor out of the way of passing vessels. If she allows it to hang at the hawse pipe, with the flukes below the surface of the water, where it sinks a colliding boat, she is in fault. She is also in fault for not dropping it on the approach of a vessel.

[Cited in The B. S. Sheppard, Case No. 2,072; Price v. The Sontag, 40 Fed. 176.]

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

4. Though such a position of the anchor may meet the requirements of the city ordinances, it does not meet the demands of maritime law.

[See The B. S. Sheppard, Case No. 2,072.]

5. City ordinances concerning vessels are binding only as police regulations: beyond this they have no force in the United States courts. This court will allow them to be read, determining for itself their application to the subject matter.

On the 12th of July, 1854, the schooner Palmetto was lying at the claimant's dock, on the west side of the south branch of the Chicago river, with her head up stream. An anchor was suspended from her larboard bow, with its flukes some distance below the surface of the water. It was about six o'clock in the morning; the wind was blowing pretty fresh from the south-east. At that time, and while the Palmetto was in that position, the steam tug Seneca was proceeding down the south branch from Bridgeport, having in tow eight or nine canal boats, two abreast. Among these canal boats was the Rio Grande, in the third tier from the tug, loaded with oats—both boat and cargo the property of the libellant. It was near a bend in the river, and just before they approached the Palmetto, the stern of the Rio Grande struck two mud scows which were lying near the dock, about two hundred feet above the schooner, which caused the bow of the Rio Grande to swing in towards the dock of the Palmetto. The speed of the Seneca was only two or three miles an hour, and it had been slackened as they were rounding the bend in the river. The river was quite full of vessels. With the wind as it was then, and for the Seneca, it was a heavy tow. The helmsman of the Rio Grande saw that he could not, with the helm, prevent the canal boat from coming in contact with the schooner, and an effort was made to keep her off with poles, which, as the mud was there soft, was unavailing, and a collision took place between the Rio Grande and the Palmetto forward, the anchor of the latter knocking a hole in the canal boat, which caused her to sink immediately.

Grant Goodrich, for libellant.
Mr. Hooper, for respondent.

DRUMMOND, District Judge. The Palmetto was lying at her dock in the act of discharging her cargo. There can be no question of her right to be moored there for that purpose. While in that position, it was the imperative duty of all craft navigating the river to avoid coming in contact with her. This is a cardinal rule to be borne in mind in judging of the conduct of the Rio Grande. It is well known that the Chicago river is a narrow stream, requiring great caution on the part of vessels in passing up and down, and it is of primary importance that they should, as near as possible, keep the center of the river. Though there were several vessels at the time in the river, it does not appear that there were any immediately opposite the place where the Palmetto was moored which obstructed the channel. It was at a bend of the river. The tendency of the wind was to drive them toward the western shore. The circumstances and the place demanded unusual circumspection. The tug and its tow should have moved only at such speed as to be under the command of the helm, or if that was impracticable, the speed should have been, so checked as to avoid all danger in case of collision. The helmsman of the Rio Grande states that the canal boat struck some scows, which caused her to swing into the Palmetto. I can see nothing in the testimony to excuse or justify this contact with the scows. It is a fair inference that it was the cause of the collision, and it is a circumstance not to be overlooked, that he did not state this material fact till he had already undergone one separate examination. Independent of all this, I am of the opinion that, under the circumstances, the Seneca had too heavy a tow. The witnesses do not all agree about the wind, but the weight of the evidence is, there was a fresh breeze on the river. It is natural for tugs to include as many in tow as possible, but it should be remembered that the tow is almost exclusively under the control of the steamer, and if the latter is overtasked, it is an error which may be attended with the most serious consequences. In this instance the canal-boat was subject to the steamer, but the latter was the agent of the Rio Grande, and the principal must answer for the acts of the agent.

Besides, when a vessel navigating the river, comes in collision with another, properly moored at her wharf, the presumption is that the former is in fault, and that presumption must be overcome by satisfactory evidence. I see nothing in this case to rebut that presumption, but much to confirm and strengthen it. It would be a dangerous doctrine to hold a vessel entirely free from fault and its consequences, which by carelessness, negligence, or want of skill while navigating the river, comes in contact with another moored at the wharf, merely because there might be a fault on the part of the stationary vessel which would produce injury or tend to produce it. It is said if the anchor of the Palmetto had not been where it was, no damage would have been done. It is difficult, perhaps, to decide absolutely what would have been the result if the anchor had not been there, but it may with equal truth be said,—conceding the proposition,—that if the Rio Grande had not come in contact with the Palmetto no injury would have ensued. I feel inclined to judge the conduct of the Rio Grande with rather more strictness than I should if both vessels had been under way in the river. I consider that rule the safest which conduces most to vigilance, to the exercise of skill, to prudence and circumspection; and

on the whole, my conclusion is, on this part of the case, that the Rio Grande was in fault.

The next point to be determined is, whether the Palmetto was in fault.

It has been strenuously urged on the part of the claimant, that the schooner was lawfully at her dock discharging her cargo, and that the collision and its consequences must legitimately fall upon the Rio Grande, by whose unskillful management the accident was caused.

An ordinance of the city has been introduced in evidence which requires a vessel while at the wharf to have her anchor on board, or hanging at the forefoot, and some witnesses were examined touching the precise locality of the forefoot. I do not consider it necessary to dwell upon this branch of the case. We generally allow the ordinances concerning vessels to be read, but determine their application to the subject matter. They are binding only as police regulations: beyond this they have no controlling force upon the courts of the United States, which are governed by the principles and rules of the admiralty law. The New York v. Rea, 18 How. [59 U. S.] 223. It is necessary to inquire therefore, irrespective of the ordinance, whether the anchor of the Palmetto was at the time in a proper place; and I hold clearly it was not. There is some conflict of testimony as to its actual position, but I think the weight of the evidence is, it was hanging at the hawse pipe. When a vessel is navigating the river, the anchor should be in a condition to be let go at a moment's notice, because the safety of the vessel itself, and of others, may depend upon the anchor being speedily dropped. Under such circumstances the anchor, like the helm, is one of the agents of safety. Along side the wharf the anchor is useless. There the vessel's mooring tackle is not fastened to the bottom, as with the anchor, but to the wharf, and the same remark applies here as in the other part of the case. While the vessel in motion must use all needful skill and caution to avoid the vessel at rest, the latter should always have her hamper, as well aloft as below, as much as practicable out of the way of passing vessels. The yards and anchors, and other movable parts of the vessel should be arranged with that object in view. The enforcement of this rule is peculiarly necessary in so narrow a stream as the Chicago river.

I do not think it necessary to decide a question made in the testimony and in the argument, whether the anchor was technically under the forefoot, because I am of the opinion whether it was or not, that it was not at the time properly disposed of. A vessel while lying at the wharf must have her anchor out of the way of passing vessels; it is not, perhaps, indispensable that it should be always on board, but it is certain it must be where it cannot injure vessels navigating the river. There is no other safe rule. If an anchor suspended from the hawse pipe, with its stock even with the surface of the water or just above or below it, meets the requirements of the ordinance, it certainly does not meet the demands of the maritime law.

Whether the collision would have sunk the Rio Grande if no anchor had been there, we do not absolutely know. The libellant's witnesses think not; however this may be, it is clear in such an event, the Rio Grande would not only have had to bear her own loss, but the parties would have been liable for any damage done to the Palmetto; and this I think is one test to determine whether under the circumstances, the Rio Grande was in fault.

In a stream so narrow as the Chicago river, it is manifest that collisions may occur between vessels at the wharf and those in motion, in spite of the utmost skill and care. It is therefore extremely hazardous for the vessel at rest to have her anchor hanging at her bow or elsewhere, as a weapon of offence to crush any passing vessel which by inevitable casualty may come in collision. Any practice, if any exists, which tends to produce such disastrous results cannot be sanctioned by this court.

Taking the case therefore as made by the witnesses of the claimant, the anchor was suspended at the hawse pipe in such a manner as to be liable to injure any craft in motion. This was a fault on the part of the Palmetto; it was also a fault that they did not drop the anchor on the approach of the Rio Grande, of which they had ample notice.

If it clearly appeared the Rio Grande struck the schooner through inevitable accident, as by a sudden and unforeseen flaw of wind, or otherwise, all proper skill and caution being used, I should allow the libellant full indemnity; but as I find both parties in fault. I can only allow partial compensation.

The rule in admiralty, in such cases, is that the loss must be divided. The evidence shows that the oats were a total loss. The canal boat was raised, and repaired. The quantity of oats was six thousand five hundred and sixty-two bushels, which at the market price in Chicago, as proved, is $2,067.03. The repairs of the boat were $439.42. Ten dollars a day are allowed for forty-seven days detention, $470.00. The whole damage therefore, was $2,976.45, one-half of which is $1,488.22, for which last sum a decree will be rendered against the claimant and his surety. Each party will pay his own costs.

NOTE. Where a ship is at anchor in a proper place, colliding vessel liable. Strout v. Foster, 1 How. [42 U. S.] 89.

Even though there was no fault with either vessel. The United States v. Mayor, etc., 5 Mo. 230.

The fault, under almost any circumstances is

with moving vessel. The Granite State, 3 Wall. [70 U. S.] 310.

See, also, The Lochlibo, 1 Eng. Law & Eq. 651; Culbertson v. Shaw, 18 How. [59 U. S.] 584; The Julia M. Hallock [Case No. 7,579]; The George, 2 W. Rob. Adm. 386; The Massachusetts, 1 W. Rob. Adm. 371; The Victoria, 3 W. Rob. Adm. 49; The Girolamo, 3 Hag. Adm. 169, 173; The Eolides, Id. 367; The B. S. Sheppard [Case No. 2,072].

Presumption against moving boat, and ordinary care will not excuse her. Mills v. The Nathaniel Holmes [Case No. 9,613]; The Bridgeport [Id. 1,861]; The Helen R. Cooper [Id. 6,334]; The Russia [Id. 12,168]; The Leo [Id. 8,250].

Case No. 10,700.

The PALO ALTO.

[2 Ware (Dav. 343) 344;[1] 6 N. Y. Leg. Obs. 262; 18 Hunt, Mer. Mag. 189.]

District Court, D. Maine. Oct., 1847.

SHIPPING — FORFEITURE FOR ILLEGAL TRADING—REMISSION—CONDITIONS PRECEDENT—REVOCATION.

1. A remission of a forfeiture by the secretary of the treasury, under the act of March 3, 1797, c. 13 [1 Stat. 506], granted before a libel or information has been filed, operates directly to revest the right of property and possession in the petitioner, and the collector, on his presenting the warrant of remission, is bound to restore it.

2. But, after the filing of a libel or information, the property is in the custody of the law, and the collector is the keeper of the court. The remittitur, being filed in court, is a bar to further proceedings to enforce the forfeiture, and the court will direct the suit to be dismissed and issue a precept to restore the property. But the property being in the custody of the court, the collector cannot restore the possession without an order of the court.

3. If the remission is on the payment of costs, this is a condition precedent, and the remission is inoperative until the costs are paid.

4. A tender of the costs, after a reasonable time allowed for taxing them, is equivalent to actual payment, to revest the right of property and possession. A neglect of the collector, seasonably to furnish the attorney with the cost of seizure and custody, will not defeat or suspend the right of the claimant to the possession of the property.

5. The secretary has the power, after a remittitur has been granted and communicated to the claimant, to revoke the warrant.

6. If the remission is free and unconditional, the power of revocation continues after the remittitur is filed and an order of restoration passed, and until the precept is finally executed by a delivery of the property into the possession of the claimant.

7. The order of restoration made by the court, is not properly a judicial but a ministerial act. It is the remission of the secretary that restores the right of property and possession, and the order of the court, carrying that into effect, may be demanded by the claimant ex debito justitiæ.

8. If the remission be conditional, the secretary has no power to revoke it after the condition has been performed, whether the possession of the goods has been delivered to the claimant or not.

9. After the remission has been made known to the claimant, if the secretary revokes it, the revocation is inoperative until the knowledge of it is brought home to the claimant; and if the condition has been performed before he has knowledge of the revocation, the rights of the claimant become fixed, and the remission is irrevocable.

10. In all engagements formed inter absentes by letters or messengers, an offer by one party is made, in law, at the time when it is received by the other. Before it is received it may be revoked. So the revocation, in law, is made when that is received, and has no legal existence before. If the party, to whom the offer is made, accepts and acts on the offer, the engagement will be binding on both parties, though before it is accepted another letter or messenger may have been despatched to revoke it.

[Cited in Patrick v. Bowman, 149 U. S. 424, 13 Sup. Ct. 816.]

11. The exception to this rule, established by the jurisprudence of the courts, is, that if the party making the offer dies or becomes insane before it is received and accepted, the offer is then a nullity, though accepted before his death is known.

The manner in which this case came before the court will appear by a recapitulation of the antecedent facts. The Palo Alto, a small vessel of $20^{12}/_{95}$ tons burden, built and licensed for the fisheries, was seized July 15, 1847, by the collector of Wiscasset, and libelled for being engaged, while under a fishing license, in a trade other than that for which she was licensed, in violation of the act of February 18, 1792, c. 8, § 32, for licensing and enrolling vessels (1 Stat. 305). On the 21st of July, a claim was interposed by C. F. Barnes, and on the 23d he filed a petition confessing and praying for a remission of the forfeiture. On this petition, a summary inquiry was had into the circumstances of the case, according to the provision of the act of March 3, 1797, c. 13, § 1 (1 Stat. 506). A number of witnesses were examined and the following statement of facts made out and transmitted to the secretary of the treasury, together with a copy of the libel and the petition: "Special District Court, Portland, Sept. 11, 1847. And now, on a summary examination into the facts of the case (notice having been given to the attorney of the United States and the collector who made the seizure), it has been proved to my satisfaction that the said Barnes purchased said schooner Palo Alto, June 4th, 1847, of about 20 tons burden, built and intended for a fishing vessel; that his intention was to sell her again, but that he made a conditional agreement to let her for the fishing business if he did not succeed in effecting a sale; that in the early part of July he went in her to Portland, for the purpose of making a sale; that he advertised her for sale and made attempts to sell her, but failing in making a sale, he purchased the goods named in the bill of parcels (which was annexed to the petition), at Portland, and returned with them to Wiscasset. Most of the goods purchased are such as are used in fitting out fishermen, but the quantity was much greater than would be required for fitting out a single vessel of her size. He returned in the vessel to Wiscasset, and ar-

[1] [Reported by Edward H. Daveis, Esq.]

rived at a wharf near the custom-house, between 11 and 12 o'clock in the forenoon, making no attempt to conceal what cargo he had on board from the custom-house officers. The goods which he carried all belonged to himself, and he had none for other persons. It was in proof that the collector told him when he sailed for Portland, that he could not take goods under a fishing license. Barnes is by trade a sail-maker, and has heretofore been interested in two vessels which were engaged in coasting. He has also bought and sold small fishing vessels and pleasure boats. It was in proof that fishermen which came to Portland were in the habit of taking their outfits there."

On the 13th of September the secretary remitted the forfeiture, on condition of the payment of costs, and the warrant of remission was transmitted to the attorney on the 20th. This having been filed in court, on the 30th an order was made for the restoration of the property to the claimant, and a precept issued to the marshal to carry it into execution. The deputy marshal, in his return on the back of the precept, stated, that he called, on the 5th of October, and demanded of the deputy collector the property; but, the collector being absent, he refused to deliver it, and on the 8th he called on the collector at the custom-house, and again demanded the property, and he refused to deliver it; and he returned the writ in no part satisfied. Upon the 29th of September the secretary wrote to the attorney requesting him to return the warrant of remission. The attorney in reply informed him that it having been filed in court and become a part of the record, it was not in his power to return it. And on the 4th of October, the secretary again wrote to the attorney, stating that he had requested the warrant to be returned "for the purpose of revoking it, as on a full examination of the case, relief ought not to be granted to Mr. Barnes." On the 7th of October the attorney filed a motion for an order to the marshal to stay the execution of the writ of restoration and to return it unexecuted. The circuit court being then in session and remaining so until the last of the month, the parties were heard on the motion on the 4th of November.

Dist. Atty. Haines, for United States.

S. Fessenden, for claimant.

WARE, District Judge. The questions now to be determined arise on a motion of the district attorney for a supersedeas of the writ of restoration issued by this court. But as that has been returned unexecuted since the motion was filed, in the actual posture of the case the questions would arise more regularly on a motion of the claimant for an alias execution. But as the parties are disposed to waive matters of form, and wish for an early decision, we may perhaps dispose of the questions which have been discussed, on the attorney's motion.

It is argued by the attorney, in the first place, that the writ was improvidently issued, there being no authority in law for issuing such a writ in any case; and in the second place, if there is any authority, that the remission being made on the precedent condition of payment of costs, and the costs not having been yet paid, the writ was issued prematurely.

The argument on the first point is, that the remission of the secretary operates per se and independently of any action of the court to retransfer and revest the property in the petitioner. The act of March 3, 1797, c. 13, § 1 (1 Stat. 506), under which the remission is made, provides that when any person shall have incurred any penalty or forfeiture, or is interested in any vessel or goods, which have by law become liable to seizure and forfeiture in the cases therein mentioned, on certain proceedings being first had on petition to the judge of the district, in which the penalty or forfeiture accrued, they may be remitted by the secretary of the treasury, if in his opinion it was incurred without willful negligence or any intention of fraud; and he may direct the prosecution, if any has been instituted, to cease on such terms as he shall deem reasonable. In the case of a seizure of goods, if no prosecution has been commenced, it may be true that the warrant of remission operates directly to restore to the claimant his right of property and possession of the goods, and on the presentment of the warrant, the collector may be bound to restore them. If a suit has been commenced the remission may be pleaded in bar of a further prosecution of it. If it be for the recovery of a penalty, its operation is to discharge the obligation by putting an end to the suit and by being a bar to any future suit. No further action of the court is required than dismissing the action. But if the prosecution be for the purpose of enforcing a forfeiture in rem, the property libelled is placed in the custody of the court. It is in the keeping of the law. The warrant of remission does not then give the claimant a direct authority to retake the goods, but on filing the remittitur and complying with its terms, the court will direct a precept to be issued for the restoration of the property, and order the suit to be dismissed. Such has always been the practice in this, and, it is believed, in other districts. The statute does not indeed in such cases direct a writ of restoration, but it is necessary to the orderly course of judicial proceedings, so that the record may show what disposition is made of the property.

But it is said that in this case the remission is conditional on payment of costs, and that this being a condition precedent, the remission is inoperative until the costs are paid. This, as a general proposition, is undoubtedly true. A precedent condition must generally be performed before the right vests, or that must be done which the law holds to be equivalent to performance. After the remittitur in this case was received and filed, the claimant was present in court and tendered the costs to

the attorney. He declined to receive them, because the collector not having furnished him with the item of the costs of seizure and custody, he was unable to complete the taxation. It was not, therefore, the fault of the claimant that the costs were not paid, but that of the collector in not seasonably presenting his bill of charges. Now, it is a general rule of law that a condition, on the performance of which a right vests, shall be considered as performed, so as to perfect the right, where the party for whose benefit the condition is made has by his own act or fault prevented it from being performed. The Roman jurisconsults put this doctrine into a formula, and it is inserted in the Digest among the general rules of law as a universal rule: "In omnibus causis pro facto accipitur id in quo per alium morâe fit quo minus fiat." Dig. 50, 17, 39. "Tunc demum pro impleta habetur conditio cum per eum stat, qui, si impleta esset, debiturus erat." Dig. 35, 1, 81, § 5.[2] This rule is equally well established in the common law. It was the very point on which the decision turned in Hotham v. East India Co., 1 Durn. & E. [1 Term R.] 639. Ashurst, J., in delivering the opinion of the court, said that if any authority was necessary for this principle, which was a plain dictate of common sense, it was so held in Rolle, Abr. 445, and in many other books. The same doctrine is held in Jones v. Barkley, 2 Doug. 684; Merrit v. Rane, 1 Strange. 458; Blackwell v. Nash, 1 Strange, 535; Kingston v. Preston, 2 Doug. 689; 3 Salk. 108. It was also the point directly decided in Brown v. Bellows, 4 Pick. 179, 195. Indeed it is one of those obvious rules of justice and right, that finds a place in every system of jurisprudence that makes any pretention to cultivation and refinement, and flows directly from a great principle of natural equity and universal justice, which binds every one to answer for the damage occasioned by his own act. Pothier, Obl. No. 212; 6 Toullier, Droit Civil, No. 609. A condition, says the French Code Civil, is considered as performed when it is the debtor, bound under this condition, who has prevented it from being performed. Article 1178.

It is a familiar principle of law that a tender of performance, at a fit and convenient time and place, is for many purposes equivalent to a performance. A tender of money due on a bond or other contract, it is true, does not, like payment, discharge the debt, for the plaintiff may reply a subsequent demand and refusal, but it is a bar to further damages. And it is universally true, that when a right or title is made dependent on a precedent condition, and the party is ready and offers to perform it, and is prevented by the default of the party for whose benefit it is reserved, the title vests absolutely and the condition is so far discharged that the right cannot be defeated. In this case the collector might undoubtedly claim a reasonable time to make out his bill of charges. The remittitur was dated September 18th, and transmitted to the attorney on the 20th, and the collector was immediately informed of it. Between that and the 30th there was, it would seem, ample time for him to ascertain and make out his bill of charges, and upon the payment, and, in my opinion, on the tender of payment, the claimant was entitled strictissimo jure to an order of restoration. On this state of the case the court ordered, on his depositing in the registry $150, a sum believed to be more than sufficient to cover all costs that would have accrued, that the usual precept for the restoration of the goods should be issued, and the deposit having been made, a precept was accordingly issued to the marshal to restore them to the claimant. He had already been kept out of the possession of the vessel and cargo for two months and a half, and it appeared to me that he ought not longer to be deprived of them, with a further accumulation of expense. My opinion is, that the order of restoration was properly made at the time and ought not further to have been delayed. But the bill of charges is now presented, amounting to $211.50, and, therefore, exclusive of the fees usually taxable on a libel, considerably more than the whole deposit; and it is now said to be apparent that the deposit does not cover the costs, and thus that they cannot be considered as paid. If the collector's charges are allowed, they certainly will exceed the deposit. But without intending to intimate any conclusive opinion, before the parties are heard in the taxation of costs, I will only suggest that some of the charges appear at the first blush to be of a novel and somewhat extraordinary character. There is a charge of twenty dollars for a journey to Portland of the deputy-collector, to consult the attorney on the filing of a libel, and another twenty dollars for his own attention to the case. When we come to a hearing on the taxation of costs, I may have occasion to ask the collector in what part of the fee bill established by law, or in what usage of the court, he finds an authority for taxing these items in a revenue seizure as a personal charge on the claimant. In some cases of expensive, perplexed, and protracted litigation, where the collector has incurred extraordinary expenses, and been at unusual trouble, in procuring evidence to establish a forfeiture, he has been allowed by the secretary of the treasury, on a certificate of the judge, to charge these against the United States' share of the fund; but I am not aware that it was ever thought that such expenses would be introduced into the bill of costs as a personal charge on the claimant. Without adverting to other items particularly, some of which appear of unusual amount, consider-

[2] The following are some of the texts of the Roman law in which this general rule is applied in contracts, legacies, and other cases. Dig. 35, 1, 24, 12; Dig. 12, 1, 50; Dig. 19, 2, 38; Dig. 22, 7, 20, 23; Dig. 45, 1, 25, § 7; Dig. 50, 17, 161.

ing the nature of the case, I will only observe, that the deposit is more than sufficient to meet all costs that are usually allowed in such cases. But if it were not, an execution may be issued on his stipulation, for the balance. But the ground of my opinion is, that the tender was, under the circumstances, equivalent to payment for the purpose of vesting in him a right to the possession of the property.

The principal question that arises on the motion, and that which has been mainly discussed at the argument, remains to be considered, and that is, the effect of the revocation, by the secretary, of the remittitur. But it ought first to be observed, that there is no actual revocation before the court. The letter of the secretary of October 4th, states that he had ordered the warrant of remission to be returned, for the purpose of revoking it. That, however, having been filed, an order of court passed upon it, and having become part of the record, there ought to be a regular and formal revocation placed on the files of the court. But the letter of the secretary is only a communication to the district attorney, expressing an intention to revoke, and not actually revoking and annulling the formal warrant of remission. That intention, however, having been expressed, for the purpose of raising the question, which has been elaborately argued, we may suppose the warrant of revocation to be made and entered on the files of the court.

On the part of the claimant it is argued that the secretary having once remitted the forfeiture and promulgated the warrant, and an order of court having passed thereon for the restoration of the property, this is a judgment of the court, and that the remission has thereby passed in rem judicatam and become irrevocable, and the rights of the claimant have become so vested that they cannot be divested by the act of the secretary.

In the first place, I think it may well be doubted, whether the act of the court, granting an order of restitution, is in strictness a judicial act. The power of remitting penalties and forfeitures, belongs exclusively to the secretary. The court has no authority to revise his decision or inquire into the grounds on which it is made. If a remission is granted, which on its face appears clearly to be illegal and beyond his power, it has indeed been suggested that the court may disregard it as having been improvidently issued by mistake. The Liverpool Packet [Case No. 8,405]. But if nothing of that kind appears, all the court has to do, is to carry it into execution by an order of restoration. In the preliminary steps for procuring a remission, the court, in the first instance, inquires summarily into the facts and circumstances of the case, and reports them to the secretary. It reports facts and not the evidence of facts. In making this statement the judge acts judicially. The facts must be proved by legal and competent evidence, and of the competency of the evidence he must judge. The Margaretta [Case No. 9,072]. The evidence must not only be competent and conduce to prove the facts stated, but must satisfy the judicial conscience of the judge that they are true. But whether, when proved, they are sufficient to establish the further fact that the forfeiture was incurred without willful negligence or intention of fraud, is referred exclusively to the judgment of the secretary of the treasury. It does not belong to the judge to express an opinion on this point. The secretary forms his opinion on the facts stated alone, and, under the law, no evidence can be submitted to him by either or both parties, as it is not on the evidence, but on the facts found and stated, that he is to act. If either party is not satisfied with them as stated by the judge, I by no means intend to deny that he may properly express his dissatisfaction to the secretary, but then the secretary cannot legally act on his representation, or on evidence produced by him in making up his judgment, whether the forfeiture was or was not incurred through excusable ignorance and without fraudulent intention. But he might in his discretion return the statement of facts to the judge for further inquiry and for hearing further evidence, and on such re-examination the facts may be restated or the statement be amended. It will then be on such restatement that the secretary will act, and not on the evidence of facts. But the power of remission is confined exclusively to his discretion, and when he has decided, the court has no judgment to exercise on the subject, but is bound ex debito justitiæ to issue the order of restoration. The act of the court, therefore, in making this order is more in the nature of a ministerial than of a judicial act, for it is simply to carry into effect the remission. That the secretary has a right to revise his decision after it has been made known to the parties, it seems to me, cannot well be questioned. If, in making up his judgment, he is supposed to act judicially, then, in analogy to the practice of other courts, it would seem that he must have the power, if he thinks injustice has been done, to review and revise his judgment. Every court has that power. If a decision once made and promulgated is irrevocable, it must be equally so, whether the decision is to remit or not to remit. Yet it would scarcely be contended, that when once the secretary had determined not to remit, and his decision had become matter of record by being placed on the files of the court, he could not revoke that determination for the purpose of admitting the proof of further facts. Still there must be some time when his power over his decision must cease. The question is, what that time is. If the order of restoration, awarded by the court, was strictly a judicial and not a ministerial act, I should admit the conclusion of the claimant's

counsel, that the secretary could not by his act annul a judgment of the court. But how far that would beneficially relieve the claimant, is by no means certain. For if it is a judgment of the court, it is a judgment grounded upon a single fact, and if the secretary should certify that the warrant of remission was improvidently issued, it would be the duty of the court to stay its proceedings, and if a writ of restoration had been awarded and not executed, to issue a supersedeas, till it could have time to re-examine the case, and if on such re-examination he should determine not to remit, to reverse its judgment. Such it seems to me would be clearly its duty, because it would then be apparent that the only foundation, on which it rested, failed. If so, it is not very material whether the order of restoration, on which the writ issues, be a judicial or ministerial act. Jones v. Shore, 1 Wheat. [14 U. S.] 462. The question would again return, when the power of the secretary, over his determination, is at an end?

We come, then, to the question, when does the remission become irrevocable? The argument of the district attorney is, that it does not become irrevocable until the goods are actually restored to the possession of the claimant. In support of this position, he cited the case of U. S. v. Morris, 10 Wheat. [23 U. S.] 246. The question in that case arose on a remission after a decree of condemnation. The power to remit after a final condemnation was contested. The same question had occurred in the circuit courts, and had been differently decided in different circuits. In this it had been held that the rights of the parties became fixed by the decree, and particularly that the title of the seizing officers to their shares in the forfeiture, became consummated and perfect beyond the secretary's power of remission. The Hollen [Case No. 6,608]; The Margaretta [supra]. A contrary doctrine had prevailed in other circuits. [U. S. v. Morris] 10 Wheat. [23 U. S.] 296. The case was very elaborately argued by eminent counsel, and was fully considered by the court. It was decided that the rights of the officers were inchoate by the seizure, but that they remained imperfect and contingent during the whole proceedings in court and after a final decree and of condemnation, and did not become consummated and indefeasible, until the money was actually paid over to the collector for distribution. Until the actual delivery over of the property, or its proceeds, under the decree, the rights of the officers, and, it would seem to follow, the rights of all others claiming an interest in the property or fund in litigation, whether legal, equitable, or precarious, like that of a petitioner confessing a forfeiture, were held to be dependent on the will of the secretary, under his power to grant or refuse a remission. The decision appears to me to be placed on the broad ground that all rights to the fund are subordinate to the secretary's power to remit or not to remit, until the process of law is finally closed by putting the party entitled into actual possession of the fund. The supreme court having established this principle, it appears to me to govern the present case, and after some reflection, that opinion was intimated to the parties. If the remission had been a free and unconditional remission, I still think that the decision in the case cited must have governed this; and that the secretary might revoke a warrant of remission, at any time before the precept of a court carrying it into effect was finally executed by the delivery of the goods to the claimant. Perhaps, independently of that decision, we might be brought to the same result from a more general principle of law. The forfeiture being confessed, and therefore the title of those claiming under it admitted, the remission, by which the property is restored to the claimant, partakes of the nature of a gift or donation, and being without consideration, it is in its own nature revocable at any time before the actual delivery of the thing. A donation after it is delivered, and not before, in the common law, takes the nature of a grant or contract executed, and becomes irrevocable. 2 Bl. Comm. 440, 441; 2 Kent, Comm. 438, 440; Smith v. Smith, 2 Strange, 955; Fletcher v. Peck, 6 Cranch [10 U. S.] 87; Com. Dig. "Bacon's," D 2. But, however this may be, there is a circumstance that distinguishes this case, and takes it out of the principle of the decision of the supreme court, and also extracts it from the more general principle of law, by which gifts are revocable until they are executed by delivery. It is this, that the warrant of the secretary is not a free and unqualified condonation or remission, but is coupled with a condition precedent to be performed by the grantee. Now it is an unquestioned rule of law, that if a grant is made on a condition precedent, no title vests until the condition is performed, so that if the condition be illegal or impossible, the title never vests. [U. S. v. Castillero] 2 Black [67 U. S.] 157; Co. Litt. 206. But being legal and possible, when it is once performed it vests absolutely, and the title becomes pure and perfect and discharged of the condition. 2 Cruise, Real Prop. 41; Com. Dig. "Condition," (B 3). It then vests as a purchase, and, if the condition be an onerous one, as a purchase for a valuable consideration. It has already been stated that the tender under the circumstances was equivalent to a performance, not for discharging the obligation to pay the costs, but for perfecting the title and rendering it indefeasible. It became thus a contract perfect by the mutual consent and concurrent acts of both parties, and cannot be dissolved but by the concurrence of both.

There is, however, another fact in the case to which it is proper to advert before closing this opinion. The tender of performance was

made on the 30th of September, and the letter of the secretary to the attorney, requesting him to return the warrant, bears date the 29th, the day before. If this letter is to be considered as an actual revocation of the remittitur, it may be said that it was revoked before the condition was performed. Considering it as such, when does the act of revocation take effect so as to annul the remission. This raises a question of no small difficulty, on which there has been no small diversity of opinion. The conclusion to which I have come, after considerable reflection and consulting all the authorities within my reach, is this, that the revocation has its effect to annul the remission at the time when it becomes known to the other party, and not before. To borrow a convenient phrase, more familiar in other systems of jurisprudence than in ours, if things had remained entire, until the revocation had been brought home to the knowledge of the claimant, that is, if nothing had been done on the part of the claimant to change the relation and condition of the parties in respect to this matter, the revocation would have annulled the warrant of remission, and the parties would have stood as though none had been issued. But the remission having been received and accepted by him, and the condition performed as far as it could be without the concurrence of the other party, the revocation then came too late. The remission had taken effect and become irrevocable.

My opinion proceeds on this general principle, that in all engagements inter absentes, when the negotiations are carried on by letters or messengers, an offer by one party, until it is made known to the other, is but an intention not expressed, propositum in mente retentum. If the messenger or letter can be overtaken before it arrives at its destination, it may be revoked; but if the revocation does not arrive until after the offer is received and accepted, and especially not until it has been acted upon, then it is too late. For the revocation is but a simple act of the will, a propositum, not res gesta, an act done, until after it is known, and of course can have no more effect than an intention not expressed, but confined within the breast of the party. It is a remark of one of the most profound jurists of the last age, that an act of the will not known is, in jurisprudence, as if it did not exist. "Une volontè qui n'est pas connue est en jurisprudence comme si elle n'existait pas." 6 Touiller, Droit Civil, No. 29.

This is the conclusion to which my mind has been brought after the most careful consideration I have been able to give to the subject; so that if the letter of September 29th be considered as a revocation, it must only be considered as such when the knowledge of it was brought home to the claimant, and this was after the condition was performed. At the same time it is freely admitted that this is a question of general jurisprudence, of no little intricacy, and that it is not easy to determine by any universal and inflexible rule when engagements entered into by letters or messengers, between persons residing at a distance from each other, become irrevocably binding on both parties. The question was pretty fully considered by the court of king's bench, in the case of Adams v. Lindsell, 1 Barn. & Ald. 681, and the decision was in conformity with the principle that I have adopted. But I infer from the reasoning of Best, C. J., in the case of Routledge v. Grant, 4 Bing. 653, that this decision was not entirely satisfactory to the court of common pleas, or at least, it receives but a qualified approval. The same general question was presented to the supreme court of Massachusetts, in McCulloch v. Eagle Ins. Co., 1 Pick. 278, and to the court of errors in New York, in Mactier v. Frith, 6 Wend. 103, and these courts came to opposite conclusions. It has been found not free from difficulties by the civilians, and perhaps it will not be found an easy task to reconcile all their opinions. The subject has been examined by Pothier (Contrat de Vente, No. 32); by 6 Touiller (Droit Civil, Nos. 30, 31, and notes; 7 Droit Civil, No. 321, and notes); and it was discussed by Merlin in a very elaborate argument before the court of cassation, with his usual logical acuteness and copiousness of learning (Repertoire de Jurisprudence, Vente, § 1, art. 3, No. 11, bis). To the general rule that has been stated there is one well-established exception. If the party who makes the offer dies or becomes insane before it is received and accepted, the offer is then a nullity, though accepted before the death is known.

On the whole, my opinion is, that the conditional remission having been received and accepted by the claimant, and he having tendered full performance of the condition and performed it as far as he could, without the concurrence of the other party, and so far as was necessary to vest and render perfect his title before the revocation became known to him, his title thereby became absolute and indefeasible. It then became a contract executed. Motion overruled.

PALOMARES (UNITED STATES v.). See Case No. 15,990.

Case No. 10,701.

PALYART v. GOULDING.

[Brunner, Col. Cas. 2;[1] 2 Mart. N. C. 78.]

Circuit Court, D. North Carolina. June Term, 1792.

PARTNERSHIP—ACTION UPON NOTE—AGAINST ONE PARTNER—ACT OF CONGRESS.

A firm in Maryland gave its promissory note to A. signed in the name of a firm, and A. sued

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

one of the partners alone, relying on the act of 1789. See 1 Rev. St. c. 31, § 89. *Held*, that he might do so, as that act did not affect the contract, but only extended the remedy.

The defendant and his two brothers carried on business as merchants in the state of Maryland, under the firm name of John Goulding & Brothers, and in the year 1791 gave the plaintiff the promissory note on which this action was brought, for a debt of the said partnership, signed John Goulding & Brothers, the style of the firm. The defendant (being the only partner in this state) was sued alone; he pleaded in abatement to the action that this contract was entered into in the state of Maryland, and that the other partners who were living and not named ought to be made defendants. To this plea there was a general demurrer.

Mr. Graham, in support of the demurrer, relied wholly on the fifth section of the act of assembly of this state (1789, 57,688).

Woods & Martin contended that this case came within the rule of lex loci, and that to allow this act the operation insisted on for the plaintiff would substantially alter the contract.

But PATTERSON, Circuit Justice, took a distinction between the contract and the remedy, and observed that the contract remained the same, notwithstanding this act, and that the remedy only was extended.

And SITGREAVES, District Judge, accordante.

A respondeas ouster was awarded.

Case No. 10,702.

The PANAMA.

[1 Deady, 27;[1] 1 Ore. 418.]

District Court, D. Oregon. Sept. 13, 1861.

PILOTS — WARRANT — STATE CONTROL — ACT OF CONGRESS—ABROGATION OF STATE LAW.

1. When a warrant to act as pilot appears upon its face to have been regularly issued, its validity cannot be questioned collaterally, or in a suit between third persons.

2. The possession and exhibition of the warrant authorize the master of a ship to treat the holder as a duly constituted pilot; and, as between third persons, is conclusive evidence that the conditions which the law attached to the appointment have been complied with.

[Cited in The Alcalde, 30 Fed. 137.]

3. Pilotage being "a rightful subject of legislation," the territory of Washington has power to pass pilot laws.

[Cited in The Ullock, 19 Fed. 212; The Abercorn, 26 Fed. 879; The Alcalde, 30 Fed. 135.]

4. The act of August 7, 1789 (1 Stat. 54), is not a grant of power to the states to pass pilot laws, but a legislative recognition that the power is concurrent in the states and the United States until exercised by the latter.

[Cited in The Glenearne, 7 Fed. 607.]

5. Does the act of March 2, 1837 (5 Stat. 153), include a territory? Query.

[Cited in The Glenearne, 7 Fed. 607; The Ullock, 19 Fed. 212.]

6. Whenever congress exercises the power of passing laws on the subject of pilotage, so far the power becomes exclusive; and all prior laws of the states within the purview of such enactments are at once abrogated and cease to have effect.

7. The act of August 30, 1852 (10 Stat. 75), provides for the employment of pilots on vessels propelled in whole or part by steam, engaged in carrying passengers on any of the bays, lakes, rivers, or other navigable waters of the United States.

[Cited in The George S. Wright, Case No. 5,-340; Joslyn v. Nickerson, 1 Fed. 134.]

8. This act, so far as it goes, supersedes all state laws regulating the employment of pilots on this class of vessels.

9. In the construction of the act of congress of 1852, its operation is not to be restrained or limited because of the pre-existence of state laws regulating the employment of pilots under like circumstances.

10. There is no presumption that congress did not intend to abrogate the state law; but, on the contrary, the power over the subject being paramountly in congress, and only permitted to the states by sufferance, in case of conflict between the two the presumption is the other way.

[Cited in The Alcalde, 30 Fed. 135.]

In admiralty.

George H. Cartter, for libellant.

David Logan, for claimants.

DEADY, District Judge. The libel of Charles Edwards, libellant, was filed March 27, 1861, and alleges that on March 17, 1861, and thereafter, the libellant was a duly licensed pilot, attached to the pilot boat California, on the Columbia River bar, according to the laws of Oregon; and that on said date libellant boarded the steamship Panama "just outside" the bar, and offered his services as pilot to conduct said ship over said bar to the port of Astoria; that said ship was at the time of such offer bound in, and libellant was the only pilot authorized to pilot said ship on board of her on said day, and was the first pilot to offer his services to such ship on that day outside of said bar. That on March 22, 1861, the said ship being bound outward over said bar, libellant hailed her at the port of Astoria and offered his services as pilot to conduct her across said bar to the sea; and that libellant was the first pilot who offered his services to said ship on said "occasion" and that there was no pilot on said ship "at the time." That said ship when inward bound as aforesaid, drew 14 feet of water, and that libellant is entitled to $12 per foot or full pilotage for this tender of services—in all, $168; and that when outward bound, as aforesaid said ship drew 13 feet of water, and that libellant is entitled to $6 per foot or half pilotage for this tender of services—in all $78; and that said sums of money remain due and unpaid to the libellant. On May 1, 1861, the claimants, Holladay and Flint, answered the libel admitting the facts

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

stated, except, that the libellant "was duly authorized according to the laws of the state of Oregon and the United States to pilot sea-going steamships carrying passengers;" and that libellant was the first pilot who offered his services to said ship on said March 17 or 22, which allegations they deny. The answer also avers that on March 17, when libellant boarded said ship, "Moses Rogers, a pilot duly authorized and licensed in accordance with statutes of the United States, to pilot steamboats carrying passengers on the waters of the Columbia bar, coast and Puget Sound, and to San Francisco, California, was on board the said ship and had charge and control of her as pilot;" and that said Rogers piloted said ship on said occasion from the high sea over said bar to the port of Astoria. That on March 22, aforesaid, said Rogers was the first qualified pilot who offered his services to the master of said ship, and did on said date pilot said ship across said bar to the open sea. That said Panama is a sea-going steamship, propelled in whole or part by steam, and on March 17 and 22, aforesaid was engaged in making a voyage from San Francisco to Portland, carrying freight and passengers. That on the date last aforesaid, said "Rogers was a duly licensed bar pilot according to the laws of the territory of Washington" regulating "pilotage on the Columbia river bar and shoalwater bay, passed February 28, 1854" [Laws 1854, p. 389]. On July 1, libellant filed an amended libel admitting that on March 17 said Rogers, "a person pretending to be a duly authorized pilot was on board said ship," and piloted her across the bar to Astoria, but avers that libellant offered his services before said Rogers did; also admitting the same as to the voyage out on March 22, but avers that libellant "hailed said ship first and offered his services as a pilot;" and that said Rogers pretends to be an authorized pilot by virtue of a license from one Pitfield, "a person pretending to be a supervising inspector of the fourth district of the United States," and that "if said license is genuine" it does not authorize said Rogers to pilot steamships over the Columbia bar; also admitting that Rogers received a license from the pilot commissioners of the territory of Washington under the act of 1854, as alleged, but avers that Rogers never performed the conditions imposed by said act, and therefore said license never took effect, and that said act has long since been repealed, and that all licenses issued under it became void on such repeal; also admitting that the Panama is a sea-going vessel, propelled in whole or in part by steam, and was engaged in carrying freight and passengers between San Francisco and Portland, as alleged.

From the evidence it appears that the libellant was appointed a pilot on Columbia river bar under the Oregon act of October 17, 1860 [Laws 1860, p. 43], by a warrant from the "board of pilot commissioners," bearing date, January 22, 1861; and that Rogers was appointed such pilot under the territory of Washington act of 1854, by a warrant from the "board of pilot commissioners" bearing date January 13, 1860. In the argument for libellant it is contended, that this warrant to Rogers is without legal effect, because it does not appear that he gave bond and kept a suitable boat on the bar as required by the act. But Rogers is not a party to this suit, and the ship is not liable for any want of authority on his part which was not apparent to the world. The exhibition of his warrant or commission, regular upon its face, entitled him to be treated and authorized the ship to receive him as a pilot. By the act of the territory of Washington a pilot "is authorized to take charge of any vessel requiring his services, but shall first show the master his warrant." Upon the production of the warrant the master had a right to presume that the conditions of Rogers' appointment—if any—had been complied with to the satisfaction of the commissioners who, by the act, have complete control of the subject of the appointment, suspension and removal of pilots. It is true that the act of 1854 requires a pilot, before entering upon the duties of his office to give bond to the commissioners, but it does not require or allow that he shall keep the bond to exhibit to masters of vessels or that it shall appear upon the face of the warrant that the bond has been given. The act does not expressly say that the bond shall be given before or at the time the warrant issues, but such is the reasonable construction, and it is fair to presume that the commissioners to whom the bond is to be given would require it to be done at or before the delivery of the warrant. As to the alleged repeal of the act of 1854, the fact appears to be that on January 31, 1861, section 4 of said act was repealed and another enacted in lieu thereof, requiring each pilot to keep a boat on the bar "of not less than fifty tons burden," while the section repealed only required the pilot to keep such boat "as the commissioners might approve." This was no repeal of the act as such, and in no way makes the warrant before issued to Rogers "void and of no effect." It only imposed a fixed rule in relation to the kind of boat the pilot should keep on the bar instead of leaving it to the discretion of the commissioners as before.

It is further insisted on the part of the libellant that a territory has no authority to pass pilot laws and that therefore the warrant to Rogers is invalid. The argument is grounded upon the assumption that the act of August 7, 1789 (1 Stat. 54), grants the power to the states to pass pilot laws and that a territory is not included in the word "states," and therefore it has no power to legislate on the subject. Admitting the premises for the sake of the argument, the conclusion does not follow. The power to govern the territories subject to the consti-

tution is in congress irrespective of the powers which it may exercise within the limits of a state. This power may be exercised mediately or immediately, by the creation of a territorial government therein, with power to legislate for the territory, or by the passage of laws directly by congress, without the intervention of the territorial government. The act of congress (10 Stat. 172), organizing a government for the territory of Washington, declares that the "legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." A rightful subject of legislation is a subject, which from the nature of things, the course of experience, the practice and genius of our government properly belongs to the legislation to regulate and control rather than the judicial or executive departments of the government. Pilots and pilotage are as much the proper subjects of legislation as any subject ever regulated by the law of a territory, and have been so from their earliest history. Congress has power to legislate upon this subject in the territories. Being "a rightful subject of legislation," in this case congress has given this power to the territorial legislation. Neither was the act of 1789 a grant of power from congress to the states to legislate on the subject of pilots and pilotage. The power is concurrent in the state and national government until exercised by the latter, when so far as exercised it becomes exclusive. If the power was exclusively in the national government, congress could not grant it to the states, and being concurrent it could not nor need not. This view is in substantial accordance with the doctrine of Cooley v. Board of Wardens, 12 How. [53 U. S.] 316, that the act of 1789 is a mere legislative recognition of the concurrent power of the states over this subject, so long as congress does not act in the matter.

The warrant to Rogers is further objected to because it is headed "Temporary." The word is superfluous, because if it has any legal effect, it is the same that the law would give the warrant without it, namely, that the party was to hold the place during the pleasure of the commissioners. So far as appears the warrant has never been revoked. For these reasons I conclude that the territorial act of 1854 is a valid act, and that Rogers was a duly qualified pilot thereunder on the Columbia bar, on March 17, 1861, when the libellant boarded the Panama on her inward bound voyage.

By the act of Oregon, the first pilot that offers his services outside the bar, to a vessel bound inward, is entitled to full pilotage, whether his services are accepted or not, and to one bound outward under like circumstances, half pilotage. Under this provision the question is made by counsel whether libellant or Rogers first offered his services to the ship on March 17th, on the inward bound voyage? It is substantially admitted by the pleadings that the libellant was the first pilot that in fact boarded the Panama outside the bar, and the evidence proves satisfactorily that Rogers was on board at the time, hired by the month, to serve as pilot between the port of San Francisco and Portland, and that he piloted the ship in over the bar on the occasion in question. Under these circumstances is Rogers to be considered a bar pilot who tendered his services as such to the ship before the libellant? The principal objection to his being so considered is that he was not on the bar at the time of the offer, and did not maintain a pilot boat there. I do not think the objection sufficient. The libellant, for anything that appears, might have gone half way done the coast to meet the Panama, and if the master was willing to take him on then, and bring him up to the bar as a pilot, it would be a good offer of his services so as to prevent another pilot who remained on the bar from first offering his services. Nor do I think the court can in this suit consider whether Rogers kept a boat on the bar at the time to cruise for vessels or not. As to third persons, so long as his warrant is unrevoked, I think he must be considered a qualified bar pilot. If Rogers was libellant in a suit, claiming compensation as a pilot, it might possibly be shown in bar of such claim that he did not remain on the bar and cruise for vessels with a sufficient boat, etc. But even this is doubtful. The legislature has confided the administration of the law in these matters to the pilot commissioners. Whenever it appears that a pilot is evading the law and using his authority to the detriment of commerce or the pilot service, they can and should revoke his warrant.

The conclusion reached upon this point renders it unnecessary to consider whether the act of 1837 (5 Stat. 153) applies to this case. By that act, the master of a vessel upon waters that form the common boundary between two states is authorized to take a pilot from either; and therefore is not required to take the first pilot that offers, but may take the second one from the other state. Whether the word "state," as used in this act should be construed so as to include a territory, is a question not free from doubt. The case is within the mischief intended to be remedied by the act, and it seems to me might be held to come within its spirit and purview, without any violation of principle. I do not think it comes within the reasoning or considerations that controlled the court in Hepburn v. Ellzey, 2 Cranch [6 U. S.] 445, in which it was held that under the judiciary act giving the national courts jurisdiction of controversies between citizens of different states, that a citizen of the District of Columbia could not sue in such courts, as a citizen of a state,

because such district was not a member of the Union. But waiving this point, the libellant not being the first pilot to offer his services as alleged in his libel, on the inward bound voyage, cannot recover on that claim.

Upon the claim for half pilotage, I find from the evidence that on March 22, between upper and lower Astoria, and below the custom house, as the Panama was proceeding to sea, the libellant rowed out into the stream, hailed the ship, and offered his services as a pilot; and that the master of the Panama paid no attention to the offer, but steamed down the stream some three or four hundred yards, opposite the wharf at lower Astoria. At this point the ship was stopped, and Rogers, who appears to have been waiting for her, went on board immediately and piloted her out to sea; and that this all occurred on what is understood among navigators who frequent that harbor as pilot-ground. It does not appear that the limits of the pilot-ground have ever been authoritatively defined, and are only known from local usage.

As a conclusion of fact from the foregoing, I find that the libellant first offered his services to the ship on this occasion, and assuming that the act of 1837 does not apply to a water which is the boundary between a state and a territory, the libellant as against a territory of Washington pilot, was entitled by reason of such offer to be employed or paid his claim for half pilotage. But it also appears from the evidence and the admission of the pleadings, that Rogers, on March 22, was a duly licensed steamboat pilot, under the act of 1852. It is admitted by the pleadings that the Panama is and was a vessel propelled by steam and engaged in carrying passengers. This brings her within the class of vessels provided for in the act of 1852, and the acts of 1838 [5 Stat. 304] and 1843 [Id. 626], of which it is amendatory, and commonly called the "Steamboat Acts." The avowed purpose of these acts is, "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam." As a means to this end, the act of 1852 (10 Stat. 75) provides that "instead of the present system of pilotage of such vessels, and the present mode of employing engineers on the same," there shall be a board of inspectors in each collection district who shall examine, "license and classify all engineers and pilots of steamers carrying passengers;" and that "it shall be unlawful for any person to employ, or any person to serve, as engineer or pilot on any such vessel who is not licensed by the inspectors; and any one so offending shall forfeit one hundred dollars for each offence." It is also admitted that the libellant was not a duly licensed pilot under the act of congress of 1852. But it is maintained on his behalf that congress did not intend by the passage of this act to supersede the existing state laws on the subject of pilotage, because it is said the act does not expressly so declare—because of the inconvenience that would result from such construction, and because it being eminently proper and necessary that the states should control this subject themselves, it is therefore not to be supposed that congress would interfere with it.

As to the power of congress in the premises there can be no doubt. The constitution (article 1, § 8) gives congress power "to regulate commerce with foreign nations and among the several states." This includes the power to regulate navigation, and pilot laws are regulations of navigation. In Cooley v. Board of Wardens, 12 How. [53 U. S.] 315, the supreme court say: "That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relation which that service and its compensations bear to navigation between the several states, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualification of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the constitution." The power of congress being established, what was the intention in this respect in the passage of the act of 1852? In its language nothing can be found limiting its operation as to place. It expressly applies to pilots on all vessels propelled by steam and carrying passengers upon "the bays, lakes, rivers and other waters of the United States." As to the argument founded upon the assumed inconvenience and impropriety of superseding the state pilot laws I do not assent to the assumption nor perceive the force of the argument drawn from it. The question of convenience and propriety is for congress to determine. The frequent and almost wanton loss of life and property under the former system of piloting steam vessels and employing engineers thereon, and the inability of the separate states to remedy the evil, was a sufficient reason, if any reason besides its own will was necessary, for the action of congress. Nor are the acts of congress to be limited in their legal import or restrained in their operation, upon the idea that some state law is thereby rendered inoperative, or that some state prefers some other system or regulation. The act of congress on this subject is paramount, and all state legislation which is inconsistent or in conflict with its terms, reasonably and fairly construed, must give way. Nor is it true that there is any presumption in favor of the state law and against the act of congress, which in a doubt-

ful case would determine the question in favor of the former. On the contrary, when, as in this case, the power over the subject is paramountly in congress and only permitted to the state by the sufferance of the former, the presumption, if any, would be the other way. The wisdom and necessity of the act were questions for congress to determine, and not the court or state. There is, then, no reason why the terms of the act should not be taken in their natural and ordinary import, so that, when it declares that the regulations therein prescribed, shall be substituted for the present system of pilotage of steam vessels, it shall be held and construed to mean what it says. At the date of this act what was the existing system which these regulations were to take the place of? Certainly, it was the laws and usages of the states and ports therein, regulating and governing the subject of pilots and pilotage of steam vessels. The regulations of the act were to be instead of—to take the place of this system of the states. Wherever this system existed, in this respect it was to be changed and superseded by the establishment of these regulations. Is the Columbia river bar in any way exempt from the operation of these general words? It is a water of the United States, and at the date of the act there was a state system of pilotage for steam vessels upon it. As the state system did not extend beyond the waters and ports within its limits, there can be no ground for presuming or assuming that the proposed change was intended to be confined to the high seas—as in such case the act would work no change at all. Because the state has a system of pilotage upon the Columbia bar with which these "regulations" interfere, so far as steam vessels are concerned, is the substantial reason urged why the bar should be considered as not within the provision of the act. If this had been the intention of congress in passing the act, instead of declaring, as it did, that the regulations therein should take the place of the then existing system, it would have read somewhat in this wise: "The following regulations shall be observed instead of the present system of pilotage for steam vessels—that is the state pilot laws and usages—only where the present system does not exist." I am satisfied that the act applies to the employment of pilots on steam vessels engaged in carrying passengers, throughout the whole voyage and every part of it. It is made a crime for the master of any such vessel to employ any one as a pilot unless first licensed by the United States inspectors, or for any one not having such license to be so employed. For the greater security of life, it seems to have been the intention of congress to no longer leave this subject to the conflicting and inefficient legislation of the several states, or the total lack of it, but to provide a general rule and uniform authority for examining and licensing pilots for steam vessels; men who were not merely acquainted with the channels, rocks and shoals of a particular water or route, but also with the machinery, action and motive power of steam vessels, and who were competent to control and handle them under any or all emergencies. A bar pilot under the state system may be a good seaman and familiar with the currents, tides and shoals of his pilot-ground, but this alone is not sufficient to qualify him to take charge of a steam vessel.

The difficulty suggested by counsel, that pilots licensed by the United States inspectors would be wanting in local knowledge is possible, but not very probable. The inspectors are to inquire diligently into the qualifications of the applicant, and for this purpose may examine witnesses. One of the necessary qualifications of a pilot for any vessel is a knowledge of the particular pilot-ground for which he is licensed. The inspectors are appointed within collection districts, and their licenses are for routes within such district. They may, with good reason, be supposed to have as much knowledge and means of information in the premises as a board of pilot commissioners appointed by the state. As yet no inspectors have been provided for this district, and the administration of the act in this respect has devolved upon the supervising inspector living upon the Atlantic coast. Under this state of things, it is not to be expected that the examination of pilots and engineers would be very thorough or frequent, and such I understand has been the fact. But as soon as the importance of the matter is brought to the attention of congress, inspectors will doubtless be provided for this district, and this difficulty will be obviated. The act only so far abrogates the state system as to require that a steam vessel, carrying passengers, shall be under charge of a pilot licensed by its authority. The compensation of pilots, the manner and times of offering their services, still remain, until congress sees proper to provide otherwise, legitimate subjects of state legislation. The libellant, although he first offered his services to the Panama, as she was outward bound, is not entitled to recover his claim for half-pilotage. The law of the state under which he claims, as to the necessary qualifications for piloting the Panama, was abrogated by the act of congress. The libellant was prohibited under a penalty of one hundred dollars from being employed on her as a pilot and the master in the like sum from employing him.

Decree, that the libel be dismissed, and that the claimants recover of the libellant and his sureties their costs.

Case No. 10,703.

The PANAMA.

[Olc. 343.] [1]

District Court, S. D. New York. April, 1846.

BOTTOMRY—DEBT AT RISK—MORTGAGEE—MASTER AND OWNER—REMNANTS—DAMAGES SUSTAINED BY CHARTERER.

1. A bottomry bond, executed by the master of a ship as master, if he be at the time owner, also, will impart to the holder the same rights and privileges as if given in the character of owner.

2. An agent or broker who purchases a vessel for his principal, at the same time lending him money with which to pay the price, and taking the bill of sale in his own name to secure the repayment of the loan and interest together with his commissions on the purchase, is mortgagee, and not owner of the vessel.

3. The owner of a ship may bottomry her abroad to secure a loan of money, or his personal liabilities for the ship or voyage, provided the debt be put at risk, without regard to the necessity of the ship, or his inability to obtain credit or supplies by other means, or the receipt of the consideration before the ship went to sea. It is not necessary to the validity of a bottomry that the loan or supplies shall have been already received when the bond is executed, if the credit was upon the faith that a bottomry security should be given.

[Cited in The Archer, 15 Fed. 279.]

4. A bottomry of a ship in a foreign port by her owner is valid, although a part of the loan for which it is given consists of a bill of exchange drawn by the bottomry lender on the home port of the ship.

5. The credit of the bottomry lender, given in aid of the ship or owner in a foreign port, is a sufficient consideration to support a bottomry security. But a court of admiralty may call for proof that such credit or liabilities had been actually satisfied by the lender before decreeing an enforcement of the bottomry.

6. When the owner and mortgagee of a ship both appear and file answers to the libel of a bottomry holder, it is competent for each to claim in his answer or by a separate petition, that the proceeds of the vessel, after satisfaction of the bottomry security, be paid to him.

7. On such mode of proceeding the court may at its discretion adjudge prospectively between the contestants the method of distribution of the avails of the ship, or may defer the decision until her proceeds are paid into the registry; and may, also, if the case is difficult or important, direct the parties to litigate their claims to the fund by formal suit.

8. Whatever mode of procedure is pursued, a party proved to be a mortgagee, after admitting in his answer to the original action that the bottomry security is valid and consenting to a decree of sale of the ship under it, cannot set up a title to the ship in himself as absolute owner and not mortgagee, in bar of the claim of the bottomry borrower to a share in the remnants remaining in court.

9. In such collateral proceeding the owner of the ship may defeat the claim of a mortgagee to such remnants by proof that the mortgage was given on an usurious consideration.

10. But it is not usury for a broker or agent to charge the usual and customary commissions for his services in purchasing a ship, and also to take legal interest on his own moneys advanced towards the purchase, unless it be proved that the commissions were intended by the parties as a means and cover for reserving more than legal interest upon the loan.

11. Quere. Whether the court, in disposing of remnants in the registry, cannot take cognizance of other claims thereto, than those having a lien upon the vessel, or being of a maritime character?

[Cited in The A. M. Bliss, Case No. 274.]

12. Damages sustained by a charterer of a ship by a breach of the charter contract in the loss or delay of his voyage, through the negligence or fault of the owner, are a lien upon the vessel; and if a mortgagee satisfies the demand and takes an assignment of the claim, he is entitled to come in upon remnants in court for repayment.

[Cited in brief in Fleishman v. The John P. Best, Case No. 4,861; The Archer, 15 Fed. 279.]

The controversy in this action is upon a bottomry bond, and came before the court in two aspects. The owner of the ship and a mortgagee intervened, and filed answers to the libel, and each claimed, as against the other, a right to the remnants and surplus remaining in the registry after satisfaction of the bottomry bond in suit. Separate petitions were also filed by them for such remnants. The owner also contested the validity of the bottomry. The mortgagee admitted it, and consented to a decree to enforce it. The main contestation was in relation to the remnants in court. The owner contended that the mortgagee had no title upon which to found a claim to those remnants; that his mortgage debt was void for usury, and that the other items of his demand were not liens upon the vessel or her proceeds, nor were they of a maritime character. The mortgagee contended that the legal ownership of the vessel was vested in him, and not in his co-claimant, and that accordingly the latter had no standing in court in relation to that fund. Both branches of the cause were brought to hearing the same term, and were argued by the same counsel.

Ogden Hoffman and Mr. Barret, for bottomry holder.

John Anthon, for owner.

F. B. Cutting, for mortgagee.

BETTS, District Judge. This was a suit upon a bottomry bond to the libellant, executed at Hull, England, May 3, 1845, by the claimant Cameron, master of the ship. The libel avers that it was executed by him in his capacity of owner as well as master of the ship, and that the loan secured by the bottomry was duly made and paid to him. The answer admits the claimant was conditional owner at the time, but alleges he gave the bottomry as master only. It denies that the sum named in the bond had been advanced by the libellant when the bottomry was given, or that it is now payable, and alleges that a large portion of the debt was created after the bottomry was given, and the vessel had gone to sea. It was stipulated in writing between the proctors of the parties, that work and materials were furnished the ship

[1] [Reported by Edward R. Olcott, Esq.]

at the request of Cameron, and that the amount charged therefor in the account furnished by the libellant was paid by the libellant, and composes part of the bottomry debt. The other claimant, Quincy, denies that Cameron was owner of the ship, and avers that title to the ship was vested in him, (Quincy,) at the time the bottomry was executed, and that Cameron was to become entitled to the ownership only on repayment of the purchase-money advanced by him, Quincy, with commissions, &c. This branch of the case respecting the legal ownership of the ship was not in contestation on the hearing before the court, and the case is accordingly to be disposed of in its present posture, upon the assumption that Cameron was legal owner as well as master, when the bottomry bond was executed.

The ground is, however, taken on the argument, that Cameron assumed in the bond, to act in the capacity of master, and that it was accepted by the bottomry creditor as given by the master alone, and accordingly that the transaction must now be considered an hypothecation by a master, and subject to the rules of law applicable to that particular security. The general principle with respect to a contracting party is, that however he may describe himself or his powers, his contract will have effect according to his actual authority and right in the subject matter, when no specific reserve or restriction is expressed, the obligee being entitled to the full benefit of the stipulations in his favor, so far as the obligor is able to fulfill them. Welsh v. Usher, 2 Hill [S. C.] 168. This benefit may be secured by way of estoppel. When the party making an engagement or representation has no capacity at the time to perform it, and afterwards acquires the ability, he and his representatives will be estopped denying the full force and effect of his undertaking. Com. Dig. "Grant"; Gough v. Bell, 21 N. J. Law, 156; 4 Kent, Comm. 98; 24 Pick. 324. This doctrine, more familiar in the interpretation and force of real covenants and contracts than in those connected with the personalty, still has a common affinity in principle in relation to both, and may, if necessary, be invoked to uphold a charge upon a ship by maritime lien or mortgage, no less than transfers or encumbrances of real estate; restricted possibly in both descriptions of grant, to those which are positive and assuring, and not to mere releases and acquittances. 11 Wend. 110; McCrackin v. Wright, 14 Johns. 193; 1 Cow. 616; Co. Litt. 265b, § 446. Still, if in strictness of legal rules a party assuming a right to act as if he had a particular capacity, which does not belong to him at the time, may not be bound in that capacity if he afterwards acquires it, yet admiralty, exercising, in some measure, the powers of a court of equity, may hold his act or obligation shall have operation as in cases of equity relief, according to the condition of parties at the time the decree is rendered. 9 Paige, 244; [Hepburn v. Dunlop] 1 Wheat. [14 U. S.] 178.

In my opinion, neither in equity nor under the stricter rules of law will a party who gives a bottomry upon a ship in the name and character of master, and was at the time, or afterwards becomes owner of the ship, be permitted to restrict the rights of the bottomry holder at the time of its enforcement merely to those conferred by the authority of a ship-master. He takes all the benefits under it which would have accrued had it been avowedly executed by the owner. Those who come in as subsequent purchasers under the same owner, or holders of claims, or liens, or encumbrances posterior in law to the bottomry security, have no privileges in this respect higher than those of the owner. In this case, in executing the bottomry and hypothecation, Cameron described himself, and professed to contract as master of the ship. It now appears upon his answer, and also on the proofs, that he was at the time absolute owner, subject only to an outstanding mortgage to Quincy, the other claimant. The holder of the hypothecation is accordingly entitled to every advantage derivable from the fact that it was made by one possessing not solely the authority of agent, but that of principal also.

This point being established, the case stands relieved of all questions raised as to the necessity or fitness of items charged as supplies or reparations to the ship, and made part of the bottomry debt, because the owner is held competent to raise money, or secure his debts by a bottomry on his vessel, without regard to the necessity of the ship, or his inability to procure funds by other means. The Smilax [Case No. 17,777]; The Draco [Id. 4,057]; The Mary [Id. 9,187]. It is plain, upon the authorities, that the objection to the validity of this security, for want of adequate power in the bottomry giver so to hypothecate the ship, cannot be sustained. The Barbara, 4 C. Rob. Adm. 1; The Duke of Bedford, 2 Hagg. Adm. 294. Indeed, the bearing of the cases is, that a bottomry by a master, in presence of the owner, is only valid by reason of his implied assent to it ([The Aurora] 1 Wheat. [14 U. S.] 96; The Mary [Case No. 9,187]; Patton v. The Randolph [Id. 10,837]), unless it be given in a case of stringent necessity, and the owner withholds his assent unreasonably (3 Kent, Comm. 172). Nor do I find any authority or principle of law in support of the argument that this bottomry can only stand upon the rightful power of the master, as such, to execute it.

The ancient sea laws regard the master a substitute only for the owner in his absence. They show that he generally has no authority to bottomry his ship in her home port, because the owner is to be presumed present there. Consulato del Mare (Boucher) c. 239, pl. 694. Emerigon refers to various ordinances of maritime states to the

same effect. Contrat a la Gross, c. 3, § 3; Jacobson, 363. The authority in Cameron, in the capacity of master alone, to charge his ship by way of bottomry in a foreign port being irrefragable, it would seem reasonably to follow, that it would be left to his judgment to determine what her necessities, at the time, for the completion of the voyage, might be. Admitting, however, that the courts will scan his acts in the character of master, and determine whether he proceeded prudently in view of the rights of those having interests attached to the ship, by admitting within the bottomry security all the particulars which made up the amount of the debt covered by it, and may also do the same, notwithstanding his legal ownership of the vessel when the equitable and substantial interest is in third parties, leaving no more than a conditional or trust title in him, yet in either such case the secondary or trust interests sought to be protected must be brought forward distinctly in the pleadings by the parties entitled to enforce them. But the rights of parties, in that aspect of the case, are not before the court in this issue between the libellant and the claimant, Cameron. All that is involved in this branch of this controversy is the question of the relative rights of the bottomry creditor and debtor when the dealing for the hypothecation is directly with the ship-owner. The stipulation signed in the cause, as also the admission of Cameron after payment of the bottomry was demanded, proves that the debt due by him to the libellant, and intended to be embraced within the bottomry, was £1,325 11 11, sterling—being £125 11 11 beyond the condition of the bond. This fact gives occasion to one of the objections preferred against the validity of the bond to its full extent. It is contended, that when the bond was executed, but a small part of the debt was due the libellant, and that he is limited in his relief on the bottomry to the amount of the indebtment payable at that time. The ship came into Hull in a disabled state, consigned to the libellant by Cameron. Her repairs and supplies were obtained on the credit of the libellant, part of the bills for which had been rendered and paid when the bond was given, and the ship sailed, and the residue came in and were paid subsequently, but before the bond became absolute. There were also advances of money made by the libellant directly to the master, partly cash in hand and in part by a bill at sight on a house in New York, which was duly honored. It is no way a vital ingredient to a bottomry given by a master that the advances it secures shall precede its execution, even when it purports to protect a direct loan or to secure existing debts, if the credit in either case was upon the faith that a bottomry should be given. 3 Dod. 273; The Virginia, 8 Pet. [33 U. S.] 552. Nor, in my opinion, is its validity affected if it be given after the ship has sailed, provided the debt is at risk. Conrad v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386. As in this case, the hypothecation was made by the owner himself, there would seem to be no mode of avoiding it left him except to show a total want or failure of consideration to support it. The liabilities of the libellant for the vessel and owner, when the bond was taken, would be an adequate consideration upon which to found a bottomry, although a court of admiralty would doubtless call for proofs that the liabilities had been extinguished by actual payment before it would decree the enforcement of the bond, even on the defence of the owner; and especially so, if it is opposed by other creditors, whose prior liens on the ship or freight might be postponed by the bottomry. The presumption that the dealing with the libellant for this credit was, in its inception, on the understanding that it should be secured by bottomry, is strongly corroborated by the acknowledgment of the master after the bond became payable, that he had given it, and that the whole amount named in it was owing by him. Nevertheless, it was strenuously pressed upon the argument, in favor of the owner, (Cameron,) that a large part of the demand now sought to be recovered arose upon liabilities or transactions between him and the libellant, subsequent to the departure of the ship and the execution of the bottomry, and are not proper subjects for bottomry security.

I do not go into an examination of these allegations, nor consider whether it is competent to an owner to invalidate his personal contract by objections of that character, because the stipulation on file admits the whole balance claimed by the libellant to be justly due, and, as before suggested, the same admission was orally made to the libellant before this suit was brought. The court, seeing in the transaction between the parties that this debt may well be a legal foundation for a bottomry security, will not impeach it, it having been given by the owner himself, upon any presumptions or even positive evidence, which might have availed him had the bottomry been executed by the master in his absence and without his direction.

Upon this state of the pleadings and proofs a decree must be rendered in favor of the libellant affirming the validity of the bond, and directing the whole amount, with the marine interest reserved, to be paid, and that the ship and her freight be condemned therefor, as against the owner and claimant, Cameron; subject, however, to such decree as may be rendered on the defence interposed in the case on the part of the other claimant, Quincy, to the effect that Cameron had no authority to hypothecate the ship in his capacity of owner, further than he could legally charge her in the character of master, as against the claimant, Quincy. Interest also will be computed on the loan and marine

interest, from the day they became payable to this decree, with costs to be taxed.

BETTS, District Judge. The claimant, Quincy, in his answer, interposes no objection to the validity of the hypothecation of the ship by Cameron, nor to the sale of the vessel under it; and admits, so far as he is concerned, that the libellant is entitled to a decree therefor; but he claims that in the distribution of the proceeds of the ship in court, his demand is prior in legal right to that of Cameron. The court having decided that the bond was operative and good for its amount as against Cameron, it remains to be settled between these two claimants, after the satisfaction of the libellant's debt out of the fund in court, which of them is entitled to receive the surplus. Quincy proves a bill of sale, executed upon the purchase of the ship, on the 12th of November, 1844, vesting the nominal title and ownership in him. Other documents and evidence produced in the case, however, show that his right, under the bill of sale, was only that of mortgagee, and that the actual ownership belonged to Cameron. There is, therefore, no foundation for the argument, that he can come in and claim the fund in the character of owner of the ship. He purchased her as agent for Cameron and for him, and he took possession of her as owner. This might, perhaps, make his ownership complete without a bill of sale or other paper title. 3 Kent, Comm. 129; Abb. Shipp. 12, 1829. But the pleadings and proofs in the case show that Quincy never claimed any title or interest in the ship other than that of mortgagee.

For Cameron it is contended, that the court has no jurisdiction over that branch of the subject, because the remedy of Quincy, in his character of constructive mortgagee, must be pursued in the state tribunals. This court being rightfully in possession of the funds representing the ship arrested, must necessarily, as incident to that possession, have power to decide who is entitled to withdraw them from the registry. Andrews v. Wall, 3 How. [44 U. S.] 568. It may, undoubtedly, in cases of great difficulty, retain the funds until the adversary claimants shall have litigated their rights to it by direct suit in this court, or some other proper forum; but this must be matter of discretion, and depending upon the nature of the adversary interests. Ex parte Lewis [Case No. 8,310]; Brackett v. The Hercules [Id. 1,762]; 3 Pet. [28 U. S.] 675; 3 Hagg. Adm. 129. Ordinarily the court hears the case upon summary petition or motion, and pays out or restores the remnants and surpluses according to the right of parties so established before it. Betts, Adm. 119. Outstanding liens of any description on a vessel, may be recognised and satisfied out of her proceeds, so far as they suffice, when she has been condemned in admiralty upon prior liens of a maritime character. Abb. Shipp. 112, 116, and note; The Packet [Case No. 10,654]; The John, 3 C. Rob. Adm. 288; Gardner v. The New Jersey [Case No. 5,233]; Brackett v. The Hercules [supra]; Harper v. New Brig [Id. 6,090].

The jurisdiction of the court over the subject matter being clear, no reason is discerned why the relief is not equally applicable to cases where no liens exist. The court must exercise that jurisdiction in every case, and must decide the legal ownership of the fund before an order to pay it from the registry will be given. Harper v. New Brig [supra]. But there is no necessity that the order should act at once upon the entire fund; it may be distributed in parts according to the rightful claims of petitioners; and it would seem to be of no moment, if the demand is liquidated and ascertained to be payable by the owner of the remnants, whether or not it is suable in admiralty against the vessel or her owner. This court has, on several occasions, declared that parties entitled to sue in admiralty for the recovery of their demands, may come in by petition upon the footing of such right, and be paid out of remnants in the registry, although they possess no lien upon the property out of which the remnants were obtained. The Triumph [Case No. 14,182], July 27, 1841. It is held in the English courts, that a mortgagee of a ship cannot maintain an action in admiralty to enforce the encumbrance, the hypothecation not being considered one of a maritime character (The Exmouth, 2 Hagg. Adm. 88, note; The Neptune, 3 Hagg. Adm. 132); and probably the same doctrine will be upheld in federal courts; but in both tribunals he is allowed to have satisfaction of the mortgage debt out of the proceeds of the ship in court. The distinction between the right of a mortgagee to attach the ship or impound her proceeds in admiralty, for the satisfaction of a mortgage debt, would appear more a matter of words than of substance. It no doubt takes its origin in the apprehensiveness of the English court, that it may encounter a writ of prohibition in touching a subject of a somewhat dubious nomenclature, the contract of security being a common law obligation and the subject pledged, and probably the consideration of the contract being maritime in its character. Still, without the exercise of such control over the proceeds to be disbursed by the court, so palpable it was that great wrong must otherwise be sustained by the mortgagee, that the court has yielded in part its scruple, and admitted him to recover his money out of the avails of the pledge he held for its security.

The court, by force of its jurisdiction over a maritime lien, very probably posterior in point of time to the mortgage, will have taken away the mortgage pledge, and converted it into money; and if the court, after satisfying the decree, cannot retain the balance of proceeds for the benefit of the mort-

gage charge, they must be transferred to the mortgagor as legal owner, and thus the mortgage creditor be deprived of all remedy upon his encumbrance. I think this court may take cognizance of, and adjudicate upon claims preferred against a fund in court, and distribute that fund conformably to the legal and equitable rights of the respective claimants, without being restrained in the administration of this equity to cases of maritime jurisdiction. Andrews v. Hall, 3 How. [44 U. S.] 568. Whether such jurisdiction will be exercised, must rest in the sound discretion of the court, in view of the complexity or nature of conflicting interests.

This case depends upon documentary evidence, presenting but a single question, essentially one of fact, and I see no reason why the court should decline considering the point, and determining whether the fund shall pass to the mortgagor or mortgagee, without regard to its competency to act upon a mortgage conveyance as a cause of action in admiralty. The other items of demand brought forward by Quincy, set forth in his answer and claim, and also made the foundation of a special petition, are most of them advances for the benefit of the ship, and would compose maritime liens, and be entitled, per se, to the privilege of payment out of her proceeds. The particulars in controversy between these claimants are, first, the validity of the mortgage debt of $5,175, claimed by Quincy; and secondly, the claim of $1,050 paid by Quincy to Schmidt & Balshe in favor of Cameron in relation to a charter-party upon the ship.

It is charged on the part of Cameron, that the mortgage security is void, being founded on an usurious consideration. The usury is alleged to consist in a charge by Quincy of a commission of 2½ per cent. on $12,000, the consideration paid on the purchase of the ship for Cameron, but the title to which was conveyed to him to secure his various advances, amounting to $5,175. The letter of Cameron to Quincy, of Dec. 19, 1844, on the subject of the purchase and conveyance of the ship, concludes him in my opinion, on the fact as to the real ownership, and his liability under the transaction. In that letter he declared the purchase to have been made on his account, and the bill of sale to have been taken in Quincy's name, as security for the acceptance of a draft of $5,175, in part for purchase money of the ship, and commission thereon, and in part for other advances Quincy might make on account of the ship.

The inquiry then is, were the commissions received for services in the purchase of the ship, or were they intended between the parties as a compensation for a loan, beyond the interest reserved and received thereon? The proofs leave no ground to doubt that the commission claimed is the ordinary compensation allowed for similar services, by the long-established mercantile usages of the city. The board of commerce recognise and approve it as a proper and customary compensation in like agencies and negotiations; and it is furthermore in direct proof that 2½ per cent. commission on the purchase price is the customary and well-known allowance to merchants and brokers for buying vessels. This is earned and paid when neither the personal credit nor funds of the agent are employed; and the commission is not regarded as having any relation to advances made or responsibilities assumed by the agent in the negotiation. There is nothing in the evidence inducing a suspicion that this transaction was other than is usual in that description of business. The purchase was bona fide at the instance and for the benefit of Cameron, and would seem to have been regarded as advantageous to him in its terms, for the ship was immediately insured for his benefit at $14,750, $2,750 above the consideration paid. The point, whether charging a commission or compensation for services in connection with the loan of money, and also legal interest upon the loan, amounts to usury, has been largely discussed in the books, and with great diversity of opinions. In the decisions in the courts of this state the subject has been thoroughly examined, and it may now be considered settled by the judgment of those tribunals, that taking, in the usual course of business, the customary and appropriate commission for services actually performed, although accompanied also with the advance of money upon which interest is reserved, does not constitute a violation of the laws against usury, unless an usurious purpose and intention in the proceeding is proved, and will not vitiate a credit or loan, on interest, concomitant upon such service. Trotter v. Curtis, 19 Johns. 160; Suydam v. Westfall, 4 Hill, 218; Ketchum v. Barber, 4 Hill, 224. The like principle is declared in Connecticut. De Forest v. Strong, 8 Conn. 522.

The evidence in this case shows that the intervention of Quincy in the purchase of the ship was according to ordinary mercantile transactions of the kind, and the interest he stipulated to have in the after business of the ship, in procuring freight, receiving her consignments and making the necessary insurances and advances in her employment upon accustomed allowance, strongly indicate that the arrangement was legal and fair, and not for the purpose of securing and covering an illegal interest on the loan. I shall accordingly pronounce for the mortgage debt, with interest, as not affected by the allegation of usury. The stipulation between the parties of the 19th of December, 1844, also binds the ship as collateral security to Quincy, for any other advances he might make to Cameron on her account, with the regular charges thereon. This clearly embraces the disbursements for insurance and commissions therefor, towing or pilotage to sea, filling water casks on board, and $500 cash advanced to Cameron, to provide for disburse-

ments in behalf of the ship on her homeward voyage. Those particulars compose the items of Quincy's account, amounting to $8,569 49, except $1,050 alleged to have been paid Schmidt & Balshe, for advances made by them on account of a charter-party for a voyage to Stettin, with commissions, &c., and $200 paid George Marshall for loading her. The last item was a stevedore's bill for stowing the cargo taken on board under the charter-party to Stettin.

On the 14th of July, 1845, Cameron executed a charter-party on the ship for a voyage to Stettin, in favor of Schmidt & Balshe of this city. It is unnecessary to rehearse the circumstances leading to the engagement of the ship, or the considerations expected to be realized. When the charter-party was executed, the existence of the bottomry bond to the libellant was known to all parties, and that it was in the hands of the agents of the libellant, in this city, ready to be enforced against the ship. A verbal arrangement or understanding was had with the agents, that on the payment to them of $3,500 when the ship became ready for sea, she might make the voyage without molestation on account of the balance due upon the bottomry loan. The charterers loaded the ship under the charter-party, and advanced to the master and for the ship, $1,114 41, but the $3,500 not being paid to the agents of the bondholder, they caused her to be arrested when hauled out and ready for sea. Schmidt & Balshe, the charterers, thereupon demanded the repayment of their advances, and satisfaction for the breach of contract, and an arrangement was made, under which Quincy paid them $1,050 in full satisfaction of their advances, and took their assignment to himself of that demand, and the purchaser of the ship under the bottomry sale then permitted her to perform the voyage under the charter-party. Quincy claims he is entitled to receive that $1,050 out of the proceeds, as a demand chargeable upon the ship, or as comprehended within the stipulation of December 19, 1844. If this sum of $3,500 was to be paid absolutely in advance as the price of hiring the ship or the liquidated compensation for transporting the cargo, there might, perhaps, be grounds for concluding that the charterers took upon themselves the risk of the voyage being performed, and could not, in case of its failure, compel the repayment of the money. 4 Maule & S. 37; Watson v. Duykinck, 3 Johns. 335. The rule generally applicable to advances of freight is, undoubtedly, that the shippers can recover it back if the cargo is not transported and delivered conformably to the contract. Detouches v. Peck, 9 Johns. 210, 212, note. This charter-party does not stipulate a gross sum for the hire of the ship. The engagement of the charterers is to pay certain specified rates of freight, "for the charter or freight of the vessel during the voyage," with five per cent. primage. Another memorandum in writing is, "At Stettin, &c., consign to friends of charterers, subject to 2½ commns., on amount of freight in one place only." "$3,500 to be advanced in N. Y., on the freight, when the vessel is loaded, for which a draft is to be given on Stettin at the rate of 67c. per Prussian rix dollar, and policy of insurance for same, to be handed over as security. Five per cent. comms. on freight to be paid here."

It is manifest, upon these stipulations, that this was an ordinary case of affreightment, leaving the respective parties under the obligations usually attaching to that contract, and that the reserve of part of the freight here did not vary the liability of either party towards the other in respect to the performance of the contract. If upon the principles of the maritime law, the charterer has a right to hold a vessel liable for the repayment of freight advanced when the voyage has not been performed, or goods delivered, Schmidt & Balshe, in this case, would have possessed such lien, because, as between them and Cameron, the charter-party had been annulled by his failure to discharge the bottomry lien, and Quincy, by their assignment of that demand, would have become entitled to their privileges and remedies thereon. This point is not free from difficulties. To a certain extent the engagements in charter-parties are undoubtedly to be regarded as personal only, and not real, or affecting the vessel. Such would be stipulations to take cargo on board, to surrender up designated portions of the ship, to have her at particular places at particular times to receive her lading, &c., &c. There can be no better reason for enforcing in rem such contracts than those for buying a ship for a given service, or having her equipped for it at a time fixed; or that she shall be provided with certain documents in order to be freighted, such as a warranty of national character, a clean bill of health, free of contraband of war, &c. Agreements of that character would acquire no higher effect by being inserted in a charter-party than if contained in a bill of sale or other contract; and I am aware of no authority upon which claims of that description could be prosecuted in admiralty courts against the ship, nor do I regard those engagements coming within the jurisdiction of the court in suits in personam.

In the present case, the owner would have had a lien on the goods on board for the freight, and the reciprocal lien of the shippers on the ship for the delivery of the cargo would attach in their favor. [Gracie v. Palmer] 8 Wheat. [21 U. S.] 605; Drinkwater v. The Spartan [Case No. 4,085]; [Marcardier v. Chesapeake Ins. Co.] 8 Cranch [12 U. S.] 49; Certain Logs of Mahogany [Case No. 2,559]; The Nymph [Id. 10,389]; The Paragon [Id. 10,708]. Had the cargo

not been delivered according to the terms of the charter-party, the shippers would clearly then have a right upon their bills of lading, and also upon the charter-party (Certain Logs of Mahogany [supra]; The Volunteer [supra]), to proceed in rem against the vessel for the amount of their interest and the losses thereon (Andrews v. Wall, 3 How. [44 U. S.] 568). In such case the loss would not only be the value of the goods, but also the freight paid for their transportation, and both items would be recoverable. The ship becomes answerable for the safe keeping and safe delivery of the cargo from the time it is placed on board. Abb. Shipp. 222. The freight, when advanced, may reasonably be regarded as constituting part of the value of the cargo, which the ship is thus bound to deliver to the freighter; and the two united would compose the encumbrance or lien for which a freighted vessel stands responsible. On the sale of the ship and breaking up of the voyage, by fault of the owner, the shipper of the cargo could have attached her in the hands of the purchaser as subject to that double lien: 1. For the return of the cargo or its value; 2. The repayment of the freight advanced; and the purchaser would clearly have been allowed the amount of such liens, to be deducted from the sum of the purchase-money. The whole purchase-money being paid into court, the adjustment of the rights of the parties in respect to it will now be the same as if it had been retained by the purchaser to await the judgment of the court, and be paid pursuant to judicial directions.

Accordingly, I am of opinion that Schmidt & Balshe acquired a lien upon the vessel to the amount of the freight advanced by them under the charter-party. That privilege passed to Quincy under their assignment, and he can, since the sale of the vessel, enforce the right against her proceeds in court, to the amount of his loss, which, in this case, is to be measured by the amount of his actual payment on the assignment, $1,050, that being the liquidation of the damage by the parties. The sum of $200, paid by Quincy to Marshall, the stevedore, is disallowed. This court has repeatedly held that stevedores do not rank above shore laborers, and have no more lien on the vessel for stowing cargo than carmen have for bringing it to the ship, or the wharfinger for hoisting it on board. Their contracts are personal with the master or owner, and their remedy must be against their employers. This claim cannot be admitted under the authority of the stipulation of December 19, 1844, because the payment was not made to Cameron or by his request, nor was it on account of the ship, she not being responsible for it. The decree will be that Quincy be allowed and paid, out of the proceeds in court, his account, to the amount of $8,369 49, (including the mortgage loan,) with interest from the time of payment or advance of the respective items by him. There yet remaining various petitions against the fund in court, the residue of it, after satisfying this order or decree in favor of Quincy, will be retained in court until it be determined whether the sums claimed by the petitioners are chargeable solely against Cameron personally, or they attach to the whole balance undisposed of, as proceeds representing the vessel. Reference was made on the argument to policies of insurance held by Quincy, and a deduction or allowance was claimed to be due Cameron on that account. The facts have not been brought out on that point so as to enable the court to dispose of it, and this decree is to be considered as leaving the rights of the parties in this behalf unaffected.

A decree was entered in the cause in accordance with the principles laid down in the foregoing decision.

[NOTE. Certain creditors of the master filed a libel and petition, seeking to have the remnants of the Panama paid to them in satisfaction of their debts, alleging they have a prior equity to the balance of the proceeds remaining after the vessel was sold in conformity with the above decree. The application was denied. Case No. 11,697.]

Case No. 10,704.

PANAUD v. UNITED STATES.

[Hoff. Op. 469; Hoff. Dec. 18.]

District Court, D. California. Oct. 2, 1860.

MEXICAN LAND GRANT—MISSION LANDS—PUBLIC DOCUMENTS—CIRCUMSTANCES OF SUSPICION.

[J. A. petitioned Governor Pico for certain of the lands belonging to the mission of San Jose, and claimed by him to have been abandoned by the mission. Upon this petition, the governor made a marginal decree ordering the alcalde to put the petitioner into possession and to make report of the condition of the lands, so as to determine the amount to be paid to the mission by the petitioner as indemnity. The alcalde made his report, and subsequently J. A. petitioned for final decree. These were all the documents found in the archives. From his private possession the claimant produced the testimonio of the act of possession given by the alcalde, and also the final decree of title from the governor, purporting to grant to the petitioner and to A. P. (a brother of the governor) the lands in question. This grant was said to have been made at a time a few weeks following the receipt by the governor of the letter from the supreme government positively prohibiting the granting of mission lands, and which letter the governor had communicated to the departmental assembly. A claim had, before this suit, been declared spurious by the court which attempted to set up a grant to the same parties of the whole of the San Jose mission lands, which spurious title was of a date 20 days prior to the date of the title in this case. *Held*, that the claim is spurious in view of the improbability of the governor's violating, so soon after its receipt, the command of the supreme government, and of the suspicious circumstances surrounding the alleged grant (and especially the custody from which the title was produced), and the further improbability that the parties would petition for a grant of lands covered by an older grant to them, and

the insufficiency of the confirmatory evidence produced by the claimant.]

[Claim by Clement Panaud and others to the garden of San Cayetano, a part of the mission lands of San Jose. The grant, it was claimed, was for 100 varas, and was made to Juan B. Alvarado and Andres Pico.]

HOFFMAN, District Judge. The claim in this case is for the orchard of San Cayetano, and adjoining land, formerly within the mission of San Jose. The evidence offered in support of the claim is as follows:

(1) A petition, signed by Juan B. Alvarado and addressed to Pio Pico, dated March 11, 1845. In the petition Alvarado states that he is desirous of establishing a house within the limits of the mission of San Jose, where there are already some individuals residing, by permission of the governor's predecessors, who have also received grants or lots according to their petitions. He therefore asks for "100 varas of land in the vicinity of the main building, and including an orchard of trees and a vineyard which is contiguous to said lot, but separate from the principal one of the mission, as this property is almost completely abandoned, offering, nevertheless, to indemnify or satisfy the natives or the government for the value of said plants, as has been done by other persons when the government has granted them vacant houses at the mission of Santa Clara and other places, on account of their being in the condition which I have stated,—for which purpose, and in order to avoid delays, etc., I suggest to your excellency, if you should think fit, to take the information which you may think necessary from persons who are actually in this city (Los Angeles), who are persons living in that neighborhood, in relation to what I solicit," etc. (2) The marginal decree of Governor Pico on this petition, dated March 12, 1845. In this petition the governor states that, "being convinced that it is for the prosperity of the department that the lands of the mission should pass into the hands of industrious individuals who may improve them, and also taking into consideration the decaying condition of the Indians, I decree and order that the respected judge put the señor colonel in possession of the 100 varas of land, orchard and vineyard, which he solicits; that the act of possession being concluded, the same judge shall send to this government a minute report, stating the actual condition of the orchard and vineyard which have been granted, as also the present petition and decree, in order that, in view thereof, the government may know what sum of money Señor Alvarado will have to pay over to the community of the mission of San Jose for the same, and that the title be issued." (3) The report of the alcalde of San Jose, Antonio Ma. Pico, in compliance with the foregoing decree, dated August 27, 1845. In this report the alcalde states that, in obedience to the decree, he had given the possession therein mentioned to the señor colonel of militia, Juan B. Alvarado, represented by his agent, of which act of possession he had given a "testimonio," or certified copy, to the interested party. The alcalde thereupon proceeds to give a minute account of the condition of the orchard, vineyard, etc., stating the number of useful trees, vines, etc. (4) A petition by Alvarado to the governor, dated March 1, 1846. In this petition Alvarado states that, "having, by the determination of the government, obtained the favor of putting at his disposition the orchard called San Cayetano, of the property (de la putunencia) of the mission, I am now in possession of the same, and in order to be considered owner in full property thereof, it is necessary that the government should issue to me the corresponding title. I pray your excellency that you be pleased to decree accordingly, for which purpose I annex hereto the documents which are the evidence of the concession and possession of the same, representing to you, likewise, in order that your excellency may act with justice, that, on account of the ruinous condition of the property, it will not produce to your petitioner for some years to come enough to remunerate him for the expense of repairs, for which reason I offer in payment therefor, either to the Indians or to the government, the number of 200 head of meat cattle. Wherefore I pray, etc."

The signatures to the foregoing documents are testified to as genuine. They are all found among the archives, and, so far as I am informed, there is no reason to suspect their authenticity. The claimant has also produced from his own custody the certificate or testimonio of the act of possession given to him by the alcalde. The genuineness of this document is sworn to by the alcalde, and the agent of Alvarado, to whom the possession was given as stated by the alcalde in his report, is also produced, and confirms the report in that particular. The claimant also produces the final title, dated May 25, 1846, and alleged to have been issued as prayed for in Alvarado's petition of March 18, 1846, except that, in pursuance of an arrangement between him and Andres Pico, the title is in favor of both jointly. It is also testified by Alvarado that the title was issued to him and Andres Pico, and that the latter paid to the government 200 head of cattle, or thereabouts.

It will be observed that the only evidence that the grant was issued consists of the production of the instrument itself. The book in which it is said to be noted is not found in the archives. Neither Pico, who is alleged to have made the grant, nor Morino, who signed it as secretary, have been examined as witnesses. The only evidence in support of it is the usual proof that the signatures are genuine. How it came to be

issued to Andres Pico and Alvarado jointly, and not to Alvarado alone, is not explained, except that Alvarado states he had an arrangement with the brother of the governor. But it is not a little singular that both of these alleged grantees should, in another grant, have pretended to be owners, not merely of the orchard, but of the whole mission of San Jose and its appurtenances. The grant produced in that case was dated May 5, 1846,—20 days previous to the grant now relied on,—and it purported to sell to Alvarado and Andres Pico, the grantees in this case, the mission of San Jose and its appurtenances. If the genuineness of that grant were established, it would be almost conclusive proof that the same parties could not have applied for and obtained, 20 days after its execution, another grant of part of the very land already granted to them, and have paid an additional consideration, viz. two or three hundred cattle for the additional title paper. That grant, however, was rejected by the court as spurious. But the fact remains that the same parties have, in another case, set up different title to the property claimed in this; and as one of the grants is spurious, the suspicion is naturally suggested that the other is of the same character. The documents themselves are, also, in some degree suspicious. If, on the petition of Alvarado, the governor determined to accede to it, it is singular, and a departure from an almost uniform practice, that the governor did not, on the margin of the petition, make some order or decree indicating the dispositions he intended to make in the premises. But the petition contains no such marginal order.

In the case of Larkin v. U. S. [Case No. 8,091], it was held by this court that, under the decree of 1840, and the positive instructions contained in the official letter, signed "Montesdioca," the governor had no authority to grant the cultivated and improved property belonging to the mission establishments. By the decrees of the departmental assembly of May 28, 1845, and March 30, 1846, the governor was authorized to lease certain of the missions, and if that were found to be impracticable, to sell them to the highest bidder. On the 15th of April, 1846, the letter of the Montesdioca, instructing the governor to suspend all further proceedings relative to the alienation of the missions, was communicated by the governor himself to the assembly. It is, therefore, not only highly improbable that the governor should have, within a few weeks thereafter, proceeded to do the very thing he was prohibited from doing, but, as already decided by this court, it is clear that he had no power to do it. When we consider the nature of this claim, the absence of any evidence from the archives that the grant issued, the fact that the usual marginal note is not found on Alvarado's petition, the introduction of the brother of the governor as a grantee, the facility with which the title could be manufactured and antedated, the fact that another title issued by the same governor in favor of the same parties, and including the same land, has already been found spurious, and that the pretended action of the governor was in direct violation of a positive order recently received by him, it is difficult to avoid the conclusion that both grants have a common origin and a similar character.

It is contended that the marginal order of the governor upon Alvarado's first petition, the possession given to him in pursuance thereof, and his subsequent occupation of the land constitute an equitable title, which the United States must respect. At the time of the acquisition of California by the United States the work of secularizing the missions, which had been begun under the decree of 1833, was by no means completed. The attempt of Figueroa and his successors to secure to the Indians some part of the cultivated land which their labors had improved had signally failed. Each successive regulation, having for its object to secure the faithful administration of the missions by the administrators and stewards in whose hands they had been placed, seems to have been without avail, and the governors continued to grant the lands belonging to those establishments, with but slight regard for the rights of indigenous inhabitants by whose labor they had been built, and among whom it was originally intended to distribute such lands as they might require when the missions should be converted into pueblos. But these extensive spoliations, to which these once flourishing establishments were subjected, did not merely deprive the Indians of the asylum and the means of support created by their labor, and promised to them when just reclaimed from savage life. The seizure by the administrators of the orchards, vineyards, etc., and even the mission buildings, left the padres and the secular clergy, by whom they were to be replaced, destitute of the means of support. The bishop of the Californias, therefore, addressed a memorial to the government, in which the disastrous effect upon the church of the policy which had been pursued was set forth, and the government, recognizing the justice of these representations, decreed on the 9th of November, 1840, "in conformity with everything the reverend bishop of the Californias had petitioned in his communication, and in conformity with the decree of the 7th November, 1835, which ordered the missions to be restored to their former condition," and it announced its intention to issue "a general order to the governor of the Californias for the restoration to the missionary father, without delay or impediment, of the possession and property used by them under their administration, for the conversion of the heathen." Among the earliest acts of Micheltorena was the issuing of a proclamation or decree that various missions, among which was that of San Jose, should be delivered up or restored to the

most reverend fathers who were to continue to govern them and take charge of the natives as before.

It is unnecessary to recapitulate the various decrees passed by the departmental assembly, authorizing the sale and the renting of the missions. I have been unable to discover from what source they derived any authority to empower the governor to deal with this portion of the public property. It is to be observed, however, that both the renting and sales were required to be made at public auction; and in the distribution of the proceeds, the claims of the church and the rights of the Indians were, in form at least, respected. For the conservation of divine worship, and the maintenance of the Indians, two-thirds of the proceeds of the rents were, by the decree of 28th October, 1845, to be devoted. By the decree of 28th October, 1845, the surplus of the proceeds of the sales therein authorized, after paying the debts of the missions, was to be placed at the disposal of the respective prelate for the maintenance of religious worship, and a disposition of the suits was made similar to that contained in the decree of May 28th, preceding. By the decree of March 30, 1846, the surplus of the purchase moneys was required to be distributed equitably amongst the Indians. The action of Pio Pico, therefore, in attempting to sell at private sale, to his brother and others, not merely the lands, but the houses and orchards made by the missionaries and their neophytes, and "contiguous to and in immediate communication with the churches," and which the supreme government had decreed "should remain to the use and benefit of the missionaries, in accordance with the petition of the bishop," was not only in violation of that decree, but unauthorized by the decrees of the departmental assembly, from which he pretended to draw his authority. That the supreme government so regarded it is evident from the order signed "Montesdioca," which peremptorily directs the governor to suspend all proceedings respecting the alienation of the mission property. That the departmental assembly so regarded it is evident from their decree of October 31, 1846, the 1st article of which provides that "the sales of missions made by Don Pio Pico as governor, as well as all other acts done by him on the same subject beyond his authority, are entirely annulled." This decree, though passed after the taking of Monterey, and what has been deemed the date of the conquest of the country, is, nevertheless, important as a practical construction of the validity of the governor's acts by the very body from which he professed to derive his powers.

From the foregoing, it results that the alleged inchoate or equitable title which, it is claimed, was conferred by the marginal decree of Pio Pico can have no greater validity than the final title, which, it is alleged, issued after the reception of the Montesdioca document. Neither the marginal decree nor the final title in this case could have issued in virtue of the authority conferred by the colonization laws of 1824, or the regulations of 1828. Alvarado had already received from the government all the lands which could, by those laws, have been granted to any individual. The fact, therefore, of occupation and settlement can add nothing to his equities, as might be the case if the grant had been a colonization grant, for which occupation and settlement furnished the only consideration. The transaction proposed was to all intents a sale, and the only circumstance which could strengthen the equitable rights of the claimant would be the payment of the price. But on this point the evidence is insufficient. No receipt for any sum, or any number of cattle is produced. The only evidence on the subject is the statement by Alvarado, that Andres Pico gave to the government 300 head of cattle or thereabouts. But the petition of Alvarado offers, and the grant accepts, 200 head of cattle as the compensation to be paid for the land. The recollection of Alvarado is thus at fault as to the number of the cattle, and when it is considered that, in the former case, for the mission of San Jose, the same parties were alleged to have paid $12,000 for lands within which the land now claimed is embraced, it is difficult to attach much credit to the bare statement of Alvarado that a payment was made in this case. That Alvarado did not himself consider the order directing the possession to be given to him as amounting to a title is expressly stated in his subsequent petition: "In order to be considered the owner in full property of the land, it is necessary that the government should issue to me the corresponding title, etc." That title, I thing, it is not satisfactorily shown that he ever obtained, nor do I consider the evidence of the payment of the price clear enough, nor the fact of his having occupied the ancient orchard and vineyard of the mission sufficiently to create any equitable title which the United States, who have already recognized, on the claim of the Roman Catholic bishop, the right of the church to the lands now claimed, are bound to respect. On both grounds, therefore, I think, the claim should be rejected:

1. Because the governor had no power to confer an inchoate title, or to make a final grant of the land. And

2. Because, if such power technically existed, it was in this case exercised in violation of the policy of the supreme government, the claims of the church, and the rights of the neophytes, as well as in entire disregard of the directions of the departmental assembly; and in the absence of satisfactory proof of the bona fide payment by the grantees of a reasonable equivalent for the concession, there can be no equitable obligation upon the United States to complete the grant by giving to the claimants the "title in full property."

Case No. 10,705.

PANCOAST v. BARRY.

[1 Cranch, C. C. 176.] [1]

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

TRESPASS—PLATS—PLEA OF NOT GUILTY—WHAT DEFENCES—BOUNDARIES—WITNESS—INTEREST.

1. In ejectment, plats are part of the pleadings; in trespass they are evidence only.

2. Upon the plea of not guilty, in trespass quare clausum fregit, and notice of "defence on warrant," the defendant may give his title in evidence as a justification, without pleading it specially.

3. A person interested in supporting a particular location, is not a competent witness to prove it.

4. All locations not counter-located are admitted to be correct.

5. When a boundary is proved, course and distance must yield to it.

Trespass quare clausum fregit; not guilty; defence on warrant; plats, deposition, and accounts filed; leave to add and amend.

The defendant had a new location and plat of a contiguous tract made by the surveyor, since the last term, under leave to add and amend, thirty days' notice having been given to Pancoast.

Mr. Gantt, for the plaintiff, moved for a continuance, on the ground of its being an important amendment on the part of the defendant, which would require time to consider and plead.

Mr. Mason and Mr. Key stated that, in ejectments, the locations of the pretensions of the parties are considered as part of the pleadings, the allegata; but that locations of adjacent lands, for illustration, are to be considered as matter of evidence, probata. But this is an action of trespass. All plats taken in an action of trespass are for illustration, and are matters of evidence; it is therefore like the taking of a deposition; notice was duly given to the opposite party. He had time to collect counter evidence, if he pleased.

Upon the trial, Mr. Woodward, for the plaintiff, moved to strike out "defence on warrant," and contended that if the defendant means to rely on title as a justification, it must be specially pleaded.

Mason & Key, for defendant. The words, "defence on warrant," are only to give notice of the nature of the evidence intended to be produced. The plea is, not guilty. Upon the trial of that issue, if the plaintiff should object to the evidence, that will be the time to consider it. It has been the uniform practice in Maryland to try the title on the general issue, after giving notice in this form.

And of this opinion was THE COURT (KILTY, Chief Judge, absent).

H. Selby was called by the plaintiff to prove the declarations of a Mr. Bean, who is dead, as to the 2d boundary of 1st line of St. Elizabeth, and that it was some distance westward of the place alleged by defendant; but it appearing that Bean was the owner of an adjoining tract, which would be injured by the defendant's location, THE COURT refused to admit his declarations to go in evidence. Afterwards, the defendant having given the declarations of the same Mr. Bean in evidence, in support of his location, THE COURT permitted the plaintiff to give evidence of Bean's declarations to the contrary. For if Bean had himself been introduced as a witness for the defendant, it would be competent to give his contrary declarations to others at different times, in evidence, to discredit him, and his declarations cannot be better evidence than his testimony upon oath.

Mr. Key moved the court to instruct the jury that all locations made by either party and not counter-located by the opposite, are admitted to be correct.

Mr. Woodward contended that his client not having in fact attended, although he had notice, was not bound by the plats.

THE COURT gave the instruction as prayed. It was admitted, that where a boundary is called for and proved, the course and distance must conform, although thereby it varies from the course and distance stated in the grant.

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

PANCOST (RIDGWAY v.). See Case No. 11,818.

Case No. 10,706.

PANCOST v. WASHINGTON.

[5 Cranch, C. C. 507.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.

ATTACHMENT—DEATH OF DEFENDANT—DISSOLUTION.

An attachment under the Maryland act of 1795, c. 56 [1 Dorsey's Laws, p. 320], is dissolved by the death of the principal defendant, and the appearance of his administrator.

[This was an action at law by Mary Pancost against the corporation of Washington, garnishee of Elias Gurnaer.] Attachment under the Maryland act of 1795, c. 56.

Elias Gurnaer, the principal debtor, having died since the last term, Mr. Redin moved the court that the appearance of the administrator may now be entered and the attachment be dissolved. He contended that the object of the attachment was only to compel an appearance; and that where, by the act of God, or of the law, the defendant cannot give bail and appear, the attachment should be discharged. The defendant, while living, had a right to appear, upon giving bail, which would have dissolved the attachment. But his administrator has a right to appear without bail, and the appearance dissolves the

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

attachment. The attachment, and the action upon the capias, cannot be going on at the same time. The attachment did not transfer the property from Mr. Gurnaer; the attached effects would have remained his property until a sale under a judgment of condemnation, and did remain his property until his death, when they vested in his administrator as assets for which he is accountable in the due course of the administration. No judgment had been rendered in the cause. Nicholl v. Savannah Steamship Co. [Case No. 10,-225], in this court, June term, 1820; Davis v. Marshall [Id. 3,641], July term, 1804; Serg. Attachm. 133; Fisher v. Lane, 3 Wils. 297.

C. Cox and Mr. Bradley, contra. The defendant could not appear and give bail after the return of the capias ad respondendum. The object of an attachment is not to compel an appearance, but to enable a creditor to obtain satisfaction out of the property of his absent or absconding debtor. Chase v. Manhardt, 1 Bland, 344. The garnishee has pleaded nulla bona for himself and non assumpsit for the principal. This gives the plaintiff a lien on the funds in the hands of the garnishee.

THE COURT (THRUSTON, Circuit Judge, contra) permitted the appearance of the administrator of the principal debtor without bail, and dissolved the attachment.

PANDORA, The (EMERSON v.). See Case No. 4,442.

PANHORST (NEWARK SAV. INST. v.). See Case No. 10,142.

Case No. 10,707.

PANNILL v. ELIASON et al.

[3 Cranch, C. C. 358.] [1]

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

DEPOSITION—CAPTION—EVIDENCE—PRINCIPAL AND AGENT—PROOF OF AGENCY.

1. In a joint action against two, if one only be taken, and an alias capias issued against the other from term to term, and, before he be arrested, a deposition be taken on the part of the plaintiff, by consent of the defendant, who was first taken with an agreement that it should be read at the trial; and if, in the caption of the deposition, one only of the defendants be named, and afterwards the other be taken, the deposition may be read at the trial against both defendants.

2. An agent is a competent witness to prove his own authority as agent.

Assumpsit against John Eliason and Joel Brown, joint merchants, trading under the firm of Eliason & Brown, for goods sold and delivered, &c. While the suit was pending upon the docket, after the arrest of Eliason, and before that of Brown, who was not taken until several terms had elapsed after the arrest of Eliason, the deposition of one Thompson Cockerell was taken on the part of the plaintiff by consent, with an agreement of counsel on the part of the plaintiff and the defendant Eliason, that it should be read in evidence at the trial. In the caption of the deposition the action was stated to be "George Pannill v. John Eliason." Brown having been taken, and having pleaded, and the cause having come on to trial against both defendants.

C. C. Lee, for plaintiff, offered to read the deposition in evidence to the jury.

Mr. Coxe and Mr. Marbury objected that it did not appear to be taken in this suit, which is against both; but purports to be taken in an action against Eliason only.

But THE COURT (THRUSTON, Circuit Judge, absent) overruled the objection, and suffered the deposition to be read.

The defendants' counsel then contended that the witness was not competent to prove his own authority to sign receipts for wheat delivered by the plaintiff to the defendants. 1 Phil. Ev. 95; 4 Starkie, Ev. 55, 1730.

But THE COURT (nem. con.) upon the authority cited in Pal. Ag. 245, said he was competent.

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

PAPIN (ST. LOUIS NAT. BANK v.). See Case No. 12,239.

PAQUET BOT DE CAYENNE, The (HALL v.). See Case No. 5,941.

Case No. 10,708.

The PARAGON.

[1 Ware (322) 326.] [1]

District Court, D. Maine. April 28, 1836.

SHIPPING — CARRIAGE OF GOODS — LIABILITY FOR LOSS—SACRIFICE FOR COMMON SAFETY—GENERAL AVERAGE—PRIORITY OF CLAIMS.

1. Every contract of the master within the scope of his authority as master, by the general maritime law, binds the vessel, and gives the creditor a lien upon it for his security.

[Cited in The Flash, Case No. 4,857; The Panama, Id. 10,703; Stone v. The Relampago, Id. 13,486; The Williams, Id. 17,710; The Edwin v. Naumkeag Steam Cotton Co., Id. 4,301; The Lulu, 10 Wall. (77 U. S.) 201; The Kalorama, Id. 212; Roberts v. The Windermere, 2 Fed. 727; The Canada, 7 Fed. 120; The T. A. Goddard, 12 Fed. 178; The Brantford City, etc., 29 Fed. 385. Approved in Florez v. The Scotia, 35 Fed. 917. Cited in The Wilmington, 48 Fed. 568; The Roanoke, 50 Fed. 577.]

2. The master is responsible for the safe stowage of merchandise under deck. If he carries goods on deck, without the consent of the owner, he is responsible for their safety, and if they are lost by the dangers of the seas, it will be his loss.

[Cited in Weston v. Minot, Case No. 17,453; Chubb v. Seven Thousand Eight Hundred Bushels of Oats, Id. 2,709; The Watchful,

[1] [Reported by Hon. Ashur Ware, District Judge.]

Id. 17,250; The Thomas P. Thorn, Id. 13,-927; The Delaware, 14 Wall. (81 U. S.) 604; The Governor Carey, Case No. 5,645a; The Gran Canaria, etc., 16 Fed. 873.]

3. If goods carried on deck are sacrificed for the common safety, goods under deck do not contribute to the loss.

[Cited in The Delaware, 14 Wall. (81 U. S.) 604; Wood v. The Sallie C. Morton, Case No. 17,962.]

4. There is no established custom of trade between Portland and Boston, authorizing the master to carry goods on deck without the consent of the owner.

5. To establish a local custom, derogating from the general law, it is not enough to prove that the act has been frequently done. It must be shown to be so generally known and recognized, that a fair presumption arises that the parties, in entering into their engagement, do it with a silent reference to the custom, and tacitly agree that their rights and responsibilities shall be determined by it.

[Cited in The Hendrik Hudson, Case No. 6,-358; Chubb v. Seven Thousand Eight Hundred Bushels of Oats, Id. 2,709; Clifton v. A Quantity of Cotton, Id. 2,895.]

6. Where there are several privileged debts against a vessel, those which are in the same rank of privilege are to be paid concurrently. But debts occupying a higher rank of privilege are fully paid before any allowance is made to those holding a lower rank of privilege.

[Cited in Dudley v. The Superior, Case No. 4,115; The St. Joseph, Id. 12,229; The Illinois, Id. 7,005; The E. A. Barnard, 2 Fed. 719; The Frank G. Fowler, etc., 8 Fed. 333; The Arcturus, 18 Fed. 744; The J. W. Tucker, 20 Fed. 131; The Lady Boone, 21 Fed. 732.]

7. Seamen's wages for the last voyage are preferred in a decree against the vessel, to all other claims, after the expenses of justice necessary to procure a condemnation, and such charges as accrue, after the vessel is brought into port, as wharfage, &c.

[Cited in Porter v. The Sea Witch, Case No. 11,289; The Lillie Laurie, 50 Fed. 221.]

Three libels were filed against this vessel; one by Charles Moody, founded on a bill of lading of merchandise, shipped to his order at Boston for this port, and consigned to him, and which was not delivered; another by Mitchell & Cobb, for goods shipped for them by their order, by a parol agreement without a bill of lading; and a third by Tarr, one of the crew, for wages. It appeared from the evidence that the Paragon [Elwell, master] sailed from Boston the last of February, and meeting with tempestuous weather, it became necessary to throw overboard the goods of the libellants, which were stowed on deck, for the safety of the ship and the lives of the crew, by which means the shippers lost their goods. That part of the cargo which was stowed under deck arrived safe. The bill of lading in Moody's case was produced, and the shipping of the goods for Mitchell & Cobb was proved by parol evidence. The libel for wages was not contested. The vessel was let to the master, on shares, he to victual, man, and have the control of the vessel, and pay two fifths of her earnings for the hire of the vessel.

W. P. Fessenden, for libellants.
Fessenden & Deblois, for claimants.

WARE, District Judge. The liability of the vessel to answer for the non-execution of a contract of affreightment entered into by the master, is not controverted; and it makes no difference, in this respect, whatever be the form of the contract, whether it be by charter-party or by bill of lading, or whether the contract be in writing or by parol. By the general maritime law, every contract of the master, within the scope of his authority as master, binds the vessel, and gives the creditor a lien upon it for his security. But it is contended that the goods, in this case, having been lost by the dangers of the seas, both the master and the vessel are exempted from responsibility within the common exemption in bills of lading; and the goods having been thrown overboard from necessity, and for the safety of the vessel and cargo, as well as the lives of the crew, that it presents a case for a general average or contribution, upon the common principle that when a sacrifice is made for the benefit of all, that the loss shall be shared by all. In Moody's case, the contract is by bill of lading, and the danger of the seas is expressly excepted by the terms of the contract. The contract in Mitchell & Cobb's case, being by parol, is silent on this subject. But in every contract of affreightment, losses by the dangers of the seas are excepted from the risks which the master takes upon himself, whether the exception is expressed in the contract or not. The exception is made by the law, and falls within the general principle that no one is responsible for fortuitous events and accidents of major force. Casus fortuitos nemo præstat. But then the general law is subject to an exception, that when the inevitable accident is preceded by a fault of the debtor or person bound, without which it would not have happened, then he becomes responsible for it. Pothier, des Obligations, No. 542; Pret. a Usage, No. 57; Story, Bailm. c. 4, No. 241; In Majoribus casibus si culpa ejus interveniat tenetur; Dig. 44, 7, 1, § 4.

It was abundantly proved in this case, nor has it been questioned at the argument, that the jettison was, by the violence of the tempest, rendered necessary for the common safety. But then it is answered that it was rendered necessary only in consequence of the goods being laden on deck, and that if they had been properly secured under deck they would have been saved, as all the goods which were thus secured were delivered uninjured. It is evident, therefore, that the loss was occasioned solely by their being placed in this exposed and hazardous situation. And this presents the principal question which has been argued in the present case, whether the master was authorized to stow the goods in this manner. If he was, without any special agreement with the

shippers for that purpose, then no fault is imputable to him, and the consequence contended for by the counsel for the respondents seems naturally to follow, that the loss having been clearly a sacrifice for the common safety, is a proper case for contribution. 4 Boulay-Paty, Cours de Droit Maritime, p. 566; 2 Boulay-Paty, Cours de Droit Maritime, p. 31; Phil. Ins. 332. The master is responsible for the safe and proper stowage of the cargo, and there is no doubt that by the general maritime law he is bound to secure the cargo safely under deck. The only exception to the universality of this rule which our books on maritime law furnish, if that can be considered an exception, is in the Commercial Code of France. That, after stating the general principle that the master is responsible for goods laden on deck, excepts from the rule petit cabotage. Article 219. But this can hardly be considered an exception, because it is confined to a trade that is carried on principally in undecked boats. 1 Valin, Comm. 397; 2 Valin, Comm. 203; Rogron sur Code de Commerce, art. 219. If the master carries goods on deck without the consent of the shipper, unless he can bring himself within some such exception, he does it at his own risk. If they are damaged or lost in consequence of their being thus exposed, he cannot protect himself from responsibility by showing that they were damaged or lost by the dangers of the seas. If, from stress of weather, it becomes necessary to throw them overboard for the common safety, this will not be a loss to be divided with the rest of the cargo, by a general average, but will be the particular loss of the master and the ship-owners, who are responsible for his acts; because it was in consequence of the fault of the master, in overloading the vessel, that the jettison was rendered necessary. When the shipper consents to his goods being carried on deck, he takes the risk upon himself of these peculiar perils, and if it becomes necessary to sacrifice the goods for the safety of the ship and the rest of the cargo, he cannot call on the other shippers for a contribution. They enter into no partnership with him in this peculiar and extraordinary risk, but he takes the whole upon himself, though his own goods are liable to contribution if they are saved by a sacrifice of any of the cargo under deck. This is the doctrine of all the authorities, ancient and modern. The reason of the law is obvious. Goods thus situated are too much exposed themselves; and not only this, but by encumbering the deck they embarrass the crew, render the manœuvering of the vessel difficult, and in tempestuous weather endanger the safety of the vessel and the rest of the cargo. Consulat de la Mer, c. 186; Peckius, Ad rem Nauticam, Vinnius, p. 236, note; Emerigon, des Assurances, c. 12, § 42; Dodge v. Bartol, 5 Greenl. 286; 1 Phil. Ins. 332, 364; Stev. Av. (Phil. Ed.) pp. 64–210.

It is contended that in this case there was a special agreement that the goods should be carried on deck. But it is to be observed, in the first place, that neither of the libellants were in Boston at the time of the shipment, so that no consent could be given by them personally. The goods were shipped by their correspondents, to their order, and the merchants who shipped them expressly deny that they gave any consent to their being carried on deck. The mate, and Edwards, one of the crew, did, indeed, testify that something was said about some of the goods going on deck. But their testimony was not very explicit, and by no means sufficient to overcome the direct testimony on the other side. Besides, the master gave, in Moody's case, what is called a clean bill of lading, that is, one in the common form, without any memorandum in the margin, stating that the goods were on deck. Now the witnesses who have testified to the usage generally, say that a clean bill of lading implies that the goods are under deck. But independent of any proof, such would be the legal effect of the contract. The bill of lading being in the usual form, it binds the master to secure and carry the goods in the usual way, that is, under deck, unless he can prove the custom set up, exempting him from this obligation. The same remark, substantially, may be applied to the case of Mitchell & Cobb. The verbal contract of affreightment will be presumed to be a contract to stow and carry the goods in the usual way, unless a different agreement is proved. But upon this point the proof fails.

In the second place, it is contended that this case is withdrawn from the general rule by the usage of this particular trade, it being, as it is said, an established custom in the trade between this port and Boston, for vessels to carry a part of their cargo on deck; and it is proved that vessels built specially for this trade are constructed with an express view to their carrying a deck-load. This is, indeed, the principal question in the case, and it is one of grave importance, as affecting the trade of this port, and deserves a very mature consideration. It is not denied that such a custom may exist in a particular trade, as will authorize the master to carry a part of his cargo on deck, without subjecting himself to responsibility for its loss, or any damage it may sustain from the dangers of the seas, in being thus exposed. Story, Bailm. p. 339. The French Ordinance de la Marine, liv. 2, tit. 1, art. 12, in conformity with the general maritime law, prohibits the master from lading goods on deck, under the penalty of answering personally for any damage that may happen to them on that account. But notwithstanding the positive text of the law, a custom has always prevailed in some of the ports of the kingdom, of lading goods on deck in small vessels employe[d] in petit cabotage. This custom was sanctioned by the courts, and

the master relieved from his responsibility under the general law. 1 Valin, Comm. 397; 2 Valin, Comm. 203. The exception, which was introduced by usage and confirmed by the jurisprudence of the courts, has been incorporated into the text of the Code de Commerce, No. 219.

In our law, the rule requiring the cargo to be safely stowed under deck does not stand upon the express text of any act of the legislature, but upon the authority of general usage and custom. A rule of law that is established by custom may be repealed or restrained by a contrary custom. But the general rule being founded on the common custom of the country, universally known, and having the force of a general law, he who would exempt himself from its obligation by a special local custom, is bound to prove the local custom by clear and conclusive evidence. Because the legal presumption is that every contract is entered into with the understanding and intention of the parties that their rights under it are to be governed and determined by the general law. A local custom, in order to be binding on the parties, and withdraw their contracts from the application of the common law, must be so generally known and understood that it may fairly be presumed that all persons engaging in that particular trade are acquainted with it and assenting to it, as they are presumed to know the general law. The presumption then will be that they form their engagements with a silent reference to the special custom. And the custom, to be obligatory, must not be a loose practice, but precise, definite, and certain, so as to supply the place of the common law in the given case, and be capable of being applied to the contract and defining and fixing the rights of the parties under it. Such a custom, when it is established, and so generally known and recognized that parties are presumed in their engagements tacitly to refer to it, applies itself to the contract, and forms, as it were, the complement to the terms in which the obligation is expressed by the parties, and within its proper sphere, is equally binding with the general law. The doctrine that, in conventionibus tacite veniunt ea quæ sunt moris et consuetudinis, is peculiarly applicable to commercial law.

Let us then look at the evidence, and see if any such custom is proved. A large number of witnesses were examined to this point, both by the libellants and respondents. It was very fully proved that it was customary, in point of fact, for vessels trading between this port and Boston to carry a deck-load, and that usually, though not universally, the same freight is charged for goods on deck as under deck. The packets, which are built for this particular trade, are made strong in their upper works, for the express purpose of carrying a deck-load, and it appeared to be the opinion of packet-masters that goods, not liable to be injured by being wet, were about as safe in these vessels above as under deck. But vessels built for the fishing business, as was the case with the Paragon, are not considered to be safe in tempestuous weather with a heavy deck-load. The general practice, though it is not always done, is to specify in the margin or in the body of the bill of lading, those goods which are placed on deck. If the shipper does not object when he sees the bill of lading, he is considered as assenting to his goods going in that way, and the understanding is then that the master is exempted from any special responsibility. Whether the master has a right to carry goods on deck, when nothing is said by the shipper as to the manner in which they shall be carried, is a point on which there is some variation in the testimony. Some of the ship-masters think, that, under the custom, it is left to the discretion of the master how the goods shall be stowed, and if they are goods of that description which it is customary to carry on deck, that he does not incur any extra responsibility by carrying them in that manner.

Such is the substance of the testimony. It would be dangerous to the best interests of commerce, to hold that a special custom, derogating in an important particular from general principles, could be established, and the uniformity and certainty of the law be destroyed by evidence so loose and indefinite as this. The practice of carrying a deck-load is, indeed, abundantly proved. And it may also be admitted to be proved that if the shipper consents to his goods being carried on deck, the master will not be liable for any loss or damage that is occasioned by the dangers of the seas. But this is no more than follows from the general principles of law, independent of any special custom. Modus et conventio vincunt regulam. In any case, if the owner consents to his goods being carried on deck, the master will be exempted from his responsibility. But when we come to the principal question, that which constitutes the essence of the custom, if there be one departing from the general rule, that is, whether the master is authorized to carry goods on deck when the parties in entering into the contract are silent on that subject, then we find that the witnesses disagree. The preponderance of the testimony is against the custom. But in order to prove such a custom as is allowed to have the force of law, it is not enough to show that the act, which it is pretended that the custom authorizes, is sometimes, or is often done; you must go further, and show that the right to do it is so generally recognized that a fair presumption arises that the parties, in forming their engagements, silently assent to it, and tacitly agree that their rights shall be determined by the custom. No such general understanding is proved in this case. The evidence, therefore, entirely fails in establishing the custom set up by the respondents. The con-

sequence is, that the rights and obligations of the parties must be determined by the general law. That clearly is, that if the master carries goods on deck, without the consent of the shipper, he is personally responsible, and through him the ship, for any loss or damage the goods may sustain from being thus exposed; and if it becomes necessary, from stress of weather or the dangers of the seas, to sacrifice the deck-load for the common safety, this does not present a case for contribution or general average, but it is the particular loss of the master, it having been occasioned by his own fault. The vessel being bound for the acts of the master, the decree must be that she is liable to the shippers for the loss of their goods.

It is suggested that the vessel will be insufficient to pay all the claims against it. That being the case, it will be necessary to marshal the debts according to the order of preference in which they are privileged. When all the debts hold the same rank of privilege, if the property is not sufficient to fully pay all, the rule is that the creditors shall be paid concurrently, each in proportion to the amount of his demand. But when the debts stand in different ranks of privilege, then the creditors who occupy the first rank shall be fully paid before any allowance is made to those who occupy an inferior grade. Among privileged debts against a vessel, after the expenses of justice necessary to procure a condemnation and sale, and such charges as accrue for the preservation of the vessel after she is brought into port (1 Valin, Comm. 362; Code de Commerce, No. 191), the wages of the crew hold the first rank, and are to be first paid. And so sacred is this privilege held, that the old ordinances say that the savings of the wreck are, to the last nail, pledged for their payment. Consulat de la Mer, c. 138; Cleirac sur Jugemens d'Oleron, art. 8, note 31. And this preference is allowed the seamen for their wages, independently of the commercial policy of rewarding their exertions in saving the ship, and thus giving them an interest in its preservation. The priority of their privilege stands upon a general principle affecting all privileged debts, that is, among these creditors he shall be preferred who has contributed most immediately to the preservation of the thing. 2 Valin, Comm. 12, liv. 3, tit. 5, art. 10. It is upon this principle that the last bottomry bond is preferred to those of older date, and that repairs and supplies furnished a vessel in her last voyage take precedence of those furnished in a prior voyage, and that the wages of the crew are preferred to all other claims, because it is by their labors that the common pledge of all these debts has been preserved and brought to a place of safety. To all the creditors they may say, Salvam fecimus totius pignoris causam. The French law (Ordinance de la Marine, liv. 1, tit. 14, art. 16; Code de Commerce, 191) confines the priority of the seamen for their wages to those due for the last voyage, in conformity with the general rule applicable to privileged debts, that is, that the last services which contribute to the preservation of the thing, shall be first paid. But this restriction is inapplicable to the engagements of seamen in short coasting voyages, which are not entered into for any determinate voyage, but are either indefinite as to the terms of the engagement and are determined by the pleasure of the parties, or are for some limited period of time.

Case No. 10,709.

PARASSEL v. GAUTIER.

[2 Dall. 330.][1]

Circuit Court, D. Pennsylvania. 1795.

BAIL—ACTION IN FEDERAL COURT AFTER DISCONTINUANCE IN STATE COURT—WHEN REQUIRED.

[1. It is not a sufficient reason for refusing to hold a defendant to bail in a federal court, that he had been discharged on common bail in an action for the same cause in a state court, which had subsequently been discontinued, where it does not otherwise appear that the change of forum was for purposes of vexation.]

[2. The merits of a controversy will not be examined upon a question of bail, further than to ascertain if a reasonable cause of action is shown.]

[Cited in Parkhurst v. Kinsman, Case No. 10,761; Graham v. Dominguez, Id. 5,664.]

A capias had issued in this suit, returnable to the present term; but previously to the return of the writ, there had been a hearing before Judge Peters, at his chambers, upon a citation to shew cause, why the defendant should not be discharged on common bail; the judge had ordered bail to be given; and the defendant had appealed from this order to the court. The merits of the appeal were now discussed; and, independent of some circumstances relating to the origin of the debt (which the court said ought not to weigh upon a question of bail[2]) the material facts appeared to be these: An action had been instituted in the supreme court of Pennsylvania, between the same parties, for the same cause; and on a hearing before Chief Justice M'Kean, the defendant was ordered to be discharged on common bail. From that order the plaintiff did not appeal; but afterwards applied by motion to the supreme court, for a rule upon the defendant to enter special bail. This the court refused; because they would not take cognizance of the subject, but by

[1] [Reported by A. F. Dallas, Esq.]

[2] Patterson, Circuit Justice. If you make it a question of fraud in the original contract, or in the assignment, the court cannot enquire into it, upon a question of bail. We cannot travel into the merits of the controversy. It would be, in effect, a pre-adjudication of the cause. The principle that must govern such preliminary investigations rests here; if a reasonable cause of action is shewn, the defendant ought to be held to bail.

way of appeal from the decision of the chief justice; and the proper time for making such an appeal had elapsed. Under these circumstances, the plaintiff discontinued his action in the state court, and brought the present action here. It also appeared that the plaintiff (who was a foreigner, ignorant of our laws) had not originally employed an attorney to appear before Chief Justice M'Kean, though the person that then attended him, pretended to have a competent knowledge of legal proceedings.

M. Levy, for plaintiff, contended that bail ought to be given. Nothing short of a judgment, can be a perpetual bar in personal actions; and, therefore, the certificate of a discharge on common bail by the chief justice of Pennsylvania, was not binding upon the judge of this court, who had given a different order. The person, character, and legal talents, of that judge could not be taken into view. The justices of the courts of common pleas possess a concurrent jurisdiction without possessing a spark of his jurisprudential knowledge; and yet if his discharge is conclusive, so likewise must theirs be.[3] Actions are often commenced after non-suits; and, it is clear, that the second court is not bound, in such cases, nor even in cases where a decision may have been had on the merits, by the opinion of a first court. It is true, that every species of vexation should be discountenanced; but every mistake ought not to be interpreted into an act of vexation. The plaintiff was ill-advised in the mode of presenting his case to the chief justice of Pennsylvania; and, considering his ignorance of our laws, he ought not to lose the benefit of bail, by the laches of his agent, in not pursuing the technical form of an appeal. Nor is the discontinuance of the former action, under these circumstances, to be imputed to him as matter of malice and persecution. If the plaintiff's motive was originally just and commendable, to recover a bona fide debt, the allegation of any subsequent impropriety must be manifested by some fact: now, if he was ever fairly entitled to hold the defendant to bail, the discharge can furnish no ground to accuse the plaintiff of vexation for endeavouring, by various means, to accomplish that object; and, after the state court had refused to interpose, he must either abandon that object, or discontinue his suit, and resort to another tribunal. A man may commence a suit as often as he pleases; and may hold his debtor twenty different times to bail, if any reasonable cause can be assigned for so withdrawing and renewing the process of the law. No argument to the contrary can be founded on 2 Wils. 381; for bail was there refused on the second action, because it had not been asked in the first. Vexation must flow from a worse source than ignorance, or accident: it is generally instigated by malice; and always characterized by vigilance. In the present case, there is no symptom of malice; and the want of vigilance has alone produced the plaintiff's embarrassment.

Mr. Du Ponceau, for defendant, admitted, that when a discontinuance took place, without any vexatious design or effect, either in consequence of a mistake in the nature of the action, or of an attorney's slip in the form of conducting it, bail might be ordered in the second action, for the same cause: But he contended, that when a question has been decided by one tribunal, another tribunal of co-ordinate jurisdiction will not take cognizance of it, except in the regular course of a judicial appeal. He urged, likewise, that the circumstances of instituting and discontinuing an action in the state court, were prima facie evidence of vexation, that required a better explanation and excuse than have been given; and to these he added the change of the tribunal. But he particularly insisted, that the neglect of appealing from the order of Chief Justice M'Kean, was his own laches, which he ought not to be allowed to remedy by transferring the suit to another court, at the expense of his antagonist. 2 Wils. 381.

Before PATTERSON, Circuit Justice, and PETERS, District Judge.

PATTERSON, Circuit Justice. The grounds of vexation in this case do not appear to me to be such as to justify the refusal of bail; and every case of this nature must be decided upon its own circumstances. I shall always, indeed, be a friend to the practice of holding to bail, wherever there is a probable cause of action. Here the cause of action is apparent; and though it may be liable to a reasonable controversy, or may be refuted upon a trial, we ought not to investigate the merits at this stage, further than to ascertain what probability there exists in support of the plaintiff's claim. The neglect to appeal from the order of the chief justice of Pennsylvania, which eventually occasioned the discontinuance of the first suit, appears, likewise, to be a mere slip of the attorney; and if we can, consistently with the law, prevent the plaintiff's suffering in consequence of that slip, I think we ought to do it.

PETERS, District Judge. On the hearing before me, I perceived, that there had been a lapse in not bringing the first suit formally before the state court; and I was desirous of putting the question on the same footing here, as if an appeal had been regularly instituted there. I entertain a high

[3] Patterson, Circuit Justice. The certificate of the Chief Justice of Pennsylvania is produced as evidence of vexation, on the part of the plaintiff; and not to bind the judgment of the court.

respect for the opinions of the chief justice of Pennsylvania; and, on this occasion, I am disposed to think, that the plaintiff's inability to state his case in the absence of his attorney, or the defect of proof at the time, occasioned his issuing the order for discharging the defendant on common bail. But, as the matter appears to this court, I perfectly concur in the sentiments, which have been delivered by Judge PATTERSON.

The order to hold the defendant to bail, was, accordingly, affirmed.

Case No. 10,710.

PARET et al. v. BRYSON et al.

[2 West. Jur. 351.]

District Court, N. D. Georgia. Oct. 23, 1868.

PARTNERSHIP—RELEASE OF ONE PARTNER FROM A FIRM DEBT—CONSTRUCTION.

1. Although by the common law the release of one partner, or of one of two or more joint or joint and several debtors, operates as a release to all of them, yet this rule does not apply where the release extends to the individual liability only of the party released to the creditors, and does not affect his liability to his co-partners for contribution or otherwise.

2. The court cannot construe such an instrument with reference to a foreign statute, unless the intention of the parties to be governed by such statute is evident from the instrument itself, without the aid of extrinsic evidence.

Hoge & Sprayberry, for plaintiffs, citing New York statute of April 18, 1838; 1 Hill, 135; 5 Hill, 461; Van Reimsdyk [Case No. 16,871]; 19 Wend. 390; 21 Wend. 424; 8 Term R. 112; 2 Dana, 107; 15 Ga. 570; 2 Brod. & B. 38.

Calhoun & Son and Collier & Hoyt, for defendants, citing in argument 8 Bac. Abr. 246, 276; Code Ga. §§ 2810, 2811; Story, Partn. 115, 116; Story, Const. 996, 997; 9 Bing. 341; Colly. Partn. 606; 1 Rawle, 391; 20 Ga. 415; 3 Salk. 298; 1 Bos. & P. 630; 4 Adol. & E. 676; Smith, Mer. Law, 88, 89; 3 Johns. 68; 18 Johns. 459; 13 Mass. 148; Joy v. Wurtz [Case No. 7,555]; 12 Ga. 552; [Smith v. Richards] 13 Pet. [38 U. S.] 42; [Boyce v. Edwards] 4 Pet. [29 U. S.] 111; 31 Ga. 210; Story, Confl. Laws, §§ 241, 280, 388, 414; 5 Hill, 461; 1 Hill, 185.

ERSKINE, District Judge. Henry Paret and Brother, citizens of New York, in the state of New York, brought assumpsit against Thomas M. Bryson, Thomas M. Beaumont, and John R. Wallace, partners, using, as is alleged in the declaration, the firm name and style of Bryson & Beaumont, on five promissory notes, amounting in the aggregate to $3,609.20. The notes bear date first September, 1860, were made in New York, and payable successively at four, five, six, seven, and eight months, to the order of the plaintiffs at the Georgia Railroad Banking Agency, at Atlanta, Georgia, with current rate of exchange. Non est was returned as to Beaumont. Each of the other defendants pleaded nil debet. Plaintiffs, instead of demurring, took issue thereon. Bryson also specially pleaded a release to himself; and Wallace specially pleaded the release of his co-partner in discharge of his own liability. To these special pleas, plaintiff demurred. Joinder in demurrer. The writing obligatory, which was set out totidem verbis in the body of each of these special pleas is as follows: "Whereas, the firm of Bryson & Beaumont are indebted to us, Henry Paret & Brother, in about the sum of $3,756.92, without interest, which indebtedness occurred while the said Bryson & Beaumont were carrying on business in Atlanta, Georgia, under the said firm name, etc.; now, in consideration of $939.33, to us in hand paid by Thomas M. Bryson, we hereby remise and release the said Thomas M. Bryson from all and every individual liability to us, incurred by reason of such connection with such co-partnership firm. Witness our hands and seals this September 22, 1865. Henry Paret & Bro. [Seal] Witness: John A. Doane."

For the plaintiff it was insisted that the writing does not possess the attributes of the common-law deed of release. Also, that the plaintiffs intended to relinquish no right except as to Bryson and his individual property; and that the instrument, though executed and delivered in New York, is not, by the laws of that state, a discharge of Beaumont or Wallace; and counsel rely on a statute of New York entitled, "An act for the relief of partners and joint debtors," passed in 1838. This law provides that after the dissolution of any co-partnership firm, any member of the late firm may make a separate compromise with any of the creditors, and that this shall operate as a discharge of him, and of him only. And he shall take from the creditor a note or memorandum in writing, exonerating him from all and every individual liability incurred by reason of such connection with such firm; but this shall not discharge the other co-partners, nor impair the right of the creditor to proceed against such members of such firm as have not been discharged. And the compromise or composition "shall in nowise affect the right of the other co-partners to call on the individual making such compromise for his ratable portion of such co-partnership debt, the same as if this law had not been passed." Such is a very brief synopsis of so much of the statute as it is essential to direct attention to in passing upon this case. Vide Laws N. Y. 1838, p. 243.

Counsel for plaintiffs having argued that the instrument was based upon the statute of 1838, it was then contended for defendants that, if such were the fact, it could have no extra-territorial force; that the notes being payable here, it was a Georgia contract;

and also, that the remedy to enforce the payment of the notes must be according to the lex fori. It was further insisted on the part of defendants generally, but more especially on behalf of Wallace, that the writing transcribed into the pleas is a technical deed of release; and Wallace invokes the general rule of the common law—which is also the law of Georgia, (Code, § 2800)—that the release of one joint promissor or co-obligor is, by operation of law, a discharge of all the other co-debtors. To this it was replied by counsel on behalf of plaintiffs that, if the contract executed in New York was not governed by the statutory enactment of that state, then the court would give effect to the actual intent of the parties; citing and relying on Solly v. Forbes, 2 Brod. & B. 38.

Since hearing the very able arguments in this case, a doubt has suggested itself to my mind whether the writing pleaded as a release by Bryson and Wallace, respectively, can, from its own language, be judicially considered as founded upon the New York statute. Such intention may have been in the mind of the plaintiffs, and also in that of the defendant, Bryson. But is this intention made manifest? Can it be gathered from the instrument itself?—for it cannot be collected by the aid of extrinsic evidence. A part of the second section, as was remarked by counsel for plaintiffs, is incorporated into the instrument. It says: "We remise and release the said Thomas M. Bryson from all and every individual liability to us, incurred by reason of such connection with such co-partnership firm;" but there is no reference to the statute itself—nothing on the face of the instrument indicating that the parties executed it under the authority of the statute—nothing to guide, to warn, or to encourage Wallace in his defense. On reference to the statute it will be seen that it provides that the debtor shall take from the creditor "a note or memorandum in writing, * * * which note or memorandum may be given in evidence by such debtor under the general issue, in bar," etc. From this it would seem that the legislature in enacting this law did not contemplate the giving of a writing of the legal dignity of a release. See observations of Bronson, J., in Bank of Poughkeepsie v. Ibbotson, 5 Hill, 461.

I am clearly of the opinion that even if the plaintiffs and the defendant, Bryson, at the time of the making of the deed, had the statute in view, and intended to place it within that governing power, such intention does not appear on the face of the deed. Therefore, as was contended for the defendants, it must, I think, be construed under the guide of the common law. And it may here be remarked, that if the instrument were interpreted and controlled by the statute, and the argument of the learned counsel sound that it has no force beyond the territory of the state of New York, the consequence would be that neither Bryson, though released there, nor Wallace, could successfully plead the release in discharge of the debt, when sued here. In the case of Seymour v. Butler, 8 Cole (Iowa) 304, as found in 20 U. S. Dig. 831, it was ruled that "a release of one of two partners and joint makers of a promissory note, made in New York and payable at Galena, which provides expressly for the release of such partner only, will not be held to release his co-partner." The parties to the release acted under the authority of the New York statute. In bringing this instrument before the court for judgment, it was optional with each of the defendants to plead it according to the legal effect which he deemed proper to place upon it; or, without doing so, to merely recite it in hæc verba, and refer its operation to the court. Each chose the former mode. Although, by the common law, it is well settled—at least, as a general rule—that the release of one partner, or one or two or more joint, or joint and several debtors, operates as a release of all of them; yet this, like other rules, has its exceptions, and courts of justice will be ever astute to fall in with, and give effect to, these exceptions, whenever the parties have manifested such intention in the contract, and it does not violate any of the fundamental rules of the policy of the law. Solly v. Forbes, 2 Brod. & B. 38; Couch v. Mills, 21 Wend. 424; North v. Wakefield, 13 Q. B. 536.

The first two of these cases, and some others which I shall notice, were cited and discussed in argument. Solly v. Forbes: In this case, the plaintiffs entered into a writing obligatory with Ellerman, the partner of the defendant, Forbes, and in consideration of £600 in hand paid by Ellerman, and also of twenty-four promissory notes of £100 each, the plaintiffs remised and released Ellerman from all actions, suits, &c.; provided, nevertheless, it should not release any claims which the plaintiffs had or might have against Forbes, separately, or as a partner of Ellerman; and also that it should be lawful for plaintiffs to prosecute any suits against Ellerman, jointly with Forbes, or against Ellerman, to recover payment of the debt due and owing from Forbes & Ellerman to plaintiffs as aforesaid. The plaintiffs brought an action against Forbes & Ellerman, declaring on the money counts. Pleas; by Forbes, the general issue; issue thereon. By Ellerman, general issue, release, and set-off. Replication to plea of release; demurrer thereon and joinder in demurrer. The court effectuating the intent of the parties, overruled the demurrer. Whether the court meant to adjudge the writing obligatory, a release, or a covenant not to sue, does not clearly appear in the decision. But Parke, B., in Kearsley v. Cole, 16 Mees. & W. 128, said, that in Solly v. Forbes the deed was held to be a covenant not to sue. Bronson v. Fitzhugh, 1

Hill, 185: The only question which can be said to have been decided in that case, was that the legal effect of a sealed contract can not be varied by a contemporaneous written contract of a lower degree. In the case of Bank of Poughkeepsie v. Ibbotson, supra, the plaintiff had executed to Tappan, one of its stockholders, a general and unqualified release. Defendant moved for a nonsuit on the ground that the release of one stockholder operated as a release of all of them. The motion was overruled and the case was carried to the supreme court, where the ruling of the court below was sustained. Bronson, J., speaking for the supreme court, said: "Where several persons are bound by a joint, or joint and several obligation, the unqualified release of one of the obligors will operate as a discharge of all of them." It was further held, that the stockholders were under a several and not joint liability, and, therefore, that the rule did not apply in such cases. The next case presented was Couch v. Mills, 21 Wend. 424. This case was anterior in time to the last two, but subsequent to Solly v. Forbes. After suit instituted against the makers of several promissory notes, the plaintiff, by a writing under seal, covenanted and agreed, in consideration of $500 to him paid by Talmage, one of the defendants, that he would not, at any time thereafter, sue or levy on the property of Talmage; and in case any proceedings were had, continued, or prosecuted, that the said writing should be deemed, to all intents, and purposes a release to him, Talmage. Plaintiff continued to prosecute the suit; whereupon Mills, another defendant, pleaded puis darrein continuance, that the writing was and became an absolute release to him, also. But the court —Nelson, Ch. J., delivering the decision—was of a different opinion, holding that it was manifest, from the whole scope of the instrument, that it was not intended to have the operation and effect of a technical release upon the subject matter of the suit. And in the concluding paragraph of the opinion, the chief justice said: "The main ground is, that to construe it into a technical release of all, would be carrying the obligation beyond the obvious intention of the parties. If it has been intended to be so understood, more direct and pertinent language would have been used, clearly indicating the intention to embrace all the promissors."

In Couch v. Mills, the language used in the instrument is, in the most material part, similar to, and, in my judgment, of like import with that in the instrument in the case now before the court. There, the plaintiff, in consideration of $500 paid to him by Talmage, one of the defendants, covenanted and agreed with him that if he, the plaintiff, continued or prosecuted the action against Talmage, the writing should be deemed, to all intentions and purposes, a release to him. Here, the plaintiffs, in consideration of $939.33 paid to them by Bryson, did remise and release him from all individual liability to them, incurred by reason of such connection with the said co-partnership firm of Bryson & Beaumont. To neither of these writings obligatory were any of the other defendants parties. Only one other case will be noticed—North v. Wakefield, 13 Q. B. 536. It was decided in 1849, ten years after Couch v. Mills. The plaintiffs brought debt on a promissory note for £1,000, made by defendant, payable to the plaintiffs. Among other pleas of defendant, he pleaded that the note was the joint and several note of himself and one Goddard, and that after the making of the note, the plaintiffs, by a deed-poll, and without the consent of the defendant, released Goddard and thereby then released defendant from the same. On the trial, defendant proved a deed-poll, executed by the plaintiffs and others, by which, in consideration of a composition of four shillings in the pound on their respective debts paid by Goddard, they released him from the payment of their several and respective debts. The deed contained a proviso that the release should not operate to invalidate, prejudice or affect any other securities given or payable by Goddard, together with any other person or persons, jointly or severally, and whereby any other persons might have become liable as security for Goddard, but that the said several creditors of Goddard should and might execute the deed without prejudice to such securities as to the claim thereon against surety &c. It was admitted that the sum placed opposite to the plaintiffs' names in the deed included the amount of the promissory note then sued on. Pattison, J., in delivering the judgment of the court, said: "Now the deed contained an express clause that the release to Goddard should not operate to discharge any one, jointly or otherwise liable to the plaintiffs for the same debts. It is plain, therefore, that it did not release the defendant. The reason why a release to one debtor releases all jointly liable, is, because, unless it was held to do so, the co-debtor, after paying the debt, might sue him who was released, for contribution, and so in effect he would not be released; but that reason does not apply where the debtor released agrees to such a qualification of the release as will leave him to any rights of the co-debtor."

By three of the cases referred to—Solly v. Forbes, Couch v. Mills, and North v. Wakefield—it is quite well established that where several are bound by a joint, or joint and several contract, a creditor may release one and reserve his action against the others. In the first and third of those cases, the reservation of the remedy was expressly provided for. In Couch v. Mills, the saving of the action against Mills was not made in direct and express terms; it rested upon negative construction. And Nelson, C. J., said: "The language of the instrument, as set forth, is undoubtedly very particular; but it is mani-

fest from the whole scope of it that it was not intended to have the operation and effect of a technical release upon the subject-matter of the suit, but only to protect the rights of the covenantee, which may be done by a cross action, if he suffers." So in the case at bar; the plaintiffs, after stating the indebtedness of the co-partnership firm to them, in consideration of a sum of money to them by Bryson then paid, release him from all and every individual liability to them (the plaintiffs) incurred by reason of such connection with such firm.

The question is, does the writing as set forth, constitute a bar to the action, as to all or any of the partners, co-makers of the notes? I am of the opinion that it was meant to release Bryson, but not Beaumont nor Wallace. It was to extend to Bryson's individual liability only—no farther; it did not discharge him from his liability as a partner; his interest in the assets of the social concern is still bound; nor did it release him from answering to any suit at law or in equity which his co-partners may institute against him for contribution or otherwise, if they or either of them pay more than a proportionate share of the debt. Such, doubtless, was the intention of the parties to the instrument; and that intent is, in my judgment, effectuated by the language of the instrument itself. The contract between the plaintiffs and defendant Bryson was, briefly, this: Pay us a certain sum of money, and we will look to the partnership assets, so far as they may be sufficient, for the residue of the debt; and if they fall short, we bind ourselves not to hold you further; making no stipulation, however, as to your accountability to your co-partners.

There must be judgment for the plaintiffs on each of the demurrers. The clerk will award a venire, as well to try the issues of fact joined upon the other pleas, as to inquire of the damages upon the issues in law in the pleas demurred to.

Case No. 10,711.

PARET v. TICKNOR et al.

[4 Dill. 111;[1] 16 N. B. R. 315; 5 Cent. Law J. 328.]

Circuit Court, E. D. Missouri. Sept. Term, 1877.

BANKRUPTCY—COMPOSITION—EFFECT AS TO SECURED CLAIMS.

1. A composition at twenty-five cents on the dollar was effected under section 17 of the act of June 22, 1874 (18 Stat. pt. 3, p. 178). In the statement of liabilities presented to creditors' meeting plaintiff's claim was represented as fully secured by deed of trust on real estate worth more than the amount of the debt. Plaintiff, being also an unsecured creditor, attended the composition meeting, but did not in any way participate in it, nor dissent from the representation there made as to the value of his security. Long after the composition had been recorded and carried out by the debtors, plaintiff sold the real estate under the deed of trust, and a large deficit was left unpaid. In an action to recover such deficit, *held* the composition did not, per se, extinguish plaintiff's claim, but that he was entitled to twenty-five per cent of final deficit, no matter when ascertained.

[Cited in Re Hazens, Case No. 6,285. Approved in Cavanna v. Bassett, 3 Fed. 217; Ransom v. Geer, 12 Fed. 608; Flower v. Greenebaum, 50 Fed. 192.]

2. Quære, whether this result would have been changed, even if, in the course of the composition proceedings, the bankruptcy court, at the instance of all the parties, had caused the security to be appraised, and had decided it to be ample to cover the debt?

The case was as follows: Action on notes. Defendants [Myron Ticknor and others] pleaded in bar that they had effected a composition in bankruptcy, in manner provided by act of congress; that plaintiff [John Paret] was duly notified of the various meetings and attended the same; that in the statement of liabilities, plaintiff's claim was represented, as plaintiff knew, as fully secured by deed of trust on real estate worth more than the amount of debt; that plaintiff did not dissent or object to such valuation, but acquiesced therein; and that it took all their unpledged assets to pay the composition to the unsecured creditors. Plaintiff demurred to the answer.

John R. Shepley and Henry M. Post, for plaintiff, cited In re Bestwick, 2 Ch. Div. 485, affirming same case, 1 Ch. Div. 702.

Nathaniel Meyers, for defendants, claimed that the provisions of the English composition act (32 & 33 Vict. Law J. St. 1869–70, p. 287), under which In re Bestwick was decided, differed materially from the act of congress, and cited also In re Lytle [Case No. 8,650], In re Becket [Id. 1,210], and In re Comstock [Id. 307].

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

MILLER, Circuit Justice, orally delivered the opinion of the court, in substance as follows:

Paret was a creditor of Ticknor & Co., against whom proceedings were instituted in bankruptcy. Those proceedings resulted in a composition, under the statute on the subject, by which Ticknor & Co. agreed to pay to their creditors a certain percentage of their debts—25 per cent. Paret was named in the schedule of their creditors, and had notice of the meeting of creditors on this proposition. Ticknor & Co. stated in this schedule that Paret was a fully secured creditor. To this Paret seems to have made no reply in any way, and to have made no objection or given any consent to the compromise. After this, Paret sold the real estate which was the security for his debt, and there re-

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

mained a considerable balance unpaid of the debt. He brings this suit to collect that balance. It is contended by his counsel that he is entitled to recover all of the debt that was not covered by the sale of the property which was his security. It is contended by counsel for Ticknor & Co. that they were fully discharged by the composition proceedings of any claim on account of that debt.

We are of opinion that the law of the case lies between them. I am of opinion myself that the compromise provisions of the bankrupt act design that every creditor shall receive the same proportion of his debt; and I am of opinion, as regards the parties who shall receive, that the secured creditor is a creditor for that purpose for all that is not satisfied by his security. And I am of opinion that whenever this fact is ascertained, even after the compromise, that remainder constitutes a debt against the bankrupt, of which he shall pay the same proportion to that creditor that he has paid to the unsecured creditors.

It is here urged very strongly—and the argument is very well put, and it is about the only argument I think worth noticing specially—that Paret, having notice of these proceedings, having notice that the bankrupts had scheduled him as a fully secured creditor, and having taken no exception to that statement, is bound by it. I think Mr. Meyers (defendants' counsel) considers it an adjudication of the bankruptcy court, or at least considers it conclusive against the plaintiff that his claim was fully secured. I do not take that view of it. I think it probable, but I am not sure about it, although it is my impression now, that if any adjudication had been made, and either of the parties had brought to the court the question, so that it could be decided whether the security was a sufficient security, and if it was not a sufficient security, for what sum beyond it Mr. Paret had a claim, and that matter had been adjudicated, that that would have been an end of the transaction, and that in the compromise order the bankrupt would not have been compelled to provide for the 25 per cent, or for the difference. And if it was decided by the court to be a fully secured debt, and the bankrupt had let it go in that way, then the bankrupt would have parted with all his claim to the property, and the creditor would have accepted it in full payment of the debt. It would have been a judicial settlement of the transaction, in which the bankrupt would be divested of any right to the property, and the creditor would be divested of any further claim personally against the bankrupt. But this was not done, and it follows, I think, that neither of these results was attained. Ticknor & Co. retained an interest in that property, and before Paret had finally foreclosed his rights in it they could have redeemed it; and if it had been worth ten times the debt, they would have had the right to redeem it, and have the advantage of the full value above the debt, from the fact that it remains unadjusted. And so Paret gets advantage of the fact that it remains unadjusted. He can foreclose whenever the proper time comes, or whenever by law he will be obliged to do it, and if the property sells for less than his debt he can make Ticknor pay, not the whole of the difference, but 25 per cent of it, if the composition is carried out; and if it sells for more than the debt, Ticknor & Co. will be entitled to the surplus.

What would have been the result if the parties had formally agreed in writing that the security was ample, we are not called on to say, but we are of opinion that the mere silent acquiescence of the creditor, his mere failure to dissent, does not affect his claim.

The demurrer, however, goes to the entire answer [and as the answer does set up a good defense for all but 25 per cent. of the deficit],[2] it must, therefore, be overruled.

Judgment accordingly.

NOTE. Subsequently, before Dillon, Circuit Judge, and Treat, District Judge, the plaintiff took judgment for the full amount of the note, with a provision that it might be satisfied by the payment of the 25 per cent, if the composition was carried out; if not, then the judgment to stand for the full amount.

Case No. 10,712.

In re PARHAM et al.

[17 N. B. R. 300.][1]

District Court, E. D. North Carolina. March 15, 1878.

BANKRUPTCY — SURRENDER BY PREFERRED CREDITOR—RIGHT TO VOTE FOR ASSIGNEE.

P. & D., being insolvent, made an assignment of all their copartnership property to A., their largest creditor, upon which they were adjudicated bankrupt. At the first meeting of creditors, A., having sold out the partnership goods and collected its notes and accounts in part, appeared before the register and offered to surrender to him a roll of unaccounted bills as the net proceeds of the fraudulent preference, to prove his debt and vote for assignee. *Held*, that the surrender of a fraudulent preference can only be made to the assignee, and pending his appointment and qualification the proof of debt must be postponed, and the offer of the preferred creditor to vote for assignee be denied.

P. A. Dunn & Co., of Baltimore, creditors of the bankrupts, whose preference was the basis of the petition and adjudication of bankruptcy, appeared at the first meeting of creditors, and by their counsel offered to surrender to the register the effects still remaining in their hands in specie, together with the net proceeds of sale under the fraudulent assignment, and asked leave to prove their debt and vote for assignee, which offer and

[2] [From 5 Cent. Law J. 328.]

[1] [Reprinted by permission.]

request were refused by the register; and thereupon the following questions were stated and agreed upon by the counsel for the respective parties, to be certified by the register to the district judge for his opinion thereon: First. Has a creditor whose preference has been adjudged fraudulent a right to surrender to the register the proceeds of his preference, a part in specie, and a part the proceeds of sales and collections effected by him? Second. Has such creditor at such meeting the right to prove his debt in full, or only for a moiety thereof? Third. If he has a right to prove at the first meeting, has he a right to vote for assignee? It is admitted: First. That the preferred creditors, P. A. Dunn & Co., were not parties in the proceedings instituted against Parham & Dunn, in which they were adjudicated bankrupts; that no recovery was had, and no suit was or had been instituted against P. A. Dunn & Co. about or concerning the property of the bankrupts; but that the said P. A. Dunn & Co. came forward and offered to surrender to the register every species of property, or the proceeds arising from the sale and collection thereof, which they have received at the hands of Parham & Dunn. Second. That the said P. A. Dunn & Co. did actively resist the adjudication of bankruptcy of the said Parham & Dunn, employing counsel, paying expenses of witnesses, etc., and instigating and carrying on the resistance made to the prayer of the petitioning creditors, ostensibly by J. H. Dunn, one of the bankrupt firm, and in the name of said firm, for the purpose of preventing the assignment made to them by said bankrupts from being impeached, and desired in making said surrender to retain in their hands out of the proceeds of sales made by them an amount sufficient to reimburse them for their outlay in making such resistance.

By A. W. SHAFFER, Register:

This is a proceeding in involuntary bankruptcy, and the act of bankruptcy charged was the fraudulent assignment by the bankrupts of all their estate, both real and personal, including a stock of merchandise, notes, and the book accounts of the bankrupt firm to P. A. Dunn & Co., to secure the debt which they now seek to prove and vote upon for assignee, to the amount of eight thousand four hundred and sixty-nine dollars and ninety-three cents. They have sold the merchandise in part at auction and in part in ordinary course, and collected some portion of the notes and open book accounts. It is admitted that, after the fraudulent transfer, Junius H. Dunn, the member of the bankrupt firm who made the fraudulent transfer during his partner's illness and without his assent, became the agent of these creditors for the sale of the goods and the collection of the debts due the bankrupt firm so fraudulently transferred, and that while so acting as the agent of these creditors he took an inventory of the stock of merchandise so transferred, in the interest of these creditors, amounting to two thousand nine hundred dollars or thereabouts, at original Baltimore cost. These creditors do not offer to surrender under this inventory, taken by themselves alone, but only the net proceeds of sales after deducting the cost, expenses and disbursements of such sales and collections, to wit, the sum of one thousand seven hundred dollars or thereabouts.

The unsecured creditors claim: First. That the surrender, if made, must be made upon the basis of the inventory, subject to a rigid scrutiny into the whole proceeding subsequent to the transfer. Second. That actual fraud was committed by P. A. Dunn & Co., and per consequence they may prove for a moiety only. Third. That the surrender of a preference, when it cannot be made in specie, can only be made to an assignee, who alone has power to determine the amount due the estate by the vendee of a fraudulent transfer.

With all deference to the learned counsel who stated and agreed upon the questions hereby certified, I submit that, stripped of all redundant matter, the controlling question is: Can a creditor who has received a fraudulent preference surrender the same to the register before the election of an assignee? If he can, then the right to prove his debt in full and vote for assignee must undoubtedly follow in natural sequence. That they might have surrendered to the marshal who executed the warrant of seizure against the estate of the bankrupt is doubtless true, for he was the legal custodian of the estate pending the appointment of an assignee; but that such a surrender would have been a full settlement, binding upon the assignee, and restoring these creditors to all the rights and privileges of bona fide unsecured creditors, as claimed by their counsel in the argument of this cause, is by no means conceded. The wisdom of that provision of law which authorizes the postponement of proof of a doubtful claim until the appointment of the assignee was clearly demonstrated in this case. The meeting at which the offer to surrender and prove was made was the first meeting of creditors, called for the proof of debt and the choice of an assignee, a proceeding which no collateral matter should be permitted to interrupt or delay. This claim was contested at every salient point, and to determine its truth and justice would have consumed the time of the court in a long and exhaustive investigation into a stated account, running through several years, of mutual debt and credit. The tender made in surrender was a roll of uncounted money, unaccompanied by any schedule or statement of the disposition of the property, or the sources from whence the money was derived, whereby the register might judge whether it was or was not "a full surrender of all property, money, benefit, or advantage received by them under such

preference." No adjudication had been made upon the question of actual fraud on the part of P. A. Dunn & Co. in receiving the fraudulent preference, whereby the register might determine whether the creditors were entitled to prove their debt in full, or only a moiety thereof; and even if, in an ordinary case, a register might temporarily receive the surrender of a preferred creditor, from one who tenders it in good faith, unimpaired and in specie, without opposition, such a receipt could not conclude or bind the assignee beyond a credit of the amount so received by the register and transferred to him, nor could it affect the standing rights or privileges of the party so surrendering, in the court.

The supreme court of the United States have taken the precaution to amend the fifth rule of general orders in bankruptcy, inserting a proviso therein as follows: "Provided, however, that, by the surrender of a bankrupt mentioned and referred to in this order and in the act [of 1867 (14 Stat. 517)] in that behalf, is intended and understood a personal submission of the bankrupt himself for full examination and disclosure in reference to his property and affairs, and not a surrender or delivery of the possession of his property." And the words "and in the act in that behalf" in the above paragraph quoted refer to section 5084, Rev. St., and is as follows: "Any person who . . . has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of the act . . . shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit or advantage received by him under such preference.

I have devoted to this question much more careful consideration than the case seems to me to require, because of the eminent learning and acknowledged authority of the Baltimore counsel for these creditors, in whose views I have not been able to concur. I am of the opinion that the surrender of a fraudulent preference can only be made to the assignee, and that pending his appointment and qualification the proof of the debt on account of which the preference was given must be postponed, and the offer of the creditor receiving the preference, to vote for assignee thereon, denied. And I have ordered accordingly.

Geo. Badger Harris, for P. A. Dunn & Co.

A. W. Tourgee and W. H. Young, for the estate.

BROOKS, District Judge. The questions certified by Mr. Register Shaffer, herewith filed, are examined and considered by the court, and the rulings of the register, are in all things approved and affirmed.

Case No. 10,713.

PARHAM v. AMERICAN BUTTONHOLE, OVERSEAMING & SEWING-MACH. CO. et al.

[4 Fish. Pat. Cas. 468; 3 Leg. Gaz. 121; 1 Leg. Gaz. Rep. 145; Merw. Pat. Inv. 671.] [1]

Circuit Court, E. D. Pennsylvania. April, 1871.

PATENTS — POWER TO GRANT REISSUE — SHUTTLE DRIVER OF SEWING MACHINE—ABANDONED EXPERIMENTS—COMBINATION.

1. The power of accepting the surrender of the original patent, and of granting a reissue of it, is confided exclusively to the commissioner, and is to be exercised judicially by him.

2. The presumption is, that he has exercised it lawfully, and that the reasons for which alone its exercise could be invoked have been sufficiently shown to exist.

3. As a corollary from this, his decision is final, and is to be treated as foreclosing all inquiry into the existence or sufficiency of the facts which are prescribed as necessary to authorize him to grant a reissue.

4. Fraud, even, will not warrant a re-examination of his decision, at the instance of an alleged infringer.

5. The only ground on which the allowance of a reissued patent is open to objection is, that the commissioner has exceeded his authority, in granting a reissue for an invention different from the one embraced in the original patent.

6. If the original and reissued patent are for the same invention, the latter, with the new specification and description, is to be substituted for the old as the evidence of the patentee's title, and of the nature and object of his invention.

7. Differences in the description and claims of the old and the new specifications are not the tests of substantial diversity, but the description may be varied, and the claim restricted or enlarged, provided the identity of the subject-matter of the original patent is preserved.

[Cited in Herring v. Nelson, Case No. 6,424; Kerosene Lamp Heater Co. v. Littell, Id. 7,-724.]

8. Nor is the alleged discrepancy to be determined by a reference exclusively to the two specifications; the drawings and model filed with the original specification are also proper subjects of consideration, and are often of decisive weight.

[Cited in Reissner v. Anness, Case No. 11,-688.]

9. The omission in a reissued patent of an element of a combination claimed in the original, constitutes no tenable objection to the reissue.

[Cited in McWilliams Manuf'g Co. v. Blundell, 11 Fed. 420; Buffington's Iron Bldg. Co. v. Eustis, 13 C. C. A. 143, 65 Fed. 806.]

10. A claim in the following words, "so forming and constructing the shuttle-driver of a sewing machine, that while it performs the required duty of driving the shuttle, it serves to maintain the latter in the desired proximity to the plate C," is not a claim for functions in the abstract, but the form and construction of the driver are the gravamen of the claim.

[Cited in Henderson v. Cleveland Co-operative Stove Co., Case No. 6,351.]

11. Rendered with reference to the whole specification and the model, it imports a claim

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 671, contains only a partial report.]

for a shuttle-driver constructed with a surface upon which the shuttle rests, and is carried with the driver in its oscillation, and formed with a bevel in this surface, whereby the shuttle, by its own weight or gravity, is caused to impinge upon the face-plates.

12. Where there had been no satisfactory trial of prior machines, and the persons interested in them laid them aside for years, and thus indicated a judgment against their practical utility, the court but enforces a logical sequence in assigning them to the category of unsuccessful and abandoned experiments.

[Cited in Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co., 54 Fed. 693; Washburn & Moen Manuf'g Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 Sup. Ct. 447.]

13. The reasons given for the opinions of experts are the proper tests of their comparative weight.

14. The evidence must establish clearly the priority of a completed and useful machine over that of the patentee, or it is unavailing—to doubt upon this point is to resolve it in the negative.

[Cited in Hawes v. Antisdel, Case No. 6,234; Miller v. Smith, 5 Fed. 364. Cited in dissenting opinion in the Driven Well Cases, 16 Fed. 411. Cited in McDonald v. Whitney, 24 Fed. 602; Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co., 54 Fed. 693.]

15. If the description clearly indicates the method of the use of the thing claimed, and its relations to the other mechanical elements operating with it, a claim for a combination of part of them is good, although it may not embrace some that are essential to the operative efficiency of the combination.

16. Certainly a combination to be valid must have the attribute of practical utility, but this is not to be determined by a reference to the abstract practicability of the elements claimed to compose it. Resort must be had to the whole specification, and if it is therein properly described, its relations to co-operative mechanism indicated and explained, and the method of its use in connection therewith directed, and when so used is practically operative, it is a good combination, and will support a restricted claim for it.

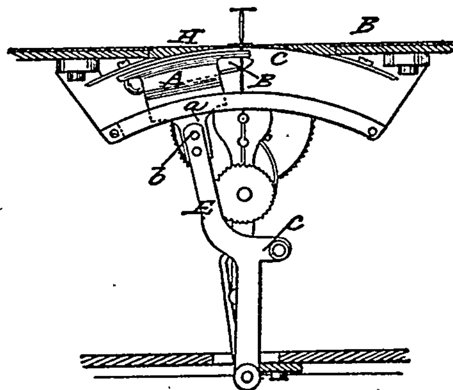
17. Letters patent for "improvement in sewing machines," reissued to Charles Parham, November 3, 1868, examined and sustained.

This was a bill in equity, filed [by Charles Parham] to restrain the defendants from infringing letters patent for an "improvement in sewing machines," granted to complainant November 21, 1854 [No. 11,971], reissued November 3, 1863 [No. 1,562], and extended for seven years from November 21, 1868. The invention related to improvements in the mechanism for driving the shuttle of a sewing machine, and their nature is well set forth in the claims of the original and reissued patents, which were as follows:

Original patent: "The shuttle carrier and driver A, forming the bearing or seat for the shuttle B, during its travel, as well as the guide for it on that side coming in contact with the thread loop formed by the needle, and freely admitting of the passage of the shuttle through the loop when said carrier is arranged and combined for operation, together with the needle and the guide-plate C, or its equivalent, on the needle side of the shuttle, whereby the shuttle is relieved from all friction or rubbing, bearing on its thread side of the loop, the thread is prevented from being soiled by lubricating material, and increased freedom of action is given to the shuttle."

Reissued patent: "(1) So forming and constructing the shuttle-driver of a sewing machine that, while it performs the required duty of driving the shuttle, it serves to maintain the latter in the desired proximity to the plate C, as set forth. (2) The combination of the driver A, shuttle B, and stationary plate C, the whole being formed and arranged substantially as described, so as to retain the shuttle during its flight in its proper position, for the purpose specified."

[Drawing of reissued patent No. 1,562, granted November 3, 1863, to C. Parham, published from the records of the United States patent office.]



George Harding, for complainant.

Theodore Cuyler and Charles B. Collier, for defendants.

Before STRONG, Circuit Justice, and McKENNAN, Circuit Judge.

McKENNAN, Circuit Judge. The complainant is the grantee in letters patent, dated November 21, 1854, for an improvement in sewing machines, in pursuance of an application filed August 3, 1853. These letters were surrendered and reissued November 3, 1863, and, November 20, 1868, the reissued patent was extended for seven years from the date of its expiration. Of the reissued and extended patents the respondents are alleged to be infringers, and the complainant, therefore, in his original and supplemental bills, prays for an injunction against them, and for an account.

The respondents set up three grounds of defense: First. That the surrender and reissue of the original letters patent "were not made by reason of, or on account of, any such inadvertency, accident, or mistake, as is contemplated by the acts of congress in that behalf, and that such surrender and reissue were not in accordance with said acts, but in violation thereof, and for the purpose of modifying the description and claim in

the original specification of said letters patent, in a manner, to an extent, and for a purpose contrary to and in violation of the true intent and meaning of said acts in that behalf; and that said reissued patent is not for the same invention intended to be secured by the said original patent." Second. That the complainant is not the first and original inventor of the improvements claimed by him. Third. That they have not committed any infringement of the complainant's patent.

1. By the act of congress of 1836 [5 Stat. 117], the commissioner of patents is authorized to accept the surrender of a patent and reissue it for the residue of its unexpired term, when it shall be inoperative or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or shall have a right to claim, as new, if the error has or shall have arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention. The power of accepting the surrender of the original patent and of granting a reissue of it is here confided exclusively to the commissioner, and is to be exercised judicially by him. The presumption then is, that he has exercised it lawfully, and that the reasons for which alone its exercise could be invoked have been sufficiently shown to exist. As a corollary from this his decision is final, and is to be treated as foreclosing all inquiry into the existence or sufficiency of the facts, which are prescribed as necessary to authorize him to grant a reissue. Fraud even will not warrant a re-examination of his decision, at the instance of an alleged infringer. Railroad v. Stimpson, 14 Pet. [39 U. S.] 458; Stimpson v. Railroad, 4 How. [45 U. S.] 484; Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 797. In Seymour v. Osborne, 11 Wall. [78 U. S.] 516, Mr. Justice Clifford, delivering the opinion of the court, says: "When the commissioner accepts a surrender of an original patent and grants a new patent, his decision in the premises, in a suit for infringement, is final and conclusive, and is not re-examinable in such suit in the circuit court, unless it is apparent upon the face of the patent that he has exceeded his authority, that there is such a repugnacy between the old and the new patents that it must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent." Battin v. Taggert, 17 How. [58 U. S.] 83; O'Reilly v. Morse, 15 How. [56 U. S.] 111, 112; Allen v. Blunt [Case No. 216].

The only ground, then, on which the allowance of a reissued patent is open to objection is, that the commissioner has exceeded his authority, in granting a reissue for an invention different from the one embraced in the original patent. If both are for the same invention, the decision of the commissioner is unimpeachable, and the reissued patent, with the new specification and description, is to be substituted for the old as the evidence of the patentee's title and of the nature and object of his invention. Differences in the description and claims of the old and the new specifications are not the tests of substantial diversity, but the description may be varied, and the claim restricted or enlarged, provided the identity of the subject-matter of the original patent is preserved. Within this range, whatever change is required to protect and effectuate the invention is allowable. Battin v. Taggert, 17 How. [58 U. S.] 84. Nor is the alleged discrepancy to be determined by a reference exclusively to the two specifications: the drawings and model filed with the original specification are also proper subjects of consideration, and are often of decisive weight. Seymour v. Osborne, 11 Wall. [78 U. S.] 516.

Testing the patents here by these principles, we are then to inquire what the patentee's invention is. It is generally described as "an improvement in sewing machines." In the specification attached to the original letters patent, it is stated to consist "in the shuttle carrier and driver, constructed substantially as shown and described, and forming the bearing or seat of the shuttle, during its travel, as well as the guide for it on that side coming in contact with the thread loop formed by the needle, and freely admitting of the passage of the shuttle through the loop when the said carrier is arranged and combined for operation, together with the needle and with the guide plate or its equivalent on the needle side of the shuttle essentially as set forth, whereby the shuttle is relieved from all friction or rubbing, bearing on its thread side of the loop, the thread is prevented from being soiled or injured by lubricating material, and increased freedom of action is given to the shuttle as specified." There may be a lack of methodical exactness in this statement of the patentee's invention —although this was a matter for conclusive adjudication by the commissioner—but it is sufficiently definite to indicate his intention to claim, first, a shuttle carrier or driver, so constructed as to perform specific functions, and second, this shuttle carrier, a needle, a shuttle, and a guide or face plate, combined so as to accomplish the described effects. This is more clearly illustrated by the mechanism of the complete machine, filed with the original application in 1853. We there find a shuttle carrier constructed to perform the functions of supporting the shuttle and of carrying it backward and forward with the vibrations of the carrier, and with a peculiar conformation of the surface on which the shuttle is borne, to wit, a bevel or inclination of it toward the face plate, by which a gentle impact of the shuttle upon the face plate is caused; a face plate with a vertical groove, in which the needle passes, but without any transverse race or groove to

serve as a support for the shuttle, or a guide for the carrier; and a shuttle adapted to the conformation of its seat. Here there are distinctly shown the constituents of the patentee's alleged invention—the mechanical device, claimed by him as new, and its combination with other elements, constructed and arranged to produce new and useful results.

In the amended specification, upon which the reissue is founded, the patentee's invention is claimed to consist: "Firstly. In so forming and constructing the shuttle driver of a lock-stitch sewing machine, that while it performs the required duty of driving the shuttle, it serves to maintain the latter in the desired proximity to the guide plate, as described hereafter. Secondly. In the combination of a driver, shuttle, and stationary guide plate, the whole being formed and arranged substantially as described, so as to retain the shuttle in its proper position during its flight."

This comparative reference to the old and new specifications is all that is needed to show that the subject-matter of both is the same invention—the same mechanism and combination of mechanical devices, indicated in the "original specification, drawings and patent office model," are described in the amended specification; and like functions are attributed to, and the same effects are claimed for both. The amended specification has the merit of greater conciseness and precision in the description of the invention, and in the methodical and separate definition of the patentee's claims. An amendment of such a character is within the statutory warrant, and has the sanction of express adjudication. In Carver v. Braintree Manuf'g Co. [Case No. 2,485], it is held "that a specification may be defective not only in omitting to give a full description of the mode of constructing a machine, but also in omitting to describe fully in the claim the nature and extent and character of the invention itself. Indeed, this latter is the common defect, for which most renewed patents are granted." And in Woodworth v. Hall [Id. 18,016], Mr. Justice Woodbury says: "The amendment is not because the former patent was void, as seems to be the argument, but was defective or doubtful in some particular, which it was expedient to make more clear. But it is still a patent for the same invention."

It is true that in the original specification the needle is made an element of the combination claimed by the patentee, and that it is no part of the combination described in the second claim of the amended specification. But this omission constitutes no tenable objection to the reissued patent, for the reason stated by Judge Story in Carver v. Braintree Manuf'g Co., supra, "that an inventor is always at liberty, in a renewed patent, to omit a part of his original invention, if he deems it expedient, and to retain that part only of his original invention which he deems fit to retain. No harm is done to the public by giving up a part of what he has actually invented, for the public may then use it; and there is nothing in the policy or terms of the patent act which prohibits such restriction." Battin v. Taggert, supra.

As both patents here were for the same invention, the modification of the description and claims of the original patent does not effect the validity of the reissued patent. In this connection it is proper to consider the argument touching the construction of the first claim of the reissued patent. The counsel for the respondents insisted, that it is to be interpreted as a claim for the abstract functions of the shuttle carrier, and therefore void, or that it is to be treated as only a duplication of the second claim, in which the combination, consisting partly of the carrier, is described.

Undeniably the mere function of a machine is not a patentable subject; but it is just as clear, that a mechanical device, adapted to perform specific functions, is, whether its operative efficiency depends upon its combination with other mechanism or not. The novelty and utility of such device are the tests of its patentable merit. Its possession of these qualities entitles its inventor to the protection of the patent laws, and this can be as effectually secured by making it the subject of a separate claim in a patent for an auxiliary combination also, as by making it the sole subject of a distinct patent. [Hogg v. Emerson] 11 How. [52 U. S.] 587; Root v. Ball [Case No. 12,035]; [Evans v. Eaton] 3 Wheat. [16 U. S.] 517, 518. If the complainant, then, was the inventor of a shuttle carrier, which by its form, or any other mechanical adaptation, is productive of a useful result, he might embody a separate claim for it in his specification, along with another claim for a combination, of which it is an element. Has he done so? We think this can be plainly shown. The specified functions of the carrier are, first, to furnish a bearing surface upon which the shuttle is to be supported and carried or driven along with it in its flight, and second, to keep the shuttle in proper proximity to the face plate. How are these functions to be effectuated? Obviously by the mechanical form and construction of the carrier. Now is not this what the claim precisely indicates? It is not to be read, "I claim, as my invention, the functions for my carrier of driving the shuttle and maintaining it in the desired proximity to the face plate," as it ought to be, if the functions in the abstract are claimed. But it is to read in its own words, as a claim for so "forming and constructing a shuttle driver," that it will perform the functions specified. The form and construction of the driver are the gravamen of the claim. Rendered with reference to the whole specification and the patent office model, it imports a claim for a shuttle driver construct-

ed with a surface upon which the shuttle rests, and is carried with the driver in its oscillation, and formed with a bevel in this surface, whereby the shuttle by its own weight or gravity is caused to impinge upon the face plate.

In Winans v. Denmead, 15 How. [56 U. S.] 330, a patent for a railroad coal car was sustained, whose distinctive patentable quality was its conical form, the effect of which was to equalize the pressure of the load, etc. Mr. Justice Curtis, in delivering the opinion of the court, says: "Patentable improvements in machinery are almost always made by changing some one or more forms of one or more parts, and thereby introducing some mechanical principle or mode of action not previously existing in the machine, and so securing a new or improved result." So here, if the shuttle carrier was distinguished only by the conformation of the shuttle seat, the complainant would be entitled to a patent for it, and the first claim in the specification would be well supported by it.

2. As to novelty. The complainant's invention is alleged to have been anticipated by several similar inventions, but as the machines devised by E. D. Leavitt and John P. Emswiler were chiefly relied upon in the argument to show this, it is only necessary to notice them. They are three in number, and are respectively designated as the Fisher, the Fisher-Wickersham, and the Emswiler machines.

The proofs in the case very clearly show, that Parham's invention was perfected about the beginning of the year 1852, and that, for a considerable period before that, he was engaged in getting up his plans. From working drawings, then furnished by him, sewing machines embodying his improvement were constructed, the identity of some of which has been traced down to the hearing; and they were in successful and steady use for many years. The completeness and practical utility of his invention are thus demonstrated. Of these facts there is ample and uncontradicted proof, and in the face of it we can not, on a mere argumentative trial of his invention, adjudge it to be inoperative and valueless.

The Fisher machine (Exhibit No. 1) was made by Fisher in the early part of 1850, and was the model from which the Fisher-Wickersham machine (Exhibit No. 2) was constructed by Wickersham in the latter part of the same year. They are substantially the same in the principle of their operation, the only notable difference between them consisting in this, that in the first the movement of the shuttle is in the arc of a circle, and in the latter in a horizontal line.

Their history is somewhat extraordinary. The first one was made by Fisher, and he never saw it in practical operation. It was made for E. D. Leavitt, and the only use he knew or "thought" was made of it is stated in his answer to the thirty-eighth cross-interrogatory propounded to him: "I think samples were sewed by it, enough to show the working of the principle; but very little." It was delivered to Wickersham, as a model for a duplicate, and remained in his shop at the Mechanic Mills, at Lowell, until 1857, when it was disentombed from the attic of that establishment, and carried to Boston to Martin and Rufus Leavitt, by whom it had been purchased. To them it belonged when the proofs were taken. At no time, during all this period, was it employed in any operative use, except as stated by E. D. Leavitt.

The Fisher-Wickersham machine was delivered to E. D. Leavitt in October, 1850, and he sewed with it a pair of pants and a jacket for a small boy, and a pair of pants for a larger boy. It was kept most of the time until April, 1857, in a small room up stairs in his house, when it also was sold to Martin and Rufus Leavitt for $200; but no use was made of it during this time, not even by Leavitt's wife in making clothing for their children. When the Leavitts got it it was boxed up and only taken out to be used in a lawsuit in Baltimore, after which it was returned to the box, and remained there until it was reproduced in this case.

Now what was the operative merit of these machines in the estimation of their inventor, makers, and various owners, as indicated by their conduct, rather than by the less reliable guide of their opinions? At the time when they were made the country had learned the great value of the sewing machine, and inventive skill was stimulated to devise improvements in its mechanism, by which its effectiveness might be increased and popular favor attracted. Is it, then, within the range of probability, that the proprietors of an invention, from which, if successful, large profits might flow, would so soon have cast it aside, if the trial to which it was subjected had proved its practical utility? No further effort was made to test its merits, no patent was applied for, and it was only rescued from entire oblivion for a reason in no wise importing its capability of successful and useful operation. While, therefore, there has been no satisfactory trial of the efficiency of these machines, and the persons interested in them have thus indicated so decided a judgment against their practical utility, we but enforce a logical sequence in assigning them to the category of unsuccessful and abandoned experiments.

But while these machines were thus thrown into disuse, they were carefully preserved by Martin and Rufus Leavitt, on account of their supposed effectiveness as evidence to protect the infringement of analogous inventions. This is the only value the Leavitts attached to them, and so they were kept from 1857, until they were used in a suit at Baltimore and now again in this case. How far they are available for that purpose here, we are now for a moment to consider.

In reference to what are called "race ma-

chines," in which the shuttle is carried and rests in a grooved channel, it is only necessary to say that they are manifestly essentially different from Parham's. In Parham's machine are found a vertical face plate, with no groove for a tongue in the shuttle to move in, a tongueless shuttle sliding in contact with it, supported on the under side by the surface on which it rests and by which it is carried backward and forward, this bearing surface and the under surface of the shuttle having corresponding bevels. These elements are not embodied in the Fisher machines, as the respondents' expert, Wickersham, testifies, and is plainly shown by an inspection of the machines themselves. Herein, then, are important mechanical differences between them; but when the functions to be performed and the effects sought to be accomplished by this mechanism are considered, these differences are shown to be substantial.

It is essential to the operative efficiency of a lock-stitch sewing machine that the shuttle should be so adjusted to the face plate, that it will pass through the loop in the needle thread, and thus, by the engagement of its thread with the loop, the lock-stitch be formed. This effect is produced in Parham's machine by the beveled form of the upper surface of the carrier and the under surface of the shuttle, and this, co-operating with the weight or gravity of the shuttle, keeps it in the desired contact with the face plate, along the grooveless surface of which the shuttle is guided.

While the carrier then performs the functions of supporting and carrying the shuttle along with it, its peculiar conformation, and its combination with the shuttle and face plate, produce these effects, viz: the necessary impact of the shuttle on the face plate, the retention of the shuttle in its proper lateral position during its flight, the reduction of the friction of the shuttle upon the face plate, and the avoidance of lubrication by which the thread is soiled.

Now it seems clear to us that these effects, all of which are useful results, even if they are conceded to be produced by the Fisher machines, are accomplished by different mechanical agencies and in different degrees. Their shuttle carrier is constructed with two upright elastic arms, from the inner face of the top of which two pins project, which are inserted in corresponding holes made in the back of the shuttle. Upon these pins the shuttle is supported, and its contact with the face plate is caused by the pressure of the arms upon its back. Tongues are formed on the needle face and at each end of the shuttle, to move in a transverse groove in the face plate, the function of which "is to keep the point of the shuttle in its proper position on the face plate, as it flies back and forth." The carrier here performs the office of carrying the shuttle with it in its flight, and, at the same time, of supporting its vertically—as is done in Parham's machine—although it is not altogether clear that this latter office is not partly performed by the ledge in one and the transverse grooves in both machines. But here the similitude ceases. Distinct and dissimilar mechanical forces are employed to cause and maintain the contact of the shuttle with the face plate. In the one, it is produced by the form of the shuttle seat, co-operating with the gravity of the shuttle; in the others, by the elastic pressure of the supporting arms, exerted directly upon the back of the shuttle. In the one, the proper position of the shuttle is preserved by the combined form and arrangement of the carrier, shuttle, and face plate; in the others, by a transverse groove or channel, co-operating with the tongues in the shuttle. In the one, only such friction is caused as is due to the mere weight of the shuttle, resting loosely against the face plate; in the others, is the superadded pressure of the elastic arms directly upon the shuttle, causing an attrition of it, which is plainly visible upon its needle face. In the one, the exposure of the thread to soiling is avoided by a grooveless face plate; in the others, it is subjected to the risk of this by the necessity of lubricating the grooves in which the shuttle vibrates. These are notable differences, and they are sufficient, in our judgment, to disprove the identity of these several machines, either in the effects produced by them, or in the principle of their operation.

Like differences, to some extent, distinguish the Emswiler from the Parham machine, although there are more points of resemblance between them. For one who had no practical knowledge of mechanics, and had never seen a sewing machine, as Emswiler says was the case with him, his machine certainly evinces considerable ingenuity, although a patent for it was refused. Its shuttle carrier consists of a single upright elastic arm, to which is attached at the top an oblong bed or cradle, and which is open only on the needle side of it. In this bed the shuttle is confined and rests, and is carried with it in its motion. It has a vertical face plate, without a longitudinal groove. The shuttle carrier here performs the functions of supporting and driving the shuttle, and of placing and maintaining it in contact with the face plate. But the agency employed to produce and preserve this contact is as different from Parham's as in the Fisher machines. In Parham's machine, as already said, it is caused by the form of the shuttle seat, co-operating with the weight of the shuttle; in the Emswiler, by the direct and continuous pressure of the carrier's arm and the shuttle bed upon the shuttle and face plate. That the friction is greater, where the shuttle bed and shuttle are thus pressed and held against the face plate, than where the shuttle rests loosely by its own weight against it, is plain. Here, then, are not only differences in form, affecting the production and value of results obtained, but differences in

the forces applied, and in principle of operation.

Wide differences of opinion exist among the expert witnesses as to the practicability of a machine constructed with a shuttle carrier like Emswiler's—the reasons given for these opinions are the proper tests of their comparative weight. Judging them by this standard, the opinion of True, one of complainant's witnesses, is entitled to special consideration. As the contact of the shuttle with the face plate is necessary to make the shuttle take the loop, so there must be sufficient space between the shuttle bed and the shuttle to allow the loop thread to pass freely around the back of the shuttle. No provision is made to secure this contact, except the pressure of the shuttle bed upon the shuttle. One of two results, then, would follow, either the shuttle would not engage the loop, if it was not pressed against the face plate, or, if it was, the loop thread could not pass behind the shuttle, and, as stated by True, it would be broken. However that may be, the working values of the machine ought to be shown by satisfactory proof of its successful use. Such is not the character or effect of the evidence produced here. On the contrary, of the machines which Emswiler says he made, like the model exhibited, and sold for use, no trace could be found of any one of them, after diligent search by both parties, aided by the offer of a liberal reward. If they had proved to be practicable and useful, all knowledge of them would not have been so entirely lost.

But did Emswiler himself treat his machine as practically complete, and its shuttle carrier as anything more than an experiment, when his first model was filed? The distinct import of his correspondence with the patent office is, that he did not. And when he made his final appeal for a patent, it was upon the basis of a new model, showing his abandonment of the movable shuttle carrier, and the substitution for it of a race. The shuttle carrier was not, then, a determinate feature of his first machine.

The time when Emswiler embodied his ideas in the concrete form of a machine, adapted to actual use, the proofs leave us to fix by indeterminate probabilities. That he was engaged in experiments for several years is sufficiently proved, but that his "speculations had been reduced to practice, and a machine had been produced" by him before 1852, when Parham's invention was complete, would be an unsafe deduction from the testimony of witnesses, whose statements are not consistent, and whose recollection of dates especially is necessarily indefinite and unreliable, after the lapse of eighteen years. The evidence must establish clearly the priority of a completed and useful machine over the complainant's, or it is unavailing—to doubt upon this point is to resolve it in the negative.

3. Are the respondents infringers of the complainant's patent? If this question were to be answered by the testimony of the witnesses on both sides alone, we would be bound to say that the preponderance of it is against the respondents. For while all the experts examined for the complainant positively affirm it, they are substantially corroborated by several of the respondents' experts.

But an analysis of the disputed parts of the respondents' machine will strengthen this conclusion. They embody a shuttle carrier with a bevel in its surface where the point of the shuttle is intended to rest, constructed to support the shuttle from its under side, and so that it will be carried backward and forward by the surface on which it rests; a shuttle with a corresponding bevel on its under side at its point; and a vertical grooveless face plate. Now these are a counterpart of Parham's invention, and if they were all, there could hardly be a question about infringement. But it is claimed that the mechanism of Parham's and the respondents' machines is unlike in other essential particulars, and it was sought to show this by an argument of much logical ingenuity and acuteness. These features are said to consist: (1) Of a spring attached to the back of the carrier and operating upon the heel of the shuttle. (2) Of an upper clutch on the carrier, just over the top of the point of the shuttle, with its side surface inclining inwardly. (3) Of a latch attached movably to the carrier, and passing over the top of the shuttle and holding it down.

Of these in their order: First. It is necessary, to insure the passage of the shuttle through the loop, that the shuttle at its point should be in contact with the face plate. This is accomplished in Parham's carrier by the beveled bottom of its bearing surface cooperating with the beveled bottom of the shuttle. Does the back spring produce this effect, or is it the essential agent in producing it? If it is, the method is not Parham's, becauses the forces employed are altogether different. The spring operates upon the back end of the shuttle and so presses it forward. But in what precise direction? In a line exactly parallel with the face plate. If the surface of the carrier were level, then it is obvious that the pressure of the spring would not cause the shuttle to incline toward the face plate. But the shuttle presses upon the face plate. How, then, is this caused, if not by the spring? By the peculiar bevels of the carrier and the shuttle; and they are, therefore, the instrumental forces in producing the specific result. The spring, then, does not perform the function which the beveled form of Parham's carrier is adapted to effectuate. It is not a substitute for the bevel, and so its employment does not discriminate the means used by the respondents from those used by Parham to produce the effect aimed at by both.

The fundamental infirmity of the argument is in assuming that Parham's patent is only for a combination; and this characterizes it throughout. But it has been before shown

that his patent embraces a claim for a carrier, adapted by its form and construction to produce a certain effect, to wit: the "proximity" of the shuttle to the face plate. It is the essential mechanical instrumentality in the production of this effect. It is not the co-operative efficiency of the weight of the shuttle—and this is all that the spring is claimed to supply—that constitutes the patentable quality of the carrier, but it is its mechanical adaptation to produce the prescribed effect. As the spring does not furnish the force thus made available, it can not be regarded as varying the principle of operation.

It is said, though, that the spring serves to keep the shuttle in a proper position to make the bevels effective. That may be so, but it is only then auxiliary to the bevels, not essential to their specific efficacy. And if a better result is thus obtained, it is an improvement on Parham's carrier, in substituting an elastic for a non-elastic back, by which the shuttle is confined and upon which it impinges. But this improvement can give the respondents no right to use what the complainant invented.

These deductions are fully supported by the evidence on both sides. Singer, a witness for the respondents, describes the spring as keeping "the shuttle in position by holding it forward against the forward part of the carrier, so as to cause the shuttle, owing to the peculiar bevels of the shuttle and the carrier, to press toward the face plate; that is, to give the shuttle an inclination toward the face plate"—and that "it acts as a kind of cushion to receive the pressure of the shuttle in drawing in the stitch, which I believe is better than if the shuttle struck solidly against the back of the carrier." He also testifies that the respondents' machines have been used for as long as two months with the spring inoperative, but that they could not do good work with any certainty in that condition. And such is the substantial import of the testimony of other witnesses of the respondents. Chabot, a witness for the complainant, states the function and effect of the bevels substantially as Singer does, but he goes further, and says that he has worked the respondents' machine with the spring inoperative, and so successfully that he would dispense with it altogether.

The result of this evidence clearly is, that the spring exerts no essential agency in pressing the shuttle upon the face plate, but that this effect is caused by the bevels, and that at most the employment of the spring only improves the effectiveness of the bevels.

Second. As before stated, the respondents' carrier has a bevel in its surface, just under the point of the shuttle, and a corresponding bevel in the under surface of the shuttle. What were they put there for? We must assume that it was for some practical purpose. Their specific operation is to incline the shuttle toward the face plate. We must therefore conclude that they were intended to perform this function, as the only one appropriately pertaining to them. Now, this is the same mechanical adaptation employed by Parham; in other words, it is the same mechanical force used by him, applied in the same way, and to produce the same effect.

But the clutch at the top of the carrier has an incline inwardly in its upper side surface, and the shuttle has a corresponding incline in its surface coming in contact with the carrier. Incline is only another name for bevel, and the avowed design of these bevels is to direct the shuttle toward the face plate. They co-operate with the bevels in the under surface of the carrier and shuttle in performing this function, and they are therefore only auxiliary to the latter. In the Parham invention, the force of the bevel is applied at the bottom of the shuttle, but as the effect produced is the same, it is immaterial whether the force is applied at the top or the bottom of the shuttle. The identity of the mechanical instrumentalities used, and of the principle of operation, is thereby unaffected.

Third. The second claim in the complainant's specification is for a combination of the driver, shuttle, and face plate, "the whole being formed and arranged substantially as described, so as to retain the shuttle during its flight in its proper position, for the purpose specified." In the body of the specification it is stated that the shuttle "is confined in front by the plate C, at the back by the driver A, above by the arched plate H, and below by the ledge x of the driver."

It is insisted that, by reference to the description, the arched top plate is to be incorporated in the claim as an element of the combination, for the alleged reason that it is necessary to the action of the combination described; and when it is so incorporated, that the respondents are not infringers, because they use a latch instead of a top plate to hold the shuttle down.

The law imposes upon an inventor the duty of describing his invention in such full, clear, and exact terms, that any one skilled in the art can make and use it. The reason of this requirement is obvious. It is, that the exact character and purpose of the invention may be understood, and that the public may be enabled to construct and use it, after the expiration of the patent. Hence, where an entire machine is claimed, it is necessary to describe all the parts essential to its practical working and use. But where an addition to an existing machine, which is an improvement merely, is claimed, it is necessary only to describe the elements composing the improvement, with their relations to the other parts of the machine. And this is true of a combination, as well as of a single mechanical device. An inventor may define his invention in his claim as he thinks proper, but it must be capable of operation, when reduced to practice, as he proposes to use it. If the description clearly indicates the method of its use, and its relations to the other mechanical elements operating with it, a claim for a

combination of part of them is good, although it may not embrace some that are essential to the operative efficiency of the combination. In Forbush v. Cook [Case No. 4,931], Mr. Justice Curtis thus concisely states the law: "Nor is it requisite to include in the claim for a combination, as elements thereof, all parts of the machine which are necessary to its action, save as they may be understood as entering into the mode of combining and arranging the elements of the combination. If inclined wires are necessary to the action of the combination specified, so are many other parts of the machine, and all parts necessary to the action and combination specified might be said to enter into the mode of combining and arranging the elements of the combination, but need not be and ought not to be included in the combination claimed."

Certainly a combination to be valid must have the attribute of practical utility, but this is not to be determined by a reference to the abstract practicability of the elements claimed to compose it. Resort must be had to the whole specification, and if it is therein properly described, its relations to co-operative mechanism indicated and explained, and the method of its use in connection therewith directed, and, when so used, is practically operative, it is a good combination, and will support a restricted claim for it. All this the complainant has done. He has embodied in his second claim only the three elements before stated. In the body of his specification he has described them particularly, and has fully explained how they are to be used, in connection with other well-known parts of the sewing-machine, among them the top plate. And when so used, he has shown that they are practically operative. He has thus fulfilled the prescribed office of the specification, and has demonstrated, by actual and thorough trial, the utility of his invention as claimed. It is true the top plate is necessary to the successful operation of the combination. But it is not more so than is either the eye-pointed needle, the presser foot, or the feed wheel. As none of these, however, "enter into the mode of combining and arranging the elements of the combination," but are only auxiliary to its action, no one of them is to be interpolated in the claim, and so treated as an essential element of the combination. The complainant's combination, thus regarded, the respondents are shown to have used, and so they are infringers.

Upon the whole case, we are of opinion: That the letters patent reissued to the complainant are valid. That, so far as appears or is shown in this case, the complainant is the first and original inventor of the improvements described in the first and second claims of said patent. That the respondents have committed infringement of both said claims.

A decree will, therefore, be entered for an injunction and an account, as prayed for.

Case No. 10,714.

Ex parte PARIS.

[3 Woodb. & M. 227.] [1]

Circuit Court, D. Maine. Oct. Term, 1847.

MARSHAL—FEES—FOR SERVICE—AIDS—DUTIES COVERED BY PER DIEM ALLOWANCE.

1. A fee is allowable to a marshal as for "a service," when a writ or warrant is executed by him; but not otherwise. Charges for "aid" or assistance are allowed where the nature of the case renders it proper, and the amount claimed is shown to be reasonable.

[Cited in Jerman v. Stewart, 12 Fed. 274.]

2. A fee is allowed for a commitment, when made under an order of the court, or in execution of a mittimus, but not in other cases.

3. A fee is proper for a discharge when a prisoner is released entirely from custody; but not when brought into court for trial or testifying.

4. A charge for keeping prisoners, at seventy-five cents a day, when their board is paid for by the government, and they are in prison, and the court not in session, is inadmissible, either as reasonable or under any statute of the state of Maine.

5. An order to commit a witness for not recognizing in a criminal case to appear and testify, or for a contempt of court, need not be in writing and sealed; but it is best to enter it on the records, and a copy be taken by the marshal to file with the jailor.

6. Many of the duties performed by marshals during the sittings of courts, are considered as covered and paid for by the per diem allowance for attendance on courts, and must not be charged as independent services.

This was a claim by Virgil Paris, as marshal, against the United States, for certain fees and expenses connected chiefly with the indictments against Cyrus Libbey, tried here in July, 1846; though there were some other charges for other terms and other prisoners. The district judge declined to certify that a portion of the claims was legal, and the marshal being dissatisfied with his opinion, applied to the presiding judge of the circuit court to examine into the claims and objections, and certify to the allowance of the whole. This being in the nature of an appeal from the decision of the district judge, the facts and law were heard before Woodbury, J., in July, at the adjourned session of the May term, 1847, and an opinion given upon them, Oct., 1847. The particulars necessary to an understanding of the case will appear in that opinion.

Mr. Howard, for the marshal.

A. Haines, Dist. Atty., for the United States.

WOODBURY, Circuit Justice. The particular claims deemed exceptionable in this case, by the district judge, are those for "aid" in the service of a warrant to receive certain witnesses under arrest, from the marshal of the state of Massachusetts. Also, for "service" of an order to commit the same witness-

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

es when failing to procure recognizances for their appearance to testify, and for "commitment" of them under the same order. Also for "service" of an order to bring them into court and a "discharge" for the same when once more returned to prison, and for another "service commitment" and "discharge" under one and the same precept as often as the prisoners during the trial at the session of the court were remanded or brought up to testify under a verbal direction of the court. The marshal made a claim, likewise, for different fees, under an amended return, after the opinion of the district judge was given against the correctness of some of the charges already mentioned. The amended claim was in the words for "keeping said prisoners and attending court from September 6th, 1845, to April 6th, 1846, inclusive, 211 days at 75 cents for every twelve hours each, $3798," and $160.50 for keeping another prisoner from April 6th to July 22, 1846. And $1765.50 costs more for like duty from April 6th to July 22, 1846. All of these amounted to $5724.

The various charges first made are attempted to be justified on two grounds. One is by acts of congress, and the other, a settled usage supposed to exist in favor of those charges in other districts of this circuit. In respect to the acts of congress, there is no expression, which in terms covers the first charge for "aid" or assistance in executing a precept. But as such "aid" is often necessary and is so expensive as not probably to be intended to be covered under the fee for "service," and as it is understood to be customary to allow it in this state in the state courts under like circumstances, if shown to have been required, I should be disposed to certify what seemed to be reasonable on such evidence being produced. But, in this case, as the prisoners were only witnesses and not held for any crime, and were paid $1.50 per day during their detention, and boarded independently, it is not to be presumed, without strong positive proof, that they were anxious to escape and that their situation warranted any expensive "aid" to keep them safely. See, for such allowances to them, Act May 20, 1826 (4 Stat. 1749).

In relation to the next claim for several services and commitments and discharges under one precept, I understood that, by the amended return, it is mostly abandoned and thereby reduced to only one "service," "commitment" and "discharge" on one precept, but a charge substituted therefor of about $57.64, under a state law. State laws, by an act of congress, are to govern for duties performed by the marshal which are not specifically provided for by congress. See Act Feb. 28, 1799, § 1 (1 Stat. 624). Looking first then to the particulars so provided for, the charge for one "service" for one precept is of course proper. But in regard to the fee claimed for a "commitment" in the service of that precept, I entertain little doubt that the fee allowed in the act of congress for "service" is intended to cover the duty of commitment as a part of the service, when the service is made of an ordinary writ or warrant, by arresting and committing the party. The terms "commitment" and "discharge," as used in the statute, were meant to apply rather to "orders," and the commitment and discharge under these orders, than to imprisonment under a writ, or to the bringing up of a prisoner under a habeas corpus. The fee for service covers the execution of them usually. The fee for a "commitment" can therefore hardly be considered as a proper charge in other cases than an order, unless when a criminal is sent to prison under a final sentence and under what is called often in common parlance a "mittimus." So the fee for a "discharge" is not to be charged when a prisoner is merely removed from one place to another but not released or discharged from the custody of the marshal or of the law. In no sense can the term "discharge" apply to the mere bringing up of the prisoner to testify or to be tried. He is not by that discharged from the custody of the marshal or the custody of the law, or the liability and detention under the original order or precept for his commitment, but he is brought into court only for examination and other purposes connected with his imprisonment, and often without being released or discharged at all, and the marshal has per diem a compensation for that.

When the prisoner is brought up by a regular writ of habeas corpus, or imprisoned by a regular warrant, either of these acts is the "service" of the writs, and is to be paid accordingly. But doing either of these is not of course "a discharge" of the prisoner from custody, and a fee for such "discharge" is not permissible till he is allowed to go at large and is at liberty entirely. When merely bringing up prisoners, or sending them back, it is understood that in some districts of the United States, the courts issued formal warrants in writing, and signed and sealed to bring up parties or witnesses who are in custody, or to send them back, and however often this may take place to the same individual and for however short a period. When this practice is followed, the marshal can properly charge for a "service" of each of them, when serving them as required. But in districts where this practice is not followed, after a party or witness is once in prison and an order of the court is made to bring them up for trial or to testify, and another order is made to commit them during an adjournment, or during a session, when other business demands precedence, these orders are not writs nor warrants, and there is to be no fee as for the service of writs or warrants. Such orders may be sufficient to justify the marshal and jailor in conjunction with the original writ. And where no previous writ existed, and indeed in all cases, the clerk might well make an

entry of the order on the docket and record of the case, and give a copy to the marshal to be left with the jailor. That record usually suffices. In England such orders are usually parol. 1 Chit. Cr. Law, 73; Moore, 408; Still v. Walls, 7 East, 533. Though there, and probably here, a final commitment must be by written warrant, signed and sealed, and setting out the offence. 2 Hawk. P. C. c. 16; 1 Chit. Cr. Law, 109; 2 Hale, P. C. 122. Here, as there, however, arrests may often be made without such warrants; but if commitment follows, it is better always to have a written warrant, or a record made of the order and a copy of that sent with the prisoner, showing in writing the grounds of the imprisonment, to the jailor, who is here a separate, and in some degree, independent office from the marshal. 1 Chit. Cr. Law, 73.[2]

In respect to fees, however, an order of commitment, whether unwritten or written, is not such a writ or warrant as to allow a charge for "service" in executing it; nor can a "service" be allowed for a mere "commitment," under an order, when no warrant, whatever, actually issued, though it might have been expedient to issue one; or when only a verbal order was given,—the original written warrant still being in force. But for such a duty as the last, the fee for a "commitment" seems proper under the order to imprison, or, in other words, remanding the prisoner into close custody. The only plausible objection, then, to the allowance of this fee for a commitment, is that the duty is performed during the session of the court, and while he is paid a per diem for his services. It is argued that this prevents any compensation for such a special act, on the ground that it is covered by the general per diem pay of five dollars. That general fee for attendance on the court, would probably reach the keeping of peace and regularity during its sessions, taking care of prisoners in custody,—whether criminals or witnesses,—and executing the various orders of the court, about bringing them up, or into court. But where a "commitment" is one of these orders, it may be proper that the assigned fee for that should be paid in addition, though it happen during the regular term of the court, and by an order made in court. There are some reasons for it, though others exist against it; and I am not satisfied, fully, that it should be disallowed, considering that the statute expressly gives it as well as a per diem, though a "service" cannot be paid also in such cases, that being applicable to the execution of only writs and warrants, or executions, rather than mere orders. The amended return presents a still different claim and one of a very large amount. It is asked for by virtue of the act of March 3, 1841, which provides, that for items not specified in acts of congress, the same allowance shall be made as is made in the highest court of the state where the service is performed. 5 Stat. 427. A statute of Maine enacts, that "for the officers attending court and keeping the prisoner in criminal cases seventy-five cents for every twelve hours and in that proportion for a greater or less time." Rev. St. p. 646, c. 151, § 4.

The items, claimed under the state laws by the amended returns, amount to $5724. They do not seem to me to be covered by the language of those laws, or the practice of the state courts under them, or reasons growing out of the nature of the case. The language is, "for attending court and keeping prisoners," "seventy-five cents for every twelve hours." This law in words applies only to the keeping of prisoners during the session of the court. In practice it is understood to have been applied during sessions only to cases of justices' courts and other special ones, where no per diem for attendance is provided for, as it is provided in another part of the statute for other courts, and has never been extended beyond the session after the justice or special court adjourns, because the prisoner, after that, is either discharged entirely or committed to prison for safe keeping. So in the cases under consideration, the prisoners were committed or discharged upon the adjournment of the court; and if this statute applied to the ordinary courts and attendance on them at their ordinary sessions, it would furnish no ground for the allowance except during the session. But it has not been considered as applicable to such courts even during their stated regular sessions—as it is the duty of the sheriff to attend them, and receive for his services there $5 per day. Much less can it have been designed for a vacation of any court, when prisoners as here are kept in prison, and their board otherwise paid by the government during the whole time. A different construction would require a double payment or allowance for board. But it is urged that some special reasons exist in this case for the charge, in the fact that the jailor, though taking and boarding the prisoners, objected to being held responsible for them, and that the marshal was responsible in law during all the period. Nothing however is seen by me in the form of the original process or order, in this case, which would exonerate the jailor from his ordinary responsibility after having received the prisoners, and charging and being paid for their board. Nor do I see anything increasing the liability of the marshal here beyond what it is in cases generally. The original warrant or precept is under seal and in the usual form.

The subsequent orders to bring up the prisoners to testify, probably need not be under seal—in such a case—though they ought to

[2] "Where a party is in court, an usher may be put over him; but if he be out of view of the justices, he cannot be arrested without process." Year Books, 10 Hen. VII. pl. 17, p. 17; 27 State Tr. 1071.

be minuted by the clerk on the record. And it would be safe to give the marshal a copy of them when asked, as was done in Moor's Case—one of those under consideration. This could be left with the jailor, when wishing it. Prisoners like these in Libbey's Case are guilty of no crime, and are not under arrest usually by any warrant. They are in most cases committed in the presence of the court for a neglect or inability to procure recognizance. See Judiciary Act Sept., 1789, § 33 [1 Stat. 91]. An order is all which is needed by the marshal for his justification, when they are so committed; and he is compensated for committing them then by his general per diem, and the fee for a "commitment" under the order. If they were at first, as here, out of court, and taken into custody elsewhere, then his regular warrant which for that existed here, is his justification for that, and his fee for the "service" of it is his compensation for that duty. The prisoners, for most purposes, in either case, are in his keeping from the first arrest till the final discharge. They are held under the original precept, when one has issued, or under the original order of commitment in court, when put into custody in that way, or by the intermediate order of the court, from day to day, when such are issued. An order to bring the prisoners up is not to change that custody as regards the marshal, but merely the place of it, to the court-room, or before the judges, instead of the jail, where he may have before employed the jailor to aid him in this safe keeping. [Randolph v. Donaldson] 9 Cranch [13 U. S.] 76. The marshal is the officer to whom the United States look for the prisoners, though the state jails are authorized to be used by him, and if the prisoners are thus lost without his fault, he may be exonerated. Id. 76, 85. But it is in law still his keeping and his responsibility in all other cases, as much as in this.

In respect to the usage for allowance in like cases in other districts some inquiry has been made. In two districts where warrants to commit and writs of habeas corpus to bring up, are in all cases used on such occasions, a charge for the "service" of each of them when so issued and served, is of course, proper. But if another fee for a "commitment" or a "discharge" is also taxed in such a case, I think it is erroneous, as being in my view, proper only in the circumstances before mentioned. And in no district is there an allowance found for "service," except where a writ or warrant actually issued and was in fact, served; nor in any of them is a charge made and allowed by any state statute, such as is presented here by the amended return.

The conclusions on this matter, then, may be summed up as these. A fee for a "service" is allowed as a proper charge when any writ or warrant is executed, and for "aid," when it is necessary, and reasonable in amount. A fee is allowed for a commitment when a person is imprisoned under a final judgment, or under an order of the court, and once for every such order. And for a "discharge," a fee is also allowed where a prisoner is set at large, free from any custody, whatever. But none of these are allowed except in the cases enumerated as proper for each.

PARISH (DRESKILL v.). See Cases Nos. 4,075 and 4,076.

PARISH (OLIVER v.). See Case No. 10,500.

PARK (EMMA SILVER MIN. CO. v.). See Case No. 4,467.

PARK (KLEIN v.). See Case No. 7,868.

Case No. 10,715.

PARK v. LITTLE et al.

[3 Wash. C. C. 196; 1 Robb, Pat. Cas. 17; Merw. Pat. Inv. 310.][1]

Circuit Court, D. Pennsylvania. April Term, 1813.

PATENTS—ALARM BELL FOR FIRE ENGINE—AGREEMENT TO ASSIGN—NOVELTY—CERTAINTY IN SPECIFICATIONS.

1. Action for an infringement of the plaintiff's patent-right to alarm-bells for fire engines. The defendants opposed the claim, because the plaintiff had given the use of his invention to the Philadelphia fire company—that the invention is not an alarm-bell, as mentioned in the patent, nor a hose or fire engine—that their bells differ in principle with the plaintiff's.

2. The plaintiff, not having assigned the whole of his title and interest in the invention, and no deed of assignment being recorded in the office of the secretary of state, may recover, notwithstanding any agreement to assign.

[Cited in Wilson v. Rousseau, Case No. 17,832.]

3. The question, whether the invention is new, will be decided, not by the fact that bells are not new, but whether the mode of ringing them, by the motion of the engine, and not by manual action, is new.

4. The thing for which the patent is granted should be truly and fully described in the specification. The matters not disclosed must appear to have been concealed for the purpose of deceiving the public.

[Cited in Whitney v. Emmett, Case No. 17,585; Wilson v. Rousseau, Id. 17,832.]

[Cited in Rowe v. Blanchard. 18 Wis. 442.]

5. If an invention is an improvement in the principle of a machine for which a patent has been granted, it is not a violation of the patent—if it is an improvement in the form; it is such a violation.

[Cited in Re Boughton, Case No. 1,696.]

Action for the violation of the plaintiff's patent-right to alarm-bells for fire engines. The specification states the bell to be attached to a horizontal piece of iron, fixed into an upright elastic piece, the vibrations of

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the supreme court of the United States, under the supervision of Richard Peters, Jr., Esq. Merw. Pat. Inv. 310, contains only a partial report.]

which are regulated by a ball of four or five pounds on the top—the whole frame being fastened on the engine, and the bell made to ring by the motion of the wheels on which the engine is fixed. These bells were used on the Philadelphia fire hose engine, for whose use the plaintiff particularly intended it, for the purpose of informing the members, at night, where to find it. The defendants [Little & Wood] being members of another hose company, erected on that engine a frame somewhat like gateposts, with a post across, to which were suspended two bells, attached, like the house-bells, to a circular elastic spring. This is the alleged violation. The objections to the plaintiff's recovery were—1. That his counsel stated, in the opening, that plaintiff had given the use of his invention to the Philadelphia fire company. 2. That this is neither a new nor a useful invention. 3. That it is called, in the patent, an alarm-bell for a fire engine; whereas, it is not intended to give an alarm, but merely to distinguish the members of the Philadelphia company from other companies; and that a hose engine is not a fire engine. Some other objections were made to the specification. 4. That the bells used by the defendants are on an entirely different principle from those of the plaintiff.

WASHINGTON, Circuit Justice (charging jury). First point: The plaintiff is entitled to recover at law, no matter what private agreement subsists between him and any other person or persons, unless he has made a legal assignment and transfer of his interest in the invention: now, in this case, it does not appear that such an assignment has been made.

2. Whether this is a new and useful invention, you must decide. But the question is not, whether bells to give alarm or notice are new, but whether the use and application of them to fire engines, to be rung, not by manual action, but by the motion of the carriage, for the purpose of alarm or notice, is a new invention, or improvement of an old one? The power of steam is not new, and yet its application for propelling boats would be considered as such. Nevertheless, you must decide, on the evidence, whether the application of these bells to fire engines is new. As to the question of its utility, it is proved that the plaintiff has received fifty dollars from one fire company in Baltimore, for the privilege of using his invention; and the fire insurance companies of this city, by voting sums of money to the Philadelphia fire company, on account of their using them, is some evidence of their opinion.

3. This is called, in the patent, an alarm-bell; and so it certainly is, so far as it may give notice of a fire to the inhabitants, and to the members of the company of the engine to which they belong. A hose engine may as properly be called a fire engine, as any other used for extinguishing fire. It is true, that the thing for which the patent is granted should be truly and fully described in the specification; but if this is done, so as clearly to distinguish it from all other things before known, and so as to enable any person skilled in the art of which it is a branch, or with which it is most nearly connected, to make and use the same, it is sufficient—the matters not disclosed must appear to have been concealed for the purpose of deceiving the public, to invalidate the patent.

4. The last question is, have the defendants by the devising or using their bells, violated the plaintiff's right? The inquiries under this head are—1st. Are the defendants' bells, as used by them, an improvement of the plaintiff's? You have seen and tried both, and can decide. 2d. Is it an improvement in the principle or in the form? If the former, then it is no invasion of the plaintiff's privilege—if the latter, it is.

Verdict for defendants.

PARK (UNITED STATES v.). See Case No. 15,991.

Case No. 10,716.

PARK v. WILLIS.

[1 Cranch, C. C. 357.][1]

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

DEPOSITION—RIGHT TO TAKE—LIMITS OF RESIDENCE—BEYOND JURISDICTION.

1. The court will not permit a deposition taken, de bene esse, to be read in evidence, if the witness resides within one hundred miles of the place of trial, although his residence is out of the District of Columbia.

[Cited in Woods v. Young, Case No. 17,994; Lewis v. Mandeville, Id. 8,326.]

2. A deposition taken and filed by the defendant, may be read in evidence by the plaintiff, upon proof that the witness is beyond the jurisdiction of the court.

Special action on the case [by Park's administrator against Willis]—plea, not guilty. On the trial, the defendant objected to the reading of a deposition, because it did not appear that the witness might not attend personally. The residence of the witness was agreed to be at Fredericksburg, fifty miles only from Alexandria. No subpœna had been issued for him.

THE COURT refused to permit the deposition to be read. See Voss v. Luke (July Term, 1806) [Case No. 17,014]; Woods v. Young (July Term, 1806) [Id. 17,994]; Lewis v. Mandeville [Id. 8,326].

The plaintiff then offered to read a deposition of John Hand, taken by the defendant, and filed in the cause, after having proved that Hand sailed for Philadelphia about three weeks ago, and had not returned. No subpœna had been issued for him.

THE COURT permitted it to be read.

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

Case No. 10,717.

PARK v. WILLIS.

[2 Cranch, C. C. 83.][1]

Circuit Court, District of Columbia. Nov. Term, 1813.

SLAVERY—ACTION FOR CARRYING SLAVE AWAY—VIRGINIA STATUTE—AUTHORITY FROM OWNER.

By the Virginia law of 25th January, 1798, §§ 6, 7, a master of a vessel is liable to the owner of a slave for his loss, if he takes the slave out of the county of Alexandria, in the District of Columbia, without a written authority from his owner, or a compliance with the other requisites of that act; and a general hiring to the defendant for eleven months, without any limitation as to the nature or place of his employment, is not such a permission as the act requires, although the plaintiff knew that the defendant's occupation was that of a master of a vessel, and the slave was a seaman. The person to whom the slave is hired is not the owner within the meaning of the statute.

This was an action on the case founded upon the Virginia laws of December 17, 1792, p. 192, § 50, and January 25, 1798, p. 374, §§ 6, 7; by the first of which it is enacted that no master of a vessel shall transport out of the commonwealth any servant or slave without the consent or permission of the person to whom such servant or slave doth of right belong, upon penalty of $150 for a servant, and $300 for a slave; one moiety to the commonwealth and the other to the owner; and such master shall moreover be liable to the suit of the party grieved, at the common law for his damages. By the act of 25th January, 1798, it is enacted, that no master of a vessel shall transport, &c., "any negro or mulatto," out of the commonwealth, on any pretext whatsoever, until he shall have produced him before some magistrate, &c., and lodged a description of the negro or mulatto, and a declaration of the place to which he is bound, and a certificate of freedom, &c., or the written direction of the owner of the negro or mulatto, commanding or permitting such master to carry him out of the commonwealth; under penalty of $500 for every negro or mulatto so carried, &c., to be recovered by action of debt by any person who will sue for the same; and such master shall moreover, be liable to the action of the owner of such negro or mulatto, &c. The first count stated that on the 25th of December, 1802, the plaintiff was the owner of a negro man slave named Anthony, in the county of Alexandria, of the value of $500, and the defendant was then and there the master of a certain vessel called the Hope, of Alexandria; and the defendant, well knowing that the said slave belonged to the plaintiff, did on that day transport the said slave in his said vessel, out of the District of Columbia and out of the commonwealth of Virginia, to wit, to the city of Philadelphia in the state of Pennsylvania, without the consent of the plaintiff. In consequence of which said transportation the said slave ran away and absconded at the city of Philadelphia, and was totally lost to the plaintiff. The second count stated that the plaintiff was the owner of the slave, and the defendant was the master of the vessel then lying in the river Potomac adjoining the county of Alexandria; that the defendant well knowing, etc., transported said slave out of the District of Columbia, and out of the commonwealth of Virginia, to wit, to the city of Philadelphia, in the state of Pennsylvania, without having produced the said negro slave before any magistrate of the county adjoining which the said vessel lay, and without having lodged with any such magistrate a description of the said negro, his name, probable age, and alleged place of birth, and a declaration of the place or port to which the defendant was bound, and without having produced to any such magistrate any certificate of freedom granted to the said negro, or the written direction of the plaintiff, commanding or permitting him to carry the said slave out of the District of Columbia or commonwealth of Virginia,—in consequence of which said transportation, the said slave absconded and was totally lost to the plaintiff, contrary to the statute in that case made and provided, whereby the plaintiff was injured and sustained damage to the amount of $700, and therefore he brings suit.

The jury, in a special verdict, found the following facts: That the defendant, on the 29th of January, 1802, hired the plaintiff's negro slave Anthony, in Alexandria, in the District of Columbia, by the following written agreement: "I have, this 29th of January, 1802, hired of James Wilson, agent of James Park, a negro man named Anthony, from this time until the 1st day of January, 1803, eleven months and two days, for $110, and to furnish the said negro with every thing necessary except his clothing and taxes, and which sum I promise to pay to the said James Wilson in quarterly payments, as witness my hand and seal this 29th day of January, 1802, Abel Willis. Attest: Rob't Compar, Jr." They found no restriction as to the defendant's right of employing the slave, or taking him out of the District of Columbia, or state of Virginia. They found that the defendant did transport him from the town of Alexandria, in the sloop Hope, whereof the defendant was master and owner, into the city of Philadelphia, in the state of Pennsylvania, where the slave made his escape before the expiration of the term for which he was hired. That the defendant used due diligence in endeavoring to recover the slave; but he was never recovered, and is lost to the plaintiff. That the defendant had, previous to the hiring of said slave, been in the habit of trading to Philadelphia, in the sloop Polly, but having sold his interest in that vessel, he purchased the said sloop Hope, took the command of her, and es-

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

tablished her as a packet between Alexandria and Norfolk, and afterwards made two voyages in her to Philadelphia, in the last of which the said slave made his escape. That the defendant did not produce the said negro slave before a magistrate nor lodge a description, etc., nor produce a written direction from the owner, etc., as required by the act of the 25th of January, 1798. And if the law be for the plaintiff, they assessed his damages at $453; but if for the defendant, etc.

Upon this special verdict, after it had been amended by consent, THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that the law was for the plaintiff, and rendered judgment accordingly.

There had been several previous attempts to obtain a verdict in the cause, but the jurors could not agree. On Saturday, the 2d of December, 1809, the jury having been out all night, came into court, and requested the instruction of the court, whether, under the act of 1798, p. 374, § 6, the defendant was not liable if he took the slave out of Virginia without a written authority, or a compliance with the other requisites of that act; and whether the written agreement for the hire of the negro was such a written authority as the 6th section of that act requires.

Mr. Jones and E. J. Lee, for plaintiff.

C. Lee and Mr. Taylor, for defendant.

THE COURT instructed the jury that the defendant was liable in the case stated by them, and that the written agreement was not such a written permission as the act requires.

That jury could not agree, and were discharged by consent. The cause came on again before another jury, at July term, 1811, when THE COURT (THRUSTON, Circuit Judge, absent) refused to instruct the jury that a general hiring by the defendant authorized him to carry the slave to Philadelphia, and refused to instruct them that if the course of the defendant's business was known to the plaintiff's agent at the time of the hiring, it authorized the defendant to take the slave out of the state of Virginia. And also refused to instruct them that the defendant, by the hiring, became the owner of the slave for the term for which he was hired.

The same opinions and instructions were given upon the last trial, and bills of exceptions were taken, but no writ of error was prosecuted.

Case No. 10,718.

PARK BANK v. NICHOLS.

[See National Park Bank v. Nichols, Case No. 10,047.]

PARKENHORN (BARKER v.). See Case No. 993.

Case No. 10,719.

In re PARKER et al.

[6 Ben. 286.] [1]

District Court, E. D. New York. Dec., 1872.

BANKRUPTCY—PREFERRED DEBTS—TAXES.

Bankrupts occupied land under a lease, in which they covenant to pay the taxes on the land. They failed to pay them, and the lessors paid them: *Held*, that the lessors were not entitled to claim the amount of such payment, as a preferred debt, under the 28th section of the bankruptcy act [of 1867 (14 Stat. 530)].

[In the matter of Parker & Peck, bankrupts.]

BENEDICT, District Judge. I am of the opinion that the payment by the petitioners of taxes and assessments on their own land gives them no right to claim that amount out of the bankrupt's estate as a preferred debt under section 28 of the bankruptcy act, notwithstanding the fact that the bankrupts were the occupants of the land under a lease in which the lessee covenanted to pay a yearly rent, and "all such taxes, water rents and penalties as shall during said term grow due and payable out of said demised premises." The failure by the lessee to perform this covenant gave the lessors a right of action from the breach thereof, and nothing more. The prayer of the petitioners that their demand be declared entitled to be paid out of the estate of the lessee, in preference to the other creditors, must, therefore, be denied. Upon being properly proved, their demand is, however entitled to share with the other creditors of the lessee in the distribution of his estate.

Case No. 10,720.

In re PARKER.

[4 Biss. 501.] [2]

District Court, N. D. Illinois. June, 1868.

BANKRUPTCY—GROUNDS FOR REFUSING DISCHARGE—DEBTS NOT SCHEDULED—INTENTION.

A discharge will not be withheld from a bankrupt for not scheduling property in which he did not at the time know that he had a substantial interest. There must be an intention to conceal the property.

In bankruptcy. Application for discharge. Attorneys for creditors objected that the bankrupt [Renslow S. Parker] had not scheduled certain interests in personal property belonging to his wife before marriage, but which they claimed vested by marriage in the husband. The marriage was in 1859, at which time the wife had about $1,500 in cash in her own right, and which came into his hands soon afterward, and before the passage of the act of 1861. This money he

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

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

had used from time to time as his wife's and for her benefit.

DRUMMOND, District Judge. The language of the law is, "or if he has concealed any part of his estate or effects, or any books or writings relating thereto." Does not that mean if there was the intention to cover up and conceal property, that the will must have taken part in the effort to conceal? Suppose this man fairly believed, in good faith, that he had not a good right to this property, but that the right was in his wife, whereas, in fact he had the title, what then?

It might well happen that a man would have title to property that he would know nothing about. I apprehend that if he did not schedule it, that would not prevent his discharge in bankruptcy. The assignee can claim the property. The facts as they appear in evidence are these: He was married in 1859. At the time of his marriage his wife had $1,500 in her own right. This came into his hands, subject to his control, in a year after the marriage, apparently before the act of 1861 (1 Gross' St. c. 69a) in relation to married women's property went into operation. He had used this money or property from time to time as his wife's,—that is, for her benefit. That he kept it thus, entirely distinct in all instances from his own property, is his own statement, corroborated, to some extent, by that of his wife; that when he has operated with it he has operated with it as her money; that he did not make any entries in relation to it,—which, by the way, I think he ought to have done,—but he always kept it distinct and separate; that he turned this property or money into assets of various kinds, as bonds or stocks, or anything of that sort, which was evidenced on paper of various kinds; that he turned them over to his wife as her property, and when he wanted to use them again, for the purpose of making some other transaction, he took them and used them in the same way he had previously used the money; that, operating in this way for a series of years, this fund had accumulated some few thousand dollars, and, after it had thus accumulated,—the intent and motive of both parties, as they say, being, to appropriate it to the purchase of a home for themselves,—they purchased property on Wabash avenue, for which they paid about $4,500 cash, the whole purchase price being $9,000.

There may be a very important question, and one, perhaps, not entirely free from difficulty, as to the interest of the bankrupt in that property. The ordinary rule undoubtedly is, or was before the act of 1861, in this state, that the marriage of a woman transferred by operation of law all her personal property to him. But, as I understand this law, in order to prevent the discharge in bankruptcy (because it will be recollected that we are not deciding whether any interest in this property belongs to the assignee or not, but whether the bankrupt has concealed this property) there must have been on his part a voluntary concealment of property; that is to say, he must have had the property, knowing that he had it, and he must have concealed it. The language of the law means to hide, to secrete. I apprehend that there can be no doubt that where a man owns property of which he has no knowledge, as often happens, that the fact that he did not put it in his schedule would not prevent his discharge. There being no other ground of opposition, the discharge will be issued.

Consult In re Shoemaker [Case No. 12,799], and notes to same.

Case No. 10,721.

In re PARKER et al.

[See 11 Fed. 397.]

Case No. 10,722.

In re PARKER et al.

[1 Pa. Law J. (1842) 370.]

District Court, E. D. Pennsylvania.

BANKRUPTCY—DEBTS OF FIDUCIARY CHARACTER—PRODUCTION OF BOOKS.

[In the case of a voluntary application by a debtor for the benefit of the act, the court, if desired by a creditor who asserts that the debt due to him has been created in a fiduciary capacity, will direct the debtor to produce, even before the time for a decree, all books and papers having relation to the debt returned.]

The applicants in this case returned, in the schedule of debts they owed, one to Von Werke, which they described as due "on notes and money left with us, till convenient, through the rates of exchange, to draw upon for sums or amounts to suit our mutual ability or convenience."

H. D. Gilpin stated to the court that, if the circumstances of this case could be developed, it would appear that the debt thus returned had been contracted by malversation in a fiduciary capacity,—a fact which, by the first section of the act, would deprive the applicants of a decree; and, in order that he might more easily show the origin of the debt, he would ask the court for an order on the petitioners to produce, before the commissioners, all books and papers in their possession, having relation to this debt.

The granting of the order asked for was opposed by Mr. McIlvaine, who contended that as the law (section 6) enacted that such bankrupt shall, &c., be subject to examination, the court would not order an examination before the applicant was a bankrupt, i. e. had been so decreed; that, if the objecting creditor alleged that this debt was a fiduciary debt, he was, himself, bound to show that it was so, and could not call upon the petitioner to prove the case for him. But Mr. Gilpin having shown, by numerous authorities, that the present application was according to

analogous cases in equity practice, RANDALL, District Judge, without much hesitation, granted the order.

[NOTE. The following question was adjourned into the circuit court: "Admitting the debt to be fiduciary, are the petitioners entitled to the benefit of the act?" It was held that the petitioner is excluded from the benefit of the act, if the public or any fiduciary creditor, oppose the decree. Case No. 10,723.]

Case No. 10,723.

In re PARKER et al.

[1 Pa. Law J. (1842) 370.]

Circuit Court, E. D. Pennsylvania.

BANKRUPTCY—DEBTS OF FIDUCIARY CHARACTER—DISCHARGE—WHO MAY OPPOSE.

[1. If a voluntary applicant for the benefit, &c., owe a debt created in consequence of defalcation as a public officer, or as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, he cannot be discharged under the act, even though, besides the fiduciary debt, he may owe other debts not of a fiduciary character.]

[2. But the right to object to a discharge is given for the benefit of the party injured, whose interest it may be not to oppose the discharge. If, therefore, such party do not make objection, no other person can.]

The first section of the bankrupt law enacts, "that all persons whatsoever, &c., owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, &c., &c., or while acting in any other fiduciary capacity," shall be entitled, &c. The applicants in this case owed some debts which it was admitted were of an ordinary character, but among their debts was likewise one which had been created while acting in a fiduciary capacity. The clause of the act in question, has received different constructions. In one district it has been held that where a debtor owes fiduciary and other debts, he may receive a limited discharge, i. e., a discharge from all debts except those of a fiduciary character. In another district, that though a certificate, general in its terms, would be given, yet that even such a discharge would not be a bar to a suit on the fiduciary debt. In consequence of the obscurity of the language of the enactment, and this diversity of decision, his honor, Judge Randall, adjourned the question into the circuit court in the following form: "Admitting the debt to be fiduciary, are the petitioners entitled to the benefit of the act?" [Case No. 10,722.]

The case was argued, at length, by H. D. Gilpin, Esq., against the right to a discharge, and by Mr. McIlvaine on the other side. The latter gentleman, relying principally on the words of the act [of 1841 (5 Stat. 440)], "owing debts which shall not have been contracted, &c., while in a fiduciary capacity," contended that as the petitioner owed debts of an ordinary sort as well as one of a fiduciary character, that their case came within the language of the act, and that they were accordingly entitled to a discharge. But the court decided otherwise.

BALDWIN, Circuit Justice, said that, evidently, the law meant to make some discrimination between the two classes of debtors; but that if a debtor owing debts created by breach of fiduciary duty, could, by merely contracting another debt not of that character, bring himself on a footing with the honest debtor, the provision of the law was practically without power; that the first section derived some light from the fourth section, which, in the proceeding by the creditor, deprived a debtor of a certificate of discharge, in case, after the passage of the act, he shall have applied "trust funds of his own use," and that on the whole, the object of the law, the interest of pecuniary morals, as well as sound public policy, forbade the court, unnecessarily, to give to the law a construction which extended to the public defaulter, and to the violator of private trusts, the humane privileges deserved by none but the meritorious. The court was clear, that there could be no such thing as either a partial certificate, or a general certificate with a partial effect; for that by the terms of the act (section 4), the discharge when duly granted, is "a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under the act; and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever." The answer to the question propounded by the district court, accordingly, was, that such petitioner is excluded from the benefit of the act, if the public or any fiduciary creditor oppose the decree.

NOTE. In Case of McCrea [unreported], Judge Randall stated that the court considered in the foregoing case, that the party injured was the person for whose benefit this provision was made, and that therefore such party was the only one who could oppose the application: that, accordingly, if thinking it more for his benefit to waive opposition, such party chose to do so, other creditors could not make the objection.

Case No. 10,724.

In re PARKER et al.

[5 Sawy. 58;[1] 18 N. B. R. 43.]

District Court, D. Oregon. Jan. 12, 1878.

BANKRUPTCY — EXEMPTIONS — OREGON STATUTE—WAGON AND TEAM—EXCHANGE.

1. A bankrupt is not entitled to a wagon and team as exempt from the operation of the bankrupt act [of 1867 (14 Stat. 517)], under section 14 thereof, and section 279, subd. 3, of the Oregon Civil Code, unless he personally follows some trade, occupation or profession, to the

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

carrying on of which such wagon and team is necessary; nor unless he habitually earns his living by such trade, occupation or profession.

2. The business of mere buying and selling or directing or employing the labor of others, is not a trade, occupation or profession within the statute; the statute was made for the benefit of those who live by their own labor and require therefor the use of some of the articles enumerated therein.

3. An insolvent person exchanged five hundred dollars' worth of wheat for a wagon and team, with a view to claiming the latter as exempt from the operation of the bankrupt act. *Held*, that under sections 5129 and 5046 of the bankrupt act, the transaction was void, and the title to the wheat vested in the assignee. Semble, that the assignee may elect to take the wagon and team as the price or value of the wheat, and thereby affirm the exchange.

In bankruptcy. Exceptions to assignee's report setting apart property to the bankrupt.

R. S. Strahan, for bankrupt.

M. W. Fechheimer, for assignee.

DEADY, District Judge. On June 5, 1877, Allen Parker, of Albany, was adjudged a bankrupt upon his own petition filed upon the same day. The bankrupt excepts to the report of the assignee concerning property set apart under section 14 of the bankrupt act, because there was not set apart to him a certain wagon, team and harness, belonging to the estate, of the value of five hundred dollars. The bankrupt alleges that at the date of the adjudication "he was engaged in the business of farming, hauling and storing grain and general jobbing and hauling in Linn county, * * * and that by said business he habitually earned his living; and that a wagon and team were and are necessary to enable him to carry on his said occupations;" that at the date aforesaid he "owned a wagon, team and harness" of the value of five hundred dollars; and then and still uses the same in his business by which he habitually earned and now earns his living, and that the same was and is necessary for that purpose. The assignee denies that the bankrupt at the date of the adjudication was engaged in any business other than that of a warehouseman as a member of the firm of Parker & Morris, and alleges that the bankrupt a few days before filing his petition in bankruptcy, and with the intent to commit a fraud upon the bankrupt act, purchased said wagon and team with the design of claiming it as exempt under the bankrupt act.

From the evidence it satisfactorily appears that at the time of the adjudication the bankrupt owned a farm near Albany, and was also a partner in a wheat warehouse at that place. In the fall of 1876 he rented the farm, and from thenceforth until the filing of his petition in bankruptcy his only business was that of a warehouseman. In March, 1877, the bankrupt was aware of his insolvency, and contemplated going into bankruptcy unless an arrangement could be made with his creditors. About May 1, the bankrupt, under advice of counsel, purchased the property in question from his father-in-law with wheat due him in the October following, for the express purpose and with the design of claiming the same as exempt from the operation of the bankrupt act. It also appears that after the purchase of the team it was used more or less by the adult son of the bankrupt in teaming about Albany, he receiving his board from his father and allowing him two dollars per day of the proceeds, which were about three dollars, for the use of the same.

Under said section 14 the assignee set apart to the bankrupt about three hundred dollars worth of property; and it is now claimed that this wagon and team are also exempt under the provision of said section, which excepts from the operation of the act all property exempt from execution by the law of this state; namely, section 279, subd. 3, of the Oregon Civil Code, which, among other things, provides that "the tools, implements, apparatus, team, vehicle, harness, or library necessary to enable any person to carry on the trade, occupation, or profession by which such person habitually earns his living, to the value of four hundred dollars," shall be exempt from execution.

In any view of the matter it is plain that all this property is not exempt from the operation of the act, because it is of the value of five hundred dollars—one hundred dollars more than the law allows. But if the bankrupt is entitled to a team, harness and wagon of the value of four hundred dollars, and there is none belonging to his estate of only that value, I suppose so much of this as does not exceed that sum may be set apart to him. Upon these facts does it appear that the bankrupt, at or shortly before the filing of his petition in bankruptcy, was a person who habitually earned his living at an occupation, which the possession of this team was necessary to enable him to follow or "carry on?" In an able argument, citing numerous authorities on the subject of exemptions, counsel for the bankrupt maintains that he was. But none of these cases arose under a statute like that of Oregon. Under this statute the person claiming the exemption must habitually, not occasionally, now and then, earn his living, not merely some of it, by some trade, occupation, or profession. The word business is not in the statute. In this respect it does not appear to have been made for the benefit of those who do not live by their own labor, and therefore do not require the use of the particular articles enumerated therein. The mere business of buying and selling, or directing or employing the labor of others, does not appear to be within its scope. The pursuit must be one which in some way involves the personal labor and skill of the debtor, and the article claimed as exempt must be something which is necessary—suitable and convenient, to say the least—to enable him to follow and carry it on.

In this case the debtor's occupation was that of a warehouseman. True, he also owned a farm, but he was not engaged in farming since January 1, 1877; and it is quiet doubtful whether he had followed the occupation of a farmer for the three years in which he had been engaged in the business of a warehouseman. Now, while a warehouseman may own and employ teams in hauling wheat to and from his warehouse, or otherwise, it is not necessary for him to do so to enable him to carry on such business. The business of a warehouseman consists in receiving, storing and delivering grain—not in teaming. A lawyer, doctor or minister may own teams and employ them, but that fact does not of itself make either of them a teamster, or a person who habitually earns his living as a teamster and by means of a team. Nor do I thing the business of a warehouseman is a "trade, occupation, or profession" within the meaning of the statute, so as to entitle a person engaged in it to claim any tools, implements, or other things as exempt from execution. His warehouse and grounds are the things used in carrying on his business, and they are not within the category of property which may be claimed as exempt. The bankrupt simply owned this team, and hired it to his adult son, who gave a certain share of his earnings with it for the use of it. He did not thereby become a teamster, although the profits derived from such ownership and employment may have been employed to the support of his family. And if upon the evidence it should be concluded that the bankrupt, instead of hiring this team to his son, hired the son to drive the team, the difference would not change the legal effect of the transaction; still the bankrupt would not be a teamster, or habitually earn his living by the use of a team.

In Brusie v. Griffith, 34 Cal. 302, a case in its leading features like this, and arising under a statute very similar to that of Oregon, it was held that "in the sense of the statute, one is a teamster who is engaged, with his own team or teams, in the business of teaming; that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family, if he has one. While he need not, perhaps, drive his team in person, yet he must be personally engaged in the business of teaming habitually, and for the purpose of making a living by that business. If a carpenter or other mechanic, who occupies his time in labor at his trade, purchases a team or teams, and also carries on the business of teaming by the employment of others, he does not thereby become a teamster in the sense of the statute. So of the miner, farmer, doctor, and minister." I do not think the bankrupt is entitled to the exemption under the statute.

It is also claimed by the assignee that the purchase of this property under the circumstances was a fraud upon the bankrupt act (Rev. St. § 5129), and therefore void; citing In re Wright [Case No. 18,067]; In re Boothroyd [Id. 1,652]; In re Lammer [Id. 8,031]. There is no doubt but that the transaction comes within the prohibition contained in said section. At the time of the purchase the bankrupt was insolvent, and it was made with a view of preventing the wheat exchanged for the team from coming to his assignee and to prevent the same from being distributed under the bankrupt act. By exchanging the former for the latter, which he hoped to retain as exempt from the operation of the act he intended and expected to prevent five hundred dollars of his property from coming to his assignee in bankruptcy, and thereby deprive his creditors of that amount to his own gain. But the transaction being void because contrary to section 5129 aforesaid, it would follow that no title or interest passed by it, and therefore the wheat remained the property of the bankrupt and passed to his assignee, as provided in section 3046, Rev. St., which declares that "all property conveyed by the bankrupt in fraud of his creditors" shall vest in the assignee. And it may be that the assignee may affirm the exchange by electing to take the property received by the bankrupt in exchange for the wheat, as the price or value thereof. The exception to the action and report of the assignee is overruled.

[Subsequently a mortgage given by Allen Parker to one Irvine was adjudged a fraudulent preference. 11 Fed. 397.]

PARKER (ATLANTIC GIANT POWDER CO. v.). See Case No. 625.

Case No. 10,725.

PARKER v. BAMKER.

[6 McLean, 631.][1]

Circuit Court, S. D. Ohio. Oct. Term, 1855.

PATENTS—PLEADING—FAILURE TO ANSWER—DAMAGES—PROFITS.

1. When no answer is made to an alleged infringement of a patent, the charge is admitted.

2. One-fourth of the proceeds being estimated as the profits of the mill, the damages were estimated at that amount.

This is an action for damages, by the plaintiff [Zebulon Parker, against Thomas Bamker], for the infringement of plaintiff's patent, in using his percussion water wheel for mills, etc. No plea being filed, the charge in the declaration was admitted. A witness being sworn, proved the use of the wheel three months in the year; that 3,000 feet of plank would be sawed in a day, and he estimated one-fourth of the proceeds for the expense of the mill, one-fourth to keep the

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

mill in repair, one-fourth for the hire of a sawyer, and the other fourth for profit, which amounted, in five years, to the sum of $460, for which the jury found a verdict. Judgment.

Several other cases were decided on the same principle.

Mr. Stanbery, for plaintiff.

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

Case No. 10,726.

PARKER v. BIGLER et al.

[1 Fish. Pat. Cas. 285;[1] 14 Leg. Int. 180.]

Circuit Court, W. D. Pennsylvania. May, 1857.

PATENTS—COSTS—EXPENSE OF MAKING MODELS—FEES FOR SERVING RULE—WITNESS—ATTENDANCE AND MILEAGE.

1. The expense of making or procuring models can not be included among the taxable costs, nor can models properly be classed as "exemplifications," under the act of February 26, 1853 [10 Stat. 161].

[Cited in Spaulding v. Tucker, Case No. 13,-221; Ethridge v. Jackson, Id. 4,541; Huntress v. Epsom, 15 Fed. 733; Wooster v. Handy, 23 Fed. 62.]

2. The marshal is not entitled to fees for serving a rule to plead.

[Cited in Spaulding v. Tucker, Case No. 13,-221; Ethridge v. Jackson, Id. 4,541.]

3. If a witness be summoned in several suits brought by the same plaintiff against different defendants, he is entitled to his attendance and mileage in each case.

[Cited in Wooster v. Handy, 23 Fed. 64; Young v. Merchants' Ins. Co., 29 Fed. 275; Archer v. Hartford Fire Ins. Co., 31 Fed. 662; The Vernon, 36 Fed. 117.]

4. When a witness lived without the state and within one hundred miles of the place of trial, by an air-line, but the marshal traveled one hundred and sixty miles to serve him, the marshal can be allowed mileage for one hundred miles only. The court can not assume an air-line for jurisdiction and a zig-zag for mileage.

[Cited in Spaulding v. Tucker, Case No. 13,-221; Haines v. McLaughlin, 29 Fed. 70; The Vernon, 36 Fed. 116; Burrow v. Kansas City, Ft. S. & M. R. Co., 54 Fed. 282.]

This was a motion [by Zebulon Parker] to retax a bill of costs, upon exceptions filed by the defendants [William Bigler, William Powell, and John F. Weaver]. The first exception was based upon the fact that the court (Irwin, J.) had at a former term made an order appointing a mechanic to make models of the wheels used in defendants' mill, and authorizing him to enter said mill for the purpose of obtaining measurements, etc. This order had been executed, and three tin models were produced and used as evidence upon the trial of the cause. The expense of examining the mill, and of making these models was taxed in the bill of costs. The other exceptions are sufficiently explained in the opinion of the court.

J. B. Sweitzer and S. S. Fisher, for plaintiff.

R. C. G. Sproul, J. H. Hamilton, and G. P. Hamilton, for defendants.

GRIER, Circuit Justice. 1. The first exception is to a charge for making models of defendants' mill wheels in order to show the infringement of the plaintiff's patent, $36.

It is alleged that the act of 26th February, 1853, "to regulate fees and costs," proposes to define what shall be hereafter the fees or compensation to be allowed to attorneys, marshals, witnesses, jurors, commissioners, and printers, which shall be taxed and allowed, and not to define absolutely what expenses of trial may be recovered from the losing party as costs of suit. Hence it is contended that this charge is not excluded by the enumeration of persons whose fees are limited by this act, and the expense incurred for models being necessary for the information of the court and jury should be paid by the losing party, as part of the "expensa litis." This may be true in a court of chancery where the decree may include any expenses which have been necessarily incurred in the suit, for the information of the court and in order to a just decision of the cause. These may be imposed on either party or both as the conscience of the chancellor may dictate, yet, in courts of law no such discretion is given to the court. At common law no costs were allowed to either party before the statute of Gloucester (6 Edw. I. c. 1), and since that time only such as are called legal taxed costs. These are usually defined by statute, and, however far they may fall below the actual expenses incurred by the litigant, yet it is all the law allows as "expensa litis." See Day v. Woodworth, 13 How. [54 U. S.] 372.

The act of congress defines the fees and expenses which are taxable as costs, to be "the bill of fees of clerk, marshal, and attorney, and the amount paid printers, and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on the trial."

Models are not within the category, unless we treat them as "exemplifications;" but although "printers'" bills seem to be allowed, I can not see that carpenters' or tinkers' bills have the same favor, or that a model of a mill wheel can be called an "exemplification or copy of a paper." Whether courts of law have the power, which has been exercised in this case, of appointing an artist to make models for the use of plaintiffs' case, and authorizing him to enter on the defendants' premises for that purpose, may well be doubted. Where the same court has both a law and equity side it is liable to forget sometimes in which capacity it is acting. In actions of ejectment, it has long been the practice for the court, at the instance of a party, to appoint surveyors to run the disputed lines. The expense of such surveys is borne

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

by the party who obtains the order, or by both parties equally, when they join in the request; but it made no part of the taxed costs unless such had been the agreement of the parties, or some statute provision authorized it. Nevertheless the power of a court of law to compel a defendant to permit the agents of plaintiff to enter on his property for the purpose of furnishing evidence of a trespass or other tort, though sometimes assumed by courts, when no objection is made, can not be admitted; much less, their power to add the expense thereof to the bill of taxed costs. I know an instance, where, after full argument, the court decided they had no power to compel a defendant to permit artists for witnesses to enter the shaft or adit of his coal mine in order to ascertain the amount of coal taken from under his neighbor's land, but instructed the jury to consider such a refusal as a confession of the trespass and of largest damages, because the defendant having it in his power to prevent the truth from being ascertained, chose so to do.

The first exception is, therefore, allowed.

The second exception:

2. Is to a fee charged by the marshal as mileage for serving the rule to plead on the defendant, amounting to twelve dollars.

It is objected to this charge, that the marshal is allowed to fees only "for the service of any warrant, attachment, summons, capias, or other writ," and "for travel in going only, to serve any process, warrant, attachment, or other writ," including subpenas, etc. It is contended, moreover, that notice of a rule to plead should be served on the attorney who is in court, and consequently there can be no mileage.

It may be doubted whether a party can be ruled to plead, who has not appeared, and is not technically in court. It is true we no longer proceed to outlawry to compel an appearance, but enter judgment in default of appearance and plea; but as the fee bill gives no fee for services or mileage in case of notices under rules of court, the 48th rule of court permits notice of all such rules to be given by mail. The service by the marshal was therefore not official nor necessary. The second exception is, therefore, supported and the charge disallowed.

3. The third objection to the bill of costs is founded on this fact. The plaintiff has set for trial seven actions for infringement of his patent, brought against seven several defendants, against each of whom he has charged fees for subpenaing, and for the attendance and mileage of the same witnesses. When the same witness has been brought to court in suits where the parties are different, one can not complain that another has paid him, if he has obeyed the process of each, and given his testimony when called on. But where a witness has been produced by the same plaintiff to give his testimony in more cases than one against different defendants, his right to demand from the plaintiff any fees for more than his actual attendance and mileage seems more doubtful. The witness should have but one remuneration for but one service. But on this subject different opinions have been entertained by courts, and it has been left to legislation and a correct construction of the statute on the subject.

The act of congress allows to the party entitled to recover as costs, "the amount paid witnesses," and if the witnesses have a right to demand mileage and daily pay in each suit in which they have been subpenaed to attend, by the same party, then this charge in the bill of costs is correct. The statute says, "when a witness is subpenaed in more than one cause between the same parties in different suits at the same court, but one travel fee and one per diem compensation shall be allowed for attendance," etc.

The inference from this provision would seem to be, that when the parties are not the same, the witness has a right to fees in each suit, and cases where the plaintiff alone is a party in each suit, are left in the same category with those where all the parties are different. Such has been, as we are informed, the construction given to this clause in other circuits, and in which we concur.

4. The fourth exception is to fees of marshal, for mileage in serving subpenas one hundred and sixty miles on persons living out of the state.

The sixth section of the act of March 2, 1793 (1 Stat. 335), declares that "subpenas for witnesses who may be required to attend a court of the United States, in any district thereof, may run into any other district, provided, that in civil cases, the witnesses living out of the district in which the court is holden do not live at a greater distance than one hundred miles from the place of holding the same."

An answer to this objection (which is clearly supported by the letter of the proviso), has been attempted by asserting that the witness lives in Guernsey county, Ohio, within a hundred miles of Pittsburg, by an air-line, but that the marshal had to travel one hundred and sixty miles by railroad and steamboat to reach his residence. But we can not assume two different modes of calculating distances, an air-line for jurisdiction and a zig-zag for mileage.

This exception is supported as to the sixty miles, and the marshal is allowed for one hundred miles only. If on rendering a service to the plaintiff he has actually traveled a greater distance, at his request, the plaintiff may be liable to him for the same, but is not entitled to recover it as costs. The clerk will retax the bill according to the principles stated.

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

Case No. 10,727.

PARKER v. BRANT et al.

[1 Fish. Pat. Cas. 58.] [1]

Circuit Court, E. D. Pennsylvania. April, 1850.

PATENTS—INJUNCTION—PRIOR ADJUDICATIONS—PATENTEE'S TITLE—AVERMENTS.

1. A party who relies upon the verdict of a jury, and the judgment of a court of law, for the establishment of his title, as a foundation of his claim to be quieted in the possession and enjoyment of it, and for protecting him against infringement by others, must aver, in his bill, that such proceedings have taken place. Grier, Circuit Justice.

[Cited in American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. 804; Wirt v. Hicks, 46 Fed. 71.]

2. On a motion for an injunction, based upon prior adjudications in favor of a patent, the defendant may show that the title was not fairly in controversy in the cases which professed to try it; or that some material fact was then unknown, or some apposite argument overlooked; and the court, if satisfied that in truth such was the case, would not hold itself concluded by the former adjudications. Kane, District Judge.

3. But the considerations which would justify a judge in renewing the discussion of a patentee's title, after solemn hearing and judgment at law, should be such as, if presented to his view after a trial at law, would have induced him to set aside the verdict. Kane, District Judge.

[These were bills in equity by Oliver H. P. Parker against Joseph Bryant and others.] These were suits in equity, for the infringement of the patent of Zebulon and Austin Parker, [granted Oct. 19, 1829,] more particularly described in the case of Parker v. Hulme [Case No. 10,740]. Upon a motion for provisional injunction against the defendants, objection was made that the bills contained no averment of prior adjudication, to support the application.

Mr. Titus, for complainant.

Watts, Mallery & Penrose for defendants.

Before GRIER, Circuit Justice, and KANE, District Judge.

GRIER, Circuit Justice. I take this occasion to say, that the court has no doubt of the validity of the complainant's patent. That question has been fully settled here, by a trial at law, of extraordinary duration, and closeness of research. The report of the case of Parker v. Hulme, [supra], by my Brother KANE, who presided at the trial, and information derived from the affidavits and printed works, which have been read on both sides, during the present hearing, as well as the acquaintance of the subject which I derived while engaged in the trial of another case growing out of this patent, leaves no doubt on my mind, that the complainant's patent is not only valid, but of the greatest importance to the country.

I may add, on the part of both of us, that we approached the question without any previous leaning in favor of the rights asserted by Mr. Parker, as an inventor, and it was only upon a more than usually close scrutiny of the facts that we came to the conclusion which we now express.

Indeed, it is a subject of regret that the public has been so tardy in acknowledging the merits of the Messrs. Parker as inventors. Their improvement as described in the patent before us, is not less ingenious and profound than useful. In France, M. Fourneyron received the highest honors and most liberal rewards, for introducing into use this very improvement, after it had been invented in this country by the Messrs. Parker. And it was not until the circulation of Fourneyron's paper on Turbines in this country, that the public attention was fairly called to the valuable improvement of the Messrs. Parker.

Of the infringement by the defendants, the court has no doubt. The wheels which they use are direct and positive violations of the complainant's rights, as appears by the affidavits on behalf of the defendants, and the models which they themselves have submitted to the court. In point of fact the complainant has established his right to the injunction which he prays. But I do not wish to establish the precedent in this court, that a party who relies upon the verdict of a jury and the judgment of a court of law, for the establishment of his title, as the foundation of his claim to be quieted in the possession and enjoyment of it, and for protecting him against infringement by others, shall omit, as the complainant has here omitted, to aver in his bill, that such proceedings at law have taken place. Without such averment, the ground of the action of the court may be misunderstood, and the defendant may not be properly apprised beforehand, of the case which he has to meet. In these cases, we are the more ready to lay hold of the admission, as we feel a reluctance to stop two hundred mills from grinding a bushel of grain, or sawing a board, without giving the defendants a chance of making a settlement or compromise. On the other hand, it is by no means our intention to compel this complainant to relitigate his patent, already established at law, against a combination of two hundred wealthy mill-owners in this district, who are, as these defendants allege, using machines of which the model above described is the representation. By an amendment of his bill, the complainant may overcome his present technical difficulty.

In all this, I am authorized to say, that my Brother KANE fully concurs with me.

The bills having been amended, the motion was subsequently heard before Judge KANE on bill, answer, and affidavits.

KANE, District Judge. The patent under which the complainant claims, is an ancient one, having been issued in 1829, and renew-

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

ed by the commissioners in 1843. Its character and history have, on former occasions, been investigated in this court very fully; the first, on the trial of the case of Parker v. Perkins [Case No. 10,745], at which Judge Grier presided, and afterward more at large, in the case of Parker v. Hulme, which was tried before me; and recently again, in a full court, during the elaborate argument of the motion for an injunction against the present defendants, before the amendment of the bills. These investigations, conducted by counsel of the highest ability, with the aid of scientific mechanicians, who have no superiors anywhere, led the minds of two juries, and of both the judges, to the same conclusion, namely, that the patent was a valid one. It has, therefore, passed into the category of those which equity exerts its preventive interposition to protect against infractions.

Since the motion was last before the court, the defendants have filed answers, which, for the purposes of the present question, are of course to be regarded only as affidavits. These deny the novelty of the invention in very express terms, and profess also to traverse the use of it.

I need not say this mere denial of the complainant's title, by the defendants, can avail them nothing at this time. He is in possession, under an ancient right, solemnly confirmed by a public proceeding, in which its validity was put in issue, to which the defendants might have made themselves parties, if they would, and of which they had just the same sort of notice they have of other binding acts of the government. His title has, moreover, been submitted to the scrutiny of the court in a controversy at law, honestly and well contested, and has been formally established by verdict and judgment. It is true, that a defendant is in no wise precluded by all this from impugning the patent in the appropriate manner and by pertinent proofs; but for the present, such facts advise us judicially, that the complainant is in recognized and apparently lawful possession under his asserted title. They make for him a strong prima facie case; and a court of equity can no more allow third persons to disturb his continued enjoyment, upon the allegation that his patent can be invalidated hereafter, than it will permit trespassers to cut down a neighbor's trees, upon offering to prove that he has no title to his farm. A patent, vouched as this is, must be invalidated before equity will suffer it to be violated.

No doubt, upon an application like this, the defendants might show that the title was not fairly in controversy in the cases which professed to try it—or that some material fact was then unknown, or some apposite argument overlooked—and the court, if satisfied that such in truth was the case, would not hold itself concluded by the former adjudications. It is safe, however, to say that the considerations which would justify a judge, at this stage of an equity cause, in renewing the discussion of a patentee's title after solemn hearing and judgment at law, should be such as, if presented to his view after a trial at law, would have induced him to set aside the verdict. After-acquired evidence, of doubtful character or doubtful bearing, imputations of collusion, unsustained by apparent probability or strong proof—views of the evidence, or the law, which, however ingenious or original, might have been met by new facts, or answered by other arguments: these, any, or all of them, should hardly be potent enough to deprive a patentee of the protection of equity for the time. If a verdict for the complainant would stand in spite of all that is now before me, I can not call upon him to renew the vindication of his long-continued right at an interlocutory hearing.

But the evidence which has been presented to me, so far from proving that the verdicts have been erroneous, is not even such as to cast a serious doubt on the question of novelty. It consists of a printed description in "White's Century of Inventions," a book published in 1822, of a machine which is supposed to resemble the complainant's—and a deposition of a millwright, Mr. Squiers, who saw a machine, many years ago, of which he gives a model, that might at first glance be supposed to embody the same principle. But the device of Mr. White seems to have been regarded by its author as a wheel of impact and not of reaction: he calls it a wheel of "impulse," and refers its efficiency to the velocity of the "jet" with which the water "strikes" against the floats—while the appearance of the water in his drawing, as it approaches the wheel, and after leaving it, shows that, if intended for a reaction wheel at all, it must have been among the very worst contrived of its class. And the model by which Mr. Squiers illustrates his testimony—made, he says, by himself—represents to me nothing else but a clumsy imitation of Parker's machine, in which the principle is overlooked, and the proportion between the areas of supply and discharge so mutilated as to make it absolutely worthless.

Besides this evidence, I have the expression, by the defendants, of a confident belief that the principle of Parker's patent was well known before the year 1827, in several states of the Union, but by whom, or in what parts of those states, is not specified—and a reference to two cases in other circuits, which were decided, it is said, against the patentee. Now, were the cause on its trial, the law would not permit me to hear evidence of this supposed prior use and knowledge of a plaintiff's invention, without a much more definite specification beforehand, of place and person. Besides, I have not forgotten, that when Parker v. Hulme was on trial, we had much evidence of prior knowledge of this invention in different parts

of the United States, and that it was all explained away by other proof, or disbelieved, as I thought, properly, by the jury. I can not assign, in anticipation, a higher efficacy to evidence which is not yet adduced. As to the adjudication elsewhere, the records of them are not here; and the verdicts may have been very right upon the evidence, or the issues, before those courts, and yet be entirely without bearing on the question I am to decide. To allow me to repose on them for my judicial action as relieving me from the influence of the former, or cotemporaneous proceedings in this very court, the cases should come in a form unquestionably authentic, and fully reported.

The remaining question is, have the defendants infringed the patent as the complainant alleges? I have looked through the answers which they have filed, and I am constrained to say, that, whether regarded as affidavits merely, or as answers, they do not, by any means, meet the bills frankly. They deny, it is true, but by inference and arguments, or in general terms, not by a definite traverse of the substance of the charge. They abound in negatives pregnant, following the words of the bill, yet avoiding that direct and specific and peremptory contradiction of its import, which the rules of chancery pleading enjoin. Indeed, they admit in detail, while denying in formal words, and must be understood by the court, in justice to the respectable parties from whom they proceed, as only negativing the use of the plaintiff's invention constructively by negativing his property in it. That is to say, they admit that they are using machines substantially like his, but they deny that he was the first to invent such machines; thus resolving the question of use into that of title, which I have already considered.

Injunctions accordingly till hearing or further order.

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

PARKER v. The BROOKLYN. See Case No. 1,938.

Case No. 10,728.

PARKER v. BYRNES.

[1 Lowell, 539.] [1]

District Court, D. Massachusetts. Feb., 1871.

STOPPAGE IN TRANSITU — IMPORTED GOODS ENTERED FOR WAREHOUSE—ACTS OF OWNERSHIP—LIEN.

1. It seems, that the seller of imported goods does not lose his right to stop them in transitu on the failure of the buyer, by the mere fact that they have been entered for warehouse, if they were not entered by the buyer, and he has exercised no acts of ownership over them.

2. But where the seller had goods on board ship which he sold on four months' credit, and took notes for the price, and handed all the shipping papers to the buyer, who entered the goods and warehoused them in his own name, the seller had thereafter no right of stoppage nor a lien.

3. So where the goods, being in a bonded warehouse, were sold on like terms, and the seller wrote an order of transfer to the buyer, which was accepted by the warehouseman, and handed all the papers relating to these goods to the buyer, and the goods were distinct from all other goods of the seller, he retained in law no lien or right over them.

4. It seems, that by the law of Massachusetts, a purchase of goods with an intent not to pay for them, is voidable by the seller, and so is a sale made upon the faith of any wilful misrepresentation. Such fraud not found in this case.

[Cited in Burrill v. Stevens, 73 Me. 400; Oswego Starch Factory v. Lendrum, 57 Iowa, 583, 10 N. W. 905.]

Bill in equity by [J. G. Parker] the assignee of Edward Oakes, to ascertain the title to certain parcels of salt in bond. Oakes had been a well known salt merchant in Boston for a great many years, and had dealt largely with the defendant [W. B.] Byrnes. In December, 1869, the defendant sold Oakes three several lots of salt on a credit of four months, and took his notes for the price. The first lot had been entered by Byrnes under the warehousing acts, and was in the bonded warehouse of Naylor & Co., on Constitution Wharf. The defendant gave Mr. Oakes a receipted bill of parcels, the necessary papers for getting the goods out of warehouse, and an order on Naylor & Co. to deliver "five hundred and twenty-five sacks Ashton salt, bal. lot ex ship Arcadia in good order," and this was accepted in writing by the warehousemen. The defendant afterwards made a memorandum on the back of the order that storage was to begin about the third of January, 1870. The second and third lots were both on board ship, at the time of the sale, and were entered and warehoused by Oakes, who never removed the goods nor paid the duties, and when he stopped payment in February the defendant wrote him that he should not complete the sale nor deliver the salt, and tendered him back his notes which were not accepted but returned by Oakes. The defence was that the sale had been procured by fraudulent representations by Oakes of his commercial standing, and that it had never been fully completed.

T. H. Sweetser and T. Weston, Jr., for plaintiff.

H. W. Paine and T. F. Nutter, for defendant.

LOWELL, District Judge. The mere fact that goods imported from abroad upon the order of a buyer have come into the hands of the officers of the customs, and have been by them put into a warehouse, the buyer exercising no acts of ownership over them, has been held not to determine the transit. Burnham v. Winsor [Case No. 2,180]; Donath v. Broom-

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

head, 7 Barr [7 Pa. St.] 301. Nor does the seller's right depend on the question whether the property has passed. In the case of Barrett v. Goddard [Id. 1,046], cited at the bar, the lien of the seller was disallowed, although the goods remained in his own warehouse, because the title had fully vested in the purchaser. But I take the modern doctrine to be, that if the buyer stops payment before the seller has actually parted with possession, though after he has parted with the title, if no rights of innocent third persons have intervened, his lien revives, if he is able to give up the note received for the price; and that an assignee in bankruptcy stands in this, as in all other cases not involving fraud, on the precise footing of the bankrupt himself. Arnold v. Delano, 4 Cush. 33. So that if it were true, as assumed by the defendant in his letter of the ninth of February, that the possession was still in him, he had a lien somewhat analogous to the right of stoppage in transitu, which he might enforce against the bankrupt, and against the present plaintiff. In the case of the two lots entered, and warehoused by Oakes, it is now admitted that there was no scintilla of possession left in Byrnes. And it seems to me equally clear that Oakes was in possession of the Ashton salt. The defendant had made over all the papers necessary for the withdrawal of this salt from the warehouse; the warehouseman had agreed to look to Oakes as his principal, and the order itself shows that the salt was all that remained of a certain cargo, and so must have been separate and distinct from all other goods. This was all the delivery that the nature of the case required, and Naylor & Company thereby became the agent of Oakes, and ceased to be the agent of Byrnes, which is the usual test. Hollingsworth v. Napier, 3 Caines, 182; Carter v. Willard, 19 Pick. 1; Foster v. Frampton, 6 Barn. & C. 107. In the case of Mottram v. Heyer, 5 Denio, 629, it is said by the chancellor that the mere entry of the goods by the consignee will not put an end to the right of stoppage, nor will the storing them by the revenue officers for safe-keeping; but he adds that if they were warehoused under the direction of the consignee in accordance with the acts of congress, the delivery would be complete. It is argued that the order on Naylor & Co. contained the implied condition that the duties should be paid before delivery, and this is true. But it was not a condition imposed by the seller, and had no relation to the contract between these parties. The order was, in effect, to hold for Oakes as the warehouseman had before held for Byrnes, subject to the act of congress which requires payment of duties before the removal of the goods out of custody. The word delivery, therefore, as thus used in argument introduces a fallacy. The seller parted with all the possession which he had, unconditionally; and the constructive delivery by order and acceptance, was a legal equivalent for actual delivery, and put an end to all transit, and all lien on his part.

The evidence does not satisfy me that there was fraud in the purchase. Byrnes says that Oakes told him that his note was good and would be paid, and it seems that Oakes must at that time have been insolvent. No questions were asked of Oakes by either side concerning this representation, an oversight which may have arisen form the irregular mode in which the case was prepared, the answer having been filed after his deposition was taken. But he undertakes to tell all that passed between the parties, and his silence on this point is to some extent contradictory of the statement of the seller. I take it to be the law of Massachusetts, which governs this contract, that a fraudulent misrepresentation by the buyer, relied on by the seller, will avoid the sale. And a purchase of goods with a distinct intention not to pay for them will have a like effect. This doctrine has been denied in some other states, but is adhered to in this commonwealth. Dow v. Sanborn, 3 Allen, 181; Kline v. Baker, 99 Mass. 253; Biggs v. Barry [Case No. 1,402]. It may be difficult of application, but there are cases in which it would apply. If it were proved that a merchant, knowing himself to be insolvent, bought goods for the express purpose of putting them or their proceeds into the hands of a favored creditor, and expected then to stop payment, the sale could be avoided within the meaning of the Massachusetts authorities as I understand them. This is, in substance, the ground taken by the defendant; but I am not satisfied that it is made out in evidence. All the circumstances of the sale tend to prove that Oakes was acting as a buyer usually acts, that he made a good bargain, and was tempted by the low price; and there is nothing but the actual state of his affairs and of his dealings about this time in the way of paying off his friends that has any tendency to establish fraud. He swears that he did not know of his insolvency, and did not expect to stop payment, and that he was forced into failure by the conduct of his brother in holding money, put in his hands for another purpose, as a set-off for a large debt due him. Undoubtedly there are circumstances which tend to throw suspicion on this transaction with the brother; but they are not sufficient to enable me to say that the bankrupt's whole conduct for two months was fraudulent, and that his business was kept alive merely to enable him to prefer his friends; and to this extent must the evidence go before this particular contract can be set aside on the ground of an intent not to pay, because as to these particular goods there is no evidence whatever that he intended to use them as a means of fraud; so that this sale can be avoided on that ground only if all sales made to the bankrupt at or after that time can be avoided.

As to the misrepresentation, it appears that the defendant had dealt with Oakes for

years, and had no reason to make any particular inquiries, and made none excepting casually and in very general terms; and when Oakes stopped payment, the rescission was demanded on totally different grounds without any allusion to a misstatement. The bankrupt is not asked about it, and mentions no inquiries or representations; but does say that he had no knowledge of insolvency or intention or expectation of failure. Upon the whole, I do not find that there was a fraudulent misrepresentation made by the buyer and relied on by the seller. If any thing was said it was scarcely more than is implied in the giving a note on four months, and I am not satisfied it was fraudulently said, and it seems to have made but little impression on the mind of the seller, and not to have been recalled even when the failure was made known to him. Decree for the plaintiff.

Case No. 10,729.

PARKER v. The CALLIOPE.

[2 Pet. Adm. 272.] [1]

District Court, D. Pennsylvania. 1806.

SEAMEN'S WAGES—PRIVILEGES SUPPLEMENTARY TO THE SHIPPING ARTICLES.

1. Embezzlement charged on a cook for selling the ship's slush. Enquiry into the custom of the port, relative to this article. No custom of the port to justify the claim by the ship's cook to the slush. Wages decreed.

[2. Cited in The Warrington, Case No. 17,208, to the point that a mariner may recover the value of privileges granted him supplementary to the shipping articles, and not written in them, the act of congress of July 20, 1790 (1 Stat. 131), not requiring their insertion.]

The respondent [Florimond J. Dusar], the owner [of the ship Calliope], allowed the claim of wages, but made a charge against the libellant for the amount of a quantity of ship's slush, valued at seventy-eight dollars and upwards, which he alleged the cook had embezzled, sold and converted the proceeds to his own use. The libellant [Thomas Parker] proved by a witness, who swore that he was present when the agreement was made by the captain, that the cook should have the slush, in addition to pecuniary wages. The cook desired this to be entered on the articles, but the captain said his word was sufficient, and nothing was inserted but the wages to be paid in money; and the witness also asserted, that the owner assented. The same witness also declared, that the captain, after the ship's return, acknowledged the agreement with the cook, for the perquisite claimed. The clerks in the owner's compting house swore that no such conversation took place in their hearing, though they were present in the compting-house, at the time of the alleged transaction; and one of them was active in forwarding the business of shipping the men. A witness, who had been a mariner on board, on the ship's return from the voyage in question swore that the captain at Newcastle, on the Delaware, had given express permission to the cook to sell the slush, alleging, that it was offensive, and the sooner it was taken away the better. The same witness proves that the cook on the voyage, had mentioned, in the presence of or so near to the captain, that he must have heard him, his right to the slush. He also proves, that the cook was for some time sick, and the steward performed his duty, and was permitted to take and sell the slush, collected in that period. No direct testimony, to discredit the libellant's witnesses, was produced; but objections to the credit of the first witness, were founded on the improbability that the agreement should have been made, and the clerks not hear it, in a small apartment. No imputation was attempted on the character or credit of the mariner testifying to the transaction at Newcastle, save that the general incorrectness of seamen was hinted at.

An importance was given to this cause, by supposing that a general custom of the port for allowing the perquisite herein claimed to all ship's cooks was endeavoured to be established. A number of depositions were filed and read, disproving this custom, as a privilege to be claimed of right, though often allowed to cooks from motives of generosity. The danger of the permission was shewn, as it gave opportunities to fraud, by encreasing the quantity of slush with ship's provisions, at the hazard, in long voyages, of producing a necessity for short allowance to the crew. A point was made that no parol testimony could be received, as the article in writing expressed no such perquisite as part of the agreement.

BY THE COURT. I desire that it may be understood, that I do not ground my decision upon any general custom, by which ship's cooks can legally claim the perquisite to which the libellant alleges his right. Several years ago, I investigated an alleged custom, that stewards should, of right, have the remnants of cabin stores after the voyage ended; and decreed they had no such right. There is no such general custom, as that of cooks having, of right, the slush; and, therefore, in this case, it can only be claimed under the special agreement. It appears to me, that the shipping articles contemplated by the act of congress, do not necessarily require these supplementary grants of additional benefits to be inserted. The privileges to mates, &c. are never specifically written in the articles; which seem only calculated for pecuniary agreements. Therefore, parol testimony may be given of such extraneous matter.

My decree will be formed solely on the point of the alleged embezzlement. I should have hesitated to have given perfect credence to the first witness, who swears to the agreement in the owner's compting-house, were his testimony not corroborated by the mariner

[1] [Reported by Richard Peters, Jr., Esq.]

who swears to the captain's license, confirmatory and executory of the agreement originally alleged. The captain was the agent of the owner; and if he has made an agreement, or given privileges contrary to the owner's interest, or instructions, he is responsible. The cook cannot be charged with embezzling an article carried away and sold by the express license of the master. Here are two affirmative witnesses, swearing expressly to the point of an agreement, and a posterior ratification and license. These witnesses I am legally bound to admit in proof. I cannot reject them as unworthy of credit, from any general prejudice, which it is my duty not to indulge.

Wages decreed to the libellant, amounting to one hundred and fifty dollars, with costs.

Case No. 10,730.

PARKER v. CARTZLER.

[5 McLean, 4.][1]

Circuit Court, D. Ohio. Oct. Term, 1849.

WITNESS FEES — SUMMONED IN SEVERAL CAUSES.

A motion was made by Mr. Mason, to retax the costs of a witness summoned in eleven cases, and charged for an attendance in each. Cited 1 Stat. 73 (Act 1789); 3 Stat. 21 (Act 1813).

This motion was opposed by Mr. Noble, who cited 5 Mass. 313; 10 Mass. 174; Crosby v. Folger [Case No. 3,421]; 1 Pick. 452; 1 Wend. 68.

OPINION OF THE COURT. The court have generally followed the practice of the state court, in allowing witness fees. In perhaps all the states in this circuit, each witness is allowed to claim his per diem in all the cases in which he has been summoned. But this in some cases would give a witness in the circuit court of the United States from ten to twenty dollars each day. Such cases require the alteration of the rule, and we, therefore, adopt a rule, "that where a witness shall be summoned in several causes, he shall be allowed a per diem and mileage only in one case; and such allowance shall be distributed and charged equally among the cases in which he shall be summoned."

Case No. 10,731.

PARKER v. CORBIN.

[4 McLean, 462;[1] 2 Robb, Pat. Cas. 736.]

Circuit Court, D. Ohio. Nov. Term, 1848.

PATENTS—INFRINGEMENT—IGNORANCE OF PLAINTIFF'S RIGHTS—COMPENSATORY AND VINDICTIVE DAMAGES.

1. Where a patent right has been infringed, the defendant not knowing of the plaintiff's right at the time, no more than compensatory damages will be given.

2. But where the infringement is characterized by a disposition to affect the interest of the patentee, counsel fees, and what may be termed vindictive damages, may be assessed by the jury.

In equity.

Mr. Ewing, for plaintiff.

OPINION OF THE COURT. This is an action for the infringement of a patent, by the construction of a water wheel for a saw mill, using the right which exclusively belonged to the plaintiff. The defendant suffered a default, and the jury were sworn to inquire of the damages, etc. The counsel prayed the court to instruct the jury that the plaintiff was entitled to recover as a part of the damages the counsel fees paid by the plaintiff. The court declined giving the instruction positively, but said to the jury, the damages were to be assessed by them in the exercise of their judgment, from the evidence. That where the act complained of had been done without a knowledge of the plaintiff's right, and under such circumstances as to authorize the jury to infer that the defendant was not aware that he was violating the rights of any one, the damages should be so graduated as to give nothing more than to compensate the injury done to the plaintiff. But where the circumstances were of a somewhat aggravated character, what was sometimes called in the law vindictive damages might be given, which would include counsel fees, and something more by way of example to deter others from doing the same thing. Verdict for plaintiff.

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

PARKER (CREASE v.). See Cases Nos. 3,376 and 3,377.

Case No. 10,732.

PARKER v. CULVERTSON.

[1 Wall. Jr. 149.][1]

Circuit Court, E. D. Pennsylvania. Oct. 20, 1846.

GUARANTY—PURSUIT OF PRINCIPAL DEBTOR.

The word "guaranty" is somewhat technical and limited in its signification in Pennsylvania; and where it is employed, the creditor must enforce his remedies against the principal debtor before he resorts to the guarantor; or else he must show that the affairs of such principal debtor were in such a condition that any pursuit of him would have proved fruitless. This at least, unless the agreement of guaranty is in some way qualified so as to control the obligation which, when the word "guaranty" is used, it commonly imposes.

[Cited in brief in Koch v. Melhorn, 25 Pa. St. 90.]

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

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

On the 25th of May, 1839, Chambers executed to Parker his bond and mortgage for $10,000, payable one year after date; and as a collateral security, assigned to him a bond and mortgage of one Wharton, dated the 30th March, 1839, "to secure the payment of $6,000 on the 30th March, 1841." On the 20th March, 1840, more than a year before this last bond became payable, Chambers applied to Parker to receive Wharton's bond and mortgage of $6,000 as an absolute payment, pro tanto, and to release from the lien of this last—the mortgage of $10,000—all the property embraced by it, certain inconsiderable items excepted. Parker agreed to do this, on condition of one Culvertson's becoming security for the payment of Wharton's debt of $6,000, and the balance, $4,000, which would yet remain due by Chambers. And accordingly by a deed poll, reciting all the above facts and executed contemporaneously with a release of lien by Parker, and his acceptance of the collateral security of $6,000 as payment, Culvertson became security, in effect as follows:

"I do hereby covenant and agree and hereby guarantee to the said Parker, the payment of the said debt or sum of six thousand dollars so as aforesaid secured to be paid by the said Wharton to the said Chambers and assigned to the said Parker as aforesaid: and do hereby also covenant and agree to guarantee the payment of the balance of the said debt of $10,000, to wit, the sum of four thousand dollars, which, upon the acceptance of said bond of said Wharton as payment, will still be due by the said Chambers to the said Parker, and for the further security to which the said Parker will also hold his mortgage before mentioned, upon two lots, &c.; all the other lots having been released by the said Parker from his said mortgage. And I do hereby covenant and agree to and with the said Parker, his heirs and assigns, that the security of his debt of ten thousand dollars and its interest so due and owing to him by the said Chambers shall, in no wise, be affected or rendered less secure in its ultimate payment to the said Parker, by reason of anything contained in the release of the said Parker bearing even date herewith, but the said debt shall be well and truly paid."

The above mentioned parties were all residents of Pennsylvania, where the mortgaged property was situate and where all the contracts connected with the matter were made. Before the bringing of this suit Parker alone became a citizen of New Jersey.

Wharton's bond not having been paid, and the mortgaged premises having produced on sale, but $1,380, Parker brought this action of covenant to April, 1845, against Culvertson, to recover from him the deficiency on his aforementioned deed poll.

The first count of the declaration, which contained two counts, recited the mortgage of Chambers for $10,000, and the assignment of the mortgage of $6,000, as collateral; that plaintiff agreed, at the instance of Chambers, to take Wharton's mortgage as payment instead of security, and to release certain property in Chambers' mortgage: in consideration of which the defendant agreed to guarantee the payment of said debt or sum of $6,000 by the said Wharton; and averred that the said Chambers and the said Wharton, had not, and that neither of them had paid any part of the $6,000, of which defendant had notice. Breach, in nonpayment.

The second contained the same recitals as the first; and averred that after the date thereof, that is to say, on the 1st of January, 1844, the plaintiff caused process to be issued on the mortgage, and obtained judgment, &c., by virtue whereof the premises were sold, and produced only $1,380, &c., whereof defendant had notice. Breach, in not paying, &c.

The validity in substance of this declaration now came before the court, on the plaintiff's demurrer to certain of the defendant's pleas, and on the defendant's demurrer to one of the plaintiff's replications. The alleged defect in the declaration was, that it omitted to aver either that Wharton had been pursued to insolvency by plaintiff or that his circumstances were so desperate that any pursuit of him would have been attended with no benefit. And this point it was which formed the matter of the argument.

T. I. Wharton, for plaintiff: Mr. Wharton was bound to make payment of his bond "well and truly," at the day; and Culvertson guarantees that payment. Payment, unqualified, means payment according to the tenor of the bond, i. e. "at the day," not at some future, uncertain, unknown day, after all the remedies of compulsive justice have been exhausted and found vain. Our guaranty is not, as in one case (Adcock v. Fleming, 2 Dev. & B. 470) to pay if A. should "fail to collect"; nor, as in another (Moakley v. Riggs, 19 Johns. 69), that the note is "good and collectible after the due course of law"; nor, as in a third (True v. Harding, 3 Fairf. [12 Me.] 193) to secure I.'s note out of certain property; nor as in two other cases (Cumpston v. McNair, 1 Wend. 457; White v. Case, 13 Wend. 543), for the collection of the note; nor yet, as in a sixth case (Curtis v. Smallman, 14 Wend. 231; Girard v. Heyl, 6 Bin. 253, and note), a warranty that a note is "good." "Goodness" or "secureness" or susceptiveness of collection is not payment. One is satisfied by nothing but gold or silver money of the United States; each of the others is answered if, through any, the most difficult of the whole circle of legal resorts, you can procure payment.

On principle, the position assumed by the defendant is untenable. A guarantor undertakes to see that the stipulation made by another is performed by that other, or else to perform it himself. It is not conditional, like the engagement of an indorser, but abso-

lute. The guarantor signs in order to bind himself: an indorser to pass his interest. A surety undertakes to pass in the first instance the debt of another; a guarantor undertakes that he will see it paid, or pay it himself. His obligation may be secondary as to the person to pay: as to the fact of payment there is nothing secondary about it. "How," says Judge Cowen, for the supreme court of New York in a case less strong than ours (Luqueer v. Prosser, 1 Hill, 256), "how is this distinguishable from a direct signature as surety. A man writes: 'I promise that $100 shall be paid to A. or bearer.' Who would doubt that such a promise would be a good note? The use of the word 'guarantee,' or 'warrant' or 'stipulate' or 'covenant,' or other word importing an obligation, does not vary the effect. . . . In one case (Morice v. Lee, 8 Mod. 362–364), Fortescue said: 'I promise that J. J. or order shall receive £100,' is a good note. Suppose it to stand, 'shall receive of J. J.' or 'I will see that £100 is paid by J. J.' All this and the like is no more than saying 'I will pay so much by the hand of another.' "

On authority likewise, the case is with the plaintiff, for not being a question as to the construction of the statute, nor about real estate, nor about anything having a permanent locality immovable and intra-territorial in its nature, but concerning a mercantile instrument common in its use over the Union, and now in contest between citizens of different states, it is to be settled not by the local laws of Pennsylvania, but by authorities binding on this court, if there be any, or if there be none, then by the weight of reason and decision, as it stands upon a review of judicial opinion in general, Swift v. Tyson, 16 Pet. [41 U. S.] 1.

The tendency of cases of late has been to confine rather than to extend the operation of state jurisprudence, Vick v. Lane, 3 How. [44 U. S.] 464.

If these positions be correct, then it is important that the construction of the plaintiff is denied to be law, in

I. Vermont (Smith v. Ide, 3 Vt. 290), where "I will warrant him to pay according to his agreement," is held absolute; such, says the court, being the character which has been given to other like engagements by numerous adjudications.

II. Connecticut (Breed v. Hillhouse, 7 Conn. 523), where "I guarantee the payment of this note within four years," is held absolute. "The defendant's guaranty," says the chief justice, "was absolute that the note should be paid within four years by the maker, or that he would pay it himself." Page 528.

III. New York (Allen v. Rightmere, 20 Johns. 365, 366; Luqueer v. Prosser, 1 Hill, 256), where the same construction is given to similar words, and the correctness of it enforced on principles and by authority. These cases in New York, with that in Connecticut, were cases of negotiable paper, in regard to which it has been declared (Woolley v. Sergeant, 3 Halst. [8 N. J. Law] 262), that the engagement is less easy to be made absolute than in a case like ours, of an instrument not negotiable.

IV. New Jersey (Woolley v. Sergeant, 3 Halst. [8 N. J. Law] 262), where "I guaranty the within" (not "payment of the within," and therefore less strong than our case) was held an absolute engagement; the instrument guaranteed not being negotiable paper.

V. Massachusetts (Upham v. Prince, 12 Mass. 14), where "I guaranty the payment of this note within six months," was held to be an engagement that the note should be paid in six months, and the guarantor held liable as a common indorser.

In all foregoing cases, except perhaps the last, the obligation was so absolute as not to require even demand of the principal and notice of non-payment to the surety. Admitting these, however, to be necessary, an obligation either to exhaust all remedies against the principal, or to prove that he was in such a desperate state that no remedies would assist you, quite outstrips all that counsel in the foregoing cases thought of contending for. Such an obligation, it is believed, is nowhere imposed except in Pennsylvania, and now in Missouri. It has been assumed to be unnecessary by the highest judiciary of the country, when the point was not raised,[3] and decided to be so by the only inferior ones in which my researches enable me to say that it was. Bank of New York v. Livingston, 2 Johns. Cas. 409; Morris v. Wadsworth, 11 Wend. 100.

We admit that there are cases where, unlike those above stated, guaranty even of payment has not been held absolute; that is to say, not so absolute as to dispense with demand and notice; but they are all either cases of

1. Negotiable paper (Greene v. Dodge, 2 Ham. [2 Ohio] 431; Oxford Bank v. Haynes, 8 Pick. 423; Talbot v. Gay, 18 Pick. 534; Sage v. Wilcox, 6 Conn. 81; Lewis v. Brewster [Case No. 8,318]; Foote v. Brown [Id. 4,909]); some of the cases, so far as may be gathered from their language, going upon that distinction; or

2. General commercial guaranties or letters of credit, where it was doubtful whether the guaranty would be accepted, or if accepted, doubtful when, or for what amount the guaranty was to be resorted to. Mussey v. Rayner, 22 Pick. 228; Douglass v. Reynolds, 7 Pet. [32 U. S.] 113; Rapelye v. Bailey, 3 Conn. 438; Reynolds v. Douglass, 12 Pet. [37

[3] Douglass v. Reynolds, 7 Pet. [32 U. S.] 114, case of a letter of credit, in which the writers bind themselves to be "responsible" for $8,000, in case the principals fail "to do so," i. e. "fail to be responsible." not fail to pay. The court, while it held that no casus fœderis arose except after demand and notice, yet add, "The creditors are not indeed bound to institute any legal proceedings against the debtor."

U. S.] 497; Adams v. Jones, Id. 207; Tuckerman v. French, 7 Greenl. 115; Cremer v. Higginson [Case No. 3,383]; Bradley v. Cary, 8 Greenl. 234; Norton v. Eastman, 4 Greenl. 521; Howe v. Nickels, 22 Me. 175; Craft v. Isham, 13 Conn. 28.

Neither class of cases concerns us; for neither intimates that anything more than demand and notice is necessary, matters which we have averred in a form not objected to. The cases which decide that demand and notice are unnecessary, decide everything in our favor, while these last, which hold them necessary, decide nothing against us.

The Pennsylvania decisions on which reliance is placed by the other side, originate in an early considered and unsupported dictum (A. D. 1793, Eddowes v. Niell, 4 Dall. [4 U. S.] 133). Rudy v. Wolf, 16 Serg. & R. 79, was the first decision, but there, for aught which appears, the bond was overdue when guarantied. Johnston v. Chapman, 3 Pen. & W. 18, must be admitted to be in point, but it goes much on the prior case; and there is visible in subsequent cases in later volumes, the seminal principle of doctrine at variance with what was held in that case.[4]

Mr. Clarkson and Mr. McIlvane, for defendant: The lex loci contractus, governs the constitution and effect of the contract; and we are relieved from difficulty in the case before us as to what is the locus contractus, for the contract was made in Pennsylvania; the parties to it all resided there until after the laws of that state operated on their case; in Pennsylvania the subject matter of the contract was situate, and there it was, itself, to be performed. The same law which governs the constitution and effects of the contract governs likewise its discharge; and if the contract, owing to any omission of Parker, has never become operative, or is discharged, in Pennsylvania, it remains inoperative or is discharged everywhere. 3 Burge, Confl. Law, pp. 874–885; Story, Confl. Law, §§ 330–335 (in which books the authorities are collected). On no other principle than the one here asserted could parties all residing in the same state, contract safely. If a contract entered into by Pennsylvanians, in Pennsylvania, about property in that state, and on a subject thoroughly settled by its courts, is to be interpreted by the law of Vermont, or of Massachusetts, or of Florida, or Louisiana, or by a balance of authority struck by this court between conflicting laws of all the states, by the law of England, or by the law as now first decided by this court, and, till decided, no law at all, it is obvious that injustice will be done in the majority of cases where the court passes upon contracts made between citizens of the same state which by accident or design afterwards get there.

The argument that the federal judiciary respects nothing but state statutes or the construction of them, by the state courts, or the law of real property as settled in the state, is misapplied. That argument applies to cases where the parties to the contract were residents of different states, or the contract was to be performed in some state other than the one where it was made, or where, in short, there was no lex loci contractus other than the circuit itself. But if any parties concerned in any matter brought here, have always been citizens of Pennsylvania; if the contract have reference to that state alone; if it was there made and was there to be executed; this court will enforce the law of Pennsylvania, no matter what may be the subject of the contract. It will enforce it because it is the lex loci contractus. We claim the benefit then, of a general maximum of law; one which all courts, in all civilized countries, apply, and apply quite independently of the rules which govern the federal courts in their decisions respecting state statutes or the laws of real property. Is, then, the effect of what Culvertson did, settled in the state of Pennsylvania, where he did it?

From an early date the word "guaranty" has had a restricted meaning in Pennsylvania; and in 1793, where B. "guaranteed" all A.'s "dealings" with C., the court said that it was by no means clear that C. could call upon B., until he had failed in his endeavor to recover from A., or until A. had become "notoriously insolvent." Eddowes v. Niell, 4 Dall. [4 U. S.] 175. The spirit of this early dictum was strong enough to animate and govern all our subsequent law on this subject.

"Which bond I stand security for the payment of," is not less strong language than that used by the defendant here; yet on the assignment of a bond, it has been held to amount to no more than an engagement that if the maker became insolvent and the holder used due and ordinary diligence, then, that

[4] McDoal v. Yeomans, 8 Watts, 361. A. wrote on the back of a note, "I warrant the within to be collectible;" the holder sued him, without having sued the maker, but as an excuse of want of suit, offered to prove that the maker was so utterly insolvent that an action would have been fruitless. The court decided that the suit was unnecessary. "If the maker," says Gibson, C. J., "was insolvent, the contract was broken the instant it was made, and the guarantee had an immediate right of action on it. The words of a guarantor are to be taken as strongly against him as the sense will bear, tempered however by the circumstances of the occasion. To warrant that a debt is collectible, therefore, is to warrant that it is legally demandable, and that the debtor is of competent ability to answer it; not that he will pay it when demanded by execution. * * * Where indeed, an action against the principal debtor is made a condition precedent by the terms of the guaranty, it mist first be prosecuted to execution; but that it was intended to be a condition must appear from some circumstance or expression in the contract."

In Craddock v. Armor, 10 Watts, 258, Craddock signed himself to a promissory note of one P. who engaged to "deliver meat at my stall," "security for the fulfillment of the above," and was held a principal debtor.

the secondary liability should arise.[5] Johnston v. Chapman, 3 Pen. & W. 18, is yet more in point. Johnston assigned and guarantied to Chapman a bond not yet due, as follows: "I do hereby assign and guaranty the payment of the within bond to C." &c. This is stronger than our case. Yet the court says: "If an obligee, on assigning a bond, enter into a covenant with the assignee to stand surety for its payment, this is an engagement to pay the money on the insolvency of the obligor, provided the assignee used due diligence to obtain payment from the obligor. . . . . A demand of payment alone is not sufficient. It must be followed up with proof from which the jury can reasonably infer the insolvency of the obligor." Pages 19, 20. The law as settled in 1831 by this, the leading case on the subject in Pennsylvania, has not been overruled by any subsequent decision, nor in any way departed from, except as in McDoal v. Yeomans, 8 Watts, 361, to enlarge its spirit.

In construing a guaranty you will temper its terms by the circumstances of its contract. Miller v. Stewart, 9 Wheat. 680. Parker's debt was not yet due, and was secured by mortgage. The mortgage was the security of his debt, "and was the thing which was not to be affected or rendered less secure in its ultimate payment." Now by the laws of Pennsylvania (Act 1705), you cannot foreclose a mortgage until a year and a day after the debt which it was given to secure becomes due; and whether or not that "security" would be "rendered less secure in its ultimate payment," was a thing which could not possibly be ascertained until the mortgage had been foreclosed. Culvertson's contract arose, not upon the nonpayment of the bond, but upon the failure of the security.

GRIER, Circuit Justice. The decision of the point here raised depends upon the effect of the contract declared on, according to the laws of Pennsylvania, the place of the contract.

The covenants, when taken into connection with the recitals in the instruments, show that it is not an original contract of suretyship, nor, like the guaranty of a promissory note, a contract to pay on a given day if the principal does not; but one of a secondary or ancillary sort; for a new consideration, guarantying the sufficiency of certain securities held by the plaintiff, and their ultimate payment. Being thus collateral and conditional, it requires, in its essence, that the plaintiff should exhaust his remedies against the other parties before he comes upon the defendant.

The word used, it may be remarked, is "guaranty"; a word which in its enlarged sense, says Chancellor Kent (Comm. vol. 3, p. 121), "is a promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another party who in the first instance is liable."

The duties and liabilities consequent upon such a contract, are settled in Pennsylvania, as will be seen by reference to the cases cited on the argument, particularly by that of Johnston v. Chapman, 3 Pen. & W. 18, where the words of the contract much resemble those in the engagement before us. No case, so far as I am aware, has ever overruled this decision.

It follows then that the plaintiff must aver in his declaration, and of course must prove on the trial, that he had used due diligence to enforce payment of both the bond and mortgage assigned to him by Wharton; or that Wharton was in such a situation—call it what you wil.—that further pursuit would have been fruitless. For want of this the declaration is fatally defective and judgment must go against the plaintiff, who committed the first error, and, in this case, shows no cause of action.

NOTE. No judgment was entered, however, as the plaintiff's counsel immediately asked leave to amend his declaration, which he was allowed to do on payment of costs.

[5] Rudy v. Wolf; 16 Serg. & R. 79. It is not clear from the report of this case, whether the bond was not overdue when it was assigned.

Case No. 10,733.

PARKER v. FERGUSON.

[1 Blatchf. 407;[1] 1 Fish. Pat. Rep. 260; 1 Liv. Law Mag. 95.]

Circuit Court, N. D. New York. June Term, 1849.

PATENTS—NOVELTY.

Where a water wheel was constructed for a person who lived twelve miles distant from the place of construction, and was taken away by him to be put into a mill, and was never seen afterwards by the witness who testified to and assisted in its construction, the wheel having been a perfect wheel, and constructed before the plaintiff's, and identical with it: *held*, that the evidence was sufficient, if believed, to establish the want of novelty in the plaintiff's wheel, although there was no evidence that the prior wheel was ever actually used.

[Cited in Wollensak v. Reiher, 22 Fed. 651; Kappes v. Hartung, 23 Fed. 188.]

This was an action [by Zebulon Parker against Jonathan Ferguson] for the infringement of letters patent granted to Zebulon Parker and Austin Parker, October 19th, 1829, for "an improvement in the application of hydraulic power," and extended by the patent office for seven years from October 19th, 1843.

William H. Seward, Joshua A. Spencer, and Samuel Blatchford, for plaintiff.

Samuel Stevens, Charles M. Keller, and Henry B. Stanton, for defendant.

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

On the trial before NELSON, Circuit Justice, the defendant set up the defence of a want of novelty in the invention, and to support it introduced a witness, Hosea W. Holmes, who swore that in 1819, in Stonington, Connecticut, he assisted in constructing a water wheel embracing the principle of the patentee's invention; that it was constructed for a man who lived twelve miles distant from Stonington, and was carried away by him to be put into a mill; and that the witness never saw it afterwards.

In charging the jury, NELSON, Circuit Justice, remarked, that if the wheel spoken of by the witness, Holmes, was constructed before the plaintiff's wheel, and was a perfect wheel, and was taken away to be used, the evidence, if believed, was sufficient to establish the fact of a want of novelty in the plaintiff's wheel, although there was no evidence that the prior wheel was ever actually used.

The jury found a verdict for the defendant.

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

PARKER (FLOWER v.). See Case No. 4,891.

Case No. 10,734.

PARKER v. HALLOCK.

There is no act of congress limiting the time in which a suit may be brought for an infringement of a patent-right.

[Cited in Law, Pat. Dig. 108, 469, to the point as stated above. Nowhere reported; opinion not now accessible. Decided by GRIER, Circuit Justice.]

Case No. 10,735.

PARKER v. HALLOCK.

[2 Fish. Pat. Cas. 543, note.] [1]

Circuit Court, Pennsylvania. 1857.[2]

PATENTS—INFRINGEMENT—LIMITATIONS.

Action [by Zebulon Parker against S. B. Hallock] for infringement of a patent right. In this case the defendant's counsel insisted that the plaintiff was barred by the statute of limitations: *Held*, that, as no act of congress had been passed to meet the case, and the law of Pennsylvania did not apply to it, there was no statute limiting the time in which a suit might be brought for an infringement of a patent right. The jury found for the plaintiff, assessing his damages at $68.

[Cited in Rich v. Ricketts, Case No. 11,762.]

Fisher and Sweitzer, for plaintiff.
Selden, for defendant.

[Before GRIER, Circuit Justice. Nowhere more fully reported; opinion not now accessible. Originally published in 2 Fish. Pat. Cas. 543, as a note to Collins v. Peebles, Case No. 3,017.]

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

[2] [District not given.]

Case No. 10,736.

PARKER v. HATFIELD.

[4 McLean, 61; [1] 1 Fish. Pat. Rep. 94; 42 Jour. Fr. Inst. 319.]

Circuit Court, D. Ohio. July Term, 1845.

PATENTS—INFRINGEMENT—CONFLICTING EVIDENCE—TRIAL BY JURY—REFERENCE.

1. When the evidence on a bill to enjoin the defendant from infringing the plaintiff's patent, be conflicting, the court will direct an issue to be tried by a jury, or refer the matter to a master, to examine the machinery of the defendant, take additional testimony and report.

2. A reference being made, and a favorable report for the plaintiff on all the points controverted being made, an injunction was granted.

[2] [This was a suit in equity [by Zebulon Parker] to restrain the defendant [William Hatfield] from infringement of letters patent for "a new and useful improvement in the application of hydraulic power," viz. a percussion and reaction water wheel, granted to said Zebulon Parker and Austin Parker October 19, 1829. Austin Parker having deceased, the entire interest in the patent became, by assignment from Austin's administrators, vested in Zebulon Parker, the complainant. The invention of Zebulon Parker and Austin Parker, as secured by the said patent, is sufficiently described in the report of the master.

[The opening clause of the specification of this patent, together with the claims thereof, are as follows: "To All to Whom These Presents shall Come: Be it known that one Zebulon Parker and Austin Parker, of the county of Coshocton and state of Ohio, have invented a new and useful improvement in the application of hydraulic power by methods of combining percussion with the reaction, applied and exemplified in: (1) A compound vertical percussion and reaction water wheel for sawmills and other purposes, with the method of applying the water on the same. (2) An improved horizontal reaction water wheel, with the method of combining percussion with reaction on it. (3) A method of combining percussion with reaction on common reaction wheels, or those already in use." The claims were as follows, viz.: "(1) The compound vertical percussion and reaction wheel for said mills and other purposes, with two, four, six, or more wheels on one horizontal shaft; the concentric cylinder involving the shaft, with the manner of supporting them; the spouts which conduct the water into the wheels from the penstock, with their spiral terminations between the cylinders. (2) The improvement in the reaction wheel, by making the buckets as thin at both ends as they can safely be made, and the rim no wider than sufficient to cover them; the inner concentric cylinder; the spout that directs the water into the

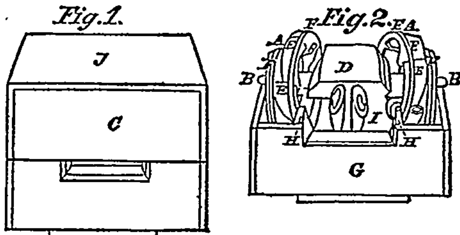
[1] [Reported by Hon. John McLean, Circuit Justice.]

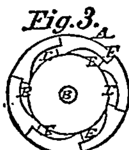
[2] [From 1 Fish. Pat. Rep. 94.]

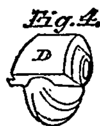
wheel; and the spiral termination of the spout between the cylinders. (3) The rim and blocks or planks that form the apertures into the wheel, and the manner of forming the apertures; the conical covering on the blocks, with cylinuer or box in which the shaft runs, and the hollow or boxgate in any form, either cylindrical, square, rectangular, or irregular."

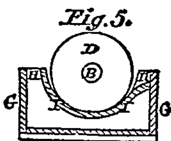
[It appeared that letters patent had been granted to the defendant, William Hatfield, December 31, 1638, the specification whereof was as follows: "The schedule referred to in these letters patent, and making part of the same: Be it known that I, William Hatfield, of Zanesville, in the county of Muskingum and state of Ohio, have invented a new and useful improvement on Parker's percussion and reaction water wheel, which is described as follows, reference being had to the annexed drawings of the same, making part of this specification. The main features of this improvement consist in the peculiar shape of the buckets of the wheels, and the arrangement of the double scroll for directing the water upon said buckets in such a manner, both above and below the axis of the shaft, as to produce the greatest effect with the least quantity of water. The wheels, A, A, are arranged in pairs on a horizontal shaft, B, lying across the boxing of the mill and covered by the wheel chamber, C. Between each pair of wheels is arranged a double spiral scroll block, D, for directing the water on the buckets to the right and left, as well as above and below the shaft at the same time. Each wheel is composed of a round, solid head, fastened on the shaft near the end thereof, having a curved rim around the peripheries of said heads, divided into equal spaces or sections, each of which containing a bucket, E, of the required shape, which is that of a section of an oval, the convexity being on the outside, and the concavity on the inside. It very nearly resembles the bowl of a tablespoon with the handle and part of the large end cut off. The wheel, when made of wood, is strengthened by

[Drawings of patent granted December 31, 1838, to William Hatfield, published from the records of the United States patent office.]

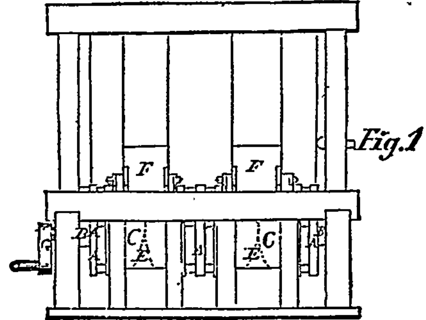


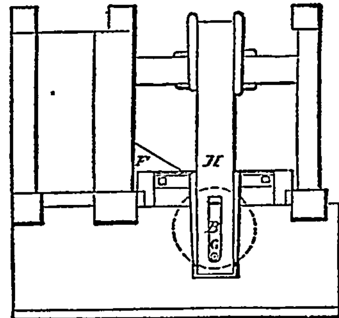


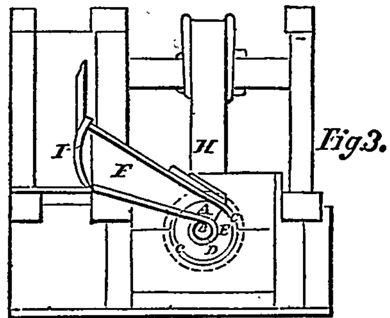


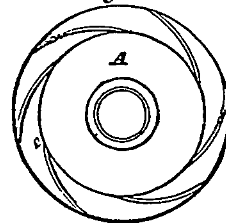


[Drawings of patent granted to Z. and A. Parker, October 19, 1829, published from the records of the United States patent office.]









bands of iron, F, around the peripheries or edges, and across the ends of the buckets. Both wheels are made alike, and are fastened on the horizontal shaft in the vertical position, with their open sides towards the center or towards the scroll. The double spiral scroll D, bears some resemblance to two volutes brought together, and secured in that position. The drawing, Fig. 4, illustrates fully the peculiar form of said double scroll. The boxing, C, and the side decks, H, are also made in the usual manner. The concave, I, in which the scroll is placed, is made something after the shape of an ogee; the convex part over which the water passes to the buckets being raised much higher than in any other wheels for the purpose of directing the water with greater force against the buckets above the axis of the shaft, and conducting the same around the buckets above the axis. The scroll commences to scroll at the small end in front, on either side, and thus continues to increase until it performs a complete revolution around the shaft for the purpose of directing the water as before described. The cup, I, is made in the usual manner. The gate is raised by the attendant by means of a lever or other contrivance. The water enters the shute and passes on at either side of the double spiral scroll block to the buckets of the two wheels at the same time, thus dividing the water, and directing it to the buckets above and below its axis on the wheel at the same time. The invention claimed, and desired to be secured by letters patent, consists in the peculiar form of the buckets, and the double spiral scroll placed between them for directing the water in the manner above described."

[The bill prayed for an injunction to restrain said Hatfield in the use of his pretended invention, and claimed that said alleged improvement was not new and useful, but was a direct infringement of the rights of the plaintiff, and further charged the defendant with confederating with parties unknown, and prayed for a discovery and answer from the defendant describing his alleged improvement, and why it was an improvement.

[The defendant in his answer cited in defense his letters patent of December 31, 1838, and stated that, being ignorant, he had to employ one Elliot at Washington to write it for him, and though he believes his invention to be new and useful, he admits that said Elliot, in naming his (defendant's) invention, styled it an improvement on Parker's, but trusted he would not be prejudiced thereby if he showed his improved water wheel to be wholly independent of and superior to complainant's. Further, that the combination of percussion and reaction in the use of water power, as claimed in plaintiff's letters patent, cannot exist to any useful extent together; that the defendant claims no advantage of percussion in his water wheel, but simply the power acquired by the weight of a body of water producing action, and the consequent power derived from the reaction of the water escaping through the issues of the wheel. Defendant further claimed: First. That, by the peculiar form of his buckets he acquired a force similar to that exerted upon the board of a boat crossing a stream by the force of the current. Secondly. That he did not seek, as the plaintiff did, to produce a vortex, and hence claimed no centrifugal force from that source. Third. That complainant's wheels were, by his specification, hung in front of the lower part of the breast, about a foot from it; that defendant's wheel was placed inside the forebay. Fourth. Complainant conducted the water to the wheel by spouts, while the defendant did not use spouts. Fifth. Complainant used a hollow gate, while defendant used the common gate, which lets the water upon the wheel in a solid body. Sixth. Complainant used a chamber 20 inches high in the forebay, to produce (defendant supposes) the vortex claimed by complainant as an improvement, and that defendant had no such chamber. Defendant claimed that the specifications of complainant's patent were not full, true, or exact, and were therefore void. Defendant denied infringement generally.

[The complainant afterward filed a supplemental bill, which, among other things, set forth other letters patent for improvement in percussion and reaction water wheels, granted to Zebulon Parker and Robert McKelvey, administrator of Austin Parker, deceased, June 27, 1840, and alleged that defendant infringed this patent by making the boxes or draft mentioned therein.

[The claims and that part of the specification of the patent of Parker and McKelvey, which appertains to the present case, are as follows: "To All Whom it may Concern: Be it known that I, Zebulon Parker, of Newark, in the county of Licking and state of Ohio, did, in conjunction with the late Austin Parker, deceased, make certain improvements in the percussion and reaction water wheel, for which letters patent of the United States were granted to Zebulon and Austin Parker, under date of October 19, 1829, and it is hereby declared that the following is a full and exact description of said improvement: The percussion and reaction of wheel or wheels, whether on a horizontal or a vertical axis or shaft, is inclosed in a box or case, which is denominated a draft, which draft is made air and water tight at the top and sides, but is without a bottom, the mouth of said draft dipping into the water; and being, whenever the mill is running, below the level of the water in the tail race, it might be supposed that this air would interfere with their being filled with water, but such, in fact, is not the case, as from the agitation produced by the passing of the water from

the wheels into the drafts, the air is intermingled therewith, and is speedily carried out with it, leaving the draft entirely filled with water. By this arrangement of the wheels within the drafts, they may be placed at a greater elevation than upon any other known plan, while, at the same time, the pressure of draft of the water below them will have the same effect upon them as it would if situated above them and acting in the ordinary manner of head water. What is claimed as new in the above-described improvement on the percussion and reaction wheel, as originally patented by Z. and A. Parker, is the placing of said wheel or wheels, or of wheels analogous thereto in the construction and mode of operation, within air or water tight cases or boxes, herein denominated drafts, substantially in the manner and for the purposes above set forth."

[The court referred the case to C. P. Buckingham, special master commissioner. The questions submitted to the master for examination are stated in his report, which was as follows:

["That, from the pleadings, exhibits, and testimony on file in said cause," he found "that, on October 19, 1829, a patent was issued to Zebulon and Austin Parker, for 'an improvement in the application of hydraulic power,' which improvement consists, according to the specification of the patent: (1) In placing several wheels (always an even number) on one shaft, and conducting the water to them through spouts which wind between concentric cylinders, producing thereby a whirling or vortical motion of the water in the same direction with that of the wheels. (2) In a contrivance for introducing the water into a single horizontal wheel, with a similar motion, together with an improvement in the construction of the wheel itself. (3) In a contrivance for applying the same principle to common wheels now in use. At a subsequent period, Austin Parker died, and his administrator, Robert McKelvey, conveyed to Zebulon Parker all his interest in the invention and subsequent improvements by deed dated November 2, 1839. On October 4, 1843, the patent was extended to the term of 21 years from its original date, upon the petition of Zebulon Parker. On December 31, 1838, William Hatfield obtained a patent for an improvement on Parker's percussion and reaction wheel, consisting, according to the specification, of the peculiar form of the buckets, and the double spiral scroll placed between them for directing the water. In his answer to the bill filed against him by the complainant, the defendant claims that his invention was denominated 'an improvement on Parker percussion and reaction wheel,' by mistake, and that the wheel for which he obtained his patent was wholly his own invention.

["The first question asked by the court in the order is, 'whether the invention claimed by the complainant was new and useful, and, should he so find, that he (the commissioner) then report the particular in which it was new, and wherein consists its utility.' The invention claimed by the complainant consists of several parts or particulars. Each of these will be examined separately. The first particular is the arrangement of several wheels upon the same horizontal shaft. There is nothing in the evidence to show that this invention was not new. The only evidence on this part of the subject is that of Isaac Dillon, who is uncertain whether the wheels which he heard of as being used by George Girty, at Dresden, on one shaft, were prior to the use of Parker's wheel or not. Next, as to its utility. The word 'useful,' as applied to an invention, does not necessarily imply an improvement upon all former methods of obtaining the same end. The office of the government in granting a patent is that of protection. The character of the invention is the only thing which the government is to look to in reference to the public interest, and it is in reference to this alone that the word 'useful' is applied in the patent. It simply means a capability of being applied to a beneficial purpose, and is opposed to that which is mischievous and injurious in its natural tendency. See opinion of Story, J., in Bedford v. Hunt [Case No. 1,217], and in Whittemore v. Cutter [Id. 17,600]. In this sense, then, the invention is certainly useful, inasmuch as it is not pretended that it has in any sense a mischievous effect upon the public. The particulars in which this part of the invention is claimed to be new are the position of the shaft (being horizontal), and the number of wheels attached thereto. Its utility consists in the convenience of attaching the shaft directly to the saw without the intervention of gearing, in avoiding friction by placing the wheels in pairs so that the water shall press equally in each way in a direction parallel with the shaft, and in permitting the power of a lower head as applied to the same shaft to be increased to the utmost extent of the supply of water by increasing the number of pairs of wheels. The next particular of the invention claimed by the complainant, to which the first question of the court will be applied, consists of the concentric cylinders and the manner of supporting them. No evidence has been adduced to show that this part of the invention is not new, nor can there be a doubt of its utility in the sense which we have assumed as belonging to the word. The particulars in which this part of the invention is claimed to be new are: A hollow cylinder, with an interior diameter nearly equal to that of the wheel; another cylinder, which is solid (except the cavity for the shaft to run in), and concentric with the first. These cylinders are placed between the tire wheels, and serve to

give the water a circular or whirling motion by passing between them before striking the wheels. Connected with these cylinders, and essential to them, is the manner of supporting them, which is simply by inclosing their ends in plank rims attached to the frame work of the forebay. The utility of these cylinders consists in the whirling or vortical motion which they give to the water before it reaches the wheels. This motion is in the direction in which the wheel moves, and causes the particles of water, as they pass out at the issue, to act at a greater angle against the inner sides of the buckets. Every wheel propelled by the action of water upon the inclined surfaces of buckets placed around its circumference, with issues for the water to pass freely out, may be said to act by percussion, for the particles of water, being urged by the pressure of those behind, in endeavoring to escape in every direction outwardly, act upon the inclined surfaces just as the force of the water is exerted upon the lee board of a boat crossing the stream by the force of the current. Now, it is clear that if, by any means, a direction be given to the current which shall coincide with that of the boat before it strikes the board, it will serve to propel the boat faster. This is just the effect of the cylinder in question, though it is by no means clear that the inner one is essential to produce the result. The next particular of the interior claimed by the complainant is 'the spouts which conduct the water into the wheels from the penstock, and their spiral termination between the cylinders.' This part of the invention is also both new and useful. The novelty of these spouts consists of their spiral termination. Their utility consists in conveying the water more easily and with less friction to the inside of the wheels, where it can act at once upon the buckets. These particulars have reference, in every case, to the arrangement of several wheels upon a horizontal shaft. Similar particulars are claimed by the complainant in the invention, as applied to the single horizontal (shaft) wheel upon a vertical shaft, and to these particulars the foregoing observations will apply in the same way. Another part of the invention claimed by the complainant is a contrivance for applying the principle of vortical or circular motion of the water to reaction wheels now in use. This contrivance is both new and useful, in the sense in which those above described are so. Its utility consists in giving to the water a circular motion as it enters the wheel to act upon the buckets or issues.

["The next question proposed by the court is 'whether the complainant's patent is valid.' There is nothing in the evidence which goes to show its invalidity. If, then, it is invalid, it must appear upon the face of the patent itself. The two principal considerations to be applied to this question are, whether the invention is one of a nature to entitle the inventor to a patent therefor, and whether the provisions of the law are complied with in the manner of making the specifications.

["And, first, the invention is one which consists mainly of three parts: (1) A contrivance for applying the water more advantageously to the buckets of the wheel, by giving it a whirling motion. (2) A combination of wheels upon one shaft for the purpose of increasing power and avoiding friction. (3) An improvement in the reaction wheel, by making the buckets as thin at both ends as they can be safely made, and the rim no wider than sufficient to cover them. Under section 6, Act Cong. July 4, 1836, the first part of this invention may very properly be denominated a 'new and useful machine,' being a contrivance consisting of cylinders and their supports, with the spiral spouts between. It can be described, made, and sold, and each and every part, whether separate or combined, may be made the subject of exclusive right, and is therefore clearly entitled to a patent. The second part of the invention may properly be called an improvement on a machine, by means of a new combination of things which were before in use and well known. It is true the inventor entitles it 'the compound vertical percussion and reaction wheel,' but this title is evidently applied to the combination, since the several parts consisting of the shaft and wheels were well known before. See opinion of Story, J., in Moody v. Fiske [Case No. 9,745]. This part of the invention has, therefore, nothing in its nature which destroys the right of the inventor to a patent. The third part of the invention is the 'improvement in the reaction wheel, by making the buckets as thin at both ends as they can safely be made, and the rim no wider than sufficient to cover them.' This part of the invention claimed by the complainant does not seem to be of a character to entitle the inventor to a patent. It is called an improvement, but it contains nothing which sufficiently differs from the old wheel to make in any sense a new machine of it. It consists merely of a slight variation or change in the form or proportions of a wheel long in use, without in any way changing the mode by which the water acts upon the wheel, nor the effect of such action. See opinion of Washington, J., in Gray v. James [Case No. 5,718]. This wheel, then, claimed by the complainant, must be considered as substantially the same wheel as the one before in use, and therefore not entitled to a patent.

["Secondly. Is the invention so described in the specifications as to correspond with the statutory requirements, that it shall be 'in such clear, full, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connect-

ed, to make, construct, compound, and use the same?' It would be difficult to imagine a description more clear and distinct than that given of the complainant's invention in the specification of his patent. The patent cannot be objected to on this account. The only point of doubt, then, as to the validity of the patent, is, whether that part of the invention said to consist in 'the improvement of the reaction wheel,' not being entitled to a patent, is sufficient to invalidate the whole. See remarks of Story, J., in Moody v. Fiske [supra]. Now, the alleged improvement in the water wheel consists of a simple change of form of the buckets and the proportions of the rim. This change, though slight, and not involving a sufficient difference from the old wheel to form a new machine in any sense, and therefore not entitled to a patent, is nevertheless, so far as there is any alteration, the invention of the complainant, so that he does not claim anything that he has not invented, though a part of that invention would not be entitled to a patent. The said commissioner is therefore of opinion that the patent, in this respect, is valid, though this opinion is expressed with hesitation.

["The third question of the court is, 'whether the invention claimed by the defendant, or the water wheel made, vended, or used by him, is an infringement of the complainant's rights under his patents, and, if so, wherein?' The improvements claimed by the defendant, in the summing up of his specifications, are 'the peculiar form of the buckets, and the double spiral scroll placed between them.' The specification itself, however, describes the wheels as placed in pairs on a horizontal shaft, and the scroll as being placed in a 'concave,' resembling an ogee. The spiral scroll, the combination of the wheels, and the 'concave,' are all of them undoubtedly infringements on the rights of the complainant, under his patent, the two first items being precisely the same as those described in the patent of the complainant, and the 'concave' being nothing less than the 'outer cylinder' of the complainant, and which principally acts in producing the vortical or whirling motion of the water.

["The fourth question of the court is 'the amount of damage sustained by the complainant by reason of the infringement of his rights under said patent by defendant.' The only evidence touching the number of wheels made and put in operation by defendant is that of S. R. Chandler and of Martin Chandler, Jr. The former says that he knows of defendant building a mill on a fork of Salt creek, in Muskingum county, and others in the neighborhood; that he has seen the wheels used by Hatfield, and that they are identical with his own (one of complainant's), except that his was made of iron, and those put in by defendant of wood. The latter says he never saw but three of defendant's wheels in operation, and he thinks there is no material difference between those and the complainant's. It would seem, then, that no more than three wheels have been proved to have been put into operation by the defendant, the damages for which, at the price demanded by the complainant for each right, would amount to $75. In the month of July, 1844, at the request of the complainant, the undersigned notified the parties that he would attend at the house of complainant for the purpose of witnessing a series of experiments having reference to this cause. Owing to the alleged illness of the defendant, he did not attend at the time appointed, and afterward protested against the experiments made in his absence being used in evidence. In the month of May last, after due notice to both parties, the experiments were repeated, defendant being still absent. After a full investigation of the matter, the undersigned became satisfied that the experiments, of which the object was to test the relative merits of the complainant's invention, had no bearing upon the question at issue between the parties, and therefore no notice was taken of them in the investigation of the subject."

[The defendant, through his counsel, excepted to said report for the following causes: (1) Due effect was not given to the testimony of Isaac Dillon, which showed that so much of Parker's invention as relates to the placing two or more wheels on one horizontal shaft was not new. (2) The commissioner had misapprehended the law in relation to the validity of a patent for a machine merely useless and not mischievous. (3) The report erred in not holding the patent void, for the reason that it embraced various distinct inventions and improvements. (4) The report was erroneous in not holding the patent void, for the reason that the specification embraced a matter which was admitted in the report not to be the subject of a patent. (5) The report was erroneous in its mode of estimating the plaintiff's damages. (6) The report is erroneous in not setting forth the experiments or their results, and in not taking notice of them in the report.][2]

Mr. Ewing, for complainant.
Mr. Goddard, for defendant.

OPINION OF THE COURT. The complainant filed his bill against the defendant, to restrain him from infringing his patent right. The complainant, in connection with his brother, now deceased, claims the invention of a new and useful improvement in the application of hydraulic power, by methods of combining percussion with re-action, applied and exemplified in the forms of machinery which they mention. The defendant, in his answer, denied the infringement, and also the right of the plaintiff as stated in his bill. At the hearing it was proved by two witnesses, introduced by the complainant, that the water wheel used by the defendant was the same in principle, as that claimed by the plaintiff.

[2] [From 1 Fish. Pat. Rep. 94.]

And one of the witnesses says that he heard the defendant say, he expected to pay Parker for his improvement.

Several of the witnesses called by the defendant, say, that the improvement claimed by the plaintiff was of no value. That the power is derived merely from the weight of the water, and that there is nothing new in the invention. Under this conflict of the testimony, the court referred the matter to C. P. Buckingham, Esquire, who was directed, at the request of either party, to witness such experiments as may be made in relation to the improvements claimed, and that he shall take such further testimony as may be requested, due notice being given. And that he report the result of his experiments and his opinion in relation to the following matters: First—Whether the invention claimed is new or useful; and should he so find, that he state the particulars in which it is new, and wherein consists its utility. Secondly—Whether the complainant's patent is valid; and if not, the reason of its invalidity. It may be proper here to remark that these directions were framed by the counsel, and the impropriety of this one was not noticed by the court, until the report of the master was made. The object was to have a report on all matters connected with the subject, which either party desired. But the validity of the patent, upon its face, was a matter of construction for the court. Thirdly—Whether the invention claimed by the defendant, or the water wheel made, vended or used by him, is an infringement on complainant's rights under his patent; and if so, wherein. Fourthly—The amount of damages, etc.

Under these directions the master reported, "the particulars in which this part of the invention is claimed to be new, are, the position of the shaft (being horizontal) and the number of wheels attached thereto. That its utility consists in the convenience of attaching the shaft directly to the saw without the intervention of gearing; in avoiding friction by placing the wheels in pairs, so that the water shall press equally each way in a direction parallel with the shaft, and in permitting the power of a low head, as applied to the same shaft, to be increased to the utmost extent of the supply of water, by increasing the number of pairs of wheels." "The next particular of the invention claimed, consists of the concentric cylinders, and the manner of supporting them." And he reports that no evidence was adduced to show that this part of the invention was not new, and he says there can be no doubt of its utility. The next particular of the invention claimed is, "the spouts which conduct the water into the wheels from the penstock, and their spiral terminations between the cylinders." And this the master reports is both new and useful. Another part of the invention claimed by the complainant is, a contrivance "for applying the principle of vortical or circular motion of the water to re-action wheels now in use." This, he says, is both new and useful. He reported favorably of the patent, that the defendant had infringed it, and he estimated the damages at $75.

Exceptions were taken to the report, and argued, but no additional testimony was offered. As to the infringement, the master reports, "the improvements claimed by the plaintiff, in the summing up of his specifications are, 'the peculiar form of the buckets, and the double spiral scroll placed between them.' The specification itself, however, describes the wheels as placed in pairs on a horizontal shaft; and the scroll as being placed in a concave resembling an ogee. The spiral scroll, the combination of the wheels and the concave, are all of them, undoubtedly infringements on the rights of the complainant, under his patent." This is the opinion of the master, who is understood to be practically acquainted with machinery, and especially with the kind of machinery involved in this inquiry. And his opinion being formed from actual examination and experiments, it is entitled to great weight. Indeed, there is no evidence in the case which can create any doubt in the mind of the court, as to its entire accuracy.

The novelty of the invention has been called in question by the counsel, and a reference is made to the Dictionary of Arts and Sciences (page 2010), under the head of "Mill"; and to other treatises on mechanics, but, we think, without success. We think the invention of complainant is different in principle from any structure referred to. And we can not doubt, from the evidence and the models exhibited, that by the combination described, a great increase of power is gained over any other machinery before used for a similar purpose. The contrivances show great ingenuity and an intimate acquaintance with hydraulics. From the evidence, and our reflection on the subject, we are impressed with the great value of the invention, with its novelty in combination, and with the high merit of the patentees in bringing into practical operation so great an improvement in hydraulic power. We therefore enjoin the defendant from further making, using or vending re-action water wheels, to be used in the manner of those heretofore made by him, or any other infringing of the exclusive privileges of the complainant, etc., and that within twenty days the defendant pay the costs of this suit, etc.

[For other cases involving this patent, see Cases Nos. 10,738, 10,731, 10,733, 10,740, 10,749, 10,727, 10,725, 10,748, 10,726, 10,737.]

Case No. 10,737.

PARKER v. HAWK.

[2 Fish. Pat. Cas. 58.] [1]

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

PATENTS — TRESPASS ON THE CASE FOR INFRINGEMENT—STATE STATUTE OF LIMITATIONS.

1. In an action on the case brought under the patent laws of the United States for an infringement of a patent right within the state of Ohio, the limitation act of that state in force when the infringement took place, which bars all actions on the case after six years from the time the cause of action accrued, is a good plea.

2. The 34th section of the judiciary act of 1789 [1 Stat. 73], providing that the laws of the several states not in conflict with the constitution, treaties or laws of the United States, shall form rules of decision for the courts of the United States, includes state legislation for the limitation of actions, and will have the same force in those courts as in the courts of the states.

[Approved in Rich v. Ricketts, Case No. 11,-762.]

3. As the act of congress provides that the action of case may be brought for an infringement of a patent right, and the statute of Ohio bars that action by its technical denomination after six years, the limitation must apply as a bar.

[Cited in Anthony v. Carroll, Case No. 487.]

4. Until congress shall declare the time of limitation for an action for an infringement of a patent right, there is no reason why a state may not interpose to prevent its citizens from vexatious suits of alleged infringements of patent rights, by the enactment of reasonable statutes of limitation barring such suits.

[Cited in brief in Collins v. Peebles, Case No. 3,017. Cited in May v. County of Logan, 30 Fed. 257.]

This was a demurrer to the plea of the statute of limitations. A patent for a new and useful "improvement in hydraulic power," was granted to Zebulon and Austin Parker October 19, 1829, and, having been extended for seven years from the expiration of the first term, expired October 29, 1850. An action on the case, to recover damages for the infringement of this patent, during its lifetime, was brought in 1857. To this action the defendant [John Hawk] pleaded the statute of limitations of Ohio, limiting actions on the case to six years, to which plea the plaintiff demurred.

G. M. Lee and S. S. Fisher, for plaintiff.

T. Ewing, Jr., for defendant.

LEAVITT, District Judge. This is an action on the case for an infringement of the plaintiff's patent for an improvement in the application of hydraulic power, known as the Parker water wheel. The declaration is in the usual form, and avers an infringement by the defendant on a day specially designated. The defendant has pleaded the statute of limitations of the state of Ohio in force when the cause of action accrued, by which all actions on the case for consequential damages, are barred after six years. To this plea the plaintiff has filed a general demurrer, and this presents the question now to be decided. The counsel for the plaintiff insists that the limitation act of Ohio does not apply to a cause of action arising under an act of congress. The argument is that as the power to grant patents for new and useful inventions is vested exclusively in congress by the constitution of the United States, and the franchise of a patentee is created by congressional legislation, no state law can affect or impair his right. The question as applicable to this action is new in this court, nor has it been directly decided by the surpeme court of the United States. The supreme court, however, have affirmed principles which by analogy may be regarded as decisive of the question arising on this demurrer. It is well settled that as state laws for the limitation of time within which actions may be brought affect merely the remedy, and do not impair the obligation of a contract, they are to be regarded as rules of decision by the courts of the United States.

The case of McCluney v. Silliman, 3 Pet. [28 U. S.] 270, is one in which this principle was recognized and applied by the supreme court. It was an action on the case against the defendant as register of a land office in Ohio for nonfeasance in refusing, on the request of the plaintiff, to enter his application for the purchase of certain government lands, as required by an act of congress. The plaintiff put in the plea of not guilty within six years, to which there was a demurrer. It was insisted that the Ohio statute of limitations could not be interposed as a bar to an action against a public officer for an omission of a duty enjoined by an act of congress. The opinion of the court, in which all the judges concurred, was delivered by Judge McLean. The learned judge, after citing section 34 of the judiciary act of 1789, which provides "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States in cases where they apply," arrives at the conclusion that the limitation act of Ohio was applicable to the case, and was a bar to the action. The court say: "Under this statute the acts of limitation of the several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts." The court further hold "that where the statute is not restricted to particular causes of action, but provides that the action by its technical denomination shall be barred if not brought within a limited time, every cause for which the action may be prosecuted, is within the statute." And again: "In giving a con-

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

struction to this statute, where the action is barred by its denomination, the court can not look into the cause of action." The court, in accordance with these views, therefore overruled the demurrer to the plea of the statute of limitations.

There would seem to be no doubt that the decision in the case referred to, must control the pending question. It is true the cause of action in the case decided by the supreme court was not the same as in the case before this court. This is an action for an infringement of a patent right, but like the case of McCluney v. Silliman [supra], it is an action on the case, and therefore within the category of suits expressly barred by the Ohio statute. The act of February 25, 1831, in force when the cause of action accrued in this case (3 Chase, 1768), fixes the bar in "actions on the case for consequential damages," at six years. It is clear that an action for an infringement of a patent right is within this designation. The act of congress of July 4, 1836 [5 Stat. 117], expressly provides that damages may be recovered for an infringement, by "an action on the case." It is not material to inquire, whether this provision excludes every other remedy at law. From the nature of the injury complained of, it admits of no doubt that the action on the case is the appropriate action. And if the statute did not directly authorize it, and the party complaining of the injury was remitted to his remedy at common law, this would be the proper form of action. And in accordance with the views of the supreme court, it is barred by its denomination as an action on the case, without inquiry into the grounds of the action.

I can perceive no objection in principle to the application of the doctrine, established by the supreme court, to this case. Congress has omitted to prescribe any bar from the lapse of time, to an action for an infringement of a patent right. It was undoubtedly within the competency of that body to have done so: and in the case of copyrights, it has exercised this power. Does it follow, because it has failed to establish a limitation in suits for infringements of patent rights, that the right of the patentee to sue shall be indefinitely extended? And is it not expedient, while it violates no principle, that the legislation of the state shall be invoked to protect its citizens from the annoyance of being sued upon stale claims for alleged infringements? A patentee has clearly no ground to complain of a violation of his rights under his patent, by being required to prosecute within a reasonable time. The right to sue at any time, is not a right secured to him by the emanation of a patent, and he can clearly claim nothing that is not conferred by his patent. There is no force in the argument, that in this view it would be in the power of a state to defend the rights of a patentee by prescribing a period of limitation so short as to render it impracticable to sue for an infringement. It is a sufficient reply to this, that this objection does not exist, and can not therefore apply in reference to the statute of Ohio now in question. And this court can not mold its decision in this case, in apprehension of such future legislation by a state, as may interfere with or thwart the just rights of a patentee. It will be proper for the court to determine what its action shall be, when the grievance supposed shall have an actual existence.

The demurrer to the plea of the statute of limitations is overruled.

NOTE. At a subsequent term, the same question arose in the case of Parker v. Hall [unreported], when Judge McLean was sitting with the district judge, and the ruling of the court was the same as in the foregoing case.

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

Case No. 10,738.

PARKER v. HAWORTH.

[4 McLean, 370;[1] 2 Robb. Pat. Cas. 725.]

Circuit Court, D. Illinois. June Term, 1848.

PATENTS—ASSIGNMENT—AVERMENTS TO SUPPORT ACTION FOR INFRINGEMENT—SIMILARITY IN PRINCIPLE—COMBINATION.

1. A patent may be assigned in part, or the whole of it.

2. An averment in the declaration that the defendant has made the thing "in imitation of the patent" is sufficient to sustain the action.

3. The machinery complained of, if the same in principle as the plaintiff's, is an infringement.

[Cited in Sewall v. Jones, 91 U. S. 184.]

4. Parker's patent is for improvements on known machinery and a combination of mechanical powers. There can be no infringement of the combination, which does not embrace all the parts.

5. But it is an infringement to adopt any improvement of the plaintiff's of any of the parts of the combination.

[Cited in Winans v. Denmead, 15 How. (56 U. S.) 342; Buchanan v. Goodwin, 57 Fed. 1040.]

6. An inventor, under his patent, claims no monopoly.

[7. Cited in Goodyear v. Blake, Case No. 5,560; National Folding Box & Paper Co. v. American Paper Pail & Box Co., 55 Fed. 490; Paine v. Trask, 5 C. C. A. 497, 56 Fed. 233. Criticised in New York v. American Cable Ry. Co., 60 Fed. 1017, on the point that copies of assignments of a patent, duly certified, are prima facie evidence of the genuineness of the originals on file.]

[This was an action by Zebulon Parker against James F. Haworth for the violation of letters patent granted to plaintiff October 19, 1829.]

Mr. Logan, for plaintiff.
Mr. Weed, for defendant.

OPINION OF THE COURT. This action is brought, charging the defendant with a viola-

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

tion of the plaintiff's patent for a percussion and reaction water wheel. The defendant pleaded not guilty. The jury being sworn, the plaintiff offered an exemplification of his patent, containing certain assignments, in evidence, which was objected to by defendant, on two grounds: (1) That there is no proof of the original assignment to McElvey; and (2) that there is no proof that McElvey was administrator, as he assumed to be.

The assignment of a patent in whole or in part, is authorized by act of congress, and it is required to be recorded in the patent office. The assignments in this case have been recorded, and the paper now offered contains a copy of them, duly authenticated; and the law of congress makes such copies evidence, as well as a copy of the patent. Such copies, therefore, must be received, as prima facie evidence at least, of the genuineness of the originals on file; and absolute evidence of the correctness of the copies from the record.

Several witnesses were examined to show the value of the improvement claimed by the plaintiff. One of the witnesses, Mr. West, says he has built forty or fifty of Parker's percussion water wheels; and the question being asked him whether there were not other wheels similar to those of Parker's it was objected to, there having been no notice given, as the statute requires, and the court sustained the objection. The witness says, the product of Parker's improvement is nearly three times as great as the other wheels in use. A question being asked of a witness whether the defendant throws the water upon the wheel through a spiral trunk, was objected to because the declaration contained no such averment. But the court permitted the question to be asked, as in the declaration the trunk was averred to be made in imitation of the plaintiff's patent.

Several witnesses were examined, who thought the improvement of no great value, and, in some respects, they considered it less valuable than the flutter wheel, generally in use: and some of them who are millwrights, do not think the defendant's wheel is an infringement upon that of the plaintiff's.

The case having been argued to the jury, the court observed to them, this action is brought to recover damages for a violation of the plaintiff's right. The policy of the law, which protects the right of the inventor, is wise. It stimulates genius, by endeavoring to secure a reasonable compensation to those who have spent their time and money in producing something of utility to the public. It is not a monopoly the inventor receives. Instead of taking anything from the public, he confers on it the greatest benefits; and all he asks, and all he receives, is that for a few years he shall realize some advantage from his own creation; not that he withholds his machine or discovery from the country, but that in distributing it he may receive a small compensation for the great benefit he confers.

The triumphs of the inventor are intellectual triumphs. His demonstrations are made through mechanical agencies, but these, in the highest degree, are attributable to mind; and the same may be said of our inventive mechanics generally. The range of their thought embraces the system of natural philosophy, in all its practical bearings; and in carrying out their views, the highest degree of mechanical ingenuity. Through the labors of these men our country has been advanced by machinery, on the land and on the water, in the saving of labor, and in a rapid and increased intercourse, and especially in the communication of intelligence, in the last forty years, more than could have been hoped for, without their instrumentality, in many centuries. And yet, how few of them are considered public benefactors. Their inventions are pirated, and they often reduced to indigence by the vindication of their rights.

The plaintiff in this case is not entitled to recover damages unless he shows that the defendant has violated the patent by using the machinery invented or improved by the plaintiff. There seems to be nothing in the evidence which can create a doubt, in regard to the invention claimed by the patent. And your inquiry will be chiefly directed to the infringement charged in the declaration. To this the plaintiff is limited. If the defendant has arranged his machinery on the same principle as claimed by the plaintiff, he is guilty of infringement. You will understand that it is not essential that the wheel of the defendant, in its form, should be exactly similar to that of the plaintiff; but it must work on the same principle. The force of the water must be thrown upon it in substantially the same manner. If you shall find for the plaintiff, you will assess such damages, as in your judgments shall be just. There are no circumstances in the case which call for exemplary damages. The defendant may not have been aware of the plaintiff's right, at the time he procured his machinery to be constructed.

Verdict for the plaintiff.

A motion was made in arrest of judgment, on the ground, that the declaration does not set forth the act complained of as contrary to the statute. This is necessary when an action is brought on a penal statute, but not in a case like the present, where damages are sought for on an injury done. Where the plaintiff sues for a penalty, as the statute is the only foundation of the action, the declaration must aver that the act is contra forman statuti. In Tryon v. White [Case No. 14,208], it is said: "If the declaration in an action for the invasion of a patent right, fails to lay the act complained contra forman statuti, the defect will be purged after the verdict."

Another ground in arrest is stated, that the declaration should allege an infringement of the combination claimed in the patent. It is

a well established principle that where the invention consists of a combination of known mechanical powers, the use of a part less than the whole combination, would be no infringement. Each one of the different powers combined constitutes a part of the whole, but the invention is not in any of the parts, but in the combination of them. The parts of which the combination consists, remain unrestrained from general use, as before the invention. But the plaintiff's invention consists, not only in the combination, but in the improvement of several of the parts of which that combination is composed. And the violation of one of them is an infringement for which an action will lie. The motion in arrest is overruled and judgment.

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

Case No. 10,739.

PARKER v. HOTCHKISS.

[1 Wall. Jr. 269.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1849.

PRACTICE—PRIVILEGE OF SUITORS.

A suitor in this court, residing without the circuit, is privileged from the service of a summons. The case of Blight v. Fisher [Case No. 1,542], decided by Judge Washington, A. D. 1809, in which his privilege was limited to exemption from arrest, is here overruled.

[Cited in Juneau Bank v. McSpedan, Case No. 7,582; Brooks v. Farwell, 4 Fed. 168; Larned v. Griffin, 12 Fed. 592; Wilson Sewing Mach. Co. v. Wilson, 22 Fed. 804; Ex parte Schulenburg, 25 Fed. 212; U. S. v. Sanborn, 28 Fed. 302; Miner v. Markham, 28 Fed. 392.]

[Cited in Andrews v. Lembeck, 46 Ohio St. 41, 18 N. E. 484; Christian v. Williams, 111 Mo. 437, 20 S. W. 97; Jones v. Knauss, 31 N. J. Eq. 216; Mitchell v. Huron Circuit Judge, 53 Mich. 542, 19 N. W. 176; Palmer v. Rowan, 21 Neb. 452, 456, 458, 32 N. W. 210; Wilson v. Donaldson, 117 Ind. 360, 20 N. E. 251.]

Hotchkiss, the defendant, who resided without this circuit, had been admitted by the court to make defence in a suit between Parker, the present plaintiff, and one Perkins; and he was attending in this city for the purpose of being present at the trial of that case. It was tried at this term, and Parker, having been nonsuited, issued summons on the same day, and served it on Hotchkiss at his lodgings. Mr. Hazlehurst having applied to Judge Kane, who was sitting for the circuit court, to have the service set aside as for a violation of privilege, Mr. Titus, for the plaintiff, contended that according to the well settled practice of this court, the service was perfectly regular. The practice was established by Judge Washington in a solemn decision (Blight v. Fisher [supra], decided A. D. 1809), made more than forty years ago, and which has been acquiesced in and acted upon by the whole profession since. In that case the position taken by Mr. Hazlehurst was supported by Mr. William Griffith, one of the most acute and learned lawyers of New Jersey, and by Mr. Rawle, of this bar. Their citations were numerous, and no doubt their argument good. Judge Washington took time to examine the books and to consider their arguments. We have a full and written opinion from him on the subject. He decided against the privilege. The very point, therefore, now before this court has been once solemnly adjudged by it. A practice of forty years—embracing two generations of the bar—has never questioned its correctness. Surely this is an answer to all argument and to all learning. If precedents be worth anything, and we are not forever to be laying foundations, some things must be regarded as settled. Both the English law and the law of Pennsylvania were the same then as they are now. They were both known to Judge Washington, both were considered by him, and their value not extenuated. He refused to adopt the state practice. He thought that the state courts had carried privilege too far. He doubted whether their notion that a member of the assembly had a right to have a continuance of his cause as a matter of privilege—a declaration made by them (Geyer's Lessee v. Irwin, 4 Dall. [4 U. S.] 107)—was right: and this court has just decided that his doubts were well founded. Nones v. Edsall [Case No. 10,290].

But if we are now to examine the matter anew, how does it stand? There has been no contempt of court; nothing which has interfered with its functions in any manner or to any degree; no terrour has been inflicted; no withdrawal of any body from its business. The privilege claimed is in derogation of a clear common law, and should rest on the clearest necessity. Cole v. Hawkins, 2 Strange, 1094 (much better reported in Andrews, 275), was a "motion against the attorney for a contempt," and the writ was served whilst "Lee, C. J., was hearing causes, and the defendant was on the steps leading to the court attending his cause, which was just going to be called on." And though the court was of opinion that the service of process in the sight of the court is a great contempt and punishable by attachment, yet Chief Justice Lee says, "It is another consideration whether such execution of a writ be void so that the party shall be discharged." Indeed, it cannot be pretended that the English courts would set aside such a service as this. In Miles v. M'Cullough, 1 Bin. 77, in our own state, the reporter's words are, "The defendant was attending in this court;" and no doubt the process was served in the presence of the court, either constructive or actual. Hayes v. Shields, 2 Yeates, 222, which settles the state practice adversely to the present practice of this court, (and which I admit is in point,) calls to its aid the privilege which in Pennsylvania is extended to politi-

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

cal functionaries; a privilege which, as declared in that state to exist, this court has denied to be rightly allowed. Curia advisari vult.

KANE, District Judge. It is said that the practice of this court, since the decision in Blight v. Fisher [supra], in 1809, has been uniform to discharge in such cases as this, from arrests under capias, but not to set aside the service of a summons. I confess that I have never apprehended the reason of this distinction, and when it was pressed upon me by the counsel for the plaintiff, I did not disguise my reluctance to accede to it. My instinctive respect for all the opinions expressed by Judge Washington, alone made me hesitate.

The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify. Witnesses would be chary of coming within our jurisdiction, and would be exposed to dangerous influences, if they might be punished with a lawsuit for displeasing parties by their testimony; and even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defence, if they were liable to be visited on the instant with writs from the defeated party.

As the privilege of the court, this incidental immunity to the party can scarcely be the subject of abuse. It can be exercised or not in each particular case, as the purposes of substantial justice may seem to require. Per M'Kean, C. J., in Starret's Case, 1 Dall. [1 U. S.] 357. The suitor or the witness from another jurisdiction may be relieved: he who is at home here amongst us, suffering no inconvenience from the service, may be refused his discharge.

Such have been my views heretofore, derived no doubt in some degree from the long established practice of our state courts, but certainly strengthened by what I have observed since I came upon the bench.

The case of Hayes v. Shields, 2 Yeates, 222, in the supreme court of Pennsylvania, was decided by Yeates and Smith, justices in 1797. A summons was served upon a nonresident defendant, one day after the trial of a cause in which he had been attending as a witness; and the court, after asserting that his exemption from process was the privilege of the court, and that the distinction taken by the plaintiff's counsel between writs of capias and summons, was not solid, "discharged the defendant from the suit."

The case of Miles v. M'Cullough, 1 Bin. 77, was also a case of summons, served upon a party in attendance on the court. There, as here, the motion was made to set aside the service, and was resisted on the ground that the privilege claimed for the party was limited to cases of arrest. But the court said: "It has been repeatedly ruled, that he is equally privileged from the service of a summons,"—and they set aside the service. I cannot regard this decision as resting on the circumstance of the defendant having been actually in presence of the court at the time when he was summoned. That circumstance was not adverted to in the argument,—the question was one of privilege regarding the suitor, not of contempt,—and the language of the court places the case of a summons on precisely the same ground as that of an arrest on the score of privilege.

I am informed, that the practice of the courts of Pennsylvania, has been always in accordance with these decisions, and that since our present term began, a gentleman of the bar, who had come from a neighboring county as counsel in a case pending before us, was protected by an eminent state judge (Judge Sharswood) from the service of a summons out of his court. It is also the practice of the state courts of New Jersey, the other state of this circuit. The opinion of Judge Southard in Halsey v. Stewart, 4 N. J. Law, 420, established this, and is besides an exceedingly clear exposition of the argument in its support.

With these views of the policy of the law, confirmed by the practice of the state courts throughout this circuit, and under a strong impression that the case of Mr. Hotchkiss illustrated aptly their propriety and justice, I felt myself at liberty to solicit the counsel of my Brother Grier (Judge Grier was at this time at Washington, attending the session of the supreme court of the United States) upon the points presented by the defendant's application; and he has authorized me to say, that he concurs with me in the opinion that the service of this writ of summons ought to be set aside. He adds in his letter to me, that Chief Justice Taney has been good enough also to consider of the question, and has arrived at the same conclusion. Service set aside.

Case No. 10,740.

PARKER v. HULME.

[1 Fish. Pat. Cas. 44; 7 West. Law J. 417; Merw. Pat. Inv. 560.] [1]

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

PATENTS — INTERPRETATION OF SPECIFICATIONS — NEW RESULT — PRIORITY — INFRINGEMENT — DAMAGES—SPECIAL VERDICT—NOVELTY.

1. The specification, being an instrument of writing, its interpretation is a matter exclusively for the court, who must explain it.

2. Duplication of parts, producing a new and useful result, may be patentable.

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 560, contains only a partial report.]

3. The propulsive effect of the vortical motion of water, in a reaction wheel, operating by its centrifugal force, and so directed by mechanism as to operate in the appropriate direction, is patentable.

4. He who first discovers that a law of nature can be applied to produce a particular result, and having devised machinery to make it operative, introduces it to the knowledge of his fellow-men, is a discoverer and inventor of the highest grade. He may assert and establish his property, not only in the formal device, for which mechanical ingenuity can at once, as soon as the principle is known, imagine a thousand substitutes; but in the essential principle which his machine was the first to embody, to exemplify, to illustrate, to make operative, and to announce to mankind. This is not to patent an abstraction, but rather the invention, as the inventor has given it to the world, in its full dimensions and extent.

5. Where a dispute arises as to priority of invention, a patentee is allowed to show the real date of it, and to have his right as fully secured as if he had taken out his patent at that time.

6. It is not enough, in order to defeat a patentee's right, to show that a machine like that patented had been made, but it must also be shown that it was used before the patentee's invention.

7. The question of infringement is one irrespective of motive. The defendant may have infringed without intending, or even knowing it; but he is none the less an infringer.

8. Damages should be compensatory; the criterion is indemnity; but the jury can not include the expenses of litigation in the verdict.

9. Jury requested to find a special verdict as to issue of novelty.

This was an action on the case [by Oliver H. P. Parker against James S. Hulme], tried before KANE, District Judge, and a jury, for the infringement of letters patent, granted to Zebulon and Austin Parker, October 19, 1829, for "a new and useful improvement in hydraulic power," and assigned to plaintiff. The history of the invention was substantially as follows: The patentees, in the year 1827, by observing in a horizontal reaction wheel, with a fixed flume, the operation of a simple stationary guide, discovered—and, by removing and replacing the guide, tested—the utility of applying as a motive power, the pressure, or centrifugal force of water made to revolve within such a wheel, and to pass into and act upon its circumferential buckets, with a circular or vortical motion, coinciding with that of their revolution. In the following year they experimented with both horizontal and vortical reaction wheels, by various adaptations of fixed guides, so formed and adjusted as to produce, maintain and regulate the proper circular currents, and give to them the required direction within the buckets. The vertical wheels were arranged in pairs, and the fixtures were so adapted, that, in several particulars, a single stationary piece of machinery served for two wheels. The patentees, in the prefatory part of their specification, declare that their invention consists of "a new and useful improvement in the application of hydraulic power, by a method of combining percussion with reaction, applied and exemplified in: 1. A compound, vertical, percussion and reaction water-wheel, for saw-mills, and other purposes, with the method of applying water on the same. 2. An improved horizontal, reaction water-wheel, with the method of combining percussion with reaction on it. 3. A method of combining percussion with reaction, on common reaction wheels, or those already in use." It is then stated that "the principle upon which this improvement is founded, is that of producing a vortex within reaction wheels, which by its centrifugal force, powerfully accelerates the velocity of the wheel, and adds, proportionately, to its momentum."

The claims of the patent are as follows:

"The parts of the above-described machinery, claimed as original, and our invention, in all their necessary dimensions and proportions, and for the use of which we seek an exclusive privilege, are as follows:

"1. The compound, vertical, percussion and reaction wheel, for saw-mills and other purposes, with two, four, six, or more wheels on one horizontal shaft. The concentric cylinders, inclosing the shaft, and the manner of supporting them. The spouts which conduct the water into the wheel, from the penstock, with their spiral terminations between the cylinder.

"2. The improvement in the reaction wheel, by making the buckets as thin at both ends as they can safely be made, and the rim no wider than is sufficient to cover them. The inner concentric cylinder. The spout that directs the water into the wheel, and the spiral termination of the spout between the cylinders.

"3. The rim and blocks, or planks, that form the apertures into the wheels, and the manner of forming the apertures. The conical covering on the blocks. The hollow box-gate in any form, either cylindrical, square, or irregular."

Titus, Campbell & Cadwallader, for plaintiff.

Hazlehurst, Keller & Clarkson, for defendant.

KANE, District Judge (charging jury). The plaintiff, Oliver H. P. Parker, for all the purposes of this suit, is the legal representative of Zebulon and Austin Parker, the patentees named in certain letters patent, which were issued on the 19th October, 1829, for "a new and useful improvement in hydraulic power"; and the complaint in this suit is, that the defendant has used their patented invention without their authority.

Three questions have been discussed:

1. What is the invention which the letters patent profess to secure to the patentees?

2. Were the patentees the first persons to make and reduce that invention to use?

3. Has the defendant used that invention? And if so, what damages should be recovered against him?

Of these, in their order:

1. The import and extent of the patent.

This is to be derived from, first: The specification made by the patentees, at the time of their application for a patent, in which they set forth the supposed discovery; and secondly: The act of congress, of 21st February, 1793 [1 Stat. 318], under which the patent was issued; upon which the question will be, whether this discovery, or invention, was such that it was possible to secure it under that law.

First, as to the import of the specification. The specification, being an instrument of writing, and the words of which it is made up having a fixed and plain import, its interpretation is a matter exclusively for the court, who must explain it. This part of the case is not for the jury, who, for the purposes of this cause, will adopt and act upon the interpretation given to it by the court. There is great reason and importance for this distribution of the respective duties of the court and the jury. The import of the instrument is purely a question of law. The interpretation of complicated instruments of writing is a special occupation, requiring, like all others, special training and practice. The judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be. The action of a judge, in such a case as that of interpreting the specification, is, moreover, open to review and correction, by reconsideration on his part, or by the revisal of a superior, or appellate court, where his reasoning can be tested. This is not so with a jury, who assign no reasons for their opinion, can not be called on, and are not permitted to review or reverse their action; and who, passing upon many questions in their private deliberations, do not declare, by their verdict, upon what particular elements they at last unite in a verdict; and it is impossible for a court to analyze them. The rule is, therefore, established, that on the judge is placed the responsibility; and he must declare the proper interpretation of written instruments.

I therefore proceed to the consideration of the import of the specification. The patentees, in their specification, claim that they have "invented a new and useful improvement in the application of hydraulic power by methods of combining percussion with reaction, applied and exemplified" in three forms of machinery, which they mention. The first of these only is involved in the present controversy; it is, "a compound, vertical, percussion and reaction water-wheel, with the method of applying the water on the same." The third section of the act of congress, of 21st February, 1793, under which this patent was issued, requires of the inventor, who seeks to obtain a patent for mechanical invention, that "he should fully explain the principle" (involved in his machine), "and the several modes in which he has contemplated the application of that principle or character." The patentees, in this case, accordingly explain the principle on which their invention is founded. They declare it to be "that of producing a vortex within reaction wheels, which, by its centrifugal force, powerfully accelerates the velocity of the wheel, and adds proportionably to its momentum." They next proceed to declare the modes in which they have contemplated the application of this principle or character; and this they do by describing an arrangement of vertical reaction wheels, in pairs, on a horizontal shaft, with certain contrivances for introducing the water into them. The instrument closes with these words:

"The parts of the above-described machinery, claimed as original, and our invention, in all their necessary dimensions and proportions, and for the use of which we seek an exclusive privilege, are as follows, to wit: 1st. The compound, vertical, percussion and reaction wheel, for saw-mills and other purposes, with two, four, six, or more wheels, on one horizontal shaft. The concentric cylinders, inclosing the shaft, and the manner of supporting them. The spouts which conduct the water into the wheels from the penstock, with their spiral termination between the cylinders."

Such is the instrument which the court is called upon to interpret, so as to ascertain what it was for which the patentees claimed a patent as inventors.

Did they mean to assert, 1. That they were the first to discover and to avail themselves practically, by mechanism, of the effect of vortical motion, imparted to water, in a reaction wheel, and operating by its centrifugal force to accelerate the wheel's velocity; or 2 (not so expanding their supposed discovery). That they were the first to devise and avail themselves practically, of certain mechanical arrangements, which they have described in their specification, and which exemplify and apply the accelerating effect of this motion; or, 3. That they were the first to do both of these?

And then, as to the mechanical arrangements which they describe—did they mean to assert, 1. That they were the first to devise and apply the combination of them to the particular object; or, 2. That they were the first to devise and apply them separately, in furtherance of that object; or, 3. That they were the first to devise and apply, as well, the elements of the combination as the combination itself, for the object proposed?

These are questions, some of them, at least, of great nicety, and great interest, and on which if the opinion now to be expressed were, in its consequences final, I should desire time for further consideration, after appropriate argument. But, for the purposes of the occasion, I feel at liberty to instruct you that the patentees claim, in their specifi-

cation, to have been the first to discover, devise, and apply to use:

1. The propulsive effect of vortical motion of water in a reaction wheel, operating by its centrifugal force, and so directed by mechanism, as to operate in the appropriate direction; and,

2. The mechanical arrangements for making, guiding, and controlling this vortical motion, as set forth in their specification, both as new mechanical devices, considered separately, in their application to these objects—and as new, in their combination, to produce and effectuate or perfect the same objects.

Passing, then, under the same general head, secondly, to the next subject for the interpretation of the court—the effect of the act of congress of 1793, in reference to the specification, upon the patentees' right—and assuming, for the present, that the patentees were inventors or discoverers of what the court has instructed you that they claimed, could they lawfully obtain an exclusive property in the subject-matter of their claims?

As to the mechanical arrangements and devices, separately or in combination, there is no question that they were patentable. In regard to the arrangement of vertical wheels in pairs, on a horizontal shaft, the mere fact that this was a duplication of the single wheel, does not, of itself alone, invalidate the patent. Duplication producing a new and useful result, as it was here produced, may be patentable. It is often the material part of a discovery; because it may be that which renders useful what was previously useless. In the case of the paper machine before this court,[2] it was held, that a number of rollers, acting in pairs for a particular purpose, might be patented, though a single pair could not have been.

As to the greater and more general subject of claim, viz. the propulsive effect of vortical motion of water in a reaction wheel, operating by its centrifugal force—and so directed by mechanism as to operate in the appropriate direction—the court instructs you, not without being aware that the question is one of possible difficulty, that this also is a valid subject of claim, and properly to be secured by letters patent.

The views which lead to this instruction are too elaborate and metaphysical, perhaps, to find a place properly in a charge at bar. They may, however, be made intelligible, by reference to a few simple positions.

All machines may be regarded as merely devices, by the instrumentality of which the laws of nature are made applicable and operative to the production of a particular result. He who first discovers that a law of nature can be so applied, and having devised machinery to make it operative, introduces it in a practical form, to the knowledge of his fellow-men, is a discoverer and inventor of the highest grade—not merely of the mechanism, the combination of iron, brass, and wood, in the form of levers, screws or pulleys—but the force which operates through the mechanical medium—the principle—or, to use the synonym given for this term in the act of 1793—the character of the machine, and this title as a discoverer he may lawfully assert, and secure to himself by letters patent; thus establishing his property, not only in the formal device for which mechanical ingenuity can at once, as soon as the principle is known, imagine a thousand substitutes—some as good, others better, perhaps all dissimilar, yet all illustrative of the same principle, and depending on it—but in the essential principle which his machine was the first to embody, to exemplify, to illustrate, to make operative, and to announce to mankind.

This is not, in my view, to patent an abstraction, in the sense which this expression has borne in the arguments on this subject. It is rather to patent the invention as the inventor has given it to the world, in its full dimensions and extent; nothing less, but nothing more. It is to patent the invention in the broad and general terms that properly express it, and to secure to the party who has made it, the exclusive right, for a limited time, to precisely that discovery, which he has imparted to the public, and which, when that limited time expires, the public will enjoy as the fruit of his mind.

The court, therefore, instructs you, as a matter of law, pertinent to the issues of this cause:

1. That the letters patent, under which the plaintiff claims, vest in the patentees an exclusive right to construct and use mechanical devices—whether such as are described in their specification, or equivalents therefor—for producing, directing and applying, as a motive power in reaction wheels, the centrifugal force of water revolving vortically round the shaft, and passing into and acting upon the wheels in the direction of their revolution.

2. That the same letters patent vest in the patentees a similar exclusive right to employ vertical reaction wheels, having two or more wheels arranged in pairs, on the some horizontal shaft.

I pass then to the second leading question in the cause:

Were the patentees the first persons to make and reduce these inventions to use? If they were not, then so far as their claim is in this respect unfounded, their patent is void. The evidence on this question is for the jury exclusively to consider. You will decide upon its effect, giving to the advice and review of the facts, by the court, such

[2] Knight v. Gavit [Case No. 7,884]. When successive pairs of rollers gave a capacity for the combined graduation of pressure and regulation of temperature, as applied to the damp sheet during the drying process. [From 7 West. Law J. 422.]

weight and influence as in your judgment they may deserve, but remembering always that the responsibility of the decision is altogether your own.

On behalf of the plaintiff the evidence is:

1. The patent itself, issued upon the oath of the patentees. This is prima facie evidence; that is to say, it stands until opposed by other proof; but as this patent was issued under an act which did not require a scrutiny by the patent office, as the law now does, it should be regarded as evidence of the lowest grade. But, having been renewed by the commissioners in 1843, after public notice and full examination, it rises in the scale of evidence on this point. Still, though it is prima facie evidence of a higher character, it is prima facie evidence only.

2. The testimony given here by one of the inventors, Zebulon Parker, who details clearly, simply, modestly, and (I think I may add, without the hazard of differing from you), as every man who heard the testimony must say, truly, the history of the invention.

3. The testimony of his brother, who witnessed the whole course of the invention, and of numerous neighbors, who also watched its progress. They fully confirm Mr. Parker, and fix the date of the invention, as perfected and reduced to successful use, as early as the month of September, 1828.

This date is important; for, by the rules of law, when a dispute arises as to the priority of an invention, a patentee is allowed to show the real date of it, and have his rights as fully secured as if he had taken out his patent—unless, indeed, he delayed his application in a manner and with views which are not imputed here. The date, therefore, with which we are to compare the testimony in settling the claim of priority in invention, is, for this case, September, 1828.[3]

These three heads embrace what may be termed the positive proof on behalf of the patentees on the question of originality.

4. But, besides this, you have a negative proof of a very high order, in the fact that the patent is now more than twenty years old, and that it has not been declared void, under either the 6th or 10th section of the patent act of 1793. When the subject of a patent is of the importance and value that must be ascribed to this, and the patent has had the additional publicity of a renewal, the fact that it has, during the twenty years, withstood all attacks upon it, is a strong proof of its genuineness.

5. Other negative proof is to be found in the circumstance, that with all the scientific libraries of the country at their command, the defendant, and the very learned and ingenious gentlemen who represent him as counsel, have found no one printed book in which anything like this invention is described.[4]

This is almost anomalous in the history of patent causes. I have scarcely ever seen one tried, in which there was any question upon the originality of an invention, that numerous works were not produced, each of which exhibited some similitude to the thing patented.

6. That as to the major subject of claim, the direction and effect of the vortex under given circumstances, the practical men who were examined here as experts on the behalf of the defendant, strange to say, denied their existence altogether; thus showing, that even to this day, they did not know or believe that the discovery in question has been made. This is, to my mind, negative proof of the very strongest kind.

Against all this, you have the evidence of Mr. Holmes and Mr. Seymour. They speak of things of ancient date, of very ancient date, some of which occurred in their boyhood; which, if they ever were known, are now forgotten, as the neighbors testify, in the places which knew them. To my mind, they are evidently confounding other wheels, acting on different principles from those invented by the patentees. I can not imagine that any thing so meritorious, so useful, so important to our great community, should have been forgotten and lost, if it ever existed. A patent case is never tried, or a verdict recorded in favor of a patentee, without his encountering a mass of just such testimony as that of these two witnesses. I do not impute to either of them the wish to misrepresent; but memory plays us sad tricks when we attempt to speak of the precise angles of the buckets of a wheel which we may have seen while fishing by the side of a mill stream, when we were children. Subsequent observation and information mingle themselves curiously with the impressions of early life; and men are prone to believe that they have seen that of which they have subsequently read, or have heard from others. A highly respectable gentlemen in this city, testing the strength of his ancient recollections, once recurred successively to by-gone transactions that he had witnessed, until he described an occurrence which he, himself, a moment afterward, discovered to have taken place

[3] Note by the Reporter. In the previous year, 1827, the patentees, according to the testimony, had discovered, and practically ascertained, that to direct the water into a reaction wheel, so as to give it a circular motion within the wheel in the direction of its rotation, would increase the useful effect. If, therefore, the difference of time had in this case been material, as it was not, the discovery of the more important part of the patented improvements would have been referred to the date of 1827. The particular application of it which was then successful, was to a horizontal wheel. Its application in the vertical wheels was successfully made in September, 1828, as stated in the text. (From 7 West. Law J. 424.)

[4] The judge here referred to the Dictionary of Arts and Sciences, in the manner mentioned above. (From 7 West. Law J. 424.)

before his birth. You will determine upon the effect to be attributed to the testimony of these witnesses.

One portion of Mr. Holmes' testimony calls for the remark that it is not enough for the defendant to show that wheels like the patented ones were made, but that he must also show that they were used, before the plaintiff's invention. This is the test of what is required to defeat the title of a patentee of an improved machine. In the present case, moreover, the mere proof of use of such wheels would not suffice, unless it was also proved that water was also introduced into the wheel with the proper direction given to it, as otherwise it could not have involved the principle of the improvement patented. This is illustrated by the accidental circumstance which led to Mr. Parker's discovery.

On this question of originality, however, the case is before you; and you are the judges upon the evidence. You will inquire:

1. Were Zebulon and Austin Parker the first persons to discover, and by mechanical devices to apply to use, as a motive power, the reaction wheels, the centrifugal force of water revolving vortically around the shaft, and passing into, and acting upon, the wheels, in the direction of their revolution?

2. Were they the first persons to invent and apply to use vertical reaction wheels, having two or more wheels arranged in pairs on the same horizontal shaft?

For purposes connected not only with this cause in its ulterior stages, but with other causes pending in this court, I beg the favor of you, when you shall announce your verdict, to certify to me your united opinion, if you shall have formed one, on each of these two questions. By so doing, you will, moreover, confer a favor on both of the parties to this litigation, by defining for them what, in the opinion formed by a highly intelligent jury, after a most full and well-directed examination, are their respective rights.

3. If you shall have determined either of these questions in the affirmative, the next question, which is also for your consideration, upon the evidence, is: Has the defendant infringed the patent right now held by the plaintiff?

This question is one irrespective of motive. The defendant may have infringed without intending, or even knowing it; but he is not, on that account, the less an infringer. His motives and knowledge may affect the question of damages, to swell or reduce them; but the immediate question is the simple one, has he infringed?

1. Has he constructed, or used mechanical devices, such as are described in the specification, or equivalents therefor, for applying, as a motive power in reaction wheels, the centrifugal force of water revolving vortically around the shaft, and passing into and acting upon the wheels in the direction of their revolution?

2. Has he constructed or used vertical reaction wheels, having two or more wheels arranged in pairs on the same horizontal shaft?

As to the second of these questions; if you shall have determined that this part of the patent is valid, you will have no difficulty in arriving at a conclusion. Indeed, the use of such wheels is admitted.

As to the first of them; if you shall have determined that this part of the patent is valid, you will, perhaps, have a less easy task; but I can not believe that it will embarrass you much.

It is often difficult for those of us who are not educated in the higher branches of mechanical science, to receive with implicit faith, the deductions which the learned make with confidence from the truths with which they are familiar; and this difficulty is often not a little increased by the directness of appugnation which these deductions encounter from those who call themselves practical men, as contradistinguished from men of theoretic science.

We have great reason, in this case, to be grateful to the ingenious and well-instructed gentlemen, who have enabled us, by direct experiment, to test the relative value of scientific deduction and empirical experience. I do not know how the working of that little glass-faced machine affected your minds, but I am free to say, for myself, that I have never witnessed a more beautiful and convincing illustration of the truth and value of scientific deduction. Professor Cresson, who was examined as one familiar with all the learning in the books, was asked what would be the course of water falling into a case of different forms, in different ways, passing in different angles, according to different arrangements of the gates and sluice. In reply, his opinion was given, as deduced from scientific principles, once, only, resting upon the observation of an experiment he had made or seen. This alone was stated as "fact," and not as a matter of deduction. The rest was a mere lecture, as from the professor's chair, informing us what the water would do, if the laws of science were really truths of nature. Professor Frazer, who took the stand afterward, and who had not heard more than a small part of the examination of Professor Cresson, answered only from theories and principles, and coincided with him in all his answers. Next came the little machine and its whirling pellets; confirming absolutely everything that these gentlemen had previously set before us in theory; marking out every current, every disturbance, every counter-current, however eccentric; indicating their direction, indicating their relative forces, with the gate in every position, without the gate, with the inclined plane, and without it, just as these men of science had so de-

cidedly, yet so modestly, declared that their theories had taught them. I repeat, gentlemen, that I have never known scientific truth more beautifully illustrated than it was by that machine. Now these witnesses swear, and have demonstrated, that the devices of the defendant are equivalents involving the same principle as those of the patentees' specification, and differing only in the degree of its application. If you place confidence in them, and think that the experiment made in your presence confirms them; and believe that the machines act in obedience to the same laws, guided by the same mechanical principle; though the mechanism may be changed, though the proportions may vary, though they differ in the extent to which the common purpose is accomplished, the court instruct you, as matter of law, that the defendant has infringed upon the right secured by the plaintiff's patent. The question, however, is for the jury, and if they entertain doubts, they should operate in the defendant's favor; for it is the plaintiff's duty to prove the infraction of his rights.

Thirdly. If you shall find that the defendant has infringed, the next question for you to consider will be the amount of the plaintiff's damages.

Your verdict, if for the plaintiff, must be for the damages he has actually sustained; of course not for vindictive damages. There is nothing in the case to call for them; and such damages are out of place in verdicts in patent cases.

The damages to be assessed should be compensatory. The criterion is indemnity. You may take into consideration the loss sustained by the plaintiff, as you may, likewise, the profit made by the defendant. In estimating the loss to the plaintiff, from the defendant's unauthorized use of the machine, the price of a license is sometimes a fair guide; but not always. Sometimes a trifle from every one may well content the patentee, as in the case of a medicine, where a license to use is thrown in to all who will pay for the dose. So in the case of machines; in some of which, as for example, an improved pocket-knife or comb, where a half cent, singly, might amply compensate a patentee in the sale of a license, but would be no criterion of damage in case of infringement. It is so with every other invention which depends, for its value, on a general use by the community, and is, from policy, sold cheap. You are therefore to give compensatory damages, such as may indemnify the plaintiff for the injuries he has directly sustained; but, according to the directions heretofore given in this court, you will not include his expenses of litigation in the amount of your verdict. Yet, upon the whole, the question of damages being one of compensation, of which it is always, in such cases, difficult to fix a standard, much must depend upon the discretion of the jury, who may sometimes properly take the conduct and motives of a defendant into consideration. I may add that, with the limitations and qualifications which I have stated, your verdict may be founded upon a full and liberal measure of the plaintiff's actual damages. But it will be a great advantage to him if you should, by your verdict, establish his patent; and I can not perceive any thing in the conduct of the defendant to call for more than a moderate rate of damage, so far as this inquiry may be involved in your deliberations.

In conclusion, I again ask the jury to consider the two questions upon each of which I have suggested that it may be useful that their finding should be specially certified; and I can not take leave of them without repeating the sincere thanks of the court for their assiduous attention and patience throughout the case. [The verdict and judgment are set forth in the docket entries above inserted.] [5]

The verdict was in favor of the plaintiff, and the jury certified in his favor both the points upon which they had been requested to find specially. On the motion for a new trial, the judge stated that so far as he had, upon the trial, suggested any doubt concerning the interpretation and effect of the specification of the plaintiff's patent, though he would be pleased to hear any argument on the subject, he did not wish any longer to be understood as inviting it, in order to remove or satisfy any doubt of his own, for he no longer entertained any. Upon this intimation, the motion was not pressed [and the court entered a final judgment upon the verdict]. [5]

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

Case No. 10,741.

PARKER v. KEMPTON.

[1 Wall. Jr. 344.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1849.

JURORS' FEES.

Jurors living at a distance, and not receiving mileage at adjournment, are entitled to a per diem for those days during which the jury stands adjourned, as well as for those to which it stands adjourned, and on which the jurors appear and answer to their names.

[Cited in Edwards v. Bond, Case No. 4,294.]

This case having been called on Monday morning, and being then fixed for Thursday following, the jury was discharged until the latter day. Some of the jurors coming from a distance, and the marshal, as it appeared, not being allowed, under the regulations of the treasury, to pay other mileage than at

[5] [From 7 West. Law J. 429.]

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

the beginning and end of the term, THE COURT, upon the application of one of the jurors who came from Harrisburg, gave it as their opinion, that the jurors who came from a distance should be allowed a per diem for those days during which the panel stood adjourned, and not merely, as is the case in regard to jurors living within the city and districts, on those days to which they were from time to time adjourned, and on which they appeared and answered to their names.

Case No. 10,741a.

PARKER v. LEWIS et al.

[Hempst. 72.] [1]

Superior Court, Territory of Arkansas. Oct., 1829.

NEW TRIAL—EXCESSIVE DAMAGES—AMENDMENT OF PLEADINGS.

1. Courts have a legal right to grant new trials in actions for torts, on the ground of excessive damages, and may grant any number until the ends of justice are answered.

2. If a party, having leave to amend pleadings, files bad pleas, they may be stricken out on motion.

3. A plea which amounts to the general issue, or does not answer the whole charge or count, is bad.

[This was an action of trespass by Peter C. Parker against Eli J. Lewis and Peter Edwards.]

Before JOHNSON, TRIMBLE, BATES, and ESKRIDGE, JJ.

TRIMBLE, J. This is a suit brought by the plaintiff against the defendants, returnable to the October term of this court, 1828. The first count in the declaration is for breaking and entering the close of the plaintiff; the second is for taking and carrying away the goods of the plaintiff. At the October term, 1828, Lewis, one of the defendants, put in his plea, to which a demurrer was sustained, and he had leave to amend his pleading, and time was given to file his amendment. On the 18th of April, 1829, Lewis amended by filing three several pleas. The first is the general issue, to which no objection is made. The second is a justification under a judgment, confessed in vacation, under the statute and execution thereon, which judgment was afterwards confirmed in court. The third plea of Lewis is property in himself, as to the negroes in the second count mentioned; and says nothing as to the balance of the goods and chattels charged in that count to have been taken and carried away. At this term the plaintiff, by his attorney, moves the court to strike out the second and third pleas of Lewis. We think this motion must be sustained if the pleas are found to be bad. The second plea justifies under an execution issued on a judgment in vacation, before the same had been confirmed in court. We have heretofore declared, that judgments thus confessed before the clerk in vacation, are not complete until acted upon by the court, and confirmed. Under the statute (Geyer, Dig. 248, § 17, tit. "Judicial Proceedings"), clerks may sign all confessions of judgments taken in vacation, which in fact is but taking the acknowledgment of the defendant, of record, and it is reserved to the court to give judgment on such confession. No execution could issue until such judgment was rendered by the court, and therefore, it appearing by the plea of Lewis that the execution under which he justified did issue before the judgment was rendered by the court, his plea on that account is bad. The third plea is bad on two grounds: (1) If properly pleaded it would amount to the general issue; and (2) it does not profess, nor does it really answer the whole charge in the second count of the declaration. The defendant, by his attorney, insists that the plaintiff should be driven to take his exception to the pleas by demurrer. We think not. The defendant, after having filed one plea, which was adjudged bad on demurrer, ought not to be permitted to amend by filing pleas no better than the first. The defendant asked leave to amend, and it was his duty to have tendered good pleas, and the indulgence as to the time granted by the court, cannot place him in any better condition than he was in at the time of obtaining leave to amend. If the court would not have received those pleas if tendered, a fortiori they ought to strike them out, when filed under the indulgence of the court, giving the defendant time to amend his pleading. The second and third pleas of defendant must, therefore, be stricken out. Ordered accordingly.

Issue having been formed on the plea of not guilty, the cause was tried by a jury composed of Joseph McKnight, Asa G. Baker, Benjamin Clemens, G. W. McSweney, James C. Collins, William Flanakin, Bartley Harrington, William Lenox, Kirkwood Dickey, Emzey Wilson, Samuel Williams, and William Dugan, who rendered the following verdict: "We, the jury, find for the plaintiff ten thousand dollars damages."

October 27, 1829.—On this day Judge TRIMBLE, the only judge in the court when the verdict of the jury was returned, handed into court a written statement of the finding of the jury, as follows: "We, the jury, find for the plaintiff ten thousand dollars damages," and being asked if that was their verdict, they said that Parker's note to Lewis for three thousand two hundred and twenty-two dollars and sixty-nine cents with interest was to be deducted, and that the balance was found against Lewis,

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

and that they found nothing against Edwards.

The plaintiff moved the court to render judgment for him on the verdict, which, after argument of counsel on both sides, was, on the next day, denied. On the 31st of October, 1829, a motion was made by the defendant Lewis for a new trial, and after due consideration a new trial was awarded, at the cost of the defendant. The plaintiff then moved that a venire facias de novo issue returnable to the present term, and that the cause be tried at the present term, but this motion was overruled by an equal division in the court, and the case was continued, with leave to the parties to take depositions.

At the next term, July 22, 1830, the cause came on for trial before Benjamin Johnson, James W. Bates, Edward Cross, and Thomas P. Eskridge, judges, and a jury was formed of the following persons, namely: Edward Shurlds, Dudley D. Mason, Nathan W. Maynor, John McLain, Cornelius W. Ennis, Jordan Stewart, Christian Brumback, Lewis Young, Burk Johnson, David Davidson, Ransalear Munson, and John H. Lenox, who, after hearing the evidence and arguments of counsel, retired to consult of their verdict, and returned into court with the following, namely: "We, of the jury, find the defendant, Eli J. Lewis, guilty in manner and form as charged in the plaintiff's declaration, and aver the plaintiff's damages by reason of the premises set forth in said declaration, to the sum of seven thousand, seven hundred and thirteen dollars. Burk Johnson, Foreman." And judgment was rendered for the plaintiff for the damages so averred, and for costs. Before the jury retired, the plaintiff asked and obtained leave to enter a nolle prosequi as to Peter Edwards, codefendant, which was done accordingly, and he was discharged.

On the next day, July 23d, 1830, the defendant Lewis moved for a new trial, for divers reasons set out in his motion, and on the 2d August, 1830, the same judges presiding, the motion was sustained, and a new trial awarded, on which occasion the unanimous opinion of the court was delivered as follows, namely:

ESKRIDGE, J. This is an action of trespass. There was a verdict during the present term for the plaintiff, for seven thousand, seven hundred and thirteen dollars, and the case is now before the court on a motion for a new trial. The material grounds assigned for a new trial are: First, that the damages are excessive, and second, that the verdict is contrary to law and evidence. That the case may be understood, a short history of it seems to be necessary. Parker, the plaintiff, confessed a judgment to Lewis, the defendant, before the clerk of the circuit court of Phillips county, in vacation, in which shortly thereafter an execution issued, which was levied on the plantation and other property of Parker. This proceeding at the time it occurred was perfectly regular, and in strict conformity with the acknowledged and universal practice of the country. At a subsequent period, however, it was decided by this court, that the confession of a judgment thus taken by a clerk, was irregular and invalid, and required to give it legal effect, to be confirmed by the court in term time. In the absence, then, of the decision of this court just adverted to, Parker had no ground of action. It is by virtue of that decision alone that he has a right to be heard in the present action.

There has been no evidence adduced, going to show that Lewis did not act in good faith, that he did not believe he was pursuing the remedy guaranteed to him by the then laws of the country for the recovery of a just debt. The evidence does not show any act of oppression or unfairness on the part of Lewis in vindicating his legal rights. What, then, was the fair criterion of damages in the present action? There is certainly not a case made out of vindictive damages. Allowing the jury all possible latitude in their estimate of damages, they certainly could not exceed the fair value of the property sold under the execution. What was the value of the property thus sold? Let us advert to the plaintiff's declaration, and the evidence adduced in its support. There are two counts in the declaration. The first for entering his close, destroying fences and crop. There was not a particle of evidence to show that the farm or crop was in the slightest degree injured. The farm, though levied on, was not sold, the fences were not torn down, nor the crop injured. The first count in the declaration is wholly unsupported by evidence, except by the facts that the farm was levied on, and that the corner was on it when he sold the personal property. The second count is trespass de bonis asportatis. What was the value of the personal property sold under the execution? It is a most difficult matter to estimate its value, for the evidence is very far from being conclusive and satisfactory. The evidence is clear as to seven bales of cotton, thirty-two head of hogs, thirteen head of cattle, one colt; and that the store goods sold under the execution for a little upwards of five hundred dollars; say that the goods were worth one thousand five hundred dollars, allowing two hundred per cent. more than they sold for at the sheriff's sale; putting the most extravagant estimate on the personal property sold under the execution, it could not have exceeded two thousand dollars in value. We have excluded the negroes from the estimate; it having been shown on the trial that the legal title to the negroes was in Lewis. He held a mortgage on them, and by virtue of it, had a right to their possession at any moment

he chose to assert it. That the mortgage on this property vested the legal title in Lewis the mortgagee, and that he had a right to reduce the negroes to possession, whenever an opportunity presented, are propositions that cannot be controverted.[2] It is true, Lewis resorted to rather a singular mode to gain possession of the negroes. But the objection comes with ill grace from Parker. Lewis had his own negroes sold, allowed a credit for the amount for which they sold, and Parker complains of it! Parker's equity of redemption could not be sold under execution, for the legal estate was in Lewis. 3 Atk. 739; 8 East, 467; 2 Bos. & P. (N. R.) 461b. But Parker has at this time a right to redeem these negroes, for his rights under the mortgage have not been impaired by the sale under the execution. It appears from this view of the case, that nearly six thousand dollars in vindictive damages were given by the jury. Did the law and the evidence authorize vindictive damages at all? We think not. But it has been said that juries in cases sounding in damages, have an unlimited and arbitrary control, and that they are in fact irresponsible, and that a court cannot grant a new trial. This position is certainly incorrect. It is not true when applied to actions for libels, slander, assault and battery, and other personal torts, for the books afford many instances of new trials granted for excessive damages in this description of actions. It was done in Wood v. Gunston, Style, 462; in Ash v. Ash, Comb. 357; in Chambers v. Robinson, 1 Strange, 692; in Clerk v. Udall, 2 Salk. 649; in Jones v. Sparrow, 5 Term R. 257; and in McConnell v. Hampton, 12 Johns. 234. In the last case a verdict had been obtained in an action for assault and false imprisonment, for nine thousand dollars, and a new trial was promptly granted by the supreme court of New York, for excessiveness of damages. Although the defendant was one of the most wealthy men in the United States, Chief Justice Thompson says, in giving his opinion, "that courts have a legal right to grant new trials for excessive damages, in actions for torts, is nowhere denied; but on the contrary, has been universally admitted, whenever the question has been agitated."

It is said by the court in the case of Payne v. Trezevant, 2 Bay, 33, that it was the duty of the court whenever the juries will take upon themselves to disregard the laws of the land, and clear and indubitable testimony, to set aside their verdicts toties quoties, until twelve men can be got firm enough to defend and support the legal institutions of the country. In Moore's Adm'r v. Cherry, 1 Bay, 269, a third new trial was granted on similar grounds. But it must be borne in mind that the case now before the court is not for a personal tort, but is for an injury done to property, and the jury in their assessment of damages should have been governed by the pecuniary loss, unless it had been established by evidence that the defendant Lewis had been guilty of acts of malice and oppression, in which case the damages might have been enlarged. It is true, the record of the judgment confessed before the clerk in vacation was not read to the jury; but it was among the papers introduced by the plaintiff, and referred to in the argument of the counsel for the defendant. But, even admitting that there was no evidence before the jury of the confessed judgment, and that they ought to have found vindictive damages, still we are clearly of opinion the damages found by the jury are outrageously and flagrantly excessive.

The jury in the case now before the court, though highly respectable and intelligent, and certainly above all imputation of improper motives, were unquestionably influenced by false and unfounded considerations in estimating the damages. The case had been long pending; was publicly investigated at a former term; had been much talked of; had given rise to much excitement, and the jury were doubtless influenced by public opinion, and unconsciously disregarded the evidence. We can alone account in this way for damages so outrageously excessive, so entirely disproportionate to the injury sustained. On the ground of excessive damages, the verdict must be set aside.

It remains for us to answer another objection to the granting of a new trial. It has been said that this is a second application for a new trial. Admitting this, we are neither precluded by the plain language of our own statute, nor by the general principles of law, from granting a second new trial. Dig. 261; Moore's Adm'r v. Cherry, 1 Bay, 269; Goodwin v. Gibbons, 4 Burrows, 2108, or Morgan's Essays, 27 28. In Goodwin v. Gibbons, Lord Mansfield said: "There was no ground to say that a new trial should not be granted after a former new trial. There is no such rule. A new trial must depend upon answering the ends of justice." Justices Yates and Astor concurred, saying that a second new trial ought to be granted as well as the first, if the reasons were sufficient for granting it. But we deny, strictly speaking, that this is a second application for a new trial. In the former trial the finding of the jury was not received, on the ground of its uncertainty and insufficiency, and a new trial was awarded as a matter of course, on that account, and without the slightest reference to the merits of the case. The second ground for a new trial is "that the verdict is contrary to evidence and law." The first branch of this reason has been already discussed. As regards the second, we

[2] The suit was subsequently adjusted between the parties, and on January 11, 1831, on the motion of Chester Ashley, Esq., attorney for the defendants, was dismissed, the defendant paying the costs.

take it for granted, without reference to the affidavits of the two jurors, which were inadmissible, that the jury took into consideration, in estimating the damages, the value of the negroes; and if so, it was contrary to law and against the instructions of the court. It has already been shown that Lewis, by virtue of the mortgage, was invested with a clear and indisputable legal title to the negroes, and to their possession, and that he had a right to take possession of them at any time. It has also been shown that Parker's rights under the mortgage remain unimpaired, as he still retains the power to redeem. The jury were distinctly instructed to exclude the value of the negroes from their estimate of damages. The verdict of the jury being contrary to law, and against the express instructions of the court, must be set aside. A new trial awarded.

Case No. 10,742.

PARKER v. McLENNAN.

[The case reported under above title in 2 Mich. Lawy. 12, is the same as Case No. 5,-334.]

Case No. 10,743.

PARKER et al. v. MUGGRIDGE et al.

[2 Story, 334;[1] 5 Law Rep. 351.]

Circuit Court, D. New Hampshire. May Term, 1842.

EQUITABLE LIENS — EFFECT OF DECREE IN BANKRUPTCY—PARTNERSHIP ASSETS—PARTNERSHIP AND INDIVIDUAL DEBTS.

1. A and B of Massachusetts, instituted several suits at law against a factory company in New Hampshire and several citizens of that state, in which property was attached on the writs. Various agreements in writing were made by and between the parties, upon the conditions of which, the actions were continued from term to term, until they were defaulted at the August term of the court, 1841, and the entry of judgment thereon, pursuant to a written agreement filed in court at the said term, was made at the August term, 1842. Previously to this, several of the defendants had been decreed bankrupts on their own petition; and an injunction was obtained by their assignee, prohibiting the plaintiffs from levying their executions upon the property of the bankrupts. It was *held*, that the contracts entered into between the parties, constituted an equitable lien, which remained in force, notwithstanding the decree of bankruptcy.

[Cited in Re Cook, Case No. 3,152; Fiske v. Hunt, Id. 4,831; Re Bellows, Id. 1,278; Clarke v. Southwick, Id. 2,863; Lawrence v. Dana, Id. 8,136; Sixpenny Sav. Bank v. Estate of Stuyvesant Bank, Id. 12,919; Kimberling v. Hartly, 1 Fed. 574.]

[Cited in Ames v. Wentworth, 5 Metc. (Mass.) 296. Distinguished in Hubbard v. Hamilton Bank, 7 Metc. (Mass.) 344. Cited in Kittredge v. Warren, 14 N. H. 526; Talcott v. Dudley, 4 Scam. 435; Zollar v. Janvrin, 49 N. H. 117.]

2. Independently of the plaintiffs' claim as an equitable lien, they were entitled to have the injunction dissolved so far as respected the property owned by the bankrupts, and those of the defendants who had not petitioned to be declared bankrupts.

[Cited in Re Schnepf, Case No. 12,471; Re Wallace, Id. 17,094.]

3. The general rule in bankruptcy is, that the property of partnerships is first to be applied to the discharge of the partnership debts, and the surplus only is to be applied to the individual debts of any one partner. But if it be necessary, in order to make a final settlement of all claims, the court may take upon itself the administration, as well of the partnership estate as of the estate of the bankrupt partner.

[Cited in Re Wallace, Case No. 17,094; Amsinck v. Bean, 22 Wall. (89 U. S.) 403; Wilkins v. Davis, Case No. 17,664.]

[Cited in Talcott v. Dudley, 4 Scam. 437.]

4. Where one partner becomes bankrupt, his assignee can take that portion of the partnership assets only, which would belong to the bankrupt, after payment of all the partnership debts, and the solvent partner has a lien upon the partnership assets for all the partnership debts, and, also, for his own share thereof, before the separate creditors of the bankrupt can come in and take any thing.

[Cited in Forsaith v. Merritt, Case No. 4,-946; Mitchell v. Winslow, Id. 9,673; Re Baker, Id. 762; Wilkins v. Davis, Id. 17,664.]

[Cited in Kittredge v. Warren, 14 N. H. 532; Perkins v. Gibson, 51 Miss. 699.]

The following bill in equity, or summary proceeding, was filed in the district court of New Hampshire by the plaintiffs.

"To the Honorable Judge of the District Court of the United States for the District of New Hampshire:

"Humbly complaining, show unto your honor, Isaac Parker and Abraham W. Blanchard, both of Boston, in the county of Suffolk, and state of Massachusetts, merchants, late partners in trade, under the firm of Parker and Blanchard, that on and prior to the seventeenth day of May, A. D. 1837, the said Parker and Blanchard held certain notes, and accounts, and other just claims against the Avery Factory Company, a corporation duly established by law, at Meredith, in the county of Belknap, in said district, Josiah Crosby, physician, Abraham Brigham, Alpha Stevens, John Philbrick, and Salmon Stevens, cotton manufacturers, all of Meredith, in the county of Belknap, in said state of New Hampshire, and citizens of said state, and against Charles Parker, Richard Fisher, and Benning Muggridge, also of Meredith, in said county and state, and citizens of said state; and that the said Parker and Blanchard on that day sued out of the court of common pleas for the county of Strafford, three writs of attachment, one against the said Avery Factory, the said Josiah, Abraham, Richard, Benning, and Charles, one against the said Avery Factory Company, the said Josiah, and Abraham, Alpha, John, and Salmon, and another against the said Avery Factory Company, and upon the said writs attached certain real and personal property of said Avery Factory Company, and certain other machinery and personal property owned by said Avery Factory, and certain of their said other debtors, and certain real and personal property owned severally by their said debtors, and cer-

[1] [Reported by William W. Story, Esq.]

tain other property owned jointly by several but not by all their said debtors; and at a term of the court of common pleas, holden at Gilford in and for the county of Belknap, on the first Tuesday of August, A. D. 1842, your said orators recovered judgment in said first mentioned action for eight thousand five hundred and sixty-eight dollars and fifty three cents debt, and thirty-five dollars and eighty-eight cents costs of suit, and in said action secondly above mentioned, for ten hundred and sixty-three dollars damages, and twenty-seven dollars and eighty-three cents costs of suit, and in said action against said Avery Factory Company alone, for eight hundred and fifty dollars and thirty-five cents debt, and seventeen dollars and seventy-nine cents costs of suit, and the said Parker and Blanchard, and one Marshal P. Wilder, having other claims justly due them from said Avery Factory Company, Charles Parker, Benning Muggridge, Josiah Crosby, and Abraham Brigham, on the —— day of May, A. D. 1842, sued out a writ of attachment for the recovery thereof, and thereupon attached real and personal estate of said last named debtors, and certain other real and personal estate owned severally by some of said debtors, and jointly by several of said debtors, and at the term of the said court last aforesaid, recovered judgment in said action for six thousand one hundred and sixty-two dollars and twenty-seven cents debt, and twelve dollars and forty-nine cents costs of suit.

"And your orators further show, that after said attachments in said first mentioned three actions, on the tenth day of June, A. D. 1837, they entered into a written contract with said Avery Factory Company, said Crosby, Brigham, Furber, Charles Parker, and Muggridge, and on the fifteenth day of June, A. D. 1838, the said Parker, Blanchard, and Wilder, entered into another written contract with said Avery Factory Company, Crosby, Brigham, Charles Parker, Muggridge, Alpha Stevens, and Philbrick, and on the twenty-sixth day of July, 1839, into another written contract with said Avery Factory Company, Crosby, Brigham, Charles Parker, and Muggridge, and on the twenty-eighth day of June, 1840, into another written contract with the last mentioned parties, and on the twenty-eighth day of July, 1841, into another written contract with the persons last mentioned, with the exception of said Brigham, and that in and by all said contracts, it was provided and agreed, that said Parker and Blanchard should cause to be furnished to the said other parties to said contracts, certain quantities of cotton, to be manufactured into cotton cloth, upon certain terms and conditions in said contracts set forth; that the proceeds of said cloth should be applied in certain proportions, in said contracts specified, to the payment of said Parker and Blanchard for said cotton by them to be furnished, and to the payment of the said claims, on which the three actions first above mentioned were founded. And in and by said contracts executed in 1837, 1838, and 1839, it was agreed, upon the considerations therein stated, that if no mortgagees of the mill of said Avery Factory Company should take possession, the aforesaid three first mentioned actions should be continued without cost, till the expiration of said contracts respectively, and in and by said contract, executed in 1840, it was agreed, that if possession should not be taken by the mortgagees of the mill and other property attached in said suits, and if no other attaching creditors should object thereto, the said suits should be continued without cost until the first of August, A. D. 1841; but if possession should be taken by any mortgagee of said mill or other property attached in said suit, or if any attaching creditor should object to a continuance of the same, so that the same could not be continued, that judgment should be rendered in the said suits against the said parties of the second part to said contract for nine thousand two hundred and ninety-two dollars and forty-five cents with interest thereon from the first day of July, then next, until the rendition of said judgment; and in and by said contract of July 28th, 1841, it was agreed, that the said three actions should be defaulted at the then next term of the court of common pleas for said county of Belknap, and if possession of said mill or property attached should not be taken by any mortgagee, and if no other attaching creditor should object thereto, the three said suits should be continued without costs until the August term of said court, 1842. But if possession should be taken as aforesaid, or if any attaching creditor should object to said continuance, so that the same could not be continued, that judgment shall be rendered in the said suits against said Avery Factory Company, and said two suits against said Avery Factory and others, for the amounts for which judgments were subsequently entered against them at the August term of said court, A. D. 1842, as hereinbefore set forth, according to agreements by them entered into in court for that purpose. And that the said parties by their agreements in writings, signed by their respective counsel in court, and filed in said court at said August term, A. D. 1841, agreed, that judgments should be entered in said actions, at such term thereof as said plaintiffs should elect, for the sums aforesaid; and your orators further show, that at said last mentioned term of said court, they elected to take judgment for the sums aforesaid.

"And the said Parker and Blanchard further show, that at the time of executing said written contracts, it was further agreed and understood between them and their said debtors, that while the said contracts remained in force, and the said actions were continued for judgment as aforesaid, the said actions and attachments should stand and remain (the defendants therein having been defaulted, in

pursuance of said contracts, at August term of said court, A. D. 1841), as security for the plaintiffs' said claims, upon which the said three actions were founded; and by virtue of the said written contracts, and of the said agreement and understanding of said parties, the said Parker and Blanchard had a lien upon the said property for their said claims, which lien is not, as they submit to said court, destroyed, or at all affected by the act of congress passed August nineteenth, A. D. 1841, or by any thing done by any of the said parties to said contracts by virtue of said act. That said Josiah Crosby, Abraham Brigham, Benning Muggridge, Salmon Stevens, and Philbrick, were, as your said orators have been informed and believe, on the seventeenth day of August, A. D. 1842, by this honorable court declared bankrupts, in pursuance of said act of congress, and that one George L. Sibley, of said Meredith, in said state, and a citizen of said state, who was then appointed assignee of said Crosby, Brigham, and Muggridge, has applied to this honorable court, and upon certain representations unknown to said orators, has obtained a writ of injunction, prohibiting your said orators from levying the said executions upon the property of said Crosby, Brigham, and Muggridge. That on the twenty-fifth day of September, A. D. 1840, and on the twenty-eighth day of July, 1841, and on other days, the defendants in all said executions, pledged and delivered to said orators large quantities of machinery, goods, and personal property, which has ever since remained in their possession, and they have long since given notice to the pledgors of their intention to sell the same, if not redeemed, and that the said pledgors have neglected to redeem the same; and that in and by said injunction, said orators are not only restrained from levying their said executions upon said property, upon which they have a lien by virtue of said attachments, in connection with said agreements, and upon the property owned by the said Avery Factory, and others, who are, by virtue of said agreements, constituted a copartnership, which copartnership has not been declared bankrupt; but also from levying their executions upon the real estate, attached in said suits, and upon which their lien and claim, by virtue of said attachment, will expire in thirty days from the time of the rendition of said judgment, and from selling said property pledged to them as aforesaid.

"Wherefore the said orators pray, that the said defendants in said executions may be required to make full, true, and perfect answers to all the matters hereinbefore charged; that the said injunction may be dissolved, and that the lien of said orators upon the said property attached, may, according to the said agreements, be decreed and established as an equitable lien; and that they may have such other and further relief, as the circumstances of their case may require, and as to your honor may seem meet. And that writs of subpœna may issue from said court to the said defendants in said executions before named, commanding them upon a certain day, and under a certain penalty therein to be inserted, to appear therein, and do, and receive, what the said court may order."

When the cause came on to be heard, the following order was passed by the district judge:

"On the hearing of the motion of the plaintiffs in the foregoing bill to dissolve the injunction granted upon the application of George L. Sibley, assignee of said Muggridge and others, the following questions arose, which were adjourned for further hearing and decision into the circuit court of the United States for said district, viz.: (1) Do the contracts, stated in the plaintiffs' bill, in connection with their attachments, as entered into by them with the Avery Factory Company, said Muggridge and others, constitute an equitable lien which remains in force, notwithstanding the decrees of bankruptcy against said Muggridge and others? (2) Independently of said plaintiffs' claim of lien, should not the injunction be dissolved, so far as it respects the property owned by said bankrupts, and by their copartners, the Avery Factory Company and Charles Parker, who have not petitioned to be declared bankrupts? (3) It was admitted at the hearing, that the actions of said Parker and Blanchard, in which their judgments were obtained, were disposed of at the session of the court of common pleas, held on the first Tuesday of August, A. D. 1842, on the last day of said term, which was the 19th day of said August, but no special entry of judgment, in any other than the usual form, was ordered or made. Said Muggridge, Crosby and Brigham were decreed bankrupts on the 17th day of August, A. D. 1842.

"The agreement in relation to the amount of judgment and the time, when they should be rendered in said Parker and Blanchard's said actions, was executed July 24th, 1840. A further agreement on the same subject was made July 28th, A. D. 1841, and was carried into effect by the entry of a default in said actions at August term, 1841, and the entry of judgment therein (pursuant to written agreements filed in court, August term, 1841), was made at August term, 1842. For the particular terms of said contracts, reference is to be had to the statement thereof in said plaintiffs' bill."

The cause now came on, and was argued by B. R. Curtis (with whom was Mr. Fletcher), for plaintiffs.

Mr. Hazelton, of New Hampshire, for the assignee, argued the cause briefly on that side. His argument was to this effect: We supposed, that the case was disposed of by the Case of Foster [Case No. 4,960], and that the attachment was dissolved by the decree in bankruptcy, and the injunction properly

issued. The contracts gave the plaintiffs no other rights than those given under the attachment laws of New Hampshire. The rights under an attachment in New Hampshire are conditional and contingent; and here, according to the doctrine in Foster's Case, the attachment is, in effect, qualified, or superseded by the proceedings in bankruptcy. We do not admit, that the plaintiffs under these contracts had any fixed rights. They were not designed to operate as a security or to confer a lien. The plaintiffs had no possession to support or found a lien. The savings in the second section of the bankrupt act of 1841, c. 9, save only such liens, mortgages, and other securities as are valid by the state laws, and not inconsistent with the bankrupt act. No lien in cases of this sort is created by the laws of New Hampshire, although it is not prohibited. Under the laws of New Hampshire, if the debtor dies, and his estate is insolvent, the attachment upon mesne process by the creditor is dissolved. That, by parity of reasoning, will apply here.

STORY, Circuit Justice. I do not wish to trouble Mr. Fletcher to reply, because I entertain no doubt whatsoever in this case. It is clear to my mind, that the contracts in this case were good and valid, and founded in a valuable consideration, and that the object of them was to give a perfect security to the plaintiffs for their debts, so far as the property attached could go, and these attachments could by law be made available. These contracts created a clear equitable lien upon the property attached, which a court of equity would be bound to enforce, and even a court of law ought to enforce, as far as it could properly do so, in the administration of justice between the parties in the suit. It is by no means necessary in the view of a court of equity, that the contracts should contain an express stipulation, that the attachments shall stand as a security for the plaintiffs. It is sufficient, if it clearly appear, that such were the obvious intent and objects; and unless that construction should be given, the plaintiffs would have parted with valuable rights without any corresponding benefits. Possession is by no means necessary to create, or to support an equitable lien. On the contrary, in equity and admiralty, liens exist altogether independent of possession; as, for example, the lien of a vendor for the unpaid purchase money, where he has conveyed the land, the lien of a bottomry holder, and the lien of a seaman on the ship for his wages. But here the possession of the personal property under attachment, although in the sheriff, was clearly for the benefit of the plaintiffs; and the attachment of the real estate created a lien thereon by mere operation of law, wholly independent of any possession by the officer.

The bankrupt act of 1841, c. 9, § 2 [5 Stat. 440], contains an express saving of all liens, mortgages, or other securities on the property, real or personal, of the bankrupt; and equitable liens, mortgages and securities, are as much within the act as legal liens, unless there be some prohibition in the state laws, which renders them invalid; and there is no pretence to say, that any such law exists in New Hampshire. Indeed, if there had been no such saving in the act, the liens, mortgages, and other securities, within the purview of the saving, would have been saved, by mere operation of law, from the natural intendment of the statute, which did not mean to disturb existing vested rights and interests in property. The case Ex parte Foster [supra], differs in all its main elements from the present. There, the attachment was merely in invitum, without the consent of the debtor. Here, the attachments, however originally made, were subsequently continued and intended to be perfected as securities by the contract of the debtors. In Foster's Case, there was no admitted debt due by the debtor, nor any agreement as to not contesting it. In the present case, the defendants have, under their own agreement and contract, been defrauded, the amount of the debts ascertained, and the attachments agreed to be held as security therefor. In Foster's Case, the bankrupt, if he obtained his discharge, had a right to plead it in bar to the suit. In the present case, the defendants have no day to plead any such defence; they have been, by their own consent, defaulted, and the amount established; and they are therefore estopped to say, that they have any defence or bar to the judgment. In truth, therefore, Foster's Case has no similarity with the present. It stands entirely upon the general and naked right of a creditor to make an attachment, and proceed in his suit against his debtor, without any equity acquired by any act of the defendant to give him new rights in the suit; or to take away any rights of the defendant.

I can have no doubt, that the contracts in the case at bar created a trust, in the sense of a court of equity, in the property attached in favor of the plaintiffs, which the defendants might be compelled to perfect and perform, according to its just interpretation. It is no objection, that the trust or security thus obtained is under legal process, or by operation of law. Securities of that sort are very frequent both in England and America, and are deemed the most certain and fixed of any. Thus, a judgment in England, and in many of the states of America, gives a permanent lien upon all the lands of the judgment debtor, and is, on that account, resorted to as a favorite security. It is true, that an attachment by our laws has not the same permanence, but it is limited to a short period after the judgment, within which the plaintiff must take the attached property in execution, or he will lose his lien. But then, in such a case, if he loses his attachment, it is his own

fault and laches. Now, in the case at bar, the plaintiffs do not ask the court to enforce their attachment or equitable lien; but they only ask the court to leave them, free from the injunction, to pursue their legal and equitable rights under their judgment and execution. It appears to me plain, that they are entitled to it. They have an equitable lien and a superior title to the property over the assignee and the general creditors; and the assignee must take the property of the bankrupts for the general creditors, subject to this lien and superior title. The case of Dale v. Smithwick, 2 Vern. 151, is strongly in point, as to the nature and obligation of a contract of this sort to create an equitable lien or trust in property. In Legard v. Hodges, 1 Ves. Jr. 477, Lord Thurlow said, that it was an universal maxim, that, wherever persons agree concerning a particular subject, in a court of equity, as against the party himself, and any claiming under him, voluntarily or with notice, it raises a trust. See 2 Story, Eq. Jur. §§ 1230, 1231; Collyer v. Fallon, 1 Turn. & R. 469, 475, 476. The cases of Ex parte Copeland, 3 Deac. & C. 199, and Ex parte Prescott, 1 Mont. & A. 316, and Ex parte Flower, 2 Mont. & A. 224, establish, that the same rule prevails in bankruptcy; and that the property will be followed and affected with the trust in the hands of the assignees, in the same manner and to the same extent, as it would be in the hands of the bankrupt. But if no such case ever existed, I should have no doubt, upon principle, that such ought to be the result. But there are many cases, which stand upon analogous grounds. See 2 Story, Eq. Jur. §§ 1230, 1231, 1232. We all know, that in bankruptcy, the assignee takes only such rights, as the bankrupt himself had, and is subject to the like equities. See 1 Cooke, Bankr. Law (4th Ed. 1799) pp. 267–270, c. 7, § 2; 2 Story, Eq. Jur. § 1411; 1 Deac. Bankr. (Ed. 1827) pp. 320, 321, c. 10, § 3. There is a close analogy, although perhaps the same principles may not apply throughout, between cases like that before the court, arising in bankruptcy, and cases of the administration of the assets of a deceased testator or intestate, by courts of equity, in the ordinary exercise of their jurisdiction, upon a creditor's bill for the benefit of all the creditors. Courts of equity in such cases always exercise a sound discretion as to restraining any particular creditor from pursuing and enforcing his legal rights under his proceedings and judgment at law, and will not interfere in such a manner as to displace any of his just rights and equities. That is sufficiently apparent from the case of Drewry v. Thacker, 3 Swanst. 529, 546, and especially from the elaborate judgment of Lord Langdale in Lee v. Park, 1 Keen, 714. It appears to me, that the district courts, sitting in bankruptcy, should uphold the like doctrine, and should exercise a like discretion in not restraining the rights of judgment creditors, who are proceeding to enforce their judgment and executions, not merely upon their ordinary rights as judgment creditors, but upon the footing of equitable rights and liens acquired under contract; for, in such cases, they have a superior equity to that of the general creditors. My opinion, therefore, is that in the present case, the plaintiffs have, in virtue of their contract, a superior equity, which ought to be protected by the courts sitting in bankruptcy; and that the injunction, granted in this case, ought to be dissolved; and this will constitute an affirmative answer to the first question propounded in this case.

The second question may be disposed of in a few words. The general rule in bankruptcy is, that in cases of partnership, where one partner becomes bankrupt, his assignee can take only that portion of the partnership assets, which would belong to the bankrupt, after payment of all the partnership debts; and that the solvent partners have a lien upon the partnership assets for all the partnership debts, and also for their own shares thereof, before the separate creditors of the bankrupt partner can come in and take any thing. See Story, Partn. §§ 375, 376. It is true, that in such cases, it may often, from the necessity of the case, and for the purpose of ascertaining the partnership assets and debts, and adjusting and settling the same, and making a final settlement and distribution of the surplus, be indispensable, that the district court, as a court of equity, should take into its own hands the exclusive management and administration of all the partnership assets, and inhibit the other partners from intermeddling therewith. But this it will do with caution, and solely for the purposes before stated. And so far from thereby displacing any of the rights, liens, and equities of the other partners, it studiously seeks to maintain and protect them. Now, in the present case, under its peculiar circumstances, there is no reason whatever for the interference of the district court by way of injunction, or otherwise, to administer the property in controversy. On the contrary, by refusing or dissolving the injunction, it accomplishes the very ends designed by the contracts between all the parties, and allows the partnership property to be applied to the discharge of the partnership debts according to its just and original destination. To the second question, therefore, an affirmative answer ought also to be given.

I shall direct a certificate to be sent to the district court accordingly.

The certificate was as follows:

"Circuit Court of the United States, New Hampshire District. In Bankruptcy. September 12, 1842. Isaac Parker et al., Plaintiffs in Equity, v. Benning Muggridge et al.

"In answer to the questions adjourned into this court by the district court of New Hamp-

shire, in bankruptcy, it is ordered that the following answers be sent to that court as the opinion of this court. First. That the contracts stated in the plaintiffs' bill, in connection with their attachments, as entered into by them with the Avery Factory Company, the said Muggridge, and others, constituted an equitable lien, which remains in force, notwithstanding the decrees of bankruptcy against the said Muggridge and others. Second. Independently of the said plaintiffs' claim as an equitable lien, which, of itself, constitutes a sufficient ground for the dissolution of the injuncuon granted in this case, the plaintiffs would be entitled to have the same injunction dissolved, so far as respects the property owned by the said bankrupts, and by their copartners, the Avery Factory Company and Charles Parker, who have not petitioned to be declared bankrupts, and indeed do not appear to be bankrupts. The general rule in all cases of this sort is, that the property of the partnership is first to be applied to the discharge of the partnership debts, and the surplus only ought to be and can be applied to the individual debts of any one partner. It may however occur, that in tne bankruptcy of one partner, it may be necessary for the court in bankruptcy to take upon itself the administration as well of the partnership estate as of the estate of the bankrupt partner, in order to have a final settlement of all the claims. But no such question is here presented, and it is here alluded to only for the purpose of excluding any different inference from being drawn from the answer to the second question. Joseph Story,

"Associate Justice of the Supreme Court of the United States."

Case No. 10,744.

PARKER v. NIXON.

[1 Baldw. 291.][1]

Circuit Court, E. D. Pennsylvania. April Term, 1831.

COMMISSION TO TAKE EVIDENCE—NAMES OF WITNESSES.

A party taking out a commission to take evidence in relation to pedigree, is not bound to name the witnesses he intends to examine.

In this case a rule had been entered for a commission to take testimony in England, on which the party obtaining it, was called on to name the witnesses he intended to examine. After an argument, the court decided that it was not a matter of course, to compel the party to name the witnesses to be examined on a commission, but depended on the discretion of the court, to be exercised on the circumstances of the case. This being a case of pedigree the commission ought to issue without naming them.

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

PARKER (OVERMAN v.). See Case No. 10,-623.

Case No. 10,745.

PARKER v. PERKINS.

PATENTS—INFRINGEMENT—DAMAGES.

The standard for estimating damages for the infringement of a patented machine is the actual profits from the making, using, or selling of the invention by the defendant. The reasonable cost of the labor and materials must be deducted, as the plaintiff himself, if he had made the machines, would have had to pay such expenses.

[Cited in Lane, Pat. Dig. 234, to the point as stated above. Nowhere more fully reported; opinion not now accessible. Before GRIER, Circuit Justice, and KANE, District judge.]

PARKER (PERRY v.). See Case No. 11,010.

Case No. 10,746.

PARKER et al. v. PHETTEPLACE et al.

[2 Cliff. 70.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1861.[2]

PLEADING IN EQUITY — FRAUD—ANSWER NOT RESPONSIVE — CORROBORATING CIRCUMSTANCES — PROOF — NATURE OF EVIDENCE — ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Where fraud is imputed in the bill, and the answer is responsive and the denial positive, the universal rule is that a decree cannot be pronounced on the testimony of a single witness, unaccompanied by corroborating circumstances.

[Cited in Scammon v. Cole, Case No. 12,432.]

2. Inasmuch as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances, in addition to his single witness, to turn the balance.

3. Satisfactory proof may be made by circumstances alone, or partly by circumstances and partly by direct testimony, or entirely by the latter.

[Cited in brief in Merrell v. Johnson, 96 Ill. 225.]

4. Whatever be the nature of the evidence, the measure of proof required is the same; that is, it must be equal to two witnesses, or one witness with corroborating circumstances sufficient to turn the balance.

5. In case of an assignment by a debtor, with preference of certain creditors, *held*, that where the proceeding was under the law of a state, such law must furnish the rule of decision for the circuit court sitting in the state.

6. Assignments with preferences to certain creditors being held valid by the courts of Rhode Island, the circuit court sitting in that state will follow that rule as to all such assignments under the state law.

Bill in equity. The case set out in the bill was in substance as follows: Edward Seagrave, of Providence, was the owner of large real and personal estates, but, becoming indebted for large sums of money, failed.

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

[2] [Affirmed in 1 Wall. (68 U. S.) 684.]

Three of the complainants, [John S.] Parker, Chapman, and Tobey, for a valuable consideration, became possessed of certain overdue and unpaid bills of exchange, and promissory notes, drawn and made by Edward Seagrave, commenced suit against him upon them, and recovered a judgment thereon for $60,520.38, for which execution issued and was partly satisfied. Soon after, Parker, Chapman, and Tobey themselves failed and assigned their property, including the judgment, to George Stevenson, the other complainant in this case. During the pendency of the first suit above mentioned, as alleged in the bill of complaint, the said Edward Seagrave combined and confederated with [James S.] Phetteplace and George A. Seagrave, two of the respondents in this case, to defraud the complainants in the present case, and to that end came to an agreement that the two named respondents should purchase paper outstanding against Edward Seagrave, to the amount of $40,000 or $50,000, at a price not exceeding twenty per cent, and the debtor should convey to the purchasers of the paper all or nearly all his visible attachable property, allowing them the full value of the paper on its face, and thus leaving in their hands the difference between the face of the paper and what they paid for it. The respondents purchased the paper to the amount of $50,000 at rates varying from fifteen to twenty-five per cent of its value, and the debtor conveyed to them certain stocks and real estate, executed to them a mortgage of certain other real estate, and delivered to them certain notes and other evidences of debt, in all amounting to $50,000, and received from the purchasers of the paper $43,000 of the sum transferred to them, under the agreement. This was charged as a fraud upon complainants, and as intended to hinder and delay them in the collection of their judgment. Edward Seagrave then assigned all his property to one Walter W. Updike, one of the respondents, preferring J. S. Phetteplace and George A. Seagrave for the payment of all notes, drafts, and acceptances held and owned by them, and on which the assignor was liable, and also for all debts due to them from him, and to indemnify them for all liabilities which they had incurred on his account. Prior to the assignment, the assignee had been the attorney of the assignor, and knew the circumstances of the bargain and agreement. The deed of assignment was alleged to be a part of the fraudulent scheme, and intended to cover up the previous fraudulent transaction, which was well known to the assignee at the time the assignment was executed. To sustain the imputation of fraud it was alleged that the paper purchased by the two respondents, and which was by them delivered to the drawer and maker, was by him delivered to his assignee as part of the assigned property, and was treated by the parties as the property of the assignor. The bill prayed for a discovery, that respondents might be decreed to pay the former judgment of the complainants, out of the property so held by them; for an injunction, for a receiver, and that the mortgage deed and assignment might be cancelled and discharged. Answers were filed by the purchasers of the bills and notes, and by the assignee of the drawer and maker, admitting all the allegations of the bill, except the following: It was denied, that the complainants paid any value for the notes and bills of exchange, &c., of Edward Seagrave, which they held, but the real interest in them was averred to be in other parties, the complainants receiving the paper solely for the purpose of commencing suit in the circuit court; it was denied that any combination was made to defraud the complainants; that any understanding was had with Edward Seagrave for them to make a purchase of the paper, that he should turn over to the respondents any part of his property in any manner to hinder and delay the complainants in the collection of their judgment, but they alleged that they purchased the paper with their own property, as the genuine evidence of a real bona fide indebtedness of the drawer and maker. It was also denied that respondents held any part of the property of Edward Seagrave, upon any secret trust, or in any manner for his benefit and use, or that the assignment was a part of any fraudulent scheme or a cover for such scheme; that any part of the assigned property was subsequently treated as the property of the assignor, but they averred that the property conveyed to them for the purchase of the paper was ever afterwards used and treated by them as their own; and that no material part of the same was ever withdrawn and used by the grantor with the knowledge and consent of the respondents.

T. A. Jenckes, for complainants.

The defendants, Phetteplace and G. A. Seagrave, were, at most, volunteers in the purchase of claims against Edward Seagrave; they had full notice that he was hopelessly insolvent. Phetteplace had received a conveyance of a part of his personal property, without consideration, and of another part of his personal property, for a note on demand, which property was worth about as much as was paid for the depreciated paper; and George A. Seagrave was Edward's brother, and both had the means of knowledge, and actually knew the amount of property held by Edward, and that a conveyance to them by Edward, of the property described in the present suit, would deprive Edward of all means of paying his other creditors; and their knowledge throws upon them the burden of proving the fairness of the transaction. This they have not done; but have admitted that they purchased depreciated paper, which Edward Seagrave claimed that he was under no moral obligation to pay, and then claimed payment in full, knowing that such payment would deprive the debtor of all

means of paying anything to his other creditors. They were not his just creditors, nor was the debt in their hands an honest debt; but the whole scheme was a gross fraud on the complainants. Kaine v. Weigley, 22 Pa. St. 179; Garland v. Rives, 4 Rand. [Va.] 282; Nesbitt v. Digby, 13 Ill. 387.

The assignment to Updike is void, as it was part of the scheme to cover up the fraud by which the property of Edward Seagrave was placed in the hands of Phetteplace and G. A. Seagrave. Such assignments are no obstruction to the execution of legal process, or to the granting of relief in equity. Stewart v. Spenser [Case No. 13,437]; Heydock v. Stanhope [Id. 6,445]; In re Durfee, 4 R. I. 401; Fuller v. Ives [Case No. 5,150]; 1 Am. Lead. Cas. 17–75.

The transfer of property to Phetteplace and G. A. Seagrave by Edward Seagrave was a voluntary conveyance, and the execution of the assignment subsequently, covering the same property, and recognizing the existence of the debt due to Phetteplace and Seagrave, pretendedly settled by this transfer, is evidence of the fraudulent character of the transfer. Cathcart v. Robinson, 5 Pet. [30 U. S.] 263.

And on the principle that if a contract be fraudulent and void in part, it is void altogether, the complainants are entitled to a decree declaring the mortgage from Edward Seagrave to Phetteplace and Seagrave void, and affirming the title of the complainant Stevenson, under the execution sale, and also for the payment of $543,856.61, with interest.

W. H. Potter, for defendants.

The gist and essence of complainants' bill is, not that the several things were done, but that they were done in pursuance of a compact and understanding to do them, for the purpose of covering up this property for the benefit of Edward Seagrave, and thereby to defraud his creditors.

In Rhode Island the right to make preferences in an assignment has ever been settled law, and the right to do so is just as perfect a right as is the right to make an assignment. The right is not partial, but absolute. If the debt be genuine, be the preference to parent or child, husband or wife, or relative, or be it to a confidential indorser, as it is termed, the preference is unquestionable, and the assignment valid.

But the complainants charge that the real scheme was to convey this property ostensibly to pay their debts, but really to keep it from complainants and from the creditors of Edward Seagrave, and to keep it for his benefit.

The complainants have no right to maintain this bill, because said complainants did not, at the commencement of this suit, and do not now, own the claims on which their bill is based; that they were nominally assigned to them for the purpose of having a suit brought thereon in this court; and that in fact said claims, whatever they are, belong to Hill, Carpenter & Co., or their assignees, all of whom are citizens of this state.

Reference on this point is made to the complainants' bill, in which they do not allege that they are the owners of this paper, but say that they became possessed of the same.

It is quite as necessary to give jurisdiction, that the transfer of paper on which a claim is sued should be bona fide, as that change of citizenship, in order to give jurisdiction, should be bona fide. Jones v. League, 18 How. [59 U. S.] 76–81.

The court have no jurisdiction of the suit.

Supposing, for the sake of the argument, that the intention of the parties to the pretended assignment was not to make a mere nominal transfer for the purpose of commencing a suit in the name of the complainants, still Hill, Carpenter & Co., or their assignees, have the legal title to the paper in question, and are the owners of it. They do not pretend, the paper does not, to have transferred to complainants the debt evidenced by that paper. Had the paper been indorsed over by Hill, Carpenter & Co. without more, there might have been a presumption that they had absolutely sold and conveyed it. But the assignment expressly declares that it is not sold; that it is not absolutely conveyed; that the property is not parted with. It is merely pledged as collateral security for a debt owing from Hill, Carpenter & Co. to complainants. The assignment does not even contain a power to complainants to collect the amount due from the parties to the paper. Hill, Carpenter & Co. not only could maintain an action thereon in their own name, but at law an action thereon must be brought in the name of Hill, Carpenter & Co. Hill, Carpenter & Co. could at any moment they pleased pay the debt for which this paper was pledged to complainants, and demand, and be entitled at once to have the paper itself delivered to them. They, by so doing, could put an end, at any instant, to any suit that may be supposed to be brought on this paper by the complainants. If it is asked, How are the complainants to make said paper available as collateral security, if they cannot sue on it? I answer, by suing in the name of Hill, Carpenter & Co., and if they interfered to prevent it, not having paid to complainants their debt, a court of equity would enjoin Hill, Carpenter & Co. from interfering with the use of their names in such suit.

Notwithstanding this pretended conveyance, Hill, Carpenter & Co. could make a valid transfer of the same paper to another party, subject only to the rights of the complainants and the person taking this transfer; the purchaser of the paper could tender to complainants the amount due them from Hill, Carpenter & Co., and if complainants did not instantly deliver up possession of said paper to such purchaser, he could maintain an action of trover against them there-

for. 1 Pars. Cont. 600, 601, and notes; Franklin v. Neate, 13 Mees. & W. 481.

And the pledgee does not acquire an absolute title even by failure of pledgor to pay the debt. There is no forfeiture until pledgee's rights have been determined by what is equivalent to a foreclosure. Brownell v. Hawkins, 4 Barb. 491.

This is not so much as an assignment of a chose in action, in the ordinary meaning of the term, because it does not carry the property, and does not give a right of action at law in the name of the party receiving the chose in action.

Complainants have seen fit to appeal to the consciences of the defendants, in answer to these charges. The charges are not merely of actual fraud, but of a conspiracy to defraud carried into effect.

We claim for each and all these defendants the benefits of the rule of law, fixing the weight of an answer in chancery. It is equal to two witnesses, or one witness and circumstances equal to another witness. It is like the rule in a charge of perjury; and Greenleaf (volume 3, latter part of section 284) well observes: "And the plaintiff having thought fit to make the defendant a witness, is bound by what he discloses, unless it is satisfactorily disproved. Nor is the answer in such cause to be discredited, nor any presumption indulged against it, on account of it being the answer of an interested party."

Each and all these defendants, under the solemnity of their oaths, positively and unequivocally deny every charge of fraud, or intention to defraud, contained in the bill, and any circumstances indicating fraud, or from which the court is asked to infer fraud.

CLIFFORD, Circuit Justice. Undoubtedly the evidence shows that a large amount of negotiable paper was outstanding against Edward Seagrave, at the period mentioned in the bill of complaint, and that he was indebted in a considerable amount to the complainants, for which they also held his negotiable paper. Assuming those facts as proved, the complainants insist that the evidence shows, that the debtor made a fraudulent arrangement with the principal respondents, in pursuance of which, they purchased a large amount of his paper so outstanding, at a discount of seventy-five or eighty per cent, and received from him a conveyance of his property, in exchange for the paper, and also a mortgage of certain real estate, as a further security for the same, estimating the paper, so purchased, at its full nominal value in the exchange. According to their theory, the intent and design of the debtor were to hinder, delay, and defeat his creditors, and that the respondents well knew that such was the intent and design of the debtor, and that they received the conveyance and mortgage with that knowledge, and have retained in their hands the amount of the difference between the value of the paper and the price paid for its purchase, for the use and benefit of the debtor. They do not controvert the fact that the debtor was justly and legally liable on the paper, but they contend, that the amount of the difference between the price paid for the paper and the nominal value is fraudulently held by the respondents, and that the mortgage to them, and the assignment to the other respondent, are without consideration and fraudulent, because, as they insist, they were executed, the one to secure that amount, and the other to facilitate the accomplishment of that purpose. Fraud, therefore, is the essence of the charge, and it is upon that ground that the complainants ask the interposition of the court, to cancel and discharge the mortgage, and the assignment of the real estate. Briefly stated, the transactions out of which the controversy has arisen were in substance and effect as follows, as appears from the pleadings and evidence: Large purchases of wool were made by Edward Seagrave, in connection with other parties, in 1853, for the purpose of speculation. Money was raised for that purpose, to a large amount, on bills of exchange and promissory notes drawn and made by the first-named party. They were unsuccessful in the speculation, and about the 4th of February, 1854, the drawer and maker of the bills and notes stopped payment on this class of paper. Payment of the paper being refused, it was protested, and a considerable amount of it subsequently went into the possession of the principal complainants. Suit was commenced by them on the paper, and a judgment recovered for the amount with costs of suit. An execution duly issued, and was levied on the real estate in controversy. Founded upon these preliminary facts, the complainants insist that their title to the real estate ought to be complete. But the respondents have a prior title, and unless the same is shown to have been fraudulently and wrongfully obtained, they must prevail in the suit. The complainants charge fraud, and in order to ascertain whether they have proved their charge, it becomes necessary to look with some care at the circumstances under which the respondents acquired their title.

Finding the aforesaid paper in the market, the respondents purchased a large amount of it at a discount of seventy-five or eighty per cent. All of the purchases were made openly, and on the 17th of November, 1854, the debtor executed to the purchasers the mortgage to secure the payment, allowing the full amount of the bills and notes. He had stopped payment on this paper on the 4th of February, 1854; and eleven months afterwards, on the 4th of January, 1855, he assigned his property for the benefit of his creditors, giving preference to the two first-named respondents. It

was under these circumstances that the two principal respondents became possessed of the real estate on which complainants levied their execution; and the complainants charge that the conveyance was fraudulent, because designed to hinder, delay, and defeat creditors, and that the respondents now hold the estate upon a secret trust, for the use and benefit of the debtor, and that the assignee was cognizant of the fraud, and participated in its perpetration. No direct evidence to prove the alleged fraud is introduced by the complainants, and it should be borne in mind that they have not made the debtor a party to the bill of complaint. Direct proof of the alleged fraud being unattainable, the complainants set forth the circumstances on which they rely to establish the charge. Taking the case as stated in the bill of complaint, the circumstances alleged by the complainants to prove the conveyance fraudulent may be classified into four distinct charges. First, they charge that the two principal respondents combined and confederated with Edward Seagrave to defraud his creditors, and to that end entered into a corrupt bargain, understanding, and agreement that the former should purchase some $40,000 or $50,000 of his outstanding paper, at a large discount, and that he, the debtor, should pay and secure the paper so purchased, at its full value, and that the purchasers should hold the property transferred to them for that purpose, over and above the amount paid for the paper, for the use and benefit of the grantor; and the charge is, that the corrupt and fraudulent agreement was substantially carried into effect. By the well-settled rules of law, the burden of proof is upon the complainants to make out their charge. Fraud may be inferred from circumstances, but it cannot be presumed without proof, and he who makes the charge has the burden of establishing it. It is insisted by the complainants, that, under the circumstances of this case, the burden of proving the fairness of the transaction is upon the respondents; but the proposition is wholly untenable, and cannot receive the least countenance. Appeal is made by the bill of complaint to the consciences of the respondents on this point, and they most explicitly and unequivocally deny the charge in all its details. Where fraud is imputed, and the answer is responsive, and the denial positive, the universal rule is, that a decree cannot be pronounced on the testimony of a single witness unaccompanied by corroborating circumstances. Hughes v. Blake, 6 Wheat. [19 U. S.] 468. Marshall, C. J., in Clarke's Ex'rs v. Van Riemsdyk, 9 Cranch [13 U. S.] 160, states the rule as follows: That "either two witnesses, or one witness with probable circumstances, will be required to outweigh an answer asserting a fact responsive to a bill"; and he gives as a reason for the rule, that the plaintiff calls upon the defendant to answer an allegation, and thereby admits the answer to be evidence; and if it is testimony, says the chief justice, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness to turn the balance. But it must not be understood from what has been said, that direct evidence is necessary, in a case like the present, to support a bill of complaint, because such is not the rule of law. Satisfactory proof may be made by circumstances alone, or partly by circumstances and partly by direct testimony, or entirely by the latter. Whatever may be the nature of the evidence, however, the measure of proof required is the same, that is, it must be equal to two witnesses, or one witness with corroborating circumstances sufficient "to turn the balance." Recurring to the pleadings, it is clear that the answer of the respondents falls within this rule, and must be overcome by circumstances more than equal to the positive testimony of a single witness.

Evidence is introduced by the complainants, to show that Edward Seagrave advised some of the holders of his paper to sell the same to the respondents, on the terms mentioned in the bill of complaint. Testimony to that effect was given by Elijah B. Newell, who says, among other things, that the debtor sent for him and advised him to sell to those parties, telling him that the terms were the best he would probably ever obtain. Spencer Mowry also testifies, that the same person first gave him information that those parties would purchase the paper, and that he urged the witness to sell to them, and that he did so, and they expressed the desire to purchase more of the paper. This witness also states, that he derived the impression, that the debtor had money left with his friends to buy the paper at twenty-five per cent, and intimates, that he accepted the same because he did not see any way to prevent the transaction. Five pieces of the paper were also sold to them by George Cooke on the same terms, but he does not testify to any conversations which can have any material bearing on the case. Many other facts and circumstances are introduced by the complainants, as having some tendency to authorize the inference, that the paper was purchased in pursuance of the alleged corrupt bargain, understanding, and agreement. They rely on the fact that the respondents purchased about the amount of paper specified in the bill of complaint; that the debtor subsequently conveyed the property and executed the mortgage as alleged; and that he paid and secured the full value of the paper. Considerations, however, of very great importance, connected with this inquiry, are entirely over-

looked by the complainants. Apparently they seem to forget that the paper purchased was the bona fide paper of the debtor, and that the purchase of it, in open market, without any combination or confederacy to defraud, and without any corrupt bargain, understanding, and agreement with the debtor to do any acts to hinder, delay, or defeat his creditors, whether purchased at a discount or not, was a lawful transaction, and consequently that proof of those facts, without more, furnished no ground whatever, of relief, in this case. They also seem to be equally unmindful of the fact that the allegations of combination, confederacy, and fraud were unequivocally denied in the answer. Those denials are very properly invoked by the respondents as evidence to refute the allegations which constitute the foundation of the prayer for relief. Reliance is not placed upon those denials alone by the respondents, but they also rely upon the testimony of the debtor himself, who most unequivocally negatives the whole foundation of the allegations in the bill of complaint. Under these circumstances, it is impossible to say that the transaction was fraudulent, or that the complainants are entitled to relief. Second, adopting the classification already suggested, the next charge is that the assignment was executed as a part of the alleged fraudulent scheme, and as a cover to the arrangement previously carried into effect, in pursuance of the corrupt bargain, understanding, and agreement made between the assignor and the principal respondents. Like the first charge, this one also is met by the unqualified denial of the answer. All three of the respondents deny the charge in all its details, and the testimony of the debtor is equally explicit to the same effect. Attention was also called at the argument to the fact that the two principal respondents were preferred in the instrument, and it must be admitted that such a clause, in some jurisdictions, would render the assignment void, but the effect of it as a general rule must depend upon the local law. State laws may authorize such a preference, or they may forbid it; and in all cases where the proceeding is under the state law, the regulations of the state must furnish the rule of decision. Assignments with preferences in favor of certain creditors are held to be valid in this state, as appears by several decisions of the state court; and this court will follow that rule, until it is repealed by competent authority. Dockray v. Dockray, 2 R. I. 547; Beckwith v. Brown, Id. 311; Sadlier v. Fallon, 4 R. I. 490. Third, complainants charge, that the assignee was cognizant of the corrupt scheme and combination set forth in the first charge, and that he well knew the fraudulent purpose for which the mortgage and assignment were executed. But the charge is very pointedly denied in the answer, and the complainants offer no satisfactory proof in support of it; and under those circumstances they can hardly expect a finding in their favor. Finally, the complainants charge, that the debtor, upon the execution of the mortgage deed and the assignment, continued to treat the property conveyed as his own, and that he was allowed to do so by the respondents. But they fail to prove the charge, and it is very explicitly denied in the answer.

In view of the whole evidence, I am of the opinion that the complainants have failed to prove any one of the charges against the respondents, and the bill of complaint is accordingly dismissed with costs.

[On appeal to the supreme court, the decree of this court was affirmed. 1 Wall. (68 U. S.) 684.]

PARKER (REISER v.). See Case No. 11,685.

Case No. 10,747.

PARKER v. REMHOFF.

[17 Blatchf. 206, 3 Ban. & A. 550; [1] 14 O. G. 601.]

Circuit Court, E. D. New York. Oct. 9, 1878.

PATENTS—INFRINGEMENT—BOX COVERS—BURDEN OF PROOF.

1. A patent for making a protuberance from the inside on the outer surface of the rim of the cover of a box, and a like protuberance from the inside on the outer surface of the rim of the box, so that, when the cover closes on the box, the projection on its rim will snap over the projection on the box, and thus form a fastening, is infringed where, instead of the protuberance on the cover, a hole is made in the cover.

2. The burden of proof is on a defendant, to establish, by satisfactory evidence, the prior use of a patented invention.

[This was an action by Charles Parker against Charles Remhoff.]

The patent upon which this suit was brought was granted to George N. Cummings, January 24th, 1860, and numbered 26,891, for an "improved catch for spectacle cases," the same being extended for seven years on January 20th, 1874. The invention consisted in producing two indentations with a proper tool, one in the forward part of the rim of the cover, and struck from the inside so as to produce a protuberance on the outer surface, and the other of like character, also from the inside upon the rim of the box part. The patentee claimed: "Forming a snap for metal boxes, such as spectacle cases, tobacco boxes etc., by making corresponding indentations on the rim of the lid and on the side of the said boxes, in the manner and for the purpose set forth herein."

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[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq. and here compiled and reprinted by permission. The syllabus and opinion are taken from 17 Blatchf. 206, and the statement is taken from 3 Ban. & A. 550.]

B. E. Valentine, for plaintiff.
Matthew Daly, for defendant.

BENEDICT, District Judge. This action is to recover damages and for an injunction against the defendant, for an infringement of letters patent owned by the plaintiff. The subject-matter of the invention is a method of fastening for metal boxes. The invention consists in producing two indentations, one in the forward part of the rim of the cover, and struck from the inside, so as to produce a protuberance on the outer surface of the rim; the other, of like character, also from the inside, upon the rim of the box part. These indentations are so placed, that, when the cover closes upon the box, the projection on its rim will snap over the projection on the box, and so form a fastening for the box. The defendant makes a metal box and puts a hole in place of an indentation from the inside of the rim producing a protuberance, into which hole a protuberance on the box snaps, and thus the box is fastened. The difference between the plaintiff's and the defendant's device is, that, in the defendant's fastening, the sides of a hole perform the function which, in the plaintiff's fastening, is performed by the sides of an indentation. The sides of the hole in the rim of the defendant's box perform the same function as that of the sides of the indentation in the plaintiff's box, and produce a similar result. The plaintiff makes an indentation in the rim of his box, to permit the protuberance on the body of the box to snap into it and so fasten the box. The defendant, instead of making an indentation, cuts a hole, which permits the protuberance to snap into it, and, by the action of the sides of the hole upon the sides of the protuberance, the box is fastened. There is no difference in principle or effect between the two fasteners, and, in my opinion, the charge of infringing is made out.

The defendant, as a further defence, denies the validity of the plaintiff's patent, for want of novelty, and produces several witnesses and various boxes, for the purpose of showing that devices similar to the plaintiff's were in use prior to [Jan., 1860] [2] the date of the plaintiff's patent. Here, the burden is upon the defendant, to establish the fact of prior use by satisfactory evidence. This has not been done. Of the various boxes that have been produced, only two of them can make any claim to resemble the plaintiff's invention, and the testimony in respect to these two articles is too indefinite and uncertain to warrant the conclusion that they were in existence prior to the plaintiff's patent, in the face of evidence from several of the largest dealers in this sort of merchandise, that, previous to the plaintiff's invention, no boxes so fashioned were known, and that, when the plaintiff introduced his fastening, the forms then in use were superseded and no longer salable. The evidence, as it stands, has failed to convince me that any fastening similar to that of the plaintiff was in public use or on sale in this country prior to the invention of the plaintiff. There, must, therefore, be a decree in favor of the plaintiff.

[2] [3 Ban. & A. 552; 14 O. G. 602.]

PARKER (ROGERS v.). See Case No. 12,-018.

PARKER (RULE v.). See Case No. 12,125.

Case No. 10,748.

PARKER v. SEARS et al.

[1 Fish. Pat. Cas. 93; [1] 4 Pa. Law J. Rep. 443; 3 Am. Law. J. (N. S.) 82; 7 Leg. Int. 138.]

Circuit Court, E. D. Pennsylvania. Aug. 26, 1850.

PATENTS—MOTION FOR INJUNCTION—ANSWER REGARDED AS AN AFFIDAVIT—TITLE AND INFRINGEMENT ADMITTED AS PALPABLE—EQUIVOCAL ANSWER.

1. The practice, upon a motion for a preliminary injunction, of treating an answer—directly and unequivocally denying the facts set forth in the bill—merely as an affidavit, is a relaxation of the settled rules of practice in the English courts of equity, which rules should be followed unless changed by the written rules of the courts of the United States.

[Cited in Farmer v. Calvert Lithographing, etc., Co., Case No. 4,651.]

2. No interlocutory injunction should issue, unless the complainant's title, and the defendant's infringement are admitted, or are so palpable and clear that the court can entertain no doubt on the subject.

[Cited in American Nicholson Pavement Co. v. Elizabeth, Case No. 312; Bailey Wringing Mach. Co. v. Adams, Id. 752; Cross v. Livermore, 9 Fed. 607.]

3. Where, however, the answers or affidavits are equivocal and evasive, or disclose a state of facts which show that the conclusions drawn from them are clearly erroneous and founded upon a mistake of law, an injunction will issue.

4. The court is not bound upon motions for preliminary injunctions to decide doubtful and difficult questions of law, or disputed questions of fact, nor to exercise this high and (if executed rashly) dangerous power before the alleged offender shall have an opportunity for a full and fair hearing.

[See Bailey Wringing Mach. Co. v. Adams, Case No. 752; Chaffraix v. Board of Liquidation, 11 Fed. 647.]

5. An injunction will be refused if the verdicts establishing the complainant's title have been obtained on such inconsistent and contradictory claims, or have left the plaintiff's title in such a doubtful shape, that the court can not say with certainty what is and what is not an infringement of the patent.

6. An injunction will also be refused where possession is very vaguely stated in the bill, and is met and avoided by allegations and proof of a more peaceable and exclusive possession by the defendants.

7. The chief object of issuing such writs before the final hearing of a cause, is to prevent irreparable mischief, not to give the complainant

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

the means of coercing a compromise on his own terms, from the inevitable injury that the defendants must suffer by the stoppage of their mills or manufactories.

[Quoted in Eastern Paper-Bag Co. v. Nixon, 35 Fed. 754. Cited in Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 803, Ney Manuf'g Co. v. Superior Drill Co., 56 Fed. 154.]

8. In particular cases, as where the patent is for a machine to make some article of manufacture, and the profit arises from the monopoly of such articles, a court would issue an injunction in the last month or week of the life of the patent. But where the plaintiff can be compensated in damages, an injunction will not under ordinary circumstances be granted during the last few weeks of a patent.

[Cited in Morris v. Lowell Manuf'g Co., Case No. 9,833.]

9. Patents should be construed liberally to support the claims of meritorious inventors. But there should not be a liberality of construction which permits the inventor to couch his specification in such ambiguous terms that its claims may be expanded or contracted to suit the exigency.

10. A patentee has the right to disclaim anything which has been claimed through "inadvertence or mistake," but when a patentee claims anything as his own, courts can not reject the claim, though the inventor himself may disclaim it at the trial.

[This was a bill in equity by Oliver H. P. Parker against John Sears and others.]

These were applications for provisional injunctions to restrain the infringement of the letters patent granted to Zebulon and Austin Parker, October 19, 1829, for what is known as the "Parker water-wheel," which patent is more particularly referred to in the case of Parker v. Hulme [Case No. 10,740].

Titus, Campbell & Cadwallader, for complainant.

Mallery & Penrose, for defendants.

GRIER, Circuit Justice. Of the one hundred bills filed by the complainant, and against persons charged with infringing his patent, some seventy have been argued together, on notice of motions for special injunctions. Most of the points involved are common to all the cases, and the different types of alleged infringement do not exceed six or seven. The argument has been conducted by counsel with great zeal and ability, with very great learning, and at very great length. The whole history and science of hydrodynamics has been discussed, and numerous conflicting affidavits read, on the apparent assumption that the court, in anticipation of the final hearing, will, on these preliminary motions, decide the whole merits of cases involving difficult and doubtful points of law, numerous and contested questions of fact, and rights of property of large amount, with the haste and expedition of a court of piepoudre. By a neglect or relaxation of the settled rules of practice in the English courts of equity (which we are bound to follow, unless changed by the written rules of this court, as established by the supreme court or ourselves), a sort of local practice has grown up, the evils of which we are beginning to feel.

We have frequently said, on the authority of some of the Eastern circuits, and some supposed custom of this district, that the answer of defendant—directly and unequivocally denying the facts set forth in the bill—should be treated merely as an affidavit, which might be contradicted by other affidavits, and should not have the technical effect of precluding contradictory testimony. The consequence has been that both parties appear on the argument of their preliminary motions, armed with quires of conflicting depositions, and the court are expected to try and decide the whole facts and law of the case, as put in issue by the pleadings. Even when the title of plaintiff is admitted, the question of infringement is often one of great doubt and difficulty, depending on questions of mechanics, in which both practical and scientific men entirely differ. Difficult legal questions, arising from the construction of long and perhaps obscure specifications, on which judges often may, and lawyers always do, differ, are frequently involved. Yet the court are expected in this summary way to anticipate the finding of a jury, and the final decision of the case on full hearing. And this must continue to be the case, unless we adhere more rigidly to the rule of considering the affidavit and answer, especially if accompanied with one or two depositions of witnesses, denying the infringement, as conclusive on these preliminary motions. No interlocutory injunction should issue unless the complainant's title, and the defendant's infringement are admitted, or are so palpable and clear that the court can entertain no doubt on the subject. But cases often occur where the answers or affidavits are equivocal or evasive, or disclose a state of facts which show that the conclusions drawn from them are clearly erroneous, and founded on a mistake of the law: as when an infringement is denied, and a model admitted, which shows a palpable infringement, and it is evident that the denial is made under a gross mistake of the true and settled construction of the patent; or, where the originality of the invention is denied in general terms, and infringement is admitted, and the patent has been fully established at law, and it is evident that the denial of its validity is but a matter of obstinate opinion, or a mistake of law. Such cases, and such only, can be considered as exceptions to the general rule. The court are not bound, in this stage of the cause, to decide doubtful and difficult questions of law, or disputed questions of fact, nor exercise this high and dangerous power (if exercised rashly) in doubtful cases, before the alleged offender shall have an opportunity of a full and fair hearing.

The terms of this court are almost wholly occupied in the trial of patent cases; and perhaps these hints of our intentions in fu-

ture cases to adhere more rigidly to the rules of practice, may tend, in some measure, to hinder us, as well as the learned counsel, from the painful necessity of spending our whole vacations in anticipating and duplicating these long and difficult investigations, and trying the merits of every case on these preliminary motions.

In stating our reasons for the conclusions to which we have arrived, with regard to the present motions, it is not our intention to notice all the numerous points, both of law and of mechanics, which have been pressed on our consideration with so much learning and ability, or to anticipate a construction of the plaintiff's patent on points which are, perhaps, now for the first time made.

As to many of the cases, if not all, it is a sufficient reason for refusing the present motions, that the question of infringement, even when the facts are admitted, is far from being clear or devoid of doubt. This remark applies especially to those of the defendants who use what are called the Kraäts, the Wertz, the Howd, and the Greenleaf wheels. The patentee declares the principle on which his improvement is founded, to be "that of producing a vortex within reaction wheels, which, by its centrifugal force, powerfully accelerates the velocity of the wheel;" and the machines described in his specification are confined to the application or development of that principle alone. The wheels just mentioned do not appear to be constructed with a view to produce a vortex within reaction wheels, or to contain any colorable imitation of the machines described by the complainant's patent. But we would not be understood as deciding definitively that they do not infringe, but (what is sufficient for this occasion) that it is not clear that they do.

We shall now proceed to state same reasons for refusing the present motions, which equally apply to all the cases, even where the question of infringement is not so doubtful as in those just mentioned, and they are:

1st, because the verdicts establishing the complainant's title have been obtained on inconsistent and contradictory claims, so that the court can not say with certainty, what is or what is not an infringement of the patent.

And, 2nd, because the possession so vaguely alleged in the bill, is met and avoided by the allegations and proof of a more peaceable, and exclusive possession by defendants (at least in Pennsylvania), under the patents and machines purchased and used by them.

And, 3d, even if these positions were not correct, there are other reasons (hereafter to be stated) why it would not be a proper exercise of discretion in the court to issue injunctions under the particular circumstances of these cases.

1. The complainant charges in his bill that the patentees have established their title by a suit at law in this court, in the case of Parker v. Hulme [supra], and that "they have erected and put in operation many machines in different parts of the country, by which the water-power thereof has been much augmented." The defendants deny the validity of the patent, and especially that the patentees were the original inventors of certain machines specially claimed in their specification. (1.) The compound vertical reaction wheels, with two or more wheels on one horizontal shaft. (2.) Or "the spouts which conduct the water into the wheels with their spiral termination." (3.) Or the improvement in the reaction wheels "by making the buckets as thin at both ends as they can safely be made, and the rim no wider than sufficient to cover them." (4.) Or the "hollow boxgate, in any form, either cylindrical, square, or irregular"—and have produced some evidence tending to prove these allegations. They admit that in the case of Parker v. Hulme, the jury found specially that the patentees "were the first to invent and apply to use two or more reaction wheels arranged in pairs on one horizontal shaft." They insist that this verdict should have no effect as against them, because they were not parties to that suit, and produce the affidavits of ten witnesses tending to prove the verdict incorrect, which were not examined in that case, or known to the defendant. They aver, also, that in the case of Parker v. Stiles [Case No. 10,740], tried in Ohio, the same objection was made to the patent, and so fully proven that the plaintiff admitted the fact, but denied that the patent claimed such a machine, and produced the charge of the judge in that case, deciding "that the plaintiff's patent did not claim the duplication of wheels on a horizontal shaft," and giving as a reason for this construction "that this arrangement of wheels on a horizontal shaft has been so long used and known, that it cannot be presumed the patentees were ignorant of it and intended to claim it as new." They aver, also, that "in the case of Parker v. Moreland [unreported], tried in Indiana, there was a verdict for defendant, deciding all the points against the claim of the plaintiff." To meet the allegation of possession on the part of the patentees, the answer avers also, "that the wheels used by the defendants have been publicly used by them for a long space of time, and that the complainant has long had knowledge of such use; that many other similar wheels have been publicly sold and openly used in New York, New Jersey, and Pennsylvania, and in many other states, for a great number of years, and that the right to use the same has not been questioned, disputed, or denied until the present complaint and the proceedings of complainant in this behalf;" and that the patentees, or their assigns, have never run or used water-wheels such as are run or used by the defendants, or had actual or legal possession of the same. Now, al-

though the patentees have incorrectly stated their invention in their patent to be an "improvement in the application of hydraulic power, by methods of combining percussion and reaction," yet in their specification, they have well and clearly described three different hydraulic machines or combinations of machinery, which are undoubtedly valuable inventions, and founded on the application of a principle first discovered or directly applied by the patentees, though perhaps not stated in correct or scientific phraseology. That the patentees are highly meritorious inventors, can not, we think, be disputed; and had they confined their claim to the three machines described in their specification, and other modes of developing the same principle, and producing the same result by similar or equivalent devices, their patent could not, and probably would not have been assailed. But they have (injudiciously, as we think) enumerated nine several parts of the combined machines, which, as distinct machines or devices, they "claim as their invention, and for which they seek an exclusive privilege." If they are the original inventors of each of those, their claim is undoubtedly set forth with sufficient distinctness to entitle them to recover against any person who was charged with infringing their patent, by using any one of them. If they are not, the patent claims too much, and its validity may be assailed on that ground, even though it be of slight value or importance. It is true they have a right to disclaim any thing which has been claimed through "inadvertence or mistake." For when a patentee claims any thing as his own, courts of law can not reject the claim, though he may disclaim it himself. Otherwise, if he sums up the particulars of his invention, he is confined and held to such summary, and his patent must stand or fall by it. Patents should be construed liberally to support the claims of meritorious inventors. But there may be a liberality of construction very injurious to the public, especially if it permits a patentee to couch his specification in such ambiguous terms, that its claims may be contracted or expanded to suit the exigency. We do not wish to be understood as intimating that the plaintiff's specification is justly liable to this charge. We think (with all proper deference to learned judges who have ruled otherwise) that the specification will bear no other construction on the point under consideration, than that which was given to it by the plaintiff and his counsel, and the court, in the trial of Parker v. Hulme [supra]. We do not think it can be fairly charged with such Protean capabilities of construction as have unfortunately been given to it.

But, for the purpose of the present motions, the case stands thus: In the action at law against Hulme in this court, the plaintiff claimed the duplication of reaction wheels on a horizontal shaft to be an infringement of his patent, and called on the court to instruct the jury that such duplication might be made the subject of a patent. The defendant denied the validity of his title on the ground that he was not the first to invent or use such a duplication; and the title of the patentee was supported because the jury found he "was the first to use two or more reaction wheels on a horizontal shaft," the defendant being unable to furnish sufficient proof to the contrary. The present defendants have produced the depositions of ten witnesses, tending to disprove that fact, and have, moreover, shown that on a trial of the same issue in Ohio, where the fact of prior use was clearly proven, the defense was evaded on the ground that the specification did not claim such duplication, and for this singular and single reason—"that the patentee could not be presumed to claim what he must have known he did not invent." In the charge of the judge, in the case of Parker v. Ferguson [Case No. 10,733], in New York (which has been shown in the court), it appears that where the same defense was made and substantiated, the court instructed the jury as follows: "There is some obscurity in the wording of this claim, but it seems to me that the compound wheel they mean, is a wheel constructed by placing two or more of the wheels on a horizontal shaft, with the inner and outer cylinders supplied with water by a spiral spout." Now, how are the defendants, who are supposed to desist from infringing this patent to act? By the verdict and claim made in this state, their duplicate reaction wheels must come down. By the decision and claim made in Ohio, they may stand. And by that in New York, they must be taken down only when the duplicate wheels are connected with cylinders and spiral spouts.

It would be rather hard to compel the defendants to discover the true meaning of a patent, when three learned courts have given it as many different constructions, and the patentees, or their assigns, have been so inconsistent in their claims. Now, we do not say that the patent is invalid on account of its obscurity or ambiguity, but we do say that the trials at law, to establish the plaintiff's title, have left it in such a doubtful shape that the court can not, with clearness and certainty, say what is an infringement of the patent and what is not. The verdicts at law, like the addition of equal positive and negative quantities in algebra, seem to annihilate each other, so far as they affect the present motion.

With regard to the last ground of objection to granting the present motions, we would remark—the chief object of issuing such writs before the final hearing of the cause, is, to prevent irreparable mischief, not to give the complainant the means of coercing a compromise on his own terms, from the inevitable injury that defendants must suffer

by the stoppage of their mills and manufactories.[2] The defendants are not wanton pirators of the plaintiff's invention. They believe sincerely they do not infringe it, or if they have unintentionally done so, they can show that his patent claims more than he is entitled to. They have had many years peaceable and unchallenged possession of the machines which they purchased from patentees with prima facie evidence of title. The notice of infringement, if any there be, has been given after long acquiescence, and just as the patent is about to expire. None of their wheels are direct and palpable piracies of those described in the patent of the plaintiff, and if they do incidentally or partially act upon the principle patented, it requires more knowledge of the science of hydrodynamics to discover it, than many, if any, of them possess. To suddenly stop one hundred mills and manufactories, by injunctions issued at this time, would cause great and irreparable injury, not only to the defendants, but to the public at large, and be of no corresponding benefit to the plaintiff, whose interest it is that they should use his invention if they pay him for it. The plaintiff can be compensated by damages, if the defendants shall be found to have infringed his patent, and they are amply able to pay both damages and costs. In the six or eight weeks which this patent has to run, it can not be expected that the complainant would sell any new licenses. And if the defendants continue to use and pay him for his invention, so much the better for him. There may be, and often are, cases where the patent is for a machine to make some articles of manufacture, or merchandise, in a cheaper method than was before known, and where the source of profit to the patentee arises from his monopoly of the articles, and having no competitors in the market. In such a case, the damage to the patentee by a piracy of his invention might be very great, and the court would issue an injunction on a plain case in the last month or week of the patent's life, or even after the time limited for its expiration, to restrain the sale of the machines, or articles piratically manufactured in violation of the patent, while it was in force. But, in this case, the injunction can not benefit the plaintiff, except by its abuse. His standing by, for so many years, without complaint or demand of compensation, is conclusive evidence that a continuance of a use of his invention, for a few weeks or even months longer, if paid for in the end, will not be an injury of such an irreparable nature as to require this sharp and hasty remedy.

The issuing of an interlocutory injunction is always a matter of discretion with the court, and depends on the peculiar circumstances of each case. To suspend the operation of a single mill or manufactory, but for a week or two, because some wheel, bucket, or other small portion of its machinery may chance to infringe some dormant patent, would be a doubtful exercise of discretion, where the benefits to result from it to the complainant are so comparatively trifling, and his loss, if any, so perfectly capable of compensation. How much more so, when we are called upon to stop the operations of one hundred? To such a demand we may well use the language of Lord Cottenham, in Neilson v. Thompson, 1 Webst. Pat. Cas. 275: "It seems to me, that stopping the works under the circumstances, is just inverting the purpose for which an injunction is used. An injunction is used for the purpose of preventing mischief. This would be using the injunction for the purpose of creating mischief, because the plaintiff can not possibly be injured." For these reasons the injunctions are refused.

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

[2] [For the purpose of guarding against the abuse of the writ of injunction, here referred to, the legislature of Pennsylvania, on the 6th May, 1844 (Dunl. 923), enacted that "no injunction shall be issued by any court or judge until the party applying for the same shall have given bond, with sufficient sureties, to be approved by said court or judge, conditioned to indemnify the other party for all damages that may be sustained by reason of such injunction." From 3 Am. Law J. 88.]

PARKER (SMITH v.). See Case No. 13,087.

Case No. 10,749.

PARKER v. STILES.

[5 McLean, 44; 7 West. Law J. 168; 1 Fish. Pat. Rep. 319.][1]

Circuit Court, D. Ohio. Nov. Term, 1849.

PATENTS — CONFORMING TO REQUISITES OF THE LAW—CONSTRUCTION — MONOPOLY — CERTAINTY OF DESCRIPTION—CLAIMS NOT ORIGINAL — PRESUMPTION AS TO NOVELTY AND UTILITY.

1. In a patent suit, the court must decide, by a fair construction of the patent, whether in all substantial particulars, it conforms to the requisites of the law.

2. Letters patent for invention are to be construed liberally.

[Cited in Ingels v. Mast, Case No. 7,033.]
[Cited in Burke v. Partridge, 58 N. H. 351.]

3. The exclusive rights secured by letters patent are not to be viewed as odious monopolies, but as the result of a beneficent and wise policy.

4. If his invention is not described in his patent and specification with reasonable certainty and precision, the patentee can claim nothing under his patent.

5. The objects of the law, in requiring a full, clear, and exact description of the invention, stated.

6. If a patentee has claimed anything, as a material part of his combination, as new and

[1] [Reported by Hon. John McLean, Circuit Justice. The syllabus is taken from 1 Fish. Pat. Rep. 319.]

original with him, which is proved to have been discovered prior to the emanation of his patent, it is fatal to it.

[Cited in Tillotson v. Ramsay, 51 Vt. 313.]

7. In an action of the case, for infringement of a patent, where the patentee in good faith claims, in said patent, what is not original, and, on being apprised of the fact, does not within a reasonable time enter a disclaimer, he cannot recover, even if the jury are satisfied the defendant has infringed the parts of said patentee's invention that are original.

8. In the construction of a patent, the whole instrument, embracing the specification and drawings, is to be taken together; and, if, from this, the exact nature and extent of the claim, made by the inventor, can be perceived, the court is bound to adopt that interpretation and give it full effect.

[Cited in Ingels v. Mast, Case No. 7,033.]

9. The description of the invention in the letters patent, for improvement in the application of hydraulic power, granted to Zebulon and Austin Parker, October 19, 1829, considered, and declared minute and practical.

10. The first claim in said patent, when construed in connection with the prefatory part of the specification, is for a wheel called the compound vertical percussion and reaction wheel; the concentric cylinders inclosing the shaft, and the manner of supporting them; and the spouts which conduct the water to the wheel. The claim cannot be held to embrace the arrangement, or duplication of wheels on a horizontal shaft, as a part of the invention of the patentees. This arrangement is introduced, and perhaps unnecessarily, as described, as descriptive of the mode by which the wheels were to be used, but not as a part of the invention.

11. Reasons for such a construction of the patent considered.

12. A certain mechanical arrangement having been long known and used, before the patentee made and patented his invention, it cannot be presumed, that the patentee was ignorant of the fact, and intended to claim such arrangement as new.

13. In an action on the case, for the infringement of letters patent, to entitle the plaintiff to recover, the jury must be satisfied that the invention, embraced in the patent, is new and useful.

14. The patent raises the presumption of the novelty and utility of the plaintiff's invention, as the oath of the patentee to the originality and novelty of his invention, forming a part of the letters patent, and being in evidence to the jury, forms a legal groundwork for such presumption.

[Cited in Crompton v. Belknap Mills, Case No. 3,406.]

15. It is the province of the court to determine what constitutes novelty, and of the jury to determine, from the evidence adduced, whether the patentee's invention is new. The same rule applies to the subject of the utility of the invention.

16. Where a mechanical contrivance claimed to be essentially similar to that covered by the plaintiff's claim is set up in defense, and the proof relied on is a description of such structure contained in a printed publication, such description must be sufficiently full and precise to have enabled a mechanic to construct it; and must also be in all material respects like that covered by or described in the plaintiff's patent.

17. Proof of the previous use of a structure, bearing some resemblance to the improvement of the plaintiff, and which might have been suggestive of ideas, or have led to experiments, resulting in the discovery and completion of his improvement, will not invalidate his claim under his patent.

[Cited in Whittlesey v. Ames, 13 Fed. 898.]

18. To sustain the validity of a patent for an invention, the latter must be, to some extent, useful. But courts are not rigid and strict, on this point. In the absence of proof, by the defendant, that the thing patented is absolutely frivolous and worthless, the presumption of utility, by the patent itself, would be sufficient, so far as this point is concerned, to sustain the patent.

19. On the question of infringement, the burden of proof is with the plaintiff.

20. To make out infringement, the plaintiff must prove that the defendant has used his invention, either in the precise form in which it is constructed under the patent, or in a form and on principles substantially the same.

21. To constitute this identity, the defendant's structure or machine need not be the same in appearance, form, or proportions as that invented and patented by the plaintiff. If the operative principle of the two machines be the same, the substantial identity, contemplated by the patent law, is established.

22. The principle of a machine is the particular means of producing a given result by a mechanical contrivance.

23. The use of mechanical equivalents and the identity of mechanical structures considered, in reference to infringement.

24. The question of the identity of the invention embraced in the plaintiff's patent, and of that used by the defendant, is to be decided by the jury upon the evidence.

25. Great respect is due to the views and opinions of scientific individuals, and practical mechanics, on the question of the identity of different mechanical structures.

This is an action on the case [by Zebulon Parker against John Stiles] for an alleged infringement of a patent for an improvement in the application of hydraulic power, granted to Zebulon and Austin Parker, dated 19th of October, 1829, and renewed for an additional seven years from the expiration of the term of the original patent, thereby extending its duration till October 19th, 1850.

2 [The specification of this patent was as follows:

["To all to whom these presents shall come: Be it known, that one Zebulon Parker and Austin Parker, of the county of Coshocton, and state of Ohio, have invented a new and useful improvement in the application of hydraulic power, by methods of combining percussion with the reaction, applied and exemplified in: 1. A compound vertical percussion and reaction water-wheel, for saw-mills and other purposes, with the method of applying the water on the same. 2. An improved horizontal reaction water-wheel, with the method of combining percussion with reaction on it. 3. A method of combining percussion with reaction, on common reaction wheels, or those already in use; and that the following is a full and exact description of the construction and operation of the several parts of said improvement, as invented by us. The principle upon which this improvement

2 [From 1 Fish. Pat. Rep. 319.]

is founded, is that of producing a vortex within reaction wheels, while, by its certrifugal force, it powerfully accelerates the velocity of the wheel, and adds proportionately to its momentum.

["I. The compound vertical percussion and reaction wheel has two, four, six, or more reaction wheels, on a horizontal shaft made of iron or wood (iron generally being best), which shaft has the crank, to which the pitman and saw are attached, at one end of it. The number of wheels necessary, their diameter, and the quantity of water they will require, depend on the height of the head of water and the power and velocity required in general. If the head of water be under six feet, six wheels will be necessary; between six feet and ten, four will be required, and above ten feet, two wheels will be sufficient. For doing work with one saw, if six wheels were required, a single one is placed on each end of the shaft, and two double ones between them, equally distant from the single ones and from each other. If four wheels are necessary, a single one is placed on each end of the shaft, and a double one in the middle, and if two wheels only are used, a single one is placed near each end of the shaft. The diameter of a wheel for a head of six feet, and under, should be about twenty-eight or thirty inches, and the diameter must be increased, and the rims of the issuing section of the wheel diminished, in proportion to the increase of the velocity of the water, as the head increases in height. The following is a description of a wheel, and its appendages, for a head of seven feet, which may serve generally as data to base the other calculations of other heads upon: The horizontal shaft is about eight and a half feet long, exclusive of the gudgeons, and if made of wood, about nine inches in diameter; if of iron, about five inches. Between the wheels, the shaft should be turned round and true. Four wheels being necessary, a single one is placed on each end of the shaft, and a double one in the middle. The wheels are thirty-four to thirty-six inches in diameter. For the single wheels, solid heads four or five inches in thickness are firmly fixed on the end of the shaft. They are reduced on the inside (or sides next each other) to the thickness of two and a half inches at the edge, and they must be of the same thickness, four inches, in toward the shaft. In each of these solid heads, on the inner sides, five buckets (so called), made of sheet-iron, cast-iron, or wood, are fixed. They are five inches wide, and two and a half inches longer than one-fifth of the circumference of the wheel. The edges of these buckets are set half an inch into the heads. About three-eighths of an inch from the verge of the heads, a circle is made, upon which the inside of the points of the buckets is placed. Another circle is drawn two and a half inches within this, upon which the outer side of the head or inner ends of the buckets are placed. The inside of the points of the buckets follow the circle upon which they are placed about two and a half inches. On these buckets so placed, and set into the heads, wooden rims, equal in diameter with the wheels, two inches thick, and about three and a half inches wide, are put, the edges of the buckets being set one-half an inch into them. The wheels thus formed, are firmly bound together by screw-bolts, passing through the buckets. The middle wheels are made in the same manner, except that one solid head answers for both wheels, and it is reduced on both sides from five or six inches at the shaft, to two and a half inches at the edge. Light iron bands should be put on the heads and rims of these wheels. The distance between the rims of the different wheels should be twenty-nine to thirty-two inches. These four wheels (so formed) will have an issuing section of two hundred square inches, each wheel having fifty inches, and each issue ten inches. The direction of the issues are at right angles to radii of the wheels drawn through them; a tangent to the circle on which the heads of the buckets are placed. The middle of the buckets, or that part of them between the two circles, should form a regular and natural curve. The best buckets are made of sheet-iron. They should be doubled from the heads, the two ends of the piece forming the point of the bucket. They are left open enough in the middle for the bolts to pass through them. If they are made of cast-iron, they have holes or grooves for the bolts. If of wood, the ends or growth of the wood should be inserted into the heads and rims, and the bolts pass through them, or, the bolts being square, may form part of the bucket. Wooden buckets are practicable in large wheels, but inferior to iron. The penstock, or bulkhead, for this wheel, is in width equal to the length of the shaft, and has a perpendicular breast. The breast is formed of three posts, set in the cross-sill, the top of which sill is level with the bottom of the penstock. The middle one of these posts is from eighteen and a half to twenty-one inches wide, and about ten inches thick, and the two end posts are each from sixteen and a half to eighteen inches wide, and as thick as the middle post. The two spaces between posts are each twenty-four inches. The breast continues perpendicularly below the top of the cross sill about forty-four inches. The plank of this part of the breast is put on the front of the sill perpendicularly, above the sill. The posts are planked in their rear horizontally. Each of the posts may be double, or made of two pieces, and have spaces between them. The wheel is hung in front of the lower part of the breast, about a foot from it, with its top about level with the penstock. It is hung in upright hanging posts or beams, which may be elevated or depressed by wedges at the top of the penstock, the tops of the posts being put through timbers, and they may be-

wedged horizontally at the bottom. The wheel should be immersed to its center (or lower) into the water below the mill at its common low stage. The middle of the spaces between the wheels must correspond with, and be directly in front of the middle of the spaces between the posts. About a foot in front of the wheel, four studs or posts, which are four inches thick and eight or ten inches wide, are set with their edges to the wheel. The spaces between two of these posts on either side must be about twenty-two inches. The middle of the spaces must correspond with the middle of the spaces between the wheels. The tops of these posts or studs are about level with the top of the wheel, or a few inches higher. They are inserted into a sill, or floor, at their bottoms, and are held firmly to their places by a plank or piece of timber fixed on their tops. Two cylinders, concentric with the shaft, and with each other, are placed in each space between the wheels. Their height is twenty-seven inches, leaving a space of from half an inch to an inch and three-quarters between. The ends of the outer cylinders are about half an inch less than the inner diameter of the outer cylinders and the rims of the wheels. The inner diameter of the outer cylinders is about half an inch less than the inner diameter of the rims of the wheels. The inner diameter of the inner cylinders is about ten inches, and its thickness about an inch. The spaces between the concentric cylinders are consequently about eight inches. The larger cylinders are held stationary by a sort of wooden frames, or rims, which support them. The frames are each made of two pieces of plank eighteen inches wide and one inch and a half thick, and of sufficient length to reach from the lower part of the breast to the studs in front of the wheel. They have their edges joined together by broad dowels and draw-pins, near their ends. Circular holes are made in the middle of these joined planks or frames, large enough to receive the ends of the larger cylinders, into which these ends are put and made fast. The ends of these frames are reduced in width to about twenty-six inches, by taking off the bottoms of the lower planks at their ends. The frames are supported by having their ends inserted into grooves or mortices in the lower part of the breast, at one of their ends, and into grooves or mortices in the studs, in front of the wheel, at their other ends. The joints of these frames lie level, and they, together with the cylinders, must be made to part horizontally into two equal segments, for the purpose of getting them to their places round the shaft. To prevent the water from escaping between the ends of the larger cylinders and the rims of the wheels, additional sections are made to the internal surfaces of the larger cylinders, which extend into the wheels. These additions of the cylinders are made of rolled or hoop iron. They are held to their places by means of boards an inch thick, eighteen inches wide, and thirty-six inches long, which have semicircles cut out of the middle of their sides, nearly equal in diameter to the internal diameter of the rims of the wheels. A half of each of these hoop, or additional sections, is nailed into each of the semicircles in the boards. Two of these, boards joined together in such a manner that the hoop appears complete, are screwed against the frames that support the cylinders, and fit closely against them, and the ends of the cylinders. One edge of each hoop will consequently fit closely against each end of the larger cylinders, and the other edge should extend about an inch into the wheels. The outside of the hoops should be as close to the inside of the rims of the wheels, as they can be, without touching them. The holes in the boards which support the hoops, through which the bolts go that fasten the boards to the framing, should be considerably larger than the bolts, and the heads of the bolts should be broad, in order that the hoops may be kept to their proper places. These additions to the cylinders, extending into the wheels, may be made of cast-iron, and be supported by iron plates, screwed against the frames in the same manner as the boards, or the continuation of the cylinders may be wood, instead of iron. Iron hoops may be supported by the cylinders themselves, instead of boards or plates; but in this case, it is difficult to keep them to their proper places. From the breast, immediately above the bottom of the penstock, two spouts are inserted, through the outer cylinders, into the spaces between the cylinders. The spouts are as wide as they can be made between the posts of the breast. The top surfaces of the bottom plank of the spouts are tangent to the outer surfaces of the inner cylinders, and the bottom surfaces of the top planks of the spouts are consequently about eight inches deep, where they join the cylinders, and they should be about fifteen inches deep, where they are inserted into the breast. A partition, an inch thick, is put into each spout, dividing it perpendicularly into two equal parts. This partition, as it winds round between the cylinders, increases in its thickness, and its surfaces on both sides become regularly nearer to the wheels, till in going once round they terminate on the sides of the ends of the spouts next the wheels. These doubly spiral partitions support the inner cylinders. The water passes over the shaft, and the top of the wheel runs from the breast. At the bottom of the penstock, and joining the breast, a common chamber is made, out of which the wheels are supplied through the spouts. The chamber extends across the penstock, and is about four feet wide, and twenty inches high. In the top of this chamber, there is an aperture six feet long, and two feet four or five inches wide. Over this aperture, a light hollow or box gate is placed, which is

six feet two inches long by two feet six or seven inches wide, and sufficiently high to extend to a proper distance above the surface of the water in the penstock. It is made to fit neatly on the floor or top of the chamber, and, when it is down or shut entirely, covers the aperture into the chambers. It is hoisted by the wooden swords, hinged at the inside of the gate, near the bottom, the swords also being hinged at the top to two arms extending from a roller, which is placed near the top of the gate. The roller is turned by levers, in any way that is convenient. The gate should hoist at least a foot. It is scarcely necessary to observe that care must be taken, by good racks and otherwise, to prevent the wheels from being choked in their issue.

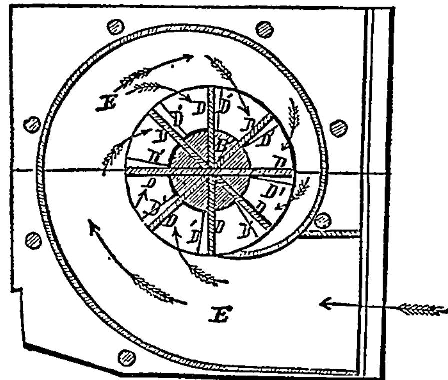
["II. The improved horizontal reaction water-wheel, with the method of combining percussion with its reaction. The dimensions and proportions of the wheel and its appendages, also, must vary to suit the head of the water, the power required, and other circumstances. The following are nearly the proper dimensions of the wheel and its appendages, for grinding with a stone four feet in diameter, with a head of water six feet high: The wheel is four feet and a half in diameter; it has five issues three and a half inches by five inches deep; the buckets are made of wood; they are an inch thick at the head, or ends, next the shaft, and increase to about an inch and a half thick in the middle, and from the middle decrease to about three-fourths of an inch at the points or outer ends. The issues are made to direct the water at right angles to radii drawn through them. The inside of the points of the buckets follow the circle on which they are set four or five inches, and the outside of the heads follow their circle about two inches. The points of the buckets extend by the heads about two and a half inches thick and about five inches wide, or no wider than sufficient to cover the buckets. The edges of the buckets are let into the head and rim about three-eighths of an inch. The wheel is bound together by screw bolts, which pass through the thick parts of the buckets. The rim is made true in the inside by turning, after the wheel is hung. The grain of the wood of the bucket stands upright. The wheel is placed or hung with its center four or five feet in front of the breast of the bulk-head or penstock, and about half immersed in water below the mill at its common low stage. A sill is placed on each side of the wheel, eight or ten inches from it. The tops of these sills are about an inch higher than the tops of the wheels. The sills support a frame or platform, five feet square, made of plank fifteen inches wide, three inches thick, the principal bars of which are long enough to reach across the space between the sills. The inside of this platform is made circular, to the same diameter as the inner diameter of the wheel. In this circle, the cylinder, that directs the water into the wheel, is erected. The inner surface of the cylinder extends below the platform into the wheel. The cylinder above the platform is fourteen inches high on that side of the wheel which runs from the breast, and it is reduced to the platform by a spiral line running from the breast, and downward, till it terminates on the platform directly under where it started. The part of the cylinder above the platform should be about two inches thick, and that part which extends into the wheel below the platform should be about half an inch thick. An inner concentric cylinder, the outer diameter of which is eighteen inches, its thickness one and a half inches, and its height four or five feet, is placed round the shaft, with its lower end even with the top of the wheel. In the outside of this inner cylinder a spiral groove is made, which corresponds with the spiral top of the outer cylinder. A screw-like covering is made over the space between the cylinders, having one of its edges inserted into the groove in the inner cylinder and the other nailed on the top of the outer cylinder. This covering supports the inner cylinder, between the beginning and termination of the covering and the inner and outer cylinder or section admitting a passage into the wheel, thirteen inches wide and fourteen inches high. To this section a spout from the penstock or bulkhead is joined, whose internal sections at the junctions exactly correspond with the section forming the passage into the wheel. The largest end of the spout or the end joined to the penstock is fourteen inches deep by about twenty inches wide. The spout has an inclination from the penstock equal to the inclination of the top of the outer cylinder. A common sliding gate shuts over the ends of the spout in the penstock, or it may have a chamber and a hollow gate similar to that of the saw-mill.

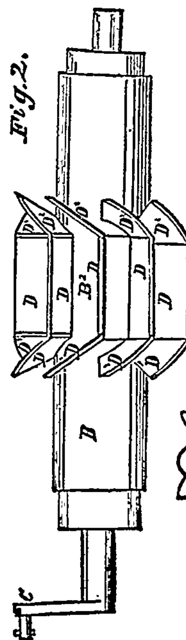
["III. The method of combining percussion with reaction on common reaction wheels, or those already in use. The common reaction wheel runs under the floor of the penstock. Through the floor a circular hole is made, nearly equal in diameter to the internal diameter of the rim of the wheel, and it is made concentric with the wheel. This hole, through the floor of the penstock, is lined with staves, which extend from the floor into the wheel, and prevent the water from wasting between the floor and the wheel. The internal surface of this staving is called the cylinder. To apply the principle of percussion to one of these wheels, and combine it with its reaction, place on the level floor of the penstock a rim of wood whose inner diameter is equal to the diameter of the cylinder. This rim may be from eight inches to a foot wide, and four or five inches thick at the outer verge, and about one inch thick at the inner edge, the top being sloped downward toward the center of the wheel. On this rim are placed, at equal dis-

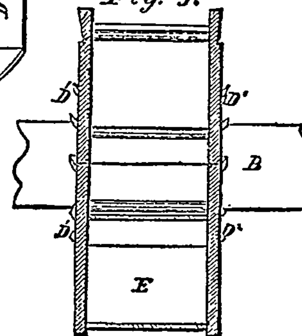
tances from each other, with their edges up, from five to ten pieces of planks, or blocks, four or five inches thick, in the middle and about an inch thick at either end, the inner side or side next the shaft being plane, and the outer side circular, or nearly so. The inner or plane sides of the blocks are placed tangent to the cylinder. They are about twelve inches high above the rim at their inner edges, and about fifteen inches high at their outer ends. On these blocks an inverted conical covering is put, which is made to fit the tops of the blocks, the apex of which should come near to the bottom of the wheel. In the center of this covering a circular or square hole is made, into which a cylinder or square box is fixed, which is sufficiently large to inclose the shaft and leave it room to run freely, and long enough to reach to a proper height above the water in the penstock. The water is let into the penstock, when the wheel is required to run, by any sort of gate usually employed in such circumstances, or it may be let in through a chamber by a hollow gate. Another mode of applying the principle is to set the blocks that guide the water into the wheel tangent to a circle two inches outside of cylinder, and cover them with a rim that will only cover them. On the circular space between them, the ends of the blocks (or guides for the water) and the cylinder, a light hollow cylinder gate is placed, which incloses the shaft of the wheel. The outer diameter of this gate is three inches larger than the diameter of the cylinder, or inner surface of the staving. When this gate is to its place and shut, or down, it stands directly over and forms a continuation of the cylinder, extending to a proper height above the water in the penstock. It is hoisted by two swords of wood, or rods of iron hinged to the gate near the bottom, either within or without, the tops of the swords or rods being hinged to arms from a roller near the top of the gate, which is turned by a lever or levers. The gate is guided and kept to its place by four pieces of timber, or joists, across the penstock. One of these joists is placed on each side of the gate, about eighteen inches from the floor of the penstock, and one at each side, at the top, when the gate is down or shut. The edges of these joists are to the gate, nearly touching it. In the edge of each, at the point nearest the gate, a perpendicular notch or groove is made, an inch, or an inch and a half wide, and about the same depth, in which tongues or slides attached firmly to the sides of the gates slip up and down. The gate, however, may be guided and hoisted in any other way, if circumstances require it. The dimensions here laid down, the number of apertures into the wheel, and their size, must vary accordingly to the height of the head of water, the power required, and other circumstances. As a general rule for all wheels, however, the sum of the sections into the wheels should not vary far from being double the sum of the sections of the reacting issues of the wheels. The principle of combining percussion with reaction is applicable to inverted wheels, either by single spouts with spiral terminations between cylinders, having their inclinations upward into the wheels, or by inverting the rim with its blocks and conical covering, so as to send the water upward into the wheel.

["The parts of the above-described machinery claimed as original, and our inventions, in all their necessary dimensions and proportions, and for the use of which we ask an exclusive privilege, are as follows, viz: 1. The compound vertical percussion and reaction wheel for saw-mills and other pur-

[Drawings of patent No. 2,726, granted July 16, 1842, to Eli B. Lansing, published from the records of the United States patent office. For drawings of the Parker water wheel, see Case No. 10,736.]







poses, with the four, six, or more wheels on one horizontal shaft. The concentric cylinder, involving the shaft, with the manner of supporting them. The spouts which conduct the water into the wheels from the penstock, with their spiral terminations between the cylinders. 2. The improvement in the reaction wheel, by making the buckets as thin at both ends as they can safely be made, and the rim no wider than sufficient to cover them. The inner concentric cylinder. The spout that directs the water into the wheel, and the spiral termination of the spout between the cylinders. 3. The rim and blocks or planks that form the apertures into the wheel, and the manner of forming the apertures. The conical covering on the blocks, with cylinder or box in which the shaft runs, and the hollow or box gate in any form, either cylindrical, square, rectangular, or irregular. Zebulon Parker,

"Austin Parker.

["Witness:

["John Jacobson,

["Laban Lamat."] [2]

The particulars of the plaintiff's claim will be best understood from the instructions asked by his counsel, and substantially given by the court, which are as follows:

Instructions asked by plaintiff:

I. As to the validity of the patent: (1) It is the exclusive province of the court to construe the patent, and determine what the patentee claims to have invented; and of the jury to determine whether he has in fact made, and sufficiently described the invention so claimed. And the rule of construction is very liberal in his favor, especially as to patents granted prior to the present law passed in 1836. (2) So far as the present action is concerned, the patentee claims: 1st. The improved wheel by itself. He does not claim the invention of a reaction wheel, nor of the idea of pairing or duplicating wheels upon a horizontal shaft; but simply his improved wheel. 2d. He claims the improved method, described by him, of conducting and applying the water to the wheel. This consists of a spiral scroll block placed between two concentric cylinders. Of these, he claims this use of concentric cylinders as a distinct invention, but not the spiral scroll block. 3d. He claims a distinct invention, the combination of the spiral scroll block with the concentric cylinders, so as to produce the spout or sluice described by the patentee. (3) In order to sustain his claim, the plaintiff must satisfy the jury that his invention is sufficiently described. Of this they are the exclusive judges. And the test is, whether the description contained in the specification and drawings, is so full, clear, and exact, as to enable a skillful millwright to construct the machine without invention of his own. (4) The plaintiff must also satisfy the jury that he was the original and first inventor, and that his invention is useful. The test of originality is, that the thing invented was not before known to him. The test of novelty is, that the thing invented was not known to, or used by other persons in a public manner, and not described in any public work. The test of utility is, that the invention is of some utility, and not simply frivolous; but the degree of utility is not important. And of all these matters, the production of the patent is prima facie evidence, throwing upon the defendant the burthen of proving the contrary. (5) The claim in this case being for the invention of distinct parts of a machine, and not for a new combination of old elements, if the defendant relies upon a prior public knowledge or use, he must satisfy the jury that substantially the same parts or elements were publicly known or used in the same way before the alleged invention of the plaintiff. (6) If the defendant relies upon a prior description in some public work, he must produce a work containing such a description as would be sufficient in a patent.

II. As to infringement: 1. The term principle, as applied to machines, does not mean a philosophical principle, which is not the subject of a patent. But it means the particular method of producing a given result by mechanical contrivance; and where a similar result is produced in substantially the same way, there is an identity of principle, and consequently an infringement, although the mechanical contrivance may be different in form or proportions, or by the substitution of mechanical equivalents. (2) Where the invention of the plaintiff is of distinct parts of a machine, and not of a new combination of old parts, it is an infringement to use any one of those parts; and if the defendant uses either substantially the same wheel, or substantially the same mechanical contrivances for introducing or applying the water to the wheel, he is guilty of an infringement. (3) If the jury believe that the mechanical contrivances in the Lansing machine, as used by the defendant, for introducing and applying the water to the wheel, operate in substantially the same way to produce the result, as those invented by Parker, then there is an infringement of Parker's patent. And this consequence is not avoided by simply changing the form or proportions of the machine, or by substituting one or more mechanical equivalents. (4) Supposing the Parker patent valid, the only question for the jury is, whether the spiral scroll case placed between an outer cylinder and an enlarged shaft, which may be an equivalent for an inner cylinder, produces substantially the same effect, by substantially the same mechanical contrivances, as the spiral scroll block placed between the two concentric cylinders in the Parker machine. If so, the alterations are merely colorable evasions, and there is an infringement.

The nature of the defence will perhaps best

[2] [From 1 Fish. Pat. Rep. 319.]

appear from the instructions asked by defendant's counsel, and which are as follows: (The jury, by consent, were permitted to take with them in their retirement both sets of instructions.) (1) That the claims enumerated under the first head of the summary of the plaintiff's specification are: 1. "The compound vertical percussion and reaction wheel, with two, four, six, or more wheels on one horizontal shaft." This is a claim to the entire wheel described. It is not stated that any particular part of this compound wheel is claimed, nor that the combination of the whole is new. In law, therefore, the claim is for the whole compounded wheel, and also, for each particular part of which it is composed, and if any particular part of this compound "turns out to be old, or the combination itself not new, the patent is void." (2) The second and third items mentioned under this head of the summary, are the concentric cylinders enclosing the shaft, and the spout with its spiral termination between them. These things are specially claimed as parts. Being so claimed, if any of them are found not to be new at the time of the plaintiff's invention, or were described in the Dictionary of Arts and Sciences, which is in evidence, the patent is void. (It is claimed by the plaintiff's counsel that the second and third claims of this summary entitle them to claim them in combination, although they are not so claimed in the specification; if the court should be of that opinion, then,) we ask the court to charge the jury: (3) That they must be satisfied that the patentees were the inventors of the entire combination. If these parts were before used in any combination less than the whole, or if the combination up to a certain point had before existed or been described in a public work, and the patentees have only added other parts to the old combination, the claim to the entire combination of these parts cannot be sustained. (4) That where the claim is for a combination of parts, the use of any of these parts less than the whole is no infringement. (5) We ask the court further to instruct the jury, that a contrivance or part of machinery, to constitute a mechanical equivalent, must be used to produce the same effect, substantially in the same way. That the names or forms of things are of little importance. To be mechanical equivalents, they must accomplish the "same purpose, object, or effect." If their forms are alike, but their effects are different, they are not equivalent.

(As there are many suits pending in the United States for the infringement of the Parker patent,—more than two hundred in Ohio alone,—we shall attempt to give a very condensed statement of the evidence.)

Evidence for the plaintiff:

Isaac Morton testified to the admission of defendant that he was using a turning wheel, and that the model in court was a correct representation of it. Is well acquainted with the construction of water wheels. Considers that Parker's wheel is a great improvement over the old reaction wheels previously in use. That the arrangement of the concentric cylinders and the spiral terminating spout, are new and useful improvements. Had never seen these improvements before the date of Parker's patent. The object and effect of them are to apply the water to the wheel in the line of motion, and at as great a distance as possible from the centre—giving it greater leverage. Has used the old reaction wheel and Parker's improvement—find a gain of twenty per cent. in the latter over the former. Can saw as much with a Parker's with six feet head, as with the old reaction wheel with nine feet head of water. The scroll keeps the water up to its work, by diminishing in volume as the water is expended. The application of the water to the wheel in the Lansing wheel, is substantially the same as Parker's. Lansing's will do more work with the scroll than without it. The scroll is an improvement to the action of both wheels.

James Sloan: "I have followed the millwright business twenty-seven years. Have made many experiments in the application of hydraulic power. I consider the improvements of Parker in the wheel, and in the method cf applying the water, to be original with him, and of great service. There is a gain in Parker's of twenty per cent. over the old reaction wheels. Lansing's scroll is the same in principle as Parker's—has the same effect. The water impinges upon all the buckets at the same time, by means of substantially the same contrivance. The enlarged shaft in Lansing's is a mechanical equivalent for the inner cylinder of Parker's."

Dr. Thomas G. Clinton: "I have been a member of the examining corps in the patent office. The class of water wheels was within my supervision. I have examined Parker's patent in the office—applications were frequently rejected upon it. I saw Lansing's patent there. The points of novelty in Parker's wheel are the narrowed rim, and the method of forming the heels and points of the buckets of area of circles, making the issues tangential. The concentric cylinders and the wedge-shaped scroll are novelties. The water passing between the cylinders acquires a vertical motion, and the scroll diminishing in its violence by approaching the face of the wheel, keeps it up to its work. The water is applied in the most economical and efficient manner. Lansing's wheel is enclosed in a spiral scroll shute, which is made to traverse round and approach its outer verge. It is substantially the same as that of Parker's in intention and operation. The vertical motion would not be so perfect without the inner cylinder, nor could the water be so economically applied without the scroll. The part of the wheel

to which the helix is applied makes no substantial difference."

Edward H. Knight: "I am a patent agent, and have examined water wheels in the patent office and elsewhere. I have examined the Parker patent, and seen the wheel in operation. The water is let on from a sluice between concentric cylinders. The outer cylinder gives it a vertical motion, and the inner cylinder keeping it from the centre gives it greater effect. The scroll which winds round between the cylinders gradually approaches the face of the wheel, directs the water towards the wheel, and, diminishing in volume as it passes round, in proportion as the volume of water is diminished by passing through the issues, keeps the remainder up to its work, causing the water to press equally upon the whole circumference of buckets. In the wheel there are points of novelty in the rim, the buckets, and the issue, which have been before explained. The method of applying the water in Lansing's is substantially the same, the effect on the oblique buckets identical. The scroll shute which winds round the wheel has the effect of keeping the diminishing volume of water up to its work as the scroll in Parker's, and also of giving the vertical motion which is the duty of the outer cylinder in Parker's. The enlarged shaft in Lansing's performs the office of the inner cylinder of Parker's. The spiral is identical in its effect in both, and there are in Lansing's mechanical equivalents for the inner and outer cylinders of Parker's. Economy is secured by the use of the scroll."

Jesse J. Call testified to the fact that defendant had told him that the Lansing wheel would do double the work of the flutter wheel, under same head.

For the defendant:

Clark Williams: "I have been engaged in the practical application of hydraulic power. The principal power in Parker's wheel is reaction, caused by destroying the equilibrium of pressure in the wheel. The Toulouse wheel exhibited, involves the same principles of action as Parker's—that is, they are both reaction. The issues and discharge are different. Parker's is superior in that respect. The introduction of the scroll block is an improvement, by preventing disturbing currents. It preserves the current in its proper place, does not accelerate it. There is little or no percussion in the wheel. There is a whirling motion produced in the Toulouse similar to that in the Parker wheel, the scroll having the same effect as Parker's outer cylinder. Lansing's scroll has the same effect as the cylinder in the Toulouse in producing a vertical motion, and as the scroll in Parker's in diminishing in volume and preventing disturbing currents. The scroll block is of no service with a vertical shaft. There is no vertical motion in the cylinder when the wheel is full. Lansing and Parker have spiral scrolls for bringing up the diminishing volume of water to different surfaces for the same purpose. The power of reaction is sufficient to account for the motion of Parker's wheel."

Dr. Chartres: "I have had in former years some practical experience in millwrighting. In Parker's wheel and method of applying the water, the scroll is injurious, for it creates greater friction. There is no value in the inner cylinders—they have no effect in directing the water. The Parker wheel is the best wheel exhibited; in its mechanical construction it is much superior. The application of the scroll in Parker's and Lansing's only differs in the part of the wheel to which it is applied—to the periphery of one and the face of the other; it has the same good effect and the same evils in both. Parker's is the best. Were the scroll removed from the Parker wheel, it would be similar to the Vermont wheel as exhibited by model. A square forebay is as good as a cylinder. The inner cylinder is new, but the wheel is the only valuable part of Parker's invention."

(Several witnesses deposed to the existence of several pairs of wheels on a horizontal shaft, prior to the issuing of Parker's patent. And this was admitted by plaintiff's counsel, in relation to wheels constructed by Roswell Wilcox.)

Russel Bradley: "In 1825 or '26, I saw several cast iron reacting wheels placed on a horizontal shaft, in a mill at Willesden, Chittenden county, Vermont. I constructed the model exhibited in court. The gate was not hoisted, and I could not see the interior of the case between the wheels. I have shown several things in the model that I did not see, and suppose them to be correct. I guessed at a great part of it. It was a new wheel. I did not examine it closely. I have guessed the whole interior arrangement; I did not look in."

John Pope testified to having seen two wheels on a horizontal shaft with a water split between them, in the year 1818, in Morgan county, Ohio. The case between the wheels was cylindrical, and the water was introduced under the shaft; the half of the cylinder over the shaft was solid, not admitting the water, which only filled the buckets as they came round to the lower half of the case.

Christopher Aumack testified to having seen in 1824 or '25, near Eldridge, Onondaga county, New York, a scroll round a wheel on a vertical shaft with radial floats, like an inverted flutter wheel—described it as similar to Lansing's.

(Several millwrights testified that they considered the scroll block injurious, and others that it had no effect, and might be reversed without alteration in the power of the wheel, and others as to the power attainable by the different methods of applying the water, overshot, undershot, reaction, &c., &c.)

Plaintiff rebutting:

Dr. T. G. Clinton, recalled: "I have examined the Toulouse, Vermont, New York, and Parker wheels. There is a slight resemblance, but a substantial difference. The tendency to a vertical motion in the Toulouse is very imperfect—there are eddies produced; the action is principally by percussion. There is no vertical motion in the Vermont wheel; the water is admitted under and over shaft."

James Sloan: "I have experimented with and without scroll. I obtained a co-efficient of 64.3 per cent. without, and 71 with the scroll; the old reaction gave 50.3. On reversing the scroll I obtained .02. There is a substantial difference between the Vermont and Toulouse wheels, and Parker's. Neither of the former have an inner cylinder nor a scroll. I always, in putting in wheels, use the scroll. A wheel is loaded when more water is let on to a wheel than the issues require."

Edward H. Knight: "I consider that there is a substantial difference in the application of the water, in the Vermont, Toulouse, and the Parker wheels. There can be no vertical motion in the Vermont wheel, due to the method of applying the water,—whatever motion may exist is produced by the wheel, and is a waste of power. In Parker's the vertical motion is produced for the purpose of more effectually applying the power of the water; while in the other the wheel is made to keep a body of water whirling round. Though water in a state of quiescence presses equally in all directions, water in motion presses with greater power upon surfaces placed across its line of motion, than surfaces parallel to it. There is in the application of the water and in Parker's wheel, a power over and above what is due to reaction, derived from the impingement of the water with a momentum due to its velocity, upon the buckets placed obliquely in its line of motion. It may be called percussion. I see no reason to quarrel with the term."

(Several millwrights were called, who testified that they used the scroll, and that when carefully put in, it very materially assisted in driving the wheel, and that by it great economy of water was attained.)

H. Stanbery, T. Walker, and H. C. Noble, for plaintiff.

G. B. Smythe, N. H. Swayne, and S. Galloway, for defendant.

LEAVITT, District Judge (charging jury). The plaintiff, under a patent issued originally to Zebulon Parker and Austin E. Parker, dated the 19th of October, 1829, and renewed in the name of Zebulon Parker, October 19, 1843, claims an exclusive right to an improvement in the application of hydraulic power to a water wheel, and seeks to recover in this action, for an alleged infringement of that right, by the defendant, in the use of a water wheel, known as the Lansing wheel. It is the duty of the court, by a fair construction of the patent, to decide, whether in all substantial particulars, it conforms to the requisites of the law. And it is now a principle, settled by the concurrent opinions of some of the most enlightened jurists of this country, that patents, securing to inventors the just rewards of their labor and industry, are to be construed liberally, and with a fair purpose of carrying out the object of the constitutional provision on this subject, and the legislation of congress based upon it. It is now justly held, that these exclusive rights are not to be viewed in the light of odious monopolies, but as the result of a policy, at once beneficent and wise. The constitution of the United States (article 1, § 8) has conferred on congress, among other delegations of power, the right to pass laws "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." And congress, in the exercise of the power thus granted, have from time to time passed laws on this subject, designed to give practical effect to the constitutional provision. At this day, there are probably few who doubt the justness and wisdom of this policy. That it has been followed with good results, in stimulating our countrymen to intellectual effort, and has thereby contributed essentially to our rapid national advance in "science and the useful arts," is too clear for controversy.

Without extending this view, I proceed at once to the inquiry, whether the plaintiff in his patent and specification, has so far complied with the provisions of the patent law, as to be entitled to the benefits of the invention which he claims. If this invention is not described with reasonable certainty and precision, the patentee can claim nothing under his patent. The statute requires, "that before any inventor shall receive a patent for any such new invention or discovery, he shall deliver a written description of his invention or discovery, in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, or compound the same." The object of this provision is two-fold: 1. That when the term, for which the patentee has enjoyed an exclusive right, has expired, and his invention becomes the property of the public, such means of information may be accessible through the records of the patent office, as will enable others to avail themselves of its benefits: and, 2. That while the patent is in force, others may be informed of the precise claim of the patentee, and may not ignorantly infringe his exclusive right.

The first question for the decision of the court is, whether, on the fact of the patent, this statute requisite has been substantially complied with. But as it is not contend-

ed by the counsel for the defense, that the patent, in the particular referred to, is defective, it will not be necessary to examine minutely the claims in this patent, with a view to the question, whether it is so "full, clear, and exact" in its specifications, as to answer the demands of the statute. It is sufficient to observe here, that it is a claim for a discovery of several improvements, claimed as original, in the application of hydraulic power to the propulsion of the water wheel. Its specifications appear to be minute and practical. It is for the jury to decide, whether from the evidence they are sufficiently so, to enable a skillful mechanic to construct the thing which is described.

But, it is insisted that this patent is void, on the ground that the patentee in the exhibition of his invention, has not distinguished between what is his own, and what was before known and in use. And it is quite clear, if the patentee has claimed any thing, as a material part of his combination, as new and original with him, which is proved to have been discovered prior to the emanation of his patent, it is fatal to it. The statute requires the patentee particularly to "specify and point out the part, improvement, or combination, which he claims as his own invention or discovery." The object of this provision is to prevent any one from claiming as his own invention, that which was not new. It would be obviously unjust, and in contravention of the spirit and design of the patent laws, that an inventor should be protected by a patent, in the exclusive enjoyment of what was not his own, and that others should be restricted in the use of what rightfully belonged to the public. It is true, the statute provides, in case a patentee, unintentionally, and without any fraudulent purpose, claims as a part of his invention what is not original, being apprized of the fact, he may disclaim for such part, if such disclaimer be made within a reasonable time, and may still recover for the infringement of such parts of what is claimed in his specifications, as shall appear to be original. In this case, no such disclaimer has been entered; and, if the objection above stated exists, the plaintiff cannot recover, even if the jury are satisfied the defendant has infringed the parts of the plaintiff's invention that are original. This, I understand to be the law, as settled by the adjudication of some of the most respected judicial tribunals of the country.

It is an important inquiry therefore in this case, whether the plaintiff in his claim has embraced more than his invention. It is insisted his patent is obnoxious to this objection in three particulars: First, that he claims the arrangement of two, four, six, or more wheels, on a horizontal shaft; second, the concentric cylinders, enclosing the shaft; and, third, the spout conducting the water to the wheel, with its spiral termination. It has already been noticed as a correct general principle, applicable to the construction of patents, that they are to be interpreted liberally. It is also well settled, that the whole instrument—that is, the patent, embracing the specification and drawings—is to be taken together; and, if from this, "the exact nature and extent of the claim made by the inventor can be perceived, the court is bound to adopt that interpretation, and to give it full effect."

The first point of the inquiry is, whether the patentee has claimed the arrangement of the wheels, on a horizontal shaft, as a part of his invention. To arrive at a just conclusion on this head, it will be necessary to examine with some minuteness, different parts of the instrument before the court. And, it is material to notice, in the first place, that the general character of the patentees' invention, as set forth in the patent itself, is declared to be, "a new and useful improvement in the application of hydraulic power." In his specification and claim, he describes minutely the several inventions or improvements, by which he proposes to accomplish that end, all of which he claims as original. In the prefatory part of the specification, the invention of the patentee is said to consist of "a new and useful improvement in the application of hydraulic power, by a method of combining percussion with reaction, applied and exemplified in: 1. A compound vertical percussion and reaction water wheel, for saw mills and other purposes, with the method of applying the water on the same. 2. An improved horizontal reaction water wheel, with the method of combining percussion with reaction on it. 3. A method of combining percussion with reaction, on common reaction wheels, or those already in use." It is then stated, that "the principle upon which this improvement is founded, is that of producing a vortex within reaction wheels, which by its centrifugal force, powerfully accelerates the velocity of the wheel, and adds proportionally to its momentum." Thus far, the great purpose of the invention—namely, the application of hydraulic power to the propulsion of water wheels, by a new and improved method—is distinctly and intelligibly exhibited. The patentee then proceeds, under three distinct heads, corresponding with those above stated, at great length, minutely to set forth the modes and appliances by which the object of his invention is to be effected. In the beginning of the first division of these specific directions, it is stated that "the compound vertical percussion and reaction wheel has two, four, or more reaction wheels, on a horizontal shaft, made of iron or wood," &c. In the conclusion of the specification, the patentees say, "The parts of the above described machinery, claimed as original, and our invention, in all their necessary dimensions and proportions, and for the use of which we seek an exclu-

sive privilege, are as follows, to wit: 1. The compound vertical percussion and reaction wheel, for saw mills and other purposes, with two, four, six, or more wheels on one horizontal shaft. The concentric cylinders enclosing the shaft, and the manner of supporting them. The spouts which conduct the water into the wheels from the penstock, with their spiral terminations between the cylinders. 2. The improvement in the reaction wheel by making the buckets as thin at both ends as they can safely be made, and the rim no wider than sufficient to cover them. The inner concentric cylinder. The spout that directs the water into the wheel, and the spiral termination of the spout between the cylinders. 3. The rim and blocks or planks that form the apertures into the wheels, and the manner of forming the apertures. The conical covering on the blocks," &c.

Under the first of the foregoing heads, construing its language in connection with the prefatory part of the specification above cited, it is clear the claim intended to be made, was that of the wheel called the compound vertical percussion and reaction wheel; the concentric cylinders enclosing the shaft, and the manner of supporting them; and the spouts which conduct the water to the wheel. It cannot be held to embrace the arrangement, or duplication of wheels, on a horizontal shaft, as a part of the invention of the patentees. This arrangement is introduced, and perhaps unnecessarily, as descriptive or explanatory of the mode by which the wheels were to be used, but not as a part of the invention. I think this construction is obvious from several considerations. First. The wheels are described as compound vertical percussion and reaction wheels; and I suppose it to be a self-evident mechanical truth, that a wheel, vertical in its position, could be no otherwise used than by attaching it to a horizontal shaft. And, it is scarcely possible to conceive it was intended to claim such arrangement, whether the wheels consist of two, four, six, or more, as an original invention. Second. If it was intended to claim this arrangement as a distinct discovery, by analogy to the manner in which the other improvements are stated, it would have been separately set forth as such, and not as a mere incident to the claim of the improved wheels. Third. The arrangement of the wheels on the shaft, has no necessary connection with the improvement of the wheels and the consummation of the general object of the patentees' invention, announced in the patent to be, "a new and useful improvement in the application of hydraulic power."

Again: It is laid down as a rule for the construction of specifications, that the language used is to be so received, as consistently with its fair import, "will make the claim co-extensive with the actual discovery." "So that a patentee, unless his language necessarily imports a claim of things in use, will be presumed not to intend to claim things which he must know to be in use." Curt. Pat. § 132. Now the arrangement of wheels on a horizontal shaft has been long known and used; nor can it be presumed that these patentees were ignorant of that fact, and intended to claim it as new. Upon the whole, I entertain a clear conviction that the arrangement of the wheels on a horizontal shaft, is not, by a fair construction of the specification, to be viewed as a part of the invention claimed by the patentees.

It is also insisted, that the concentric cylinders enclosing the shaft, and the spiral conductors for leading the water to the wheels, are claimed as parts of the patentees' invention, and that the proof is, they are not original with them. It is contended that the evidence in the case shows, that these mechanical contrivances are the same substantially as those used in the Toulouse mills; the description and model of which is in possession of the jury. That the matters stated above, are within the claims of the patent, seems not to admit of doubt; and it is for the jury to say, whether there is evidence that they were before known and used.

Having disposed of these points, I will, with as much brevity as possible, state my views of some other principles of law, applicable to the case before the jury. And in the first place, to entitle the plaintiff to recover in this action, the jury must be satisfied that the invention embraced in the plaintiff's patent is "new and useful." This is a statutory requisite, and lies at the foundation of the plaintiff's right to a verdict at the hands of this jury. The patent, however, raises the presumption of the novelty and utility of the plaintiff's invention. Before a patent can issue, the person applying for it is required to make oath, that he is, as he verily believes, "the original and first inventor or discoverer" of the improvement, or invention, for which he seeks a patent. And it has been held, that this oath, constituting as it does a part of the letters patent, and being in evidence to the jury, forms a legal ground for the presumption of the novelty and originality of the patentees' claim, until the contrary be proved. Upon this inquiry, the burden of proof is thrown upon the defendant; it being the province of the court to decide what constitutes novelty, and of the jury to determine, from the evidence adduced, whether the patentees' invention is new. The same remarks apply also to the subject of the utility of the invention.

The statute requires, that the patentee should have been the original and first inventor. If the invention, which is the subject of the patent, had been previously

known or used, or had been described in any public work, or had been in public use, it is not patentable, and no exclusive right would be conferred on the patentee. In a word, it must have been original with the inventor, and not known to others. The only exception to this rule, under our patent law, exists in the case of an individual obtaining a patent, believing the invention to have been original with him, and it is made to appear, it had been known in a foreign country, but not patented there, nor described in any written publication. This proof, in the case supposed, would not vitiate the patent.

The want of novelty in this case, constitutes one of the grounds of defense. It is insisted, that the plaintiff's water wheel, with the mode of applying the water, has been long known and used. And proof is adduced, that before the emanation of the plaintiff's patent, structures and mechanical contrivances alleged to be substantially identical with those of the patentee, were known and in use in France, and also in several of the states of this Union. I do not propose to examine the evidence on this point, as it will be for the jury to decide on its force and conclusiveness. It may not be improper to remark, however, that where the defense that a mechanical contrivance claimed to be essentially similar to that covered by the plaintiff's claim is set up, and the proof relied on, is a description of such structure, contained in a printed publication, such description must have been sufficiently full and precise to have enabled a mechanic to construct it; and must also have been, in all material respects, like that covered by, or described in, the plaintiff's patent. The jury have the evidence, in the models exhibited, and the oral testimony of witnesses on this point; and it will be their province to decide it. I pass from it with the single remark, that proof of the previous use of a structure, bearing some resemblance in some respects to the improvement of the plaintiff, and which might have been suggestive of ideas, or have led to experiments, resulting in the discovery and completion of his improvement, will not invalidate his claim, under his patent.

On the subject of the utility of the invention patented to the plaintiff, it is only necessary to say, that it must be proved to be, to some extent, useful. But courts are not rigid and strict on this point. In the absence of proof by the defendant, that the thing patented is absolutely frivolous and worthless, the presumption of utility raised by the patent itself, would be sufficient, so far as this point is concerned, to sustain the patent. The jury probably will have no difficulty on this subject, as there is positive proof by competent witnesses, that the plaintiff's improvement is valuable.

If the jury should come to the conclusion that the plaintiff's patent embraces a patentable subject, within the principles stated by the court, they will proceed to the inquiry, whether the defendant has infringed the plaintiff's exclusive right, in the use of what is called the Lansing wheel, with its fixtures; a model of which is before the jury, and which they will have with them in their retirement.

On the question of infringement, the burden of proof is with the plaintiff. He must make it appear, to the satisfaction of the jury, that the defendant has violated the exclusive right granted by his patent. And in order to make out the fact of infringement, the plaintiff must prove that the defendant has used his invention, either in the precise form in which it is constructed under the patent, or, in a form, and on principles, substantially the same. To constitute this identity, and to make out the fact of infringement, it is not necessary that the structure or machine used by the defendant, should be the same in appearance, form, or proportions, as that invented and patented by the plaintiff. It has been well said by a distinguished judge in this country, that "simply changing the form or proportion of a machine, shall not be deemed a new discovery." If the operative principle of the two machines be the same, the substantial identity contemplated by the patent law, is established. The learned judge, who, when present, is the presiding judge of this court, has very lucidly defined the principle of a machine to be, "the particular means of producing a given result, by a mechanical contrivance." It is obvious, if by a mere colorable difference in form or structure, a patented machine or invention can be infringed, a patentee has no security for his rights; nor would it be possible to carry out the great ends of our patent right system. In most cases, the patentee, whatever may have been the amount of patient thought and toil employed in the completion of an invention, and however useful and meritorious it might be, would fail to receive and enjoy the just rewards of his efforts.

In this case, it is insisted that the defendant, by the use of what are designated as mechanical equivalents in the structure used by him, has infringed the rights of the plaintiff. On this subject, I shall succeed in stating my views to the jury, in a more intelligible manner than by any other method, by quoting from a learned work on the law of patent rights, lately published. In this work the author says, the true question is, (referring to the identity of mechanical structures,) "whether under a variation of form, or by the use of a thing bearing a different name, the defendant accomplishes the same purpose as that accomplished by the patentee in his contrivance." The same writer also remarks, "that there may be different modes of obtaining the same object; and if, after a patent has been obtained for a particular thing, another person, without

borrowing from that patent, has invented a mode of accomplishing the same thing, he will be entitled to a patent, and would not infringe the rights of the previous patentee."

The question of the identity of the invention embraced in the plaintiff's patent, and that used by the defendant, is to be decided by the jury upon the evidence. That evidence consists in the models of the structures, which are exhibited to the jury, and in the opinions of the experts, who have given their testimony on this point. I do not propose to detain the jury with any remarks relating to the identity of these structures. The jury, by the inspection of the models, and the testimony of the experts, will doubtless be able to arrive at a satisfactory conclusion on this point. I will here, however, observe, that great respect is due to the views and opinions of scientific individuals, and practical mechanics, on the question of the identity of different mechanical structures. From their acquaintance with the elements of mechanical science, they are enabled satisfactorily to decide this question, while to others, it might seem involved in obscurity and doubt. The jury have the testimony of several unimpeachable witnesses examined as experts in this case, to whose opinions, I doubt not, they will be disposed to give due weight.

The jury returned a verdict for the plaintiff, assessing the damages at $150.

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

NOTE. Fig. 1. is a vertical section through the center of the wheel and scroll case. Fig. 2. is a longitudinal view of the wheel detached from the case. Fig. 3 is a transverse section at the line xx of Fig. 1. A is the bulkhead; B the shaft; C the crank; B^2 is the core. The buckets D are each made of three planes: 1st. A middle plane, D, which is parallel with the axis of the shaft, radiates from the circumference of the core, and is of any required length and breadth; 2d. Two inclined end planes, each end plane inclining in an opposite direction to the other, upward toward either end of the shaft, or standing at an angle of forty-five degrees, with a plane passing through the center of the shaft, lapping over every preceding bucket about one and one-half inch, contracted at the outlet and widened at the verge. E is the scroll case through which the water passes. The supply of water from the flume is regulated by a vertical sliding gate. The width of the scroll should be equal to the length of the buckets and closed at both ends by scroll ends, causing the water to be forced toward the center of the wheel and to escape to the right and left through two sets of inclined issues. The water admitted from the flume passes into and through the scroll-case in the direction of the arrows, acts upon the radial portions, D, of the buckets, by percussion, and on the inclined ends, D^1 D^2, of the buckets, by reaction, escaping from the ends of the wheel, causing the wheel to turn vertically in a contrary direction from that at which the water escapes, and in the same direction at which it first strikes the middle of the buckets. The improvement claimed was the construction of the buckets (radial) marked D, with inclined plane ends, D^1 D^1, diverging in contrary directions, in combination with the spiral or scroll-case E, for condensing the water and causing it to act by percussion and reaction.

Case No. 10,750.

PARKER v. UNITED STATES.

KENNAN et al. v. SAME.

[Pet. C. C. 262.][1]

Circuit Court, D. Pennsylvania. April Term, 1816.

ACTION FOR MONEY HAD AND RECEIVED — WHEN IT WILL LIE—ACCEPTOR OF BILL OF EXCHANGE —IMPRISONMENT UNDER CAPIAS — VENDOR AND PURCHASER—NOTE FOR PURCHASE MONEY — RESCINDING CONTRACTS.

1. An action for money had and received, or money paid, will not lie, by the acceptor of a bill of exchange, who has not paid the same. But the acceptor of a bill of exchange, who at the time of his acceptance had no funds belonging to the drawer, although he has not paid the bill, may sue the drawer if he has done something equivalent to payment; as if he is in confinement under a capias ad satisfaciendum founded on his acceptance.

[Cited in Parks v. Ingram, 22 N. H. 292, 293; Christian v. Keen, 80 Va. 377.]

2. Imprisonment, under a capias ad satisfaciendum, is a satisfaction of the debt as to the defendant.

3. If the vendor of property accept of a note or bill in satisfaction of his debt, he cannot sue his original debtor, provided there was no fraud or unfairness on the part of the vendee.

[Cited in Hutchins v. Olcutt, 4 Vt. 555.]

4. If the vendor, without an agreement to receive the note of the vendee in payment, take such note and transfer it, his right of action on the contract of sale is taken away as long as the note is out of his possession; and he can only sue on the contract, when he gets back the note, and has it in his power to return it to the vendee.

5. It is not a breach of the condition of a bond, given to the United States for the repayment of money which might be advanced, that the officer of the United States, to whom the bond was given, has accepted, but has not paid, orders drawn upon him by the persons to whom, by the terms of the condition, the advances were to be made.

6. What is the law as to rescinding contracts (note).

7. As to the right of an acceptor of a bill of exchange who has not paid the bill, to sue (note).

[In error to the district court of the United States for the district of Pennsylvania.]

This was a writ of error from the district court of Pennsylvania.

In the first case, the declaration filed in the district court was for money had and received, by Parker, to the use of the United States. The facts of Parker's case, as provided on the trial in the district court, and which are equally applicable to both cases, were as follows. On the 9th October, 1813, Callender Irvine, Esq., the commissary general, in behalf of the United States, entered into an agreement, under seal, with the plaintiff in error, Parker, by which it was stipulated, "that Parker should manufacture and deliver, to the commissary general, within twelve months from the 8th of December following, 120,000 yards of woollen kersey, of a certain

[1] [Reported by Richard Peters, Jr., Esq.]

quality: 10,000 yards to be delivered per month; Irvine to make an advance of 10,000 dollars, for which Parker was to give security; the price of the kersey to be one dollar per yard." These were the important parts of the contract. Whilst it was in operation, a verbal agreement was made, between the commissary general and Parker, to substitute gray kerseys for white, at the price of one dollar and twenty-nine cents per yard.

On the 13th October, 1813, Kennan, Reed and Croasdill, plaintiffs in the other writ of error, executed a bond to Irvine, binding themselves as securities for Parker, in any sum not exceeding 10,000 dollars, which should be advanced to him by the commissary general, under the above contract of the 9th of October. On the 9th of November, 1814, the same persons executed another bond to the commissary general, reciting, that 8,000 dollars advanced to Parker having been accounted for by him, and only 2,000 remaining unacounted for, they bound themselves as securities for said Parker, in the said sum of 2,000 dollars, and any further sum that might be advanced to him, not exceeding in the whole, 10,000 dollars.

It further appeared, by the evidence given in the district court, that the mode of transacting the business under the above contract was; when a quantity of kerseys was delivered, and after inspection, received by the commissary general, for him to state in writing the quantity so delivered, with the amount due to Parker, and that the same would be paid to him or to his order in thirty days, if the commissary general should be in funds. Two of these acknowledgments of debt, were assigned by Parker, one to Thorp, Siddall and Company, for 5,526 dollars 41 cents; and the other to Reed and Croasdill, for 2,470 dollars 67 cents, which being presented by the indorsees to the commissary general were verbally accepted, "to be paid when in funds." No part of the above orders, except the sum of 1,002 dollars 45 cents of the one in favour of Thorp, Siddall and Company, had been paid.

By the account stated by the commissary general, which was exhibited in the district court, it appeared, that Parker commenced the performance of the contract, on the 18th of October, 1813; and continued to deliver large quantities of kersey, until the 31st of January, 1815. He is then debited with considerable sums, advanced to him by the commissary general; and upon the whole, a balance is stated against him of 2,559 dollars 50 cents; for which a verdict was rendered. But on the debit side of this account, are found the above orders in favour of Thorp, Siddall and Company, and Reed and Croasdill; which it is admitted by the United States, have not been paid; and if these items were improperly given in evidence in this action, then it is admitted that the United States ought not to have recovered, as those orders exceed the sum claimed on their behalf, as the balance of their account. The charge of the district judge, being in favour of the United States, that this action was well brought, an exception was taken to the opinion, on which a writ of error was sued out.

For the plaintiffs in error, the following points were made:

First. The action should have been covenant on the agreement of the 9th of October, 1813: the subsequent parol contract, changing the written contract, as to the price and the kind of kerseys, made no difference; it was ingrafted, necessarily into the original contract. An action for money had and received, cannot be brought, where the contract is in part performed, and where the contract is still open. 1 Doug. 23, 24; 2 East, 145.

Second. If there was no necessity for bringing covenant on the above contract, then the advances made to Parker, constitute him a debtor to the United States, by simple contract; which debt was extinguished by the bond given by Kennan, and Reed and Croasdill, on the 8th of November. It is true, that generally speaking a simple contract debt by one person, cannot be extinguished by a security of a higher nature, given by a third person; yet it will be, if such security was contemplated by the original contract, as was the fact in this case. 2 Leon. 110; 4 Coke, 446.

Third. The United States not having paid their acceptances, no action can be maintained by them, for the amount of those acceptances; even, the giving of a note of hand, would not be a satisfaction, unless it was received as such. [M'Kim v. Riddle] 2 Dall. [2 U. S.] 100; 1 Dall. [1 U. S.] 216.

Mere responsibility is no ground of action. 3 Wils. 262; Id. 346; Co. Bankr. Law, 202; 3 Wils. 130, 528; 2 W. Bl. 840. In this case, the acceptance was not even absolute, but conditional, "to pay when in funds;" and it does not appear that the contingency has happened.

For the United States it was answered, on the first point: though there be a covenant under seal, yet if there be a verbal promise to pay the balance on an account struck, assumpsit will lie. 1 Chit. Pl. 113; 5 Bos. & P. 148; 2 Term R. 483; 1 Term R. 133.

In this case, Parker wrote to the commissary general for a copy of his account; and after receiving it, he offered to find security for the balance stated against him, if the commissary general would order him to be discharged from confinement.

Second. The present case is within the general principle, as acknowledged on the other side. 3 Bac. Abr. 106, 107. tit. "Extinguishment," D.

Third. It makes no difference, that the acceptances were conditional (3 Wils. 9; Chit. 80); though the acceptances have not been paid by the United states, yet their amount has been received by the indorsee, or payee, and the acceptances are still outstanding. In

such a case, an action for money had and received will lie. 5 Term R 513; [Harris v. Johnston] 3 Cranch [7 U. S.] 311; Co. Bankr. Law, 201. [See Case No. 15,521.]

C. J. Ingersoll, Dist. Atty., for the United States.

J. R. Ingersoll, for Parker.

Mr. Hallowell, for Kennan et al.

WASHINGTON, Circuit Justice. It is contended for the plaintiff in error, Parker, that an action for money had and received will not lie, to recover a balance formed by these acceptances, because the same have not been paid; and consequently the balance is not in favour of, but is against the United States. Other points have been made, which need not be decided.

It is admitted by the counsel for the United States, that no case precisely like the present is to be found in the books; that is, of an action for money had and received, brought by the acceptor of a bill of exchange, or the maker of a note, before the same has been paid; and I confess I should be greatly surprised, if any decision to sanction such an action could be met with. If there be any case, in which responsibility to pay money, has been decided to afford a ground of action for money had and received, I have never met with it. Responsibility merely, may entitle the party to an action, but not to this form of action. It was never yet heard of, that the acceptor of a bill of exchange, without funds of the drawer in his hands, was allowed to sue the drawer, without proving that he had paid the bill, or done something equivalent thereto; as that he is in execution for the same, under a capias ad satisfaciendum, which as to him, is a satisfaction. The cases are all the other way. 1 Doug. 249; 3 Wils. 18; Greenleaf v. Smith (in this court); 3 Wils. 262, 346, 528; 2 W. Bl. 840.

If responsibility by acceptor, amount to anything, the responsibility of the drawer is a fair set off against it, as there is no doubt, but that he is liable to the holder of the bill, if it be not paid by the acceptor.

The cases cited at the bar, in support of this action, are totally inapplicable. If the vendor of property accept of a note or bill, in satisfaction of his debt, he is paid by his own agreement, and will not be allowed to sue for his original debt, in derogation of that agreement; provided there was no fraud or unfairness on the part of the vendee; as if the bill was drawn on a person not having funds. So, if without an agreement to receive the note in satisfaction, the vendor transfer the note, he thereby exposes the vendee to a responsibility to pay the same to the holder; which as long as it continues is a bar to an action against him upon the original contract; because otherwise he might be twice charged for the same debt. Besides the assignment of the note, is so far a satisfaction received from the indorsee, that the vendee cannot sue upon the original contract, unless he gets back the note and has it in his power to return it to the vendee. In short, he cannot have the benefit of the security, which he received as a conditional payment, and at the same time insist to be paid the debt for which that security was given. But these cases, do by no means decide, that the drawer of a bill of exchange, is a receiver of the amount of it to the use of the acceptor, before the same is paid.

But it is contended, by the counsel for the United States, that this action will lie, because, after seeing the account in which these items are debited, Parker acknowledged the balance for which the verdict was given to be due. It would be a sufficient answer to this argument, to observe, that if without payment of the orders to the payees, Parker was not liable in law to pay their amount to the United States, his promise would not bind him; although it were admitted, that he knew at the time, that the orders had not been paid. But the truth is, that these items were so charged in the account, that Parker upon inspecting it, might well have supposed that these orders had been paid.

The action against Kennan, and Reed and Croasdill, is debt, upon the before mentioned obligation of the 9th of November, 1814. The principles laid down in the case of Parker v. U. S., go fully to decide this.

The obligation was given to secure the payment of any sums, which might be advanced to Parker by the United States, not exceeding 10,000 dollars; for as to the 2,000 dollars, remaining unaccounted for, on the day this bond was given, it was immediately afterwards discharged by the delivery of the kerseys. The two orders, mentioned in the above opinion, having been accepted but not paid, the amount of them cannot be said to have been advanced, either in law, or in fact; and of course the breach laid in the declaration is not supported.[2]

These judgments must both of them be reversed and entered for the plaintiff in error.[3]

[2] See the following cases: Giles v. Edwards, 7 Term R. 181; [Young v. Preston] 4 Cranch [8 U. S.] 239; 5 East, 249, as to rescinding contracts. The first case states, that though in part performed, it may be rescinded; and the last case says it cannot, unless the party can be placed in statu quo. See 3 Esp. 82.

[3] If the acceptor has no funds of drawer, he has his remedy against the drawer if he pay the bill, or do something equivalent, as being in prison under a capias ad satisfaciendum. 3 Wils. 18; Chit. Bills, 203; 1 Doug. 249.

Case No. 10,751.

PARKER v. UNITED STATES.

[2 Wash. C. C. 361.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

EMBARGO LAWS—FORFEITURE OF VESSEL—WITHIN FOREIGN JURISDICTION—PENALTIES.

1. Information against the brig Agnes, a coasting vessel, for a breach of the embargo laws, she having proceeded from the United States, in December, 1808, to St. Bartholomew's, where she was sold to the appellant, and afterwards returned to Philadelphia with a cargo.

2. A forfeiture of the vessel, imposed by the embargo laws, cannot be enforced after she has arrived within the jurisdiction of a foreign power; but the United States must then resort to the penalties imposed by those laws, and proceed for double the value of the vessel and cargo, to which they are entitled, upon their violation.

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

This was an information, filed in the district court against the brig Agnes, alias the Gustaf Ekerman [Parker, owner], for a breach of the first embargo law, and the supplement thereto. The claim of the captain, on behalf of the owner, Mr. Imlay, of St. Bartholomew's, states that she was purchased from a Mr. Darrel, of Antigua, by his said owner at the island of St. Bartholomew's, for two thousand dollars paid, and that a regular bill of sale was executed by the attorney of Darrel, on the 28th of March, 1809. That his said owner made the purchase, bona fide, and without notice of any of the circumstances stated in the information, or that the vessel had done any thing against the embargo laws of the United States, so as to subject her to forfeiture. It appeared in evidence that this vessel was built in Virginia, was enrolled by the name of "The Agnes," and licensed as a coaster, in 1808. In December, 1808, she cleared from Edgarton in Massachusetts, for Portland, and was carried to the West Indies. It did not appear by what means Darrel became entitled to her. On the 29th of April, 1809, she arrived at the port of Philadelphia, with a cargo taken in at St. Bartholomew's, and was duly admitted to an entry. The manifest of the captain stated her to have been built in Nova Scotia. Between the time of her entry and seizure, certain repairs were made to her, and materials furnished, at the request of the captain, by certain persons who filed their petition in the district court, to be paid out of the sales, in case of condemnation. A decree, pro forma, condemning the vessel, passed the district court, from which an appeal was taken.

The questions made, were, first, whether the vessel is liable to forfeiture in the hands of a bona fide purchaser? Cases cited for the United States: 1 C. Rob. Adm. 115, 271; 2 C. Rob. Adm. 198; 3 C. Rob. Adm. 84, 85; [Glass v. The Betsey] 3 Dall. [3 U. S.] 6; [Rose v. Himely] 4 Cranch [8 U. S.] 268. On the other side: [U. S. v. Grundy] 3 Cranch [7 U. S.] 337.

Secondly, are material men entitled to be paid out of forfeited property? On the affirmative were cited Gardner v. The New Jersey [Case No. 5,233]; Act Assem. of Pa. March, 1784, giving a lien to such persons. 3 C. Rob. Adm. 84; Doug. 546, E. Contra: 2 C. Rob. Adm. 195; Gardner v. The New Jersey [supra]; 2 H. Bl. 607; 5 C. Rob. Adm. 194; 1 Johns. 471.

WASHINGTON, Circuit Justice. The first and principal question is, are the United States entitled to claim a forfeiture and condemnation of this vessel, for the cause stated in the information? The first embargo law went no farther than to prohibit the sailing of all vessels, from the ports of the United States to any foreign port, except such as might be under the immediate direction of the president, and foreign vessels; and to authorize the president to make use of the navy for carrying this prohibition into effect. This law also prohibited registered or sea-letter vessels, having goods on board, from proceeding from one port of the United States to another, without bonds being first given to reland the cargo within the United States. The supplement to this law, which passed soon after, declares, "that if any vessel shall, during the continuance of the first act, depart from any port of the United States, without a permit or clearance, or shall, contrary to the provisions of either act, proceed to a foreign port, or trade with, or put on board of any other vessel, any goods; such vessel and goods shall be wholly forfeited, and if the same shall not be seized, the owner, agent, freighter, or factor of such vessel, shall, for every such offence, forfeit and pay a sum equal to double the value of the vessel and cargo, and shall never after be allowed a credit for duties." If the words used in the third section of the supplement, which are above quoted, be construed literally, so as to give to the United States an option to seize the property, or to let it alone, it will not be easy to distinguish this from the case of U. S. v. Grundy [supra]; because they would amount to this, that the vessel and cargo shall be forfeited, if the United States shall choose to seize them, or if not, then double the value; which would be precisely to give an election to the government, to take the one or the other; in which case it is decided, that until the election is made, no change of property takes place, either immediately, or by relation to the offence. This construction, however, is rejected by the district attorney, and is certainly not to be supported, since it would be extraordinary to give to the government an

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

election in all cases, and under every possible circumstance, to take the thing itself, or the double of its value. In the registering act, the punishment for a false oath, is forfeiture of the vessel, or its value, which gives a fair alternative to the government. If the words "shall not," be construed "cannot," which we think they ought, the question will be, at what time does the forfeiture of the double value accrue? But, first, it may be necessary to consider in what the offence consists, for which the forfeiture of the property is given? Departing from one port, without a permit or clearance, though with intention to go to some other port in the United States, constitutes one offence. Proceeding to a foreign port, though without a clearance from the port of departure, to some other port in the United States, is a distinct offence, and is the one for which this information is filed. But is it necessary to consummate the offence, that the vessel should actually enter the foreign port? We think not, for the following reasons: First, that such a construction would defeat the obvious intention of the law, which was to protect the property of our citizens from capture by the belligerents, as well as to induce a change of conduct in those powers, in respect to our neutral rights, by withholding from them the supplies, which their necessities might require. But this policy would have been defeated, if, notwithstanding the embargo, our vessels might freely navigate the ocean, where the danger of capture existed, and whence the wants of the belligerents might be supplied, by transhipping cargoes from one vessel to another. Another reason against such a construction of the law, is, that if the offence be not complete until the vessel shall enter the foreign port, the remedy for enforcing the forfeiture by seizure of the property, would at the same moment become ineffectual; because, within a foreign jurisdiction, no seizure could be made, and a case like the present would seldom occur, of the property being brought back to the United States. It seems proper, therefore, to consider the forfeiture as having accrued, whenever the vessel sails for a foreign port, although she has not entered it.

The inquiry may now be properly made, at what time does the forfeiture of the double value accrue? The answer obviously is, whenever the forfeiture of the property cannot be made effectual by seizure. But it cannot be contended, that so long as a possibility exists of the property returning to the United States, the forfeiture of the double value, and the right to sue for it, remain suspended; and, consequently, some reasonable time must be fixed, when the right to sue for the double value attaches. Two forfeitures cannot, under this law, exist at the same time. If the one cannot be made available, in consequence of the escape of the thing itself, then the other is substituted in its stead; whence it would seem necessarily to follow, that when the right to claim the double value attaches, the forfeiture of the property itself, for which the substitute is given, ceases. It is no answer to say that the United States are not obliged to sue for the double value, as soon as their right to claim it attaches, but that they may wait for the chance of the return of the property, when it might be seized; for the question does not depend upon a choice of remedies, but upon the vesting of a right to a particular forfeiture. If the forfeiture of this vessel continued from the time when the offence was committed, until the time when she might be seized, then the right to claim the double value, never could in the mean time attach, unless by supposing either that there did, at some period, exist a forfeiture both of the property and of the double value, or that the forfeiture of the double value depends upon the will of the United States, instead of the circumstance that the property cannot be seized; neither of which positions, we think, can be maintained. If the forfeiture of the double value has accrued, at any time between the commission of the offence and the return of the property, and it be admitted that two forfeitures cannot, under the fair construction of this law, exist at the same time, then the right to the double value must extinguish the right to the property, which cannot, upon any legal principle, be revived by the return of the property to the United States, particularly after it has passed into the hands of a bona fide purchaser.

Without determining at what precise time the right to sue for the double value attaches, it is sufficient, in this case, to say that no possible objection could be stated to the action, after the vessel had got within a foreign jurisdiction.

This opinion renders any decision upon the claims of the material men unnecessary. The sentence of the district court must be reversed.

PARKER (UNITED STATES v.). See Cases Nos. 15,992 and 15,993.

PARKER (WALKER v.). See Case No. 17,-082.

PARKER v. The WHITAKER. See Case No. 17,525.

PARKER (WILDES v.). See Case No. 17,-652.

Case No. 10,752.

PARKER v. WINNIPISEOGEE LAKE COTTON & WOOLEN MANUF'G CO.

[1 Cliff. 247.] [1]

Circuit Court, D. New Hampshire. May Term, 1859.[2]

EQUITY JURISDICTION—DAMAGES—REMEDY AT LAW.

Equity jurisdiction will not be entertained in a case where the complainant alleges damages to his rights in consequence of the wrongful acts of the respondents, and where the whole case made in the bill is denied in the answer, unless the right of the complainant is clear and well defined, and there is danger of irreparable injury from the continuance of the nuisance, or unless where the right is clear and the injury certain, an injunction is necessary to prevent multiplicity of suits or suppress interminable or oppressive litigation.

[Cited in Tuttle v. Church, 53 Fed. 427.]

[Cited in Varney v. Pope, 60 Me. 195.]

This was a bill in equity praying for an injunction to restrain the corporation defendants [the Winnipiseogee Lake Cotton & Woolen Manufacturing Company] from raising the surface of Lake Winnipiseogee, in the state of New Hampshire, or from retarding, obstructing, or holding back the natural flow of the water out of the lake and along the channel of the river constituting its outlet, to the premises of the complainant [John A. Parker]. The complainant alleged in effect as follows: that he was the owner of a certain parcel of land situated in Laconia, in this state, formerly owned by Daniel Tucker, together with the water privilege connected with the same, conferring the right to draw and use the one half of the water from the flume connected with the premises, together with a certain described portion of the second story of the building erected on the walls of the trip-hammer shop, with the water right and mill privilege of one twelfth part of the whole water power of the outlet or river on the Laconia side, at the dam there erected, in the village of Meredith Bridge. He further alleged that the outlet of the lake is called Winnipiseogee river, and has its source in the lake at a place called the "Weirs," six miles above the village of Meredith Bridge, where the complainant's premises are situated. The outlet was formerly by a natural channel, about fifty yards wide, and from five to seven hundred feet in length, when the water passed into Long Bay, and at the foot of the channel there was a natural fall of about three feet. Long Bay is a sheet of water about four and a half miles in length, and from a half-mile to a mile in width. At its foot the water is discharged into what is called Little Bay, through a channel about one thousand feet in length. Lake Village is situated on this channel. Here, before the dam was built, there was a natural fall of several feet. From that point the channel of the river passes across the southerly end of Little Bay, a distance of about a mile and a half, and then the stream empties into Sanbornton Bay, through a channel from fifteen hundred to two thousand feet in length. Little Bay forms the head-waters of the dam, connected with the premises of the complainant, which were situated in the village of Meredith Bridge, on the margin of the channel between the two last-mentioned bays. For the distance of about five miles, the current of the river then passes through Sanbornton Bay, and is then discharged out of it at a place called Union Bridge, and from Union Bridge the river pursues its course in nearly a right line to the Merrimac. In the year 1831, as the complainant alleged, the respondents became possessed of a certain water right and mill privilege situated on that river, above his premises, at the place now called Lake Village, where, in the year 1835, they constructed a dam across the river, or became the proprietors of it after it was constructed; this dam being higher than any former one. Moreover, that the dam was so constructed, that it enabled them to raise the water in Long Bay several feet, and draw it down again to its natural level, but as it did not disturb the level of the water in the lake, he did not complain. Subsequent to the year 1846, as the bill alleged, the respondents, claiming to hold possession of the land commanding the outlet of the lake, at the weirs, above the complainant's premises, made excavations through the fall in the river, by which the river bed was deepened six or seven feet, the fall mostly removed, and the water from the lake brought into the bay in larger quantities than it naturally flowed, by which the natural level of the lake might be lowered four or five feet. In 1851 or 1852 the respondents erected another dam at Lake Village, below the one previously existing, and of equal or greater height, whereby they could raise the water in the bay to the level of the lake, could discharge a much greater quantity of water than formerly and naturally flowed in the river channel, and could control the amount of water both in the lake and in the river. By this, the complainant alleged, that his water power was damaged, by the unequal supply of water produced in consequence of the respondents' dams and excavations. Another ground of complaint was, that one Stephen Perley wrongfully cut a canal through his own land, tapping the bay above complainant's dam, by which water was drawn out of the bay above complainant's dam, and returned into it below the same; that respondents had bought the canal, deepened it, and removed a dam at its mouth, which dam was erected to prevent the water passing into the canal until at a certain height at his dam. The bill prayed that respondents might be restrained from raising the surface of the lake, from

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

[2] [Affirmed in 2 Black (67 U. S.) 545.]

holding back the natural flow of the water out of the lake, or along the river to complainant's premises; and therefore prayed that they might be compelled to reduce the size of their gates, prohibited from adding to the height of their dam, and be compelled to make a solid stone dam across their excavations at the outlet to the height of the bed of the channel, so as to render it impossible to draw off the water of the lake below its former natural level; that they may be restrained from the use of the canal, or, if permitted to use it, they shall raise the channel of the inlet to the height it was at the time of their purchase. Such were the material allegations of the bill, which were, for the most part, denied in the answer, except the building of the dams, and making the excavations through the fall of the river. Possession by complainant of a twelfth part of the water power of the river, on the Laconia side, at the dam there erected in the village of Meredith Bridge, or that he owned any water right or mill privilege whatever in the premises, except the one half of a certain fixed and limited water power, were denied in the answer. It was alleged that complainant owned no part of the land where the dam stood, but it was admitted that he owned a right to draw water to carry wheels for operating a trip-hammer, grindstone, and bellows, and that it was to be drawn through a long open flume of a certain height and dimensions. It was further set up in the answer, that the quantity of water which the complainant was entitled to draw did not vary with the height of the water in the dam, unless the water fell to a level lower than the top of the flume, and the respondents alleged that it never had so fallen through their act or agency. The respondents also alleged that one Francis Boynton owned the right to draw water from the flume connected with the premises, sufficient to carry wheels to operate a trip-hammer, grindstone, and bellows, and that he sold one half that right to the complainant.

John A. Parker, pro se.

William H. Y. Hackett, for respondents.

CLIFFORD, Circuit Justice. Inequality in the quantity of water flowing in the river by the premises of the complainant greater than what naturally arose from the ordinary changes of the season, or from the ordinary fluctuations in the head of water in the lake before the attempted regulation of the same by the respondents, constitutes the gravamen of the injury alleged to have been sustained by the complainant. His representation is that the water power of his privilege is damaged to the same extent as the equality of the supply of water at all seasons is disturbed for the use and improvement of his water power. He does not allege that the quantity of water is too small or too great in his flume, nor does he pray for an increased or diminished quantity to flow into the same, or to be protected against back water, but prays that the respondents may be restrained from using and perfecting their improvements for regulating the flow and supply of water in the dam, solely upon the ground that his rights are damaged by such regulation. Accordingly he alleges that the respondents have seized upon and taken possession of the waters of the lake, and used the same as a reservoir to his hurt and damage, in the use, value, and capacity for improvement of the water power at Meredith Bridge, and have extended and intend to extend their excavations so as to enable them to draw off the water from the lake six feet below its former low-water level. What he seeks to accomplish is, to restore the flow of water from the lake and in the river to its former state, and to preserve it in that condition. Looking at the answer of the respondents, it is obvious that they deny the whole case made in the bill of complainant. They deny that the complainant is seized and possessed of one twelfth part of the water power of the river on the Laconia side, and in fact deny that he owns any part of the dam, or any right in the water power, except a restricted easement authorizing him to draw and use a certain limited quantity of water equal to one half of the quantity sufficient to carry the wheels to operate a trip-hammer, grindstone, and bellows, or equal to one half the water in the flume described in the answer, and in respect to that easement they expressly deny that they have ever interfered with the same, or in any manner injured his mill privilege or water power. Beyond question, therefore, the case is one where the whole ground of relief set up in the bill of complaint is expressly controverted and denied by the answer. Under these circumstances, it is insisted by the counsel for the respondents that the case is not one where this court sitting as a court of equity can properly take jurisdiction, but that the jurisdiction must be declined for the want of equity in the bill. In regard to private nuisances, Judge Story says: "The interference of courts of equity is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits, and he well remarks that it is not every case that will furnish a right of action against a party for a nuisance which will justify the interposition of courts of equity to redress the injury or remove the annoyance. But there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly occurring grievance which cannot be otherwise prevented but by an injunction." 2 Story, Eq. Jur. (7th Ed.) p. 230, § 925; Georgetown v. Alexandria Canal Co., 12 Pet. [37 U. S.] 98.

Irreparable injury, actual or threatened, is not alleged in this case, and there is nothing in the nature of the grievance or the proofs exhibited to warrant the conclusion that any such consequences are likely to flow from its continuance. "Courts of equity will interfere by injunction," says Shepley, J., in Porter v. Witham, 17 Me. 294, "where the party has long, and without interruption, enjoyed a right which has been recently injured, or which is in danger of being injured or destroyed;" and when, if it has not been established by long usage, it has been by a judicial decision, but it is not ordinarily to determine the right in the first instance that chancery hears the case, and then, if found to be established, exercises its extraordinary power to protect it. Chancery interference, in the first instance, rests on the principle of a clear and certain right to the enjoyment of the matter or thing in question, and an injurious interruption of that right, which on just and equitable grounds ought to be prevented. Morse v. Machias Water-Power & Mill Co., 42 Me. 119. Accordingly it has been well held that it must be "a strong and mischievous case of pressing necessity," or the right must have been previously established at law, to entitle the party to call to his aid the jurisdiction of a court of equity. Van Bergen v. Van Bergen, 3 Johns. Ch. 282; 2 Eden, Inj. per Waterman, 269; Gardner v. Village of Newburgh, 2 Johns. Ch. 165; Reid v. Gifford, 6 Johns. Ch. 19; 2 Story, Eq. Jur. (7th Ed.) § 924a. If the thing sought to be prohibited, said Lord Brougham in Earl of Ripon v. Hobart, 3 Mylne & K. 169, is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial at law; but where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, then the court will refuse to interfere until the matter has been settled at law. Where the title or injury is doubtful or disputed, or where the injury is slight and inconsiderable, courts of equity are disinclined to interfere. Whittlesey v. Hartford, P. & F. R. Co., 23 Conn. 421; Adams, Eq. 487, note. Mr. Angell concurs with Judge Story, that the interference of courts of equity by injunction in matters of private nuisance is founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing a multiplicity of suits; and he affirms that they will interfere in those cases only, as a general rule where the right of the party complaining is clearly established, and the injury which he must necessarily sustain is of such a nature that no adequate compensation can be afforded by damages, unless when delay itself would be wrong. Ang. Water Courses, § 444; 3 Daniell, Ch. Prac. 1858; Wynstanley v. Lee, 2 Swanst. 334; Whitchurch v. Hide, 2 Atk. 391; Coalter v. Hunter, 4 Rand. [Va.] 58; Gates v. Blincoe, 2 Dana, 158. No remedy whatever exists in equity for a public nuisance, says Mr. Justice Woodbury, in Irwin v. Dixion, 9 How. [50 U. S.] 27, unless the individual has suffered some private, direct, and material injury beyond the public at large, as well as damages otherwise irreparable. In cases of injury to individual rights by obstructions or supposed nuisances, the same learned judge says that an injunction is still less favored, and finally adds that when the right or title to the place in controversy, or to do the act complained of, is doubtful and explicitly denied in the answer, no permanent or perpetual injunction will usually be granted till a trial at law is had, settling the contesting rights and interests of the parties. Where the thing sought to be prohibited is in itself a nuisance, or where from its position as exhibited in the proofs it is necessarily such, and there is no doubt or controversy about the right of the complaining party, or the nature and extent of the injury, a different rule prevails. Pennsylvania v. Wheeling Bridge Co., 13 How. [54 U. S.] 567. But where the evidence to establish the right is conflicting, and it is doubtful whether any appreciable injury has been suffered, chancery will not interfere until the rights of the parties are settled at law. Brown's Case, 14 Ves. 415; Weller v. Smeaton, 1 Cox, Ch. 102; Attorney General v. Utica Ins. Co., 2 Johns. Ch. 371; Dana v. Valentine, 5 Metc. [Mass.] 14; Ingraham v. Dunnell, 5 Metc. [Mass.] 126. To authorize an injunction there should be not only a clear and palpable violation of the rights of the complainant, but the rights themselves should be certain, and such as are capable of being clearly ascertained and measured. Olmsted v. Loomis, 6 Barb. 160. All of these cases, or nearly all of them, proceed upon the ground that equity jurisdiction is not to be entertained in cases like the present, unless the right of the complainant is clear and well defined, nor unless there is danger of irreparable injury from the continuance of the nuisance, or unless where the right is clear, and the injury certain, an injunction is necessary to prevent a multiplicity of suits, or to suppress oppressive or interminable litigation. One suit at law will probably determine the nature of the complainant's rights and the extent of his injuries, and if, when that determination is made, the respondents fail to respect those rights, it will then be competent for the complainant to seek the interposition of a court of equity. Having come to this conclusion, no opinion will be expressed upon the merits of the controversy, except to say that the facts of the case as well as the pleadings clearly bring it within the rule requiring the court to decline jurisdiction until the rights of the parties are settled at law. Bill dismissed.

[On appeal to the supreme court, the decree of this court was affirmed. 2 Black (67 U. S.) 545.]

PARKER (WOODCOCK v.). See Case No. 17,971.

PARKER, THE GEORGE H. See Case No. 5,334.

PARKER, THE JAMES D. See Case No. 7,193.

Case No. 10,753.

THE PARKERSBURGH.

[5 Blatchf. 247;[1] 2 Int. Rev. Rec. 63.]

Circuit Court, S. D. New York. Aug. 22, 1865.

COLLISION — COMPETENCY OF LOOKOUT — PROPER PLACE—LIGHTS—APPORTIONMENT OF DAMAGES—COSTS.

1. The officer in charge of the navigation of a vessel is not a competent lookout.

2. The pilot house is not the proper place for a lookout.

3. A sailing vessel which discovers a steamer approaching her at night ought to exhibit a light, or she will be held in fault if a collision occurs between her and the steamer.

[Cited in The City of Savannah, 41 Fed. 893, 894.]

4. Damages apportioned, because both vessels were in fault.

5. Both parties having appealed, and the decree being affirmed, no costs of appeal were allowed to either party.

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

This was a libel in rem, filed in the district court, by the owner of the schooner J. R. Price, against the steamer Parkersburgh, to recover damages for a collision which occurred between the two vessels, on the morning of the 10th of April, 1859, before day light, some eight miles below Barnegat, on the coast of New Jersey, and three or four miles from shore. The district court decreed that both vessels were in fault, and apportioned the damages [case unreported], and both parties appealed to this court.

Daniel D. Lord, for libellant.
John E. Parsons, for claimant.

NELSON, Circuit Justice. The steamer was on her way from New York to Baltimore; the schooner from Brandywine, Delaware, to New Haven. The night was somewhat cloudy, and the weather hazy. The moon, which had shone through the clouds, was about setting at the time of the collision. The wind was light, so that the schooner had very little motion in the water. There was no light exhibited on the schooner, though she had seen the steamer several miles before the accident.

The steamer was in charge of the second mate, and his watch consisted of himself and two hands, one of whom was at the wheel, and the other on deck as a lookout. At and before the collision, the lookout had been sent to a house at the stern to get the line ready to throw the lead, and was thus engaged at the moment it occurred. The only lookout at the time was the second mate, who was in the pilot house, and had the care and management of the navigation of the vessel. This pilot house was between forty and fifty feet from the bow of the steamer.

I have frequently held, that the officer in charge of the navigation of the vessel is not a competent lookout, as his various duties, as officer of the deck, are incompatible with the undivided attention exacted of a lookout in the discharge of duty; and, also, that the pilot house is not the proper place for the lookout. I think it clear, therefore, for these reasons, that the steamer was in fault.

I also think the schooner was in fault for not showing a light, especially after discovering the steamer, which the hands saw was approaching them.

I concur, therefore, with the court below, that the damages should be apportioned, and affirm the decree. No costs are allowed either side, as each party has appealed.

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

Case No. 10,754.

In re PARKES et al.

[10 N. B. R. (1874) 82.][1]

District Court, E. D. Michigan.

BANKRUPTCY — AMENDMENT OF PROOF BY CREDITOR—SECURITY—DISCRETION OF COURT—ERROR TAINTED WITH FRAUD.

1. A party, holding security, proved as an unsecured creditor, after receiving a dividend, moved to amend his proof, because of his ignorance of the law at the time of first proving his claim. *Held*, the bankrupt court possesses discretionary power as to allowing proofs of debt to be amended.

[Cited in Re Baxter, 12 Fed. 75.]

2. This power will generally be exercised in cases of mistake or ignorance either of fact or law, in the absence of fraud, when all parties can be placed in the same position they would have been if the error had not occurred.

3. Where the error is tainted with fraud, however slight, and all parties cannot be placed in the same position as if the error had not occurred, the court will allow the burden to fall upon him who committed the error rather than upon the innocent.

4. A secured creditor may vote for assignee on so much of his debt as is unsecured, where the security applies only to a specific portion of his debt.

[Cited in Re Hunt, Case No. 6,884.]

On the petition of Moore, Foote & Co., creditors, for leave to amend their proof of debt, the answer of Edward E. Kane, assignee, and proofs. These creditors, who were wholesale dealers in groceries in Detroit, proved a debt against the estate for upwards of four thousand nine hundred dollars, being a ledger balance against the bankrupts [John F. and Charles R. Parkes] at the time of the bankruptcy, growing out of a long

[1] [Reprinted by permission.]

course of dealing between the parties; one thousand dollars of this indebtedness was secured by a mortgage given by the bankrupts upon certain land in Iosco county in this state. No mention of this security was made in the proof of debt, and the debt was proven as an entirely unsecured debt, and the creditors have received a dividend thereon accordingly. The land covered by the mortgage has been sold by the assignee, subject to the mortgage, for more than the incumbrance, and he has received the surplus of the purchase-money after deducting the amount then appearing to be due upon the mortgage for principal and interest. This being the state of the case, Moore, Foote & Co. now ask leave to amend their proof of debt so as to set up the aforesaid mortgage, on the ground that they were ignorant of the legal necessity of setting up the same when they made their original proof of debt. This is opposed by the assignee.

Meddaugh & Driggs, for petitioner.

Edward E. Kane, assignee, in person, opposed.

LONGYEAR, District Judge (after stating the facts as above). The court undoubtedly possessed the power, in its discretion, to allow proofs of debt to be amended; and in cases of mistake or ignorance, whether of fact or of law, will generally exercise that power in the absence of fraud, and when all parties can be placed in the same situation they would have been in, if the error had not occurred, and where justice seems to demand that it should be done. In re Brand [Case No. 1,809]; In re Montgomery [Id. 9,730]; In re Clark [Id. 2,806]; In re Jaycox [Id. 7,242]; In re Hubbard [Id. 6,813]. But where the proceeding is in any manner tainted with fraud, or where the creditor has gained any permanent advantage by the omission, or the estate has been permanently injured thereby, the creditor guilty of such omission will be left where his own act has placed him. Stewart v. Isador [5 Abb. Prac. (N. S.) 68]; In re Jaycox, supra.

That proof of debt as unsecured, is prima facie an extinguishment of any security held for the same, and that the same may ripen into a conclusive extinguishment, is too well settled under our act as well as under the English act, to need discussion here. See Stewart v. Isador, supra, where the authorities up to that time, English and American, are collected; also, In re Bloss [Case No. 1,562], and cases cited. And that such would be the ultimate effect of the proof of debt in this case if not amended, does not admit of doubt. The simple question, therefore, is, whether this is a case in which the court, in its discretion, will allow that effect to be avoided by allowing the proof of debt to be amended as prayed.

That Moore, Foote & Co. did not intend to relinquish the security in question, I think is amply apparent from the proofs, and that no fraud on the other creditors was intended, and that mention of the security was omitted in the proof of debt by a want of knowledge of what the law required in that respect, is equally apparent. The member of the firm who made the proof was certainly very careless in subscribing and swearing to the proof of debt with the ordinary statement in it that the firm held no security, without observing it, and for which he ought not to be entirely excused; but that he did not observe it, or if he did that it did not attract his attention as being contrary to the fact, fully appears from his testimony. Aside from this circumstance, and I am not prepared to hold that it is alone sufficient to deprive the firm of any relief they might otherwise be entitled to, I think this case one in which justice requires that the creditors should be allowed to amend their proof of debt so as to avoid the loss of their security, unless the matter has arrived at a stage in which such a course must result in injury to others.

The only ground upon which it is contended injustice to others would result from allowing the amendment, is, that Moore, Foote & Co. have received a dividend upon their entire debt, including that which was secured. That would be a valid objection if it could not be remedied at the same time the amendment should be allowed. But such is not the case; the matter is not yet closed, and there is at least another dividend yet to be made. Therefore, by making it a condition of the right to amend, that they shall refund to the assignee so much of the dividend received by them as was applicable to that portion of the debt which was secured, with interest, and pay the costs of this proceeding, equal justice will be done to all concerned. It does not appear whether Moore, Foote & Co. appeared at the first meeting of creditors and voted for assignee or not, and no complaint is made on that account. But even if they did so appear and vote, the only complaint that could be made in this case would be that they voted on too large an amount, and that such vote affected the result if such was the case; because, if the fact of the security had been stated in the proof of debt the secured portion of the debt only would have been rejected, and they would have been allowed to vote as general creditors for the residue. This is a case in which a specific portion or amount of the debt is secured, and therefore not like a case in which the security covers the entire debt, but is insufficient in amount. In this case the debt secured can be separated from the entire debt at once. In the other it could not be, and the creditor could not be admitted to take part and share in the proceedings, until the security had been realized in one of the modes prescribed by section 20 of the act, and the residue thus determined.

An order must be made allowing Moore, Foote & Co. to file an amended proof of debt

as prayed, on condition that they first repay to the assignee such portion of the dividend received by them applicable to the portion or amount of their debt secured by the aforesaid mortgage, to be computed and ascertained by the register in charge of this matter, and also the costs of this proceeding, including a solicitor's fee of twenty dollars, to be taxed; and further directing, that upon such amended proof being made, the amount of their debt, as heretofore proven, be abated by deducting therefrom the amount which the assignee received, less the price for which he sold the mortgaged property on account of the mortgage, to be ascertained and determined by the said register; and that the said Moore, Foote & Co. be admitted as general creditors for, and hereafter be entitled to receive dividends upon, the residue only of their aforesaid debt, after such abatement shall have been made.

[NOTE. The bankruptcy of J. F. and C. R. Parkes was again before the court in an action by Edward E. Kane, assignee, against William Jenkinson, to recover certain moneys paid by the bankrupts to Parkinson. Case No. 7,607. The assignee also brought trover against Delos E. Rice to recover certain lumber and other property. Id. 7,609.]

Case No. 10,755.

PARKES et al. v. ALDRIDGE et al.

[27 Pittsb. Leg. J. 15; 2 N. J. Law J. 233.]

Circuit Court, D. New Jersey. 1879.

JURISDICTION—ALIEN—WILL—INJUNCTION.

1. The United States court has jurisdiction as a court of equity, concurrent with the orphans' court, to compel an executor to settle his accounts and give security, but it cannot interfere with a suit already begun in the orphans' court for the same purpose.

2. An alien is entitled to come into this court for the construction of a will, and, as incidental to this, may compel the settlement and distribution of the estate according to the views expressed by the court. In a suit brought by aliens in this court for the construction of a will, an injunction was issued to restrain the executor from distributing the estate, the injunction not to interfere with proceedings already taken in the orphans' court to remove the executor for neglecting to give security according to the order of that court.

On bill.

S. B. Ransom, for complainants.

John Whitehead, for defendant McClelland.

Theo. Ryerson, for defendant Aldridge.

NIXON, District Judge. On filing the original bill in this case by certain devisees for the construction of the will of Richard Parkes, deceased, late of the county of Essex, an application was made for an injunction pendente lite, restraining the executor, and the defendant Sarah Jane McClelland, from selling or incumbering any portion of the estate of the testator, and from paying, demanding, or receiving any of the proceeds of the sales of the real estate. Pending this motion, a supplemental bill was filed, setting forth, in substance, that the defendant Sarah Jane McClelland was proceeding in the orphans' court of the county of Essex to cite the said defendant Thomas Aldridge to a settlement of his accounts as executor, and asking the court to restrain the parties from any further proceedings in the premises in said orphans' court until the termination of the suit in this court.

Upon the hearing it appeared that Sarah J. McClelland was a devisee and legatee under the said will; that the will was duly proved in the orphans' court of the county of Essex, on the 10th of March, 1873, and that Thomas Aldridge was the sole executor; that long before any bill was filed in this court, to wit, on the 29th of January, 1878, the said Sarah had petitioned the orphans' court setting forth that the said Aldridge had failed to make any settlement or render any account of his acts as executor, and that he was insolvent, and praying that he might be compelled to settle and give proper security to the ordinary for the faithful execution of his trust, as required by the laws of the state; and that the recent motion to revoke the letters testamentary heretofore granted to him was a mere continuance of these pending proceedings, and grew out of refusal or neglect to execute the bond with approved security, as the orphans' court had ordered to be done, before any proceedings were begun in this court. Sections 118 and 119 of the orphans' court act (Revision N. J. p. 778) gave to that court jurisdiction of the subject-matter, and the actor in these proceedings was simply seeking to secure her rights there when the other devisees of the will filed their bill here. It is undoubtedly true that this court, irrespective of the state statutes, has a concurrent jurisdiction, and could afford the same relief that was sought for in the orphans' court proceedings. Howard v. Howard, 16 N. J. Eq. 486. But that court having first acquired the jurisdiction, any interference with the parties by this court would not only be contrary to the comity, but against law. The plaintiffs in the pending suit being aliens, they are entitled to come here for a construction of the will and, as incidental to this main question, may compel the settlement and distribution of the estate in accordance with the views of the court as to the construction of its provisions. Rev. St. § 629. As it appears from the account filed in the orphans' court, and exhibited in the pleadings here, that the executor has acted heretofore upon an erroneous interpretation of the will, and made expenditures inconsistent with the obvious intent of the testator, a provisional injunction may issue, restraining the executor from paying, and the devisee Sarah Jane McClelland from demanding or receiving, any further moneys

from the estate, until the further order of the court; but such injunction is not to be construed as an attempt to interfere with the proceedings in the orphans' court of the county of Essex, touching the removal of the executor for refusing or neglecting to obey the order of that court, to give security for the faithful performance of his duty as executor under the will of the testator.

[For a hearing on bill for account and other relief, see 8 Fed. 220.]

Case No. 10,755a.

The PARKHILL.[1]

District Court, E. D. Pennsylvania. July 23, 1861.

CIVIL WAR—SUSPENSION OF COURTS OF JUSTICE—PRIZE—RESTITUTION.

1. When, through civil war against an established government, its courts of justice are closed in certain districts in which its laws cannot be enforced peaceably, hostilities for the restoration of its authority may be prosecuted in such modes as are lawful in foreign wars against public enemies.

2. When, in the prosecution of such hostilities, a naval capture has been made of a merchant vessel, which is afterwards libeled as prize, no resident within such hostile district can sustain a proprietary claim of restitution.

[Cited in The Amy Warwick, Case No. 341; The Hiawatha, Id. 6,451.]

In admiralty.

CADWALADER, District Judge. In December last, a convention of delegates, whose election had been provided for by the legislature of South Carolina, proclaimed her independence of the constitutional government of the United States. This revolutionary attempt has been followed by similar acts of such conventions in 10 other states. The 11 states are contiguous. A revolutionary constitutional confederation has been organized in them, under the usurped authority of these conventions, with a co-operation or acquiescence of those administering the former state governments. Incidental hostilities against the United States, including the capture of some of their forts, have been followed by organized opposing hostilities, and counterhostilities on so large a scale that the present proportions of the contest resemble those of a general war. In the prosecution of the naval hostilities on the part of the United States, one of their frigates, on the 12th of May last, off Charleston, S. C., captured this vessel, then on a voyage from Liverpool to Charleston. She was brought for adjudication into this district, where a libel praying her condemnation as a prize has been filed on behalf of the United States. The material averments of the libel, which is more special in its form than has been usual in prize cases, are that she attempted to violate the blockade of Charleston, and that she is the property of insurgents, traitors, and public enemies. If she is confiscable on the latter ground, the question of blockade will not arise. A claim, with a prayer of restitution, has been exhibited on behalf of her alleged proprietors, who are described in the claim as of the city of Charleston, in the state of South Carolina, and citizens of the United States. They are thus, by their own showing, commercial residents of South Carolina. The question which thus arises, independently of that of the blockade, is whether, in the present hostile relation of South Carolina, a resident of that state can sustain a proprietary claim of restitution in a prize court of the United States.

The points upon which this question depends are to be ascertained, not from reasons which may have been assigned or opinions entertained, by the naval captors, nor from orders which they may have received from the president or from the navy department, nor from the president's proclamations, but from the allegations and proofs in the cause according to the rules of proceeding of the court. One of the purposes of naval warfare is to diminish the power of hostile governments or of other hostile organizations by the indiscriminate maritime capture of the private property of all persons residing in places within hostile dominion or in permanent or temporary hostile occupation. The capture and confiscation of such property, by destroying, or suppressing the maritime trade of such places, diminishes their wealth, and thus reduces the power of their hostile rulers. The liberation of the property when captured, whether the individual residents who owned it are personally well or ill affected in feeling towards the government of the captors, would restore its value in wealth to the hostile place. In prize courts, therefore, the property of every such resident, when captured at sea, has usually been regarded as confiscable. 3 C. Rob. Adm. 18, 26–28, and Append. B, p. 8. The rule applies, though he may owe a duty of allegiance to the captor's government, and may, while in the hostile place have been perfectly loyal in his own feeling and conduct. After the declaration of war against England in 1812, a citizen of the United States residing in England, before any knowledge of the war, shipped merchandise for the United States which, having been captured on the voyage, was condemned as prize. The supreme court said: "Although he cannot be considered as enemy, in the strict sense of the word, yet he is deemed such with reference to the seizure of so much of his property, concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy, although not criminally so unless he engages in acts of hostility." The Venus, 8 Cranch [12 U. S.] 280. If, on receiving information of the war, he had returned to the United

[1] [Not previously reported.]

States, leaving in England merchandise bought by him before the war, and it had afterwards been shipped for transmission to him, it would, if captured on the voyage, have been confiscable as English property. This appears from the Case of Escott, 1 Bos. & P. 349, 350, in the note; 1 C. Rob. Adm. 203; 8 Durn. & E. [8 Term R.] 557; 16 Johns. 459, 460; The Lady Jane, 1 C. Rob. Adm. 202; 8 Durn. & E. [8 Term R.] 557. Those predatory maritime hostilities which the law of war sanctions could not be prosecuted with effect if this rule were not applied with inexorable rigor.

It has been thus applied, with regret, in cases of the temporary hostile occupation of places by an invading force and in other cases of hardship, where the intentions of the parties were such as might have entitled them to indulgence. During the war of our Independence, in the course of the hostilities between France and England, some of the British West India possessions, including Grenada, were captured by the French, and held by them under temporary subjection. The hope constantly entertained by the British public and by the islanders, who were "still British in principle and affection, and many of them by actual residence," was that these islands would soon revert to the British dominion. The previous British monopoly of their trade, under the restrictive colonial system, had made them dependent upon Great Britain for supplies of absolute necessity. The French partiality for their own islands induced them to withhold such supplies. In this necessitous condition of the sufferers, the question stated in an English prize court was "whether it was so unlawful for a British subject to send supplies to the British plantations in the Grenada Islands, whilst under the misfortune of a temporary subjection to the French, as that a confiscation of the supplies so sent should be the just and legal consequence of his misconduct." An intended supply of provisions owned in and shipped from Ireland, having been captured on the voyage, this question was answered in the affirmative. The British privy council affirmed, on appeal, a sentence confiscating the cargo as constructively French property, notwithstanding its actual Irish ownership. The Bella Guidita, 1 C. Rob. Adm. 207-209; Id. 210, note; 8 Durn. & E. [8 Term R.] 559; 16 Johns. 460. See [U. S. v. Rice] 4 Wheat. [17 U. S.] 254; U. S. v. Hayward [Case No. 15,336]; Fleming v. Page, 9 How. [50 U. S.] 615; 1 Dod. 451. The result would, of course, have been the same if the cargo had, when shipped, been owned by the parties in Grenada whose wants were to have been supplied, and this though they had, in affection, been the most loyal subjects of the British crown. The Hoop, 1 C. Rob. Adm. 98; The Lady Jane, Id. 202. If during an organized hostile contest like the present, against an established government, rules of decision different from those which have been stated prevailed in the prize courts of such a government, it could not effectively prosecute maritime hostilities to suppress rebellion or insurrection. The question is, whether any different rules of public law determine the question of confiscability during such a contest.

In this contest, the purpose of the revolted Confederates is to establish their independence of the constitutional Union, and the purpose of the United States to maintain this Union inviolate. The states which compose the constitutional Union are not, with reference to it, either foreign or independent states. The several states are, it is true, independent of one another. They are also independent of the government of the United States, except for such purposes as the constitution specifies. But, for all the specific purposes for which it was adopted, the states are, with reference to the United States, dependent and subordinate, and not foreign, states. In the constitution, the word "foreign," occurring in five clauses of the original instrument, and once in the amendments, is always used in such a sense as to exclude its applicability to a state of the Union, or to anything appertaining to one. The states, therefore, though for some purposes foreign to one another, are for all national purposes embraced in the constitution united under a government which is both independent and supreme [Fletcher v. Peck] 6 Cranch [10 U. S.] 136; [Cohens v. Virginia] 6 Wheat. [19 U. S.] 381; [English v. Foxall] 2 Pet. [27 U. S.] 590; [State of Rhode Island v. State of Massachusetts] 12 Pet. [37 U. S.] 720; [Ableman v. Booth] 21 How. [62 U. S.] 517.

The contest is thus an internal war, as distinguished from one of those hostile contests between established and mutually recognized governments which are called foreign wars. The several acts which, in the respective conventions of the revolted states, instituted the revolutionary movement, have been called "ordinances of secession." The states in which these ordinances of attempted secession were promulgated have also been called "seceded states." These phrases might mislead if the revolutionary character of the movement called "secession" were excluded from its definition. The phrase "a seceded state" might then imply that the attempted secession had been consummated, either in fact or in law. A careless use of the phrase "right of revolution" has often confounded its meaning and that of the phrase "power of revolution." A revolution must have been consummated as an act of power before the question of its rightfulness can be judicially considered. Therefore, the result alone of this intestine war is to determine whether the power exists. Its existence or nonexistence appears to be the sole question in the contest. Even governments which are not parties in such a contest cannot, without violating rules of public law, recognize the existence of a right of revolution in any case

in which its assertion has not already been sustained by a sufficient power to vindicate and establish it effectively. [Luther v. Borden] 7 How. [48 U. S.] 1. If the authority of an established government has been suspended in a part of its territory by insurgents, who have temporarily substituted a revolutionary government in it, other governments which are not parties to the contest cannot, without a breach of international decorum, declare precipitately that the case is that of civil war, as distinguished from rebellion or unorganized war. But if civil war, in truth, is its legal character, such other governments may lawfully treat the revolted insurgents, not as mere pirates or outlaws, but as entitled in the war to the same immunities as ordinary belligerents in a foreign war. This was done by the government of the United States in the case of the revolted Spanish American colonists, when the proper time for deciding upon it arrived. But, in cases of revolutionary civil war, governments not parties to the contest cannot, without violating the rules of public law, institute conventional or diplomatic or other friendly relations with revolutionary governments until their permanence has been established, either through their complete belligerent success, or through the old government's acquiescence or continued inaction or hopeless belligerent feebleness. Under this head of diplomacy, many complicated questions between the representatives of superseded powers and foreign governments have arisen. But such disputable questions do not arise in judicial tribunals of the former governments. Neither the power nor the right of revolt against a government can be asserted in its own courts. In England, the didactic essays and forensic arguments in support of the revolution of 1688 have been based upon its consummation as well as upon its asserted justice. The judicial opinions in support of it were, as its date, founded entirely upon its consummation. The technical reasoning on which they rested was, at first if not at last, quite as refined as it was practical. A criterion of the consummation of a revolution effected by the forcible deposition of an English king had been that the courts of law within the realm were no longer held in his name. The death of a king had, under the statute (1 Edw. VI. c. 7), discontinued all pending proceedings in these courts (7 Coke, 29, 30). His deposition by force had, when consummated, the same consequence in this respect as his death. Y. B. 10 Edw. IV. fol. 13a; 49 Hen. VI. pl. 1; 1 Bl. Comm. 249. Records in the Fœdera show that a reigning king, when he crossed the sea, had usually deputed a viceroy to administer the government of England until his return; and a record in Rastall, 544b, pl. 8 (see Skin. 271) shows that when this was omitted the king's absence from the realm had, in the discontinuance of process, the same effect as his death. When James II., in December, 1688, crossed the sea without making any delegation of an authority to administer the government in his absence, the argument of the supporters of the revolution was that, as the courts of justice could not be lawfully held, he had abdicated the government, and that the throne was therefore vacant when the new king and queen afterwards accepted the crown. A former crown lawyer was afterwards removed by the new government from his office for questioning the soundness of this argument, and refusing to carry it out in one of its practical consequences. 12 State Tr. 1269, 1270. It received the sanction of judicial opinions, and was confirmed by declaratory legislation. Skin. 271; 3 Mod. 252, 253; St. 1 W. & M. c. 4; St. 2 W. & M. c. 1; 3 Lev. 283; 2 Vent. 185, 193, 197. In the next century, our declaration of independence and the belligerent success of its revolutionary movement established the transformation of British colonies into sovereign states. Our own judicial tribunals, of course, dated this change of government from the time at which it was proclaimed. But British tribunals do not recognize it as having occurred until the subsequent pacification.

In 1794, in an English court, composed of most eminent judges appointed by a special commission, a leading counsel having observed "that a people had a right to alter their government," the court said: "That proposition, under certain circumstances, may be true; but it ought not to have been introduced into a court of justice bound to administer the law of the existing government and to suffer no innovation upon it." 24 State Tr. 1371. The supreme court of the United States have often said, in effect, that the consideration of political questions belongs in the first instance to other departments of the government than the judicial. When such questions are not involved immediately in the treaty-making power, and are not affected by any provision of the constitution, or legislation of the government, they may, so far as its foreign relations are concerned, be determinable, to some extent, conformably with established rules of public law, by the president, through diplomatic intercourse or otherwise. But no question as to any political relation of the government of the constitutional Union to one of the states, can be determined by the president in any mode or for any purpose whatever. None of the departments or organs of the government can ever lawfully recognize the existence of a right in one of the states to secede from this Union independently or distinguishably from a power to consummate such a revolution by hostile force; and no question as to the existence of such a power, as distinguished from right, can be entertained in the judicial or in any executive department of the government. To which of its departments the consideration of such a question, if it should ever arise, might belong, is not the present inquiry. That secession, so called, is neither more nor less than

attempted, as distinguished from consummated, revolution has been sufficiently shown.

The foregoing remarks do not suffice to define the legal character of the contest in question. It is a civil war, as distinguished from such unorganized intestine war as occurs in the case of a mere insurrectionary rebellion. Civil war may occur where a nation without an established government is divided into opposing hostile factions, each contending for the acquisition of an exclusive administration of her government. If a simple case of this kind should occur at this day, the governments of nations not parties to the contest might regard it as peculiarly one of civil war. As between the contending factions themselves, however, neither could easily regard their hostile opponents in the contest otherwise than as mere insurgents engaged in an unorganized rebellion. Thus, in the language of Sir M. Hale, "every success of either party would subject all hostile opponents of the conqueror to the penalties of treason." A desire to prevent the frequency of such a result was the origin of the rule of law, that allegiance is due to any peaceably established government, though it may have originated in usurpation. The statute of 11 Hen. VII. c. 1 (A. D. 1494), excusing an English subject who has yielded obedience, or has even rendered military service, to a ruler who was king in fact, though not in law, was declaratory of a previous principle of judicial decision. Br. Treason, pl. 10, cites 9 Edw. IV. 12 (should be 9 Edw. IV. fol. 1, b, pl. 2); 1 Hawk. P. C. bk. 1, c. 17, §§ 10-16; Fost. Crown Law, 188, 396-403; 3 Inst. 7. It has already been stated that a king, in whose name justice was administered in the courts of law, was usually regarded as in actual possession of the government. Civil war of another kind occurs where an organized hostile faction is contending against an established government whose laws are still administered in all parts of its territory, except places in the actual military or naval occupation of insurgents or their adherents. In such a case, the question has been whether a place in the actual military occupation of the revolutionary faction, or of its adherents, may, under the law of war, be treated by that government as if the contest was a foreign war, and the place occupied by public enemies. In the case of a maritime blockade of such a place, the affirmative of this question was decided in England in the year 1836. It had previously been so decided by the supreme tribunal of marine at Lisbon. 3 Scott, 201; 2 Bing. N. C. 781.

In the opinion of Grotius, Demosthenes had, in the case of The Thracian Chersonese, corectly stated the rule of public law to be that, wherever judicial remedies are not enforceable by a government against its opponents, the proper mode of restoring its authority is war. Gro. De Jure B. § 23. The opinion of Grotius has given to this case, in which the views of Demosthenes prevailed at Athens, the force of a modern precedent. The Chersonese was a dependency of Athens when other parts of Thrace were under the dominion of Macedonia. The city of Cardia, in the Chersonese, resisted the Athenian authority. Deiopeithes, the Athenian commander in the Chersonese, was prevented from reducing the Cardians to submission through the interference of Philip of Macedon, then professedly at peace with Athens, who sent a military force to their assistance. Deiopeithes, considering this measure an act of hostility on the part of Philip, at once, without waiting for instructions from Athens, invaded and ravaged parts of Macedonian Thrace. Philip complained to the Athenians of this conduct of Deiopeithes. Demosthenes, in sustaining it, avoided assuming a defensive position as to the previously intended subjugation, by Deiopeithes, of the Cardians, but incidentally justified it upon reasons which would have sanctioned the prosecution of hostilities against them on the same footing as if the war had been, as to them, a foreign one. Dismissing from consideration the charges against persons whom the judicial administration of the laws could reach, and who might at any time be judicially prosecuted, he contrasted their case with that of those whom the laws could not thus reach, saying that attempts to enforce like remedies against them would only disorder and confuse the administration of the public affairs. "Against those whom the laws cannot reach," said he, "we must proceed as we oppose our public enemies, by levying armies, equipping and setting afloat navies, and raising contributions for the prosecution of hostilities." So an English statesman, in a parliamentary debate upon a judicial question, said, in the year 1696: "You must provide for the government, and when you cannot do it by course of law, then armies must do it when the courts are shut." Speech of Harley, in Fenwick's Case, 13 State Tr. 706.

This doctrine is of obvious applicability to civil war of a third kind, which occurs where the exercise of an established government's jurisdiction has been revolutionarily suspended in one or more territorial districts, whose willing or unwilling submission to the revolutionary rule prevents the execution of the suspended government's laws in them, except at points occupied by its military or naval forces. The present contest exemplifies a civil war of this kind. It was, also, with specific differences, exemplified in the respective contest which resulted in the independence of the United Netherlands and of the United States.

The particular consideration of the legal character of the contest in question may be prefaced by a reference to a case in the supreme court of the United States, where, a collision having occurred between the judicial powers of the Union and of one of the

states; Judge Johnson, who concurred in the court's judgment, said: "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force, which acts upon the physical powers of man, and judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority. The former is happily unknown to our constitution, except as far as it shall be sanctioned by the latter. But, let the latter be obstructed in its progress by an opposition which it cannot overcome or put by, and the resort must be to the former, or government is no more." [Martin v. Hunter] 1 Wheat. [14 U. S.] 363. Within the limits of two of the states in which so-called ordinances of secession have been proclaimed, the execution of the laws of the United States has not been wholly suppressed. They are enforceable in the Western judicial district of Virginia, and perhaps in the adjacent Eastern district of Tennessee. In the other nine states which profess to have seceded, including South Carolina, those laws are not at present enforceable any where.

The constitution of the United States prohibits the enactment by congress of a bill of attainder, and secures in all criminal prosecutions to the accused the right to a speedy public trial by jury of the state and district wherein the crime shall have been committed, which district must have been previously ascertained by law. Therefore, if a treasonable or other breach of allegiance is committed within the limits of one of these nine states, it is not at present punishable in any court of the United States. This was practically shown in a recent case. U. S. v. Greiner [Case No. 15,262]. War is, consequently the only means of self-redress to which the United States can, in such a case, resort for the restoration of the constitutional authority of their government. The rule of the common law is that, when the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and the hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land. The converse is also regularly true; so that, when the courts of a government are open, it is ordinarily a time of peace. But though the courts be open, if they are so obstructed and overawed that the laws cannot be peaceably enforced, there might, perhaps, be cases in which this converse application of the rule would not be admitted. 1 Knapp, 346, 360, 361; 1 Hale, P. C. 347; Co. Litt. 249b.

The present case is one in which the courts are in the strongest sense closed. That such a war as the present should be restricted in the modes of its prosecution within limits more narrow than foreign wars, would frustrate its purpose, and place the former established government on an unequal footing with its hostile opponents. The doubt heretofore suggested has been whether the former government has not, in such a contest, greater belligerent privileges than in a foreign war. By a treaty between England and the States General, their merchant vessels might, when England was at war, carry her enemies' goods without their being liable to capture. In the war of American Independence, it was decided in an English prize court that this treaty did not exempt the ships and goods of rebellious Americans, carried in Dutch merchant vessels, from confiscability. The Aletta, cited 1 Hay & M. 13.[2]

[2] During the civil war between the French republic and the revolted negroes of St. Domingo, the French having been driven out of possession of the principal part of the island, their government prohibited all maritime communication with places on its coast occupied by the rebels, under the penalty of confiscation of vessels and cargoes, and afterwards imposed the like penalty in all cases in which vessels going to or from such places might be captured at anchor, or under sail at a distance of less than two leagues from the coast. Merchant vessels of the United States trading with such places, having been captured at sea at distances, in some cases, of less, and, in others, of more, than two leagues from the coast, were alike condemned in French prize courts. The judges of the supreme court of the United States, agreed in opinion that the French government's ancient sovereignty over the colony, must be considered as still subsisting. That France might exercise belligerent rights in the contest, in addition to those of her sovereignty, was asserted by Chief Justice Marshall, and denied by no other judge. A majority of the judges ultimately differed from him in opinion upon the question whether, if the above-mentioned acts of the French government were to be considered, not as belligerent, but as mere municipal, regulations, the proprietorship of the former owners of the vessels and cargoes had been divested by the judgments of confiscation, where the captures had been made more than two leagues from the coast. The majority of the court was ultimately of opinion that, whatever might have been in this respect the legal character of the regulations, the proprietorship had been changed by the judgments in these cases, as well as in those in which the captures had been within the two leagues. [Rose v. Himely] 4 Cranch [8 U. S.] 513; [Rose v. Himely], Id. 272; [Hudson v. Guestier] Id. 293; [Hudson v. Guestier] 6 Cranch [10 U. S.] 281, 285. The supreme court of Pennsylvania was afterwards of opinion that the property had been changed in both cases. Chief Justice Tilghman considered the acts of the French republic as not simple municipal regulations, but municipal regulations "connected with a state of war with revolted subjects," in enforcing which "the republic might avail itself of all rights which are given by the law of nations to a government thus circumstanced." He said: "The government of the United States has taken no part between the contending parties. It has never acknowledged the independence of the revolters. We are not at liberty, therefore, to consider the island in any other light than as part of the dominions of the French republic. But, supposing it to be so, the republic is possessed of belligerent rights, which may be exercised against neutral nations who carry on commerce with the revolters. This is not denied; but it is said that the words of the arrêté prove that there was no intention to exercise such rights. This argument is not conclusive. Although the French government, from motives of policy,

A recurrence to the origin of the jurisdiction exercised in prize cases will facilitate the application of some other authorities which it will be necessary to consider. All suits arising from hostile maritime captures are called prize cases. In every such case, the captor's own government should punish his acts when illegal, and vindicate them when lawful. His government may become answerable for their illegality to the governments of injured persons. Diplomatic negotiations and serious international controversies may result, as often has occurred. For these reasons, the causes, modes, and lawfulness of such captures, and all subsequent and incidental questions are investigated in peculiar tribunals of the captor's government, called under some governments marine courts, but in most countries prize courts. Their jurisdiction, except as liable to revision or appeal, is exclusive of that of all other courts of their own respective governments, and is altogether exclusive of that of tribunals of other governments. 2 Doug. 594; 2 Brown, Parl. Cas. 423; [Williams v. Armroyd] 7 Cranch [11 U. S.] 432; [The Adventure] 8 Cranch [12 U. S.] 226; [Crondson v. Leonard] 4 Cranch [8 U. S.] 434; [The Mary] 9 Cranch [13 U. S.] 142, 145. The cognizance of prize cases in the courts of the United States is not, as in the English courts of admiralty, a delegated or dependent authority, but is an inherent part of their general admiralty jurisdiction. Their prize law is, however, administered conformably to the practice established in England. The doctrines on both sides of the Atlantic are likewise the same, except in cases in which English prize courts have, in the opinion of our courts, mistaken or misapplied the rules of public law. In former wars, few such cases have occurred. Though prize courts are courts of the law of nations, this law is not always understood alike under all governments. But, as the supreme court have said, the United States having at one time formed a component part of the British empire, English prize law was our prize law, and when we separated continued to be our prize law, so far as it was adapted to our circumstances and was not varied by our legislation. [Thirty Hogsheads of Sugar v. Boyle] 9 Cranch [13 U. S.] 198; [The Venus] 8 Cranch [12 U. S.] 284.

Under the English, as under other European governments, the king's council, in his name, anciently heard, in times of general or partial war, those cases in which his own subjects or alleged nonbelligerents complained of naval captors on account of alleged wrongful spoliation, illegal seizures, or other injuries. The royal council entertained, also, petitions of the captors for the condemnation of their prizes. The exercise of the latter jurisdiction accelerated the termination of disputes between captors on the one side and their fellow subjects or professed neutrals on the other; and, in the absence of any known dispute, quieted the titles of the captors. When the captures had incontestably been lawful, the condemnation was useful to the captor by extinguishing the right of postliminy, and thus converting his military title into a civil proprietary right. Subsequently, the council of state, retaining an appellate and revisory jurisdiction, delegated an original cognizance of prize cases to courts of admiralty, whose judges were lieutenants of the admiral. The probability that this jurisdiction of the admiral and his deputies had been to some extent exercised before the year 1297 will appear by comparing two reports of a case in that year of a vessel captured off the English coast, which are in Selden's note 18, to Fortescue, c. 32; and in Fritzherbert, Avowrie, pl. 192. Two cases mentioned in the Fœdera,—one in a document of 19th of July, 1343; the other, which was the case of The St. Salvador, in a document of 29th of April, 1357,—show that before the latter date the admiralty jurisdiction, in prize cases was fully established in subordination to that of the council, and that its exercise was regulated by a recognized international maritime law. Lord Mansfield has described the mode in which the jurisdiction was afterwards exercised in every war under a royal commission to the admiral, and a delegation by him authorizing the court of admiralty, and its lieutenant and judge and his surrogates, to hear and determine all cases of capture, prize, and reprisal of ships and goods, according to the course of the admiralty and the law of nations. 2 Doug. 614. Whether, without any such special commission, the jurisdiction in prize cases would have been to any extent exercisable by that court, under the general commission to the admiral and his ordinary delegation to the judge, is a question which the mode of organization of admiralty courts in the United States renders here unimportant. In whatever mode the jurisdiction may have been delegated in England to the admiral, and through him to his court, the royal council did not relinquish their optional right of exercising it themselves in the first instance, as before. Besides their appellate and an occasional supervisory jurisdiction, they still sometimes took original cognizance of those prize cases which involved important affairs

might not choose to make mention of war, yet it does not follow that it might not avail itself of all rights to which, by the law of nations, it was entitled under the existing circumstances, under the form of a law made for the regulation of the trade and commerce of one of its colonies. This was the course pursued by Great Britain in the Revolutionary War with the United States; and it has not been supposed that she violated the law of nations when she captured and confiscated the vessels of neutrals who carried on trade with the United States, in whatever part of the ocean they were found by her ships of war and cruisers." 3 Bin. 252, 253. The act of the British government to which reference was here made, will be mentioned hereafter in the text.

of state, particularly such as might complicate the diplomatic relations of the government. The council were partially relieved of this burden by two statutes,—one of the year 1353 (St. 27 Edw. III. 13); the other of 1452 (31 Hen. VI. c. 4),—which were interpreted in 1484 as together giving to the chancellor an original cognizance of complaints of maritime spoliations at the suit of either subjects or foreigners not hostile, and authorizing him to decide such cases with or without the assistance of any of the judges. But these acts did not exclude the council from a concurrent original jurisdiction. Letter in the Fœdera of 19th July, 1343, to the king of Aragon, cited above; Y. B., 2 Rich. III. fol. 2, pl. 4; 4 Inst. 152; 2 Bulst. 27; 3 Swanst. 603–606, 662, 664. See, also, 2 Vern. 592; 1 Ves. Sr. 98; 1 Eden, 130,—which three cases were, however, within the general equitable jurisdiction of the chancellor.

The rule of public law requiring a judgment of condemnation by a marine or prize court, as indispensable to the vesting of an ownership of confiscable hostile property in maritime captors, or in their government, has been established by the consent of nations, upon sound reasons of common interest. At what precise date this rule acquired its present absolute character is, perhaps, uncertain. To recur to the earliest indications of its recognition is not necessary. We find its observance prescribed and its reason explained in an English order in council proclaimed on 30th July, 1426, which is in the Fœdera, in the words, "that no goods captured in any manner whatever shall be distributed, disposed of or sold, at sea, or in any port or harbor, at which they may arrive, but shall be kept, without breaking of bulk, until the royal council or the chancellor of England, the admiral of England, or his deputy general for the time being, shall be certified and duly informed of the capture, that it may be known whether the captured goods are the property of enemies or friends."

This inquiry, whether the subject of capture is enemies' property, is always, in technical form, the question of confiscability in a prize court. We will see, presently, that, in the phraseology of prize law, the designation "enemies' property" has a most extensive technical meaning. Its applicability, in the language of prize courts, and in that of treaties or statutes, may sometimes be very different. Before considering the more enlarged meaning of the phrase, we may remark that in a foreign war a prize court never entertain the claim of a person residing in a hostile belligerent state as an alleged owner asking restitution of his captured property unless for some special reason which deprives it of a hostile character. Such an exemption from confiscability as is allowed in the case of a cartel, or of a licensed or privileged vessel or cargo, prevents the claimant from being, in a relative sense, an enemy. Except in such peculiar cases, no claim of any citizen or subject of an enemy's country can be received; and every resident of a hostile place or country is regarded, in such a court, as a citizen or subject. His property, when libeled, at the suit of the captors or their government, is condemned, without his being heard, as that of an enemy. Nothing remains to such a former proprietor but that hostile right of postliminy, or hope of recapture, called a mere scintilla juris, which every enemy retains until either confiscation or pacification. [The Adventure] 8 Cranch [12 U. S.] 226. A pacification terminates the right of postliminy, vesting in the captors or in their government, as against their late enemies, an absolute ownership of all captured property. Such property, unless the treaty of peace provides expressly for its restoration, may be subsequently condemned ([Jecker v. Montgomery] 18 How. [59 U. S.] 110), but cannot be restored to one who was, at the time of capture, an enemy. Thus, on a question of mere proprietorship, there can be no exercise of the jurisdiction of a prize court for the benefit of a party who, in respect of the captured property, is regarded as hostile, because the capture has produced, as between the belligerents, a complete divestiture of his former property. [The Adventure] 8 Cranch [12 U. S.] 226; [The Anne] 3 Wheat. [16 U. S.] 446; 6 C. Rob. Adm. 138; 1 Dod. 244, 245, 451.

In the technical, more extended, meaning of the phrase "enemies' property," as understood in prize courts, it includes everything captured at sea which is confiscable on account of its hostile character, or of its proprietor's absolute or only relative hostility. Sir William Scott said that property of enemies was "held, in construction and practice, to embrace all property liable to be condemned as prize"; adding that, " by fiction, or rather by intendment of law, all property condemned is the property of enemies,—that is, of persons so to be considered in the particular transaction." 5 C. Rob. Adm. 176. This phraseology needs no explanation where a subject of maritime capture is contraband of war. It is hostile, whatever may be its actual ownership. In language borrowed in part from Lord Greenville, "If I have wrested any enemy's sword from his hands, the bystander who furnishes him with a fresh weapon" is more than constructively hostile to me. Chief Justice Marshall exemplified the doctrine by the case of a search resisted (see 5 C. Rob. Adm. 176, and, in the Fœdera, the letter of 19th July, 1343, above cited) or of an attempt to enter a blockaded port, saying that, in such cases, "the laws of war, as exercised by belligerents authorize a condemnation as enemy's property, however clearly it may be proved that the vessel is, in truth, the vessel of a friend ([Maley v. Shattuck] 3 Cranch [7 U. S.] 488)." The latter example is one of property only constructively hostile.

Judge Story, in delivering an opinion of the

supreme court, said: "By the general law of prize, property engaged in an illegal intercourse with the enemy is deemed enemy property. It is of no consequence whether it belong to an ally or to a citizen. The illegal traffic stamps it with the hostile character." [The Sally] 8 Cranch [12 U. S.] 384. See [Jecker v. Montgomery] 18 How. [59 U. S.] 114. Judge Washington, in the circuit court, said that in England, almost as far back as the decisions of the prize court could be traced, the property of a subject engaged in trading with enemies had been considered as enemies' property, and the owner pro hac vice as an enemy. The Tulip [Case No. 14,234]. This had previously been the language of Sir William Scott (1 C. Rob. Adm. 219, 220), and nearly the same language was afterwards used again by Judge Washington, in the supreme court in the case of The Venus, already cited ([The Venus], 8 Cranch [12 U. S.] 253). That and other decisions which have been mentioned show that, in the case of persons owing allegiance to the government in whose prize court their captured property is prosecuted as hostile, the applicability of the designation, "enemies' property," may be independent of the question whether they are traitors to their government. A learned admiralty judge said that the same conveyance of intelligence to enemies which would hang a spy would condemn a vessel. Stew. Vice Adm. 494. Here he had in view the law martial, rather than the law of treason. But, in the United States as in England, persons owing allegiance to the government are guilty of treason when they furnish or attempt to furnish enemies of the government with intelligence or supplies which may be useful in war. Such persons, however, by the law of England, though guilty of a misdemeanor, commit an offense of no higher grade when they engage in commercial intercourse of any kind with enemies. 2 Rolle, Abr. 173, "Guerre," L, pl. 3; 16 Vin. Abr. 598, 599; 12 State Tr. 789, 799, 809, 811; Lord Hardwicke's note, mentioned in 1 Durn. & E. [1 Term R.] 85; 8 Durn. & E. [8 Term R.] 550; 25 State Tr. 1426. And see The Elizabeth of Ostend, 1 C. Rob. Adm. 202, 203. During the last war with England, three acts of congress, of which one is expired and the others repealed, were passed in order to make specific offenses under this head indictable in courts of the United States. 2 Stat. 778; 3 Stat. 84, 195, 226. Judge Washington remarked, with reference to the jurisdiction of English tribunals, that a prize court would treat the property of a subject engaged in maritime trade of either kind as the property of an enemy, but "the common law courts would treat him personally as a traitor, or as guilty of a misdemeanor, as the case might turn out." The Tulip [supra].

We have seen that the local residence of a party may, in a case in which he would otherwise be thus guilty of a mere misdemeanor, exempt him altogether from legal criminality. See 6 C. Rob. Adm. 408; [The Venus] 8 Cranch [12 U. S.] 280. But in this, as in the two former cases, his property engaged in the trade is, in a prize court, confiscable as enemy's. During a civil war against an established government, the phrase "enemies' property," as understood in prize courts of this government, includes all property captured at sea which is actually or constructively hostile. During the civil war in Portugal between the queen and Don Miguel, she established a blockade of ports along the coast of her own kingdom. In a case already cited, the supreme tribunal of marine, at Lisbon, having condemned as prize a vessel of English ownership which had been captured for attempting to break the blockade and supply Don Miguel's adherents with warlike stores, it was held by a British court, in the year 1836, that the judgment of the Portuguese prize court, whether on the ground of an attempted breach of blockade, or on that of an attempted supply of contraband goods, was conclusive proof that the vessel was owned by enemies of the queen of Portugal, though Portugal was not then at war with any foreign government. 3 Scott, 202, 203, 228; 2 Bing. N. C. 781–783, 798.

Whether in the phrase "public enemies," used in this libel, the word "public," might not alter the effect otherwise attributable to the word "enemies," is a question which need not be considered, because the words "insurgents" and "traitors" are also used. But I doubt whether the point would have been important if these words had been omitted. In the case of The Adeline, 9 Cranch [13 U. S.] 283, 286, property captured in a public foreign war was libeled as enemies', when the case, as to part of it, was one of salvage only. The court thought there was no sufficient objection to a decree for salvage as to this part, and that if the objection could have been sustained it would have resulted only in a remand of the cause that the libel might be amended. The present libel, as it stands, must have the same effect as if it had simply averred that the property in question was lawful prize. This, without any special allegations, would have sufficed. 1 Dod. 82, 83; 2 Wheat. Append. [15 U. S.] 19. In the case of The Adeline, the court said that no proceedings can be more unlike than those in the courts of common law and in the admiralty, and that this is especially true in prize causes. 9 Cranch. [13 U. S.] 284.

We may here apply to prize cases arising upon maritime captures during a civil war the remark which, with a different application, has been already made and explained, that phraseological distinctions in the common law as to treason do not regulate or control the proceedings in this court against the captured property, or affect the question of its confiscability. Here two cases are to be considered,—the first that of property actually hostile, from its character or that of its own-

ers; and the second, that of property constructively so from the residence of its owner at a place in hostile occupation.

The first case is, I suppose, undisputed where the property is from its character directly hostile, as where it is contraband of war. There is quite as little reason to dispute the confiscability of the property of persons engaged in traitorous hostilities, or their adherents, though it be not contraband of war. Such property is confiscable even in the case of a mere insurrectionary rebellion or unorganized war. In the distinctions of the English law, between confiscations for certain specific treasons and for mere felonies, we may perceive the recognition of a principle from which the rule may be deduced. In the Bishop of Durham's Case (A. D. 1327), the forfeiture, in cases of treason, is called forfeiture of war (1 Hale, P. C. 255, 256), and Sir E. Coke mentions a decision of Fineux, C. J., in the reign of Henry VII., that if the chief justice of the king's bench, who is the supreme coroner of all England, in person, upon the view of the body of one killed in open rebellion, records it and returns the record to his own court, the lands and goods of the deceased traitor shall be forfeited, though he never was attainted, 4 Coke, 57b; 4 Bl. Comm. 382.[3] But our present concern is with authorities on cases of maritime capture. Judge Dunlop has, in a recent case, informed us that, on examination of the writers on public law, he does not find any difference as to belligerent rights in civil or foreign war. One of the purposes of a French ordinance of 8th August, 1582, was to ascertain the sense in which the phrase "enemies of the king" had been used in the articles on prize jurisdiction in previous admiralty ordinances. The prior ordinances of 1373 (usually cited as of the year 1400. See, as to its date, Pard. Coll. IV. 224), of 1517, and of 1543 may be found unabridged in Fontanon's collection. A comparison of them with the ordinance of 1582 would show that the phrase had been intended to include both rebels or enemies in civil wars, and hostile opponents against whom reprisals or partial war had been authorized. In the Black Book of the English admiralty, the articles under the heads "C" and "D" exhibit so many instances of attempts to usurp jurisdiction that I would not cite any of them if they had not been frequently quoted by admiralty judges in the United States and in England as of authority. In this book articles D, 1–18, inclusive, are those admiralty usages which an inquisition of the year 1375 reported as proper for future observance. Articles D, 19–81, are precepts for admiralty inquisitions without the returns. Those numbered D, 19–40, were probably issued between the years 1375 and 1378, and the subsequent articles, to D, 81, probably not later than 1389. Article D, 20, directs inquiry to be made concerning all those who victual or refresh any of the enemies of the king, or the rebels of Wales, with any manner of victuals, artillery, armor, corn, salt, iron, steel, or any other thing by which they are helped or strengthened. Article D, 31, directs inquiry to be made concerning all those who receive and keep in their ships any goods or chattels of any man attainted for treason, without rendering the same to the king, or to the admiral or his lieutenant, for the king. And article D, 58, directs inquiry to be made of all who sustain or receive in their ships any men outlawed or banished, or their goods or chattels. At the time of the Duke of Monmouth's rebellion, in 1685, the goods of rebels which were captured at sea appear to have been condemned in England as prize, in the court of admiralty. Hay & M. 47, 48. This occurred, likewise, at the rebellion of 1715. A case of The Duke de Vendome, determined in 1716, was cited by Sir George Hay. Id. 47. The dispute was not as to the confiscability of the captured property, but whether it belonged, when condemned, to the king or to the admiral. Other prize cases of the same kind were similarly adjudged after the rebellion of 1745, when there was no act of parliament on the subject, though there was legislation to facilitate prosecutions for treason in courts of common-law jurisdiction. Id. 47. See St. 19 Geo. II. c. 9.

It remains to consider cases of property condemned as hostile merely from the residence of its owner at a place or in a district which is in hostile occupation during civil war. Cases of this kind occurred in the civil wars already mentioned between Spain and the United Netherlands, and between Eng-

[3] In this reign, the jurisdiction of the court of the constable and marshal of England was still exercisable. The extent of this jurisdiction, which originated, like that of the admiral's court, in a royal delegation of authority, was defined in a declaratory statute of the year 1389. This act was intended to prevent incroachments of the constable's court beyond the bounds of its legitimate former jurisdiction. The case of Haulce v. Rosque (about A. D. 1393), mentioned in the note to 2 Knapp, 150, shows that this jurisdiction included controversies arising from the capture of booty on land in a foreign war. The statute indicates that the jurisdiction was also exercisable during war within the realm. The statute declared "the power and jurisdiction of the said constable in the form that followeth: To the constable it pertaineth to have cognizance of contracts touching deeds of arms and of war out of the realm, and also of things that touch war within the realm, which cannot be determined nor discussed by the common law with other usages and customs to the same matters pertaining, which other constables heretofore have duly and reasonably used in their time." St. 13 Rich. II. c. 2. Unless the application of the latter words must be limited to cases in which the realm was invaded by foreign enemies, which perhaps cannot be demonstrated, the language bears upon the present question, because the admiral cannot then have had a less extensive jurisdiction as to things "done upon the sea," arising from "war within the realm." His jurisdiction, whatever may have been its legitimate extent, did not afterwards, like the constable's, became obsolete. The references in this note might, possibly, through a more extended research, be so compared with other discoveries, as to elucidate the point in question.

land and the United States. There was this difference between the two wars. The United States, from the commencement of hostilities, even before the declaration of independence, until the termination of the war, considered all trade or intercourse with England unlawful, and treated it as intercourse with enemies. See 16 Johns. 473, 474. The Netherlands, in the outset of their contest with Spain, prohibited their subjects from furnishing her with warlike supplies, but until 4th April, 1586, did not prohibit commercial intercourse of all kinds. An absolute prohibition of all trade with Spaniards was contained in an edict of this date, followed, on the 18th of July, 1586, by one of like effect. But by another edict of the 4th of August, 1586, the effect of the two former edicts was restrained so as only to forbid trading with such places in Belgic territory as were in Spanish possession. These differences did not affect differently the course of Spain and England as to captured property of residents in the revolted provinces. The preamble of the Dutch edict of the 4th of April, 1586, stated that the kings of Spain had already confiscated Belgic vessels, both in Spain and Portugal, and that there was reason to expect other naval captures and confiscation. In the reference to the confiscations which had already occurred the Dutch word rendered in the translation furnished me by the word "confiscate," is in Bynkershoek, "publicasse," which Mr. Duponceau translates condemned and sold. Bynkershoek must have understood the confiscations as having been judicial; and he mentions them without questioning their propriety. Bor. II. 703, Bynk.; de Reb. Bel., c. 3; Dup. p. 12; 3 Hall, Law J.

In England, soon after the commencement of the hostilities on this continent which preceded our declaration of independence, a statute (16 Geo. III. c. 5) was passed which, in its first and second sections, was in the form of a declaratory law. In this particular, the effect of its enactments has been misunderstood by some of those who have cited it. The first section, after stating that many persons in the colonies had set themselves in open rebellion and defiance to the authority of the government of England to which they were subject, and had assembled an armed force, engaged the king's troops, and attacked his forts, had usurped the powers of government, and prohibited all trade and commerce with his dominions, for the more speedy and effectual suppression of their designs, and preventing any supplies or assistance from "being sent thither during the continuance of the said rebellions and treasonable commotions," declared and enacted that all manner of trade and commerce was and should be prohibited with the colonies, naming them, and that all ships and vessels of or belonging to their inhabitants, with their cargoes, etc., trading in, or going to, or coming from trading in, any port or place of the said colonies, should be forfeited, as if they were the ships and effects of open enemies, and should be so adjudged in all courts of admiralty and other courts. The latter provision was a mere declaratory continuance of the restrictions and penalties which had previously secured the British monopoly of the colonial trade. The declaratory form of the whole section shows that the ships of all inhabitants of the colonies and their cargoes would, in the opinion of the British parliament, have been confiscable without any legislation upon the subject. See the opinion of Tilghman, C. J., quoted in a former note. The second section, which was also in its form declaratory, provided for a limited exemption of vessels trading for specified purposes, under British licenses, from confiscability. The remaining sections were not declaratory. They were, in part, intended to remove difficulties as to the rights of captors, by placing their prizes on the footing on which other statutes had placed prizes captured in foreign wars. In the reported decisions of the English admiralty court during this war, the successive judges exhibited each a strong desire to find reasons for exempting from confiscation the captured property of persons residing in the United States who adhered to the British cause. In the case of a foreign war, an English subject leaving the enemy's country at the commencement of hostilities, and bringing with him property owned by him before the war, had, in prior cases, been indulged by a limited exemption of the property thus brought with him from confiscability. But this exemption had not been extended to goods brought with him for trading purposes, or even to goods which would otherwise have been exempt if they came in another vessel. The captured property of the American loyalists who were on their way to England was exempted. Sir George Hay was inclined to go farther and exempt the captured property in all cases, unless its owners were proved to have been concerned in some act of rebellion. Hay & M. 46. But he never made any such decision, and both he and Sir James Marriott, who succeeded him, condemned all the property of loyal inhabitants of the United States except that which they brought over with them in the same vessel in which they came. Id. 212. And see pages 4, 78, 80, 94, 95, 83, 216.

Upon the reasons which have been stated, and authorities reviewed, this vessel should be condemned as prize. But it is objected that congress had not legislated upon the existing war; that the president alone had directed and regulated the prosecution of hostilities; and that, when this vessel was captured, he had not ordered any other captures than for breach of blockade. These objections are insufficient. Any nation may be involved in a war which has not been declared, and as to which her government

has not legislated. Judges of English prize courts have agreed with Bynkershoek in the opinion, which publicists no longer dispute, that the legal consequences of an actual war must be the same, whether it has or has not been formally declared. The only modern intimations of a contrary opinion as to a foreign war are in Stew. Vice Adm. pp. 304, 414, which I consider as overruled in 1 Dod. 247. See Hay & M. 252, 253.

In the course of the argument partial war with a foreign state seems to have been somewhat confounded with informal war. A partial war may be informal, or may be more or less, or quite, formal. But the present inquiry does not involve any distinctive doctrines of public law concerning partial war. Therefore, the cases which arose under acts of congress authorizing the limited hostilities prosecuted against France at the close of the last and commencement of the present century, may be dismissed from consideration. In 1846, when congress was in session, the United States were involved in a general war which was informally begun. The war which Mexico had for some time threatened then broke out suddenly Congress thereupon declared that, by an act of Mexico, a state of war existed between her government and the United States. If no such law had been enacted, there would, not the less, have been war with Mexico. The president must, then, as commander in chief of the army and navy, have directed its prosecution conformably to the rules of public law. This he must at all events have done, if congress had not been sitting when the Mexicans attacked our army. The case of a civil war is practically the same. The marshal of the United States, in order to keep the peace of his judicial district, and enable himself to execute the process of the courts, may arm himself and his deputies, and may also call in the aid of a warlike force. Y. B. 3 Hen. VII. pl. 1; 5 Coke, 72a; Br. Riots, pl. 2; Dall. c. 95; 8 Watts & S. 191; 5 Car. & P. 254, 282. When he cannot, by such means, keep the peace of his district, and the courts in it no longer can direct their process to him, a state of war exists. The president in such a case is required by the constitution to "take care that the laws be faithfully executed." While other officers only swear to support the constitution, his official oath, as prescribed in it, requires him "to the best of his ability" to "preserve, protect, and defend the constitution." Therefore, when hostilities actually waged against the constitution and laws assume the dimensions of a general war, he must prosecute opposing hostilities, offensive as well as defensive, upon such a proportional scale as may be necessary to re-establish, or to support and maintain, the government. But he cannot (see [Brown v. U. S.] 8 Cranch [12 U. S.] 126–129; [The Thomas Giffons] Id. 427; [The Nereide] 9 Cranch [13 U. S.] 422; Act Cong. March 3, 1799, c. 45 [1 Stat. 743]; Act Cong. March 3, 1813, c. 61 [2 Stat. 829]) make "rules concerning capture on land and water." The constitution has vested this power in congress. The president cannot prosecute hostilities otherwise than according to the directions of existing acts of congress or to the rules of public law. Without his orders an officer of the navy capturing this vessel would have performed a lawful act. Had the president forbidden her capture the officer might have been punishable for disobedience of orders, but the vessel should not for that reason be liberated by a prize court, if she was in law confiscable.

The claim is rejected.

Case No. 10,756.

The PARKHILL et al.

The MEACO.

[19 Leg. Int. 13.]

District Court, E. D. Pennsylvania. Jan. 2, 1862.

PRIZE—SEAMEN'S WAGES—AFFIDAVIT.

[1. Where, in case of civil war, a voyage has been begun before the commencement of hostilities, and the vessel is captured before the voyage is completed, and condemned as prize, mariners not hostile are entitled to be paid their wages, or an equivalent compensation, out of the proceeds of the prize property.]

[2. It appearing, on examination of the ship's papers, that the mariners had no means of knowledge of certain illegal acts done in connection with the clearance of the vessel, an affidavit of their ignorance of the objectionable acts should be received, and its truth assumed.]

Upon petitions to allow the payment of wages out of the proceeds.

CADWALADER, District Judge. The question whether wages, or an equivalent compensation for mariners, has been earned for a voyage in which a vessel has been captured, can seldom arise in a prize court. If she is restored under a proprietary claim, the question cannot be decided under the prize jurisdiction, though the wages may be recoverable in an independent proceeding in admiralty. If she is condemned, the wages are, generally, lost, either from the hostile character of the mariners personally, or from a hostile character which the employment of the vessel has imparted to them; and also in most cases, because the intended voyage has not been performed, and the freight, on which the payment of wages depends, has not been earned. In the case of a general national war between independent governments, the hostile character of the vessel or mariners must be the same, whether the voyage has been begun before or after the commencement of the war. But this is not invariably the case in a civil war. In the present war I think that it is not the case when the capture has been made before the end of a voyage which was begun before the hostile relation had arisen. In such a case, though the vessel should

be condemned, I think that wages, or an equivalent for them, should be decreed where the personal relation of the mariners has not been hostile, unless the wages have been lost by reason of the non-performance of the voyage. Where it has been substantially performed, an adherence to the apparent letter of authorities applicable to cases occurring in a national war with a foreign government, would seem not less unwise than unjust. Where the voyage has been undertaken after the commencement of hostilities, reasons of policy are the same in such a war and in a civil war; but not where the voyage has been begun previously. There may, in certain cases, be an allowance of an equivalent for freight, where freight, by name, has not been specifically earned. So, as I think, an equivalent for wages may sometimes be allowed out of a fund which would not have existed if the voyage had not, so far as the mariners are concerned, been substantially completed. Where the analogy to the case of an equivalent for freight can be maintained, the claim of wages out of the proceeds of sale of a condemned prize may, as I think, be awarded under the restrictions which are implied, if not expressed, in what has already been stated. But, in the case of the The Meaco, and, perhaps, in one or two other cases, the question arises whether there may not be demerits affecting a prize vessel, for which her master, supercargo, charterers or owners, may be civilly responsible, and on account of which the vessel may be condemned, but which may not affect such a claim for mariners' wages as might otherwise, under the above restrictions, be allowable. The question is explained by considering the specific objection which has been urged in the case of The Meaco. This vessel and her master and owners may be responsible for the mode in which she was cleared for the outward voyage, and the return voyage may be inseparable from the outward, so far as they may be thus involved in the penal consequences. But an examination of her papers indicates that the mariners had probably no means of knowledge of the objectionable act or acts. On the contrary, the form of the shipping articles, and of some other papers, indicates that the outward voyage, except as to certain arrangements of an unprecedented character made at public offices on shore, had the resemblance of an ordinary one for a port of departure in a revenue collection district of the United States before the commencement of the present troubles. The affidavit of the mariners of their ignorance of the objectionable acts, ought, therefore, to be received, and its truth assumed. This case, therefore, does not, in principle, differ from that of a claim for wages by mariners shipped, before the commencement of the present civil war, in a voyage not known by them to have been undertaken with any violation, actual or intended, of the laws of the United States, or with any hostile relation or incident. In such a case, where the voyage has been so far performed that the vessel has arrived in waters which are within the territorial maritime jurisdiction of the United States, or has reached any port so near to them that she might, in time of peace, be lawfully boarded by a vessel in the revenue collection service of their government, I think that wages, or a sum of equal amount as an equivalent for them, should be awarded out of the proceeds.

I am not aware that I am sustained in the foregoing views by any judicial precedent precisely in point; and I should think the case a very proper one for an appeal if the law officers of the United States should wish the question reconsidered. But, from the course of the successive arguments, I am induced to believe that my decision is rather in accordance with, than in opposition to their opinions.

The clerk will, therefore, according to the rules deducible from the above opinion, inquire and report from time to time the cases in which wages are, and those in which they are not allowable, to the respective petitioners, and the respective amounts to be awarded in the former cases. This order will not be considered as applicable to future claims for wages without an express direction from the court.

PARKHILL (UNITED STATES v.). See Case No. 15,994.

PARKHURST (CUNDELL v.). See Case No. 3,477.

Case No. 10,757.

PARKHURST v. KINSMAN et al.

[1 Blatchf. 488; 8 N. Y. Leg. Obs. 146; Merw. Pat. Inv. 654; 1 Fish. Pat. R. 161.] [1]

Circuit Court, S. D. New York. Oct. Term, 1849.[2]

PATENTS—ANTICIPATION—PRIORITY OF INVENTION—ESTOPPEL—JOINT OWNERSHIP—MECHANICAL SKILL AND GENIUS OF THE INVENTOR.

1. It is not enough, to defeat a patent already issued, that another conceived the possibility of effecting what the patentee accomplished.

[Cited in Johnson v. Root, Case No. 7,409; Roberts v. Dickey, Id. 11,899; Gottfried v. Phillip Best Brewing Co., Id. 5,633; Roberts v. Schreiber, 2 Fed. 864.]

2. To constitute a prior invention, the party alleged to have produced it must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form.

[Cited in White v. Allen, Case No. 17,535; Johnson v. Root, Id. 7,409; Potter v. Wilson, Id. 11,342; Ellithorp v. Robertson, Id. 4,408; Reeves v. Keystone Bridge Co., Id. 11,660; Webb v. Quintard, Id. 17,324; Roberts v. Dickey, Id. 11,899; Northwestern Fire Extinguisher Co. v. Philadelphia Fire

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission. Merw. Pat. Inv. 654, contains only a partial report.]

[2] [Affirmed in 18 How. (59 U. S.) 289.]

Extinguisher Co., Id. 10,337; Seymour v. Osborne, 11 Wall. (78 U. S.) 552.]

[Cited in Lamson v. Martin, 159 Mass. 565, 35 N. E. 81.]

3. K., owning one undivided third of a patent, of which P., the patentee, owned the rest, agreed with P. to become jointly interested with him in the business of making and selling machines under the patent, K. stipulating to devote his personal attention thereto, and the profits to be divided according to their respective interests. Afterwards, by a further agreement, K. agreed to discontinue the making of machines, as soon as he should reimburse himself for his advances, and P. was then to have the sole right to make and sell, the profits to be divided as before, and neither party to sell for less than $100 profit on each machine. In a suit in equity brought by P. for an injunction, on the ground that K. had more than reimbursed himself and was still making machines, and for an account of the profits of the machines made and sold under the agreements, K. set up that one S. was the first inventor of what was patented by P., and that P. obtained his patent surreptitiously, and with a knowledge of S.'s improvement, and while S. was engaged in perfecting his machine with due diligence. *Held*, that as the second agreement was made by K. with a full knowledge of the claim of S., and after an opportunity to ascertain all the facts in respect to its merits, K. was estopped from setting up such a defence.

4. The second agreement was not void as being in restraint of trade, or against public policy.

5. An assignment by P. of all his interest in the patent worked a dissolution of the partnership between him and K.

6. A joint interest in a patent does not make those interested partners.

7. An improvement in a burring machine, as patented, consisted of hooked teeth, cut upon rings or plates, and those so arranged upon a cylinder, that the wool or cotton, when taken up by the teeth, would be drawn into the slots between the teeth, leaving the burrs and foreign matter on the surface, to be knocked off by a beater. *Held*, that a change in the form of the teeth, from the gullet form to that of the letter V, so as to make the slots smaller at the bottom, and thus operate better on cotton, was not a substantial change in the construction, but one in degree, which naturally resulted from the working of the machine.

[Cited in Wilbur v. Beecher, Case No. 17,634.]

8. The right of an inventor does not depend upon the questions whether his machine is more or less perfect, or whether slight modifications in the arrangement of the machinery or in the finish of the parts, may or may not better accomplish the end, but upon the question whether the machinery constructed as described in the patent will or will not accomplish the end practically and usefully. Perfecting the machinery by superior skill in the mechanical arrangement and construction of the parts, is but the skill of the mechanic, not the genius of the inventor.

[Cited in Wilbur v. Beecher, Case No. 17,634.]

9. Form of the decree in the case, referring it to a master to take and state the accounts.

[This case is first reported as heard upon the application of the defendant to reduce the amount of bail for which he was held under arrest. Case No. 10,761.]

The bill in this case was filed on the 9th of February, 1847, and set forth, that the plaintiff [Stephen R. Parkhurst] was the original and first inventor of a new and useful "improvement in the machine for picking, ginning and carding wool, hemp, and cotton," and that he obtained letters patent [No. 4,023] therefor on the 1st of May, 1845 [reissued February 12, 1861, No. 1,137]; that on the 22d of May, 1845, he assigned to the defendant [Israel] Kinsman one undivided third part of the patent, in consideration for which Kinsman agreed to pay $2,000 in cash, and to give his note for $1,000 at 90 days, and to loan to the joint business not exceeding $1,000, to purchase machinery, stock, &c., which was to be repaid out of the first profits realized from sales of the machines; that Kinsman further agreed to give his personal attention to the manufacturing of machines under the patent, the expenses of making the machines to be first paid out of the proceeds of sales, and the balance, over and above what might be necessary to carry on the business, to be paid over from time to time to the parties, one-third to Kinsman and two-thirds to Parkhurst; that, on the 9th of February, 1846, a second agreement, under seal, was entered into, whereby Kinsman agreed to discontinue the manufacture of machines as soon as he had made and sold so many that the profits of them, with what moneys had been already received, would amount to a sum equal to his advances, and thereafter the plaintiff was to possess the sole right to manufacture and sell the machines, and either party should sell for less than $100 profit on each machine manufactured; that the plaintiff agreed that he would go on and manufacture the machines as soon as Kinsman should discontinue, and would not sell for a less profit than $100 on each machine, and would pay over to Kinsman one-third of the profits, and the like restriction was to apply to any machines made by the plaintiff before Kinsman discontinued the manufacture. The bill further stated, that Kinsman had made and sold a large number of machines under the contract of the 22d of May, 1845, and had realized large profits on the same prior to the 9th of February, 1846; that, after the agreement of that date, he had made and sold large numbers, for at least $100 profit on each, amounting in all to the sum of $11,650; that Kinsman had applied the whole of the profits to his own use, and had refused to account for them; that the amount remaining due of Kinsman's advances, referred to in the last agreement, did not, at the time, exceed the sum of $2,000; that the plaintiff had been at all times ready to fulfil his part of the agreement; that a large sum of money had become due from Kinsman to the plaintiff, for machines manufactured and sold, which he refused to account for or pay over; that he had made and sold great numbers of the machines, and at large profits, since he had realized more moneys than sufficient to repay all his advances, and was continuing to manufacture and sell the machines in violation of his agreement and of the patent; and that he had been repeatedly applied to for an account, &c., which he had refused. On this bill an injunction was

granted, on the 3d of July, 1847. Afterwards, a supplemental bill was filed, setting forth that Kinsman, after the filing of the original bill and before the granting of the injunction, had manufactured and sold large numbers of machines, and realized large sums of money therefor, and that large sums were still due from purchasers; that all the said moneys had been withheld from the plaintiff, and an account refused; that Kinsman had assigned all his interest in the concern to the defendant Calvin C. Goddard, his clerk, who claimed Kinsman's interest by virtue of such assignment; that the assignment was with notice and fraudulent; and that Goddard was manufacturing and selling machines in collusion with Kinsman, and was insolvent. An account was prayed for. [Case No. 10,-758.] An injunction was issued on the supplemental bill, on the 11th of March, 1848. [Id. 10,760.]

The answer of Kinsman admitted the issuing of the patent to the plaintiff, but insisted that it was void. It averred that a machine constructed according to the specification and drawings was useless, in consequence of a defect in the form of its teeth, in having slots large at the bottom—gullet teeth, instead of teeth in the form of the letter V; that he, Kinsman, was manufacturing machines different from the patented machine, and with teeth of the form above mentioned; that the machines of the plaintiff would only gin wool, and failed to gin cotton; that the plaintiff was not the first and original inventor of the thing patented by him, but that Charles G. Sargent of Lowell, Mass., was, and that his machine was invented on or about the 1st of January, 1843; and that the plaintiff obtained his patent surreptitiously, while Sargent was engaged in perfecting his machine with due diligence, and after the plaintiff had obtained a knowledge of the improvement of Sargent. The answer of Kinsman admitted the agreements set forth in the bill, but insisted that the second one was void, as being in restraint of trade and against public policy. It further averred, that on the 22d of May, 1845, he, Kinsman, assigned one-half of his interest in the patent to James W. Hale; and that, from the 22d of May, 1845, to the 9th of February, 1846, he was engaged in manufacturing and selling the machines jointly with the plaintiff and Hale. It set forth an account of the money expended by him in the business prior to the 9th of February, 1846, and an account of the machines made prior to that time, but claimed that there was no profit in the business, that the amount paid, over receipts, was $7,571.76, and that the sum due him, Kinsman, under the agreement of the 9th of February, 1846, was $7,571.61. It also averred, that the plaintiff had, down to the latter part of the year 1847, failed to make a good machine; that the machine as patented would not gin cotton, and he, Kinsman, had spent much time and money to make it useful for that purpose; that he made the proper form of teeth for cleaning wool, and that that form was vital to the successful operation of the machine; that the plan of Kinsman required 62,208 teeth on a cylinder, while the plaintiff's required only 31,104 upon one of the same size; and that the value of the machine was in the number, but more especially in the form of the teeth. The answer denied that the plaintiff had been ready to account for and pay over one-third of the profits of the machines built by him, or to fulfil the agreements in other respects, and averred that the plaintiff had assigned his interest in the matter. It also denied that anything was due to the plaintiff for profits for making the machines, or that he, Kinsman, had made any machines since the profits were sufficient to repay his disbursements, but admitted that if all the moneys due for machines had been received he would have been repaid. It averred that the machines made by him since the 9th of February, 1846, were made under the invention of Sargent, and that he was not bound to account to the plaintiff for them; that he manufactured machines down to the 29th of June, 1847, but had made none since; that on that day he assigned all his interest in the establishment to Goddard, for the consideration of $15,401.99, but did not include his interest in the plaintiff's patent; and that at that time he had taken steps to get the patent for Sargent's invention.

Hale, who was made a defendant, answered, and admitted the patent, and the assignment of one-third of it to Kinsman, and that the plaintiff was the first and original inventor of the machine. He averred the assignment to him by Kinsman of one-sixth of the patent; that he paid to Kinsman $3,-500 for it; that all the profits he had received was $100; that he had repeatedly applied to Kinsman for an account of the profits of the manufacture and sale of the machines, and had been refused; and he claimed that, on an adjustment, one-sixth of the profits should be paid over to him.

It is not material to set forth the answer of Goddard at large, as it was admitted on the argument that his position in the case, in relation to the plaintiff, could not be distinguished from that of Kinsman. His answer admitted that he was engaged in manufacturing and selling the machines down to the issuing of the injunction on the supplemental bill.

The case was heard on pleadings and proofs.

Seth P. Staples and George Gifford, for plaintiff.

James W. Gerard and Ambrose L. Jordan, for defendants Kinsman and Goddard.

[The complainant's counsel cited 2 Adol. & El. 278; Webst. Pat. Cas. 290–295, and notes; 2 Paige, 146; 13 Wend. 385; 3 Hill, 217;

Webst. Dict. vide "forestalling," "regrating"; 3 Bac. Abr. 261, A, B; Webst. Supp. part in actions, 131, Nos. 78, 85, 113; 2 Johns. Ch. 87; 7 Ves. 539; 2 Ball & B. 385; 2 Daniell, Ch. Prac. 1426; 2 Story, Eq. Jur. §§ 716, 717a.

[The defendants' counsel cited 1 Story, Eq. Jur. § 522; 15 Johns. 179; [Wood v. Underhill] 5 How. [46 U. S.] 1; 2 Vern. 297; 2 Johns. Ch. 62; Chit. Cont. 664 (Ed. 1842) 665, 667; 7 Bing. 735; 5 Mees. & W. 548; 21 Wend. 166; 1 East, 143, 167; Gods. Pat. 23–31; 2 Johns. Cas. 29; 6 Johns. 194; 8 Johns. 444; 13 Johns. 112; 2 Stew. (Ala.) 175; 2 Kent, Comm. 537; 21 Wend. 166; 2 Story, Eq. Jur. § 769; 4 Paige, 305; 2 Har. & G. 100; 1 Cow. 733; 2 Story, Eq. Jur. §§ 722a, 736; 2 Schoales & L. 552; 7 Ves. 219; 14 Ves. 519; 1 Jac. 422; 3 Term R. 438; 3 Hill, 215; 8 Wend. 483; 2 Paige, 146; 13 Wend. 385; 2 Mass. 46; 2 Rev. St. p. 406, § 77; 11 Wend. 106; 13 Wend. 527; 14 Wend. 195; Bedford v. Hunt [Case No. 1,217]; 4 Burrows, 2397; 2 H. Bl. 467; Phil. Pat. 90; Hind. 87; Cromp. M. & R. 864.] [3]

NELSON, Circuit Justice. The proofs in this case are exceedingly voluminous, embracing the testimony of some fifty witnesses, many of whom were examined at great length upon the several questions presented or supposed to be presented in the pleadings, and upon the final decision of which the valuable interests involved in the subject matter in dispute must depend. I have examined them with all the care and attention which the complicated nature of the evidence necessarily requires, and the importance of the rights concerned demands, and shall proceed at once to state briefly my conclusions upon the facts and the law, so far as they may be material to a final disposition of the case.

1. I am satisfied that the proofs establish, beyond all reasonable doubt, that Parkhurst, the plaintiff in the bill, was the first and original inventor of the improvement in the burring machine, for which letters patent were granted to him on the 1st of May, 1845; that the improvement of Sargent, mainly relied on as anterior in time, was neither so far perfected by experiment, or by a reduction to practical operation, as to entitle it, in judgment of law, to the character or attribute of an invention; and also, that the imperfect and unsatisfactory nature of the experiments made by Sargent, and his subsequent conduct in throwing aside his temporary model, and wholly neglecting for years to follow up his experiments, so as to produce a perfect machine, afford strong and decisive evidence of an abandonment of the thing as a failure.

It is not enough, to defeat a patent already issued, that another conceived the possibility of effecting what the patentee accomplished. To constitute a prior invention, the party alleged to have produced it, must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form. It must have been carried into practical operation; for he is entitled to a patent, who, being an original inventor, has first perfected the invention and adapted it to practical use. Crude and imperfect experiments, equivocal in their results, and then given up for years, cannot be permitted to prevail against an original inventor, who has perfected his improvement and obtained his patent. Gibson v. Brand, Webst. Pat. Cas. 628; Househill Coal & Iron Co. v. Neilson, Id. 708, 713; Jones v. Pearce, Id. 124; Galloway v. Bleaden, Id. 525, 526; Cornish v. Keene, Id. 508; Hind. Pat. 448, 449; Bedford v. Hunt [supra]; Reed v. Cutter [Case No. 11,645]; Curt. Pat. §§ 40–49.

2. But, if otherwise, and the plaintiff was not the first and original inventor, I am of opinion that Kinsman is estopped from setting up that fact, by force of his agreement of the 9th of February, 1846, whereby he modified and confirmed the previous one of the 22d of May, 1845.

By the first agreement, he acquired an undivided third part of the interest in the patent, and stipulated to become jointly interested with the plaintiff in the business of manufacturing and vending the improved machines, and to furnish a certain amount of capital for that purpose, the profits to be divided according to their respective interests. After carrying on the business under this agreement for some nine months, it was modified by the second one, by which Kinsman agreed to discontinue the manufacture of the machines upon the terms and conditions therein stipulated, and to leave to the plaintiff the sole right to conduct the business of the partnership in future, he agreeing to pay over to Kinsman one-third of the profits. This agreement was entered into with a full knowledge on the part of Kinsman of the claim of Sargent as the original inventor of the burring machine, and after an opportunity to enquire into and ascertain all the facts and circumstances in respect to the merits of such claim.

3. I am further of opinion, that the objections taken to the agreement of the 9th of February, 1846, that it was void, as being in restraint of trade, and against the principles of public policy, are not well founded.

The parties were jointly interested in the patent right, in the proportions of one-third and two-thirds thereof, and had, by the agreement of the 22d of May, 1845, become bound to carry on the business of manufacturing the patented article for the benefit of the joint concern, Kinsman stipulating to devote his personal attention thereto. This was modified by the arrangement of the 9th of February following, whereby the establishment was put under the sole charge

[3] [From 8 N. Y. Leg. Obs. 149.]

and direction of the plaintiff, subject to certain restrictions as to price, &c., the profits to be paid over according to the respective interests of the parties. This arrangement contained no stipulations in restraint of trade, in the sense of the rule upon which the objection is founded. It simply prescribed the mode of conducting the affairs of the partnership, and was no more or less than an ordinary partnership business arrangement, such as was deemed best for the interest of all concerned. Whether the affairs of the company should be conducted by the advice and personal services of both the partners, or by the one or the other of them, depended upon their own views as to which arrangement would be the most beneficial for their common interests. It was a question they had a right to determine for themselves, and, in whichever way it might be determined, it could in no manner operate in restraint of trade in general, or as respected either of the parties. A joint interest in the patent did not make the parties partners, and some agreement, therefore, became necessary, to enable them to work the invention at their joint expense and for their joint benefit. Hind. Pat. 67, 236. They then became partners in the business of manufacturing and vending the patented article, subject to the rules of law governing parties standing in that relation to each other, except as those rules were modified and limited by the articles of partnership. While the partnership continued, it was an obvious dictate of wisdom to make it a condition, that one of the partners should not be permitted to engage in the same branch of business, to the prejudice of the interest of the common concern. Such a restraint is neither illegal nor unusual in articles of partnership.

4. I am also of opinion, that the change in the form of the slots or teeth cut on the rings or plates which composed the burring cylinder, and which, it is claimed, were made by Kinsman or others subsequent to the date of the patent, and in the course of the manufacturing of the article, was not a substantial change in the construction from that described in the patent.

The improvement consisted of hooked teeth, cut upon the rings or plates, and these so arranged upon the cylinder, that the wool or cotton, when taken up by the teeth, would be drawn into the slots or interstices between the teeth, leaving the burrs and other foreign substances on the surface, to be knocked off by the beater. The form of the teeth that would produce this result, embodied, to this extent, the principle of the improvement. Practice and experience in the working of the machine doubtless led to modifications of the form, highly beneficial, as respected both the quantity and the quality of the article cleaned. This is the natural and usual result in the operation of machinery newly invented and constructed. It requires time and experience to bring it to complete perfection. But, the right of the inventor does not depend upon the questions whether the machine is more or less perfect, or whether slight modifications in the arrangement of the machinery or in the finish of the parts composing it, may or may not better accomplish the end sought to be attained; but upon the question whether the machinery constructed as described in the patent will or will not accomplish the end practically and usefully in the way pointed out. If it will, the inventor is entitled to the protection which the government has granted him; and any one using the principle thus embodied is guilty of an infringement, however he may have perfected the machinery by superior skill in the mechanical arrangement and construction of the parts. Such perfecting is but the skill of the mechanic, not the genius of the inventor.

The proof is full to show, that several of the machines constructed in strict conformity to the description in the patent, and immediately after it was granted, operated well, and are still in use by the purchasers. The shape of the teeth, and of the space between them, best adapted to use in cleaning wool or cotton, is a matter of nice calculation, depending upon various considerations, such as the character and condition of the article, whether coarse or fine, very foul or otherwise, and also the nature of the foreign substances, and necessarily, somewhat upon practice and experience in the business. If the space is too large at the point of the teeth, the dirt will be drawn into them with the wool or cotton; if it is too small at the point, and too wide at the bottom, the space will clog, and embarrass the operation. For this reason, there might well be different opinions as to the precise shape and structure, as there have been, according to some of the witnesses. The teeth must, however, be hooked, so as to catch the wool or cotton and draw it between them and below the surface of the cylinder.

Upon the whole, without pursuing the examination of the case further in detail, I am satisfied that the plaintiff is entitled to an account of the partnership transactions from the 22d of May, 1845, down to the time when he assigned and transferred all his interest in the patent to William L. King, on the 30th of March, 1848. Having then parted with the whole of his interest, he was no longer concerned in the partnership business. The assignment worked a dissolution, and left the parties interested in the patent simply to their rights under it. Perhaps Kinsman might have insisted upon a dissolution from the time of the assignment to King of a part of the plaintiff's interest in the patent, on the 2d of September, 1847, and a closing up of the partnership affairs as they stood at that period; but, as no such step was taken by Goddard,

who then represented the interest of Kinsman, the partnership must be regarded as having continued down to the 30th of March, 1848, and the account is to be taken down to that period. And, as it appears that the plaintiff is no longer interested in the patent, the injunctions heretofore granted in his behalf, in pursuance of the prayers in the original and supplemental bills, must be dissolved, except so far as they restrain Kinsman and Goddard from collecting the partnership debts.

NOTE. The decree was as follows: "Ordered and decreed, that the plaintiff is the first and original inventor of the improvement in the burring machine, for which letters patent were granted to him May 1st, 1845, as set forth in the bill of complaint; that, if otherwise, the defendants Kinsman and Goddard are estopped from denying the fact, by virtue of the agreements of the 22d of May, 1845, and the 9th of February, 1846, also set forth in said bill; that the said agreements are legal and valid, and binding upon the parties Kinsman and Goddard; that the assignment of the whole of the interest of the plaintiff in the patent, on the 30th of March, 1848, to William L. King, worked a dissolution of the partnership which existed between him and Kinsman under the aforesaid agreements; that the burring machines manufactured and sold by Kinsman and Goddard between the 22d of May, 1845, and the 30th of March, 1848, the time of the dissolution, are to be deemed to have been made and sold under the said agreements; that the cause be referred to Charles W. Newton, Esquire, one of the masters of this court, to take and state the partnership accounts which accrued between the parties within the periods above mentioned, under the said agreements; that, in taking and stating the said accounts, the master ascertain and state the number of machines made and sold within the said time by Kinsman and Goddard, or either of them, and the prices for which they were sold, also the amount of monies advanced by the said Kinsman and Goddard, or either of them, in procuring machinery, tools, &c., for the manufacture of the said machines, and for labor, materials, expenses, &c., in the manufacture and sale of the same; and that, in stating the accounts, the master charge said Kinsman and Goddard with at least $100 profit on each and every machine made and sold by them, or either of them, since the 9th of February, 1846; that the master take and state an account with the plaintiff, including monies advanced by him, if any, in procuring machinery, tools, &c., for the manufacture of machines, and for labor, materials, expenses, &c., in the manufacture and sale of machines, and the number made and sold by him between the times aforesaid; that, in stating such account, the plaintiff be charged with at least $100 profit on each and every machine made by him since the 9th of February, 1846; that the master be authorized to require the production of the account books of the parties before him for examination, and the parties to be at liberty to furnish such further evidence in the premises as they may see fit and proper; that the master report to the court his doings in pursuance of the above directions; that all other questions in the case be reserved till the coming in of said report; and that the injunctions heretofore granted be dissolved, except so far as to restrain Kinsman and Goddard from collecting outstanding debts for vending machines prior to the 30th of March, 1848."

[On appeal to the supreme court, the decree of this court was affirmed. 18 How. (59 U. S.) 289. For other cases involving this patent, see Cases Nos. 3,477 and 9,833.]

Case No. 10,758.

PARKHURST v. KINSMAN et al.

[2 Blatchf. 72;[1] 8 N. J. Leg. Obs. 73; 1 Fish. Pat. Rep. 175.]

Circuit Court, S. D. New York. Jan. 25, 1848.

EQUITY—LEAVE TO FILE SUPPLEMENTAL BILL—AVERMENTS—NEW PARTIES.

1. Under rule 57 in equity, requiring notice to be given on an application for leave to file a supplemental bill, it is not necessary that the petition for leave should embrace the averments intended to be inserted in the supplemental bill, but only that it should advise the opposite party and the court of the ground on which the relief is applied for.

2. All that the court inquires into, on such a petition, is to see whether probable cause exists for granting the leave, and whether the petition states facts or circumstances which, if properly pleaded, would sustain a supplemental bill.

3. Where the original bill was against K., and was founded mainly on an agreement between the plaintiff and K., in relation to a machine patented to the former, which gave to K. the right to make and vend the machines on certain conditions, and, on filing the bill, an injunction was issued against K., prohibiting his further making or selling the machines: *Held*, that a petition alleging that since the filing of the bill G. had, as the plaintiff was informed and believed, become in some way interested in the machines, and was, as the plaintiff believed, acting in collusion with K. in making and vending them, and represented himself as so interested, was sufficient to authorize the plaintiff to make G. a party to the same suit by supplemental bill.

4. Where the same petition asked leave to insert in a supplemental bill new matters in regard to K.: *Held*, that although most of them would be proper subjects of amendment to the original bill, and could not lay the foundation for a supplemental bill, yet, as a discovery was sought from K. in regard to particulars not stated in the original bill, and K. had already answered that bill, the leave ought to be granted.

5. Circumstances stated under which laches will not be imputed to the plaintiff as a ground for denying him leave to file a supplemental bill.

[This case is first reported as heard upon the application of the defendant to reduce the amount of bail for which he was held under arrest. Case No. 10,761.]

This was an application, by petition, for leave to file a supplemental bill, making one Calvin L. Goddard a party to the suit, and adding new charges against the defendant [Israel] Kinsman, based partly on facts which had occurred since the original bill was filed, and partly on facts existing at that time, but not then known to the plaintiff [Stephen R. Parkhurst], and also an amended prayer for a receiver. No additional proceeding was prayed against the defendant [James W.] Hale. Notice of the application was served on Kinsman and Goddard, and they opposed it. Kinsman objected that the plaintiff had been guilty of laches, in not speeding the cause, as a plea in bar to the bill, and an answer supporting the plea had been filed nearly two years before; and that it was unreasonable to allow him now to introduce new

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

averments and a new prayer, and thus open and enlarge the field of litigation, which ought to have been closed upon the pleadings before the court. The original bill was founded mainly upon an agreement between the plaintiff and Kinsman, in relation to a burring machine patented to the plaintiff,—see Parkhurst v. Kinsman [Case No. 10,757],—which gave to Kinsman the right to make and vend the machines on certain conditions. A provisional injunction was granted against Kinsman, on the filing of the bill, prohibiting his further making or selling the machines. The petition now alleged that, since the bill was filed, Goddard, who was formerly a clerk or agent of Kinsman's, had, as the plaintiff was informed and believed, become in some way interested in the machines, and was, as the plaintiff believed, acting in collusion with Kinsman in making and vending them, and represented himself as so interested, and was issuing circulars to invite purchasers, &c. Goddard objected, that the cause of action against Kinsman set up in the bill was wholly foreign to him, being based on a contract between those parties, and seeking redress upon the spirit and equity of that contract, with which he was in no way connected in terms, and in which he had no interest; that, if the plaintiff had any cause of action against him for the violation of the patent, the remedy was by an action for the tort, and such violation had no connection with the agreement set up in the bill.

Seth P. Staples and George Gifford, for plaintiff.

James W. Gerard, for Goddard.

Ambrose L. Jordan, for Kinsman.

BETTS, District Judge. It seemed to be supposed, on the argument, by the counsel for the defendant, that the supreme court, in requiring, by rule 57, notice to be given on an application for leave to file a supplemental bill, had put the petition upon the footing of the bill itself when filed, and that the application could be defeated by showing that the petition did not make a case establishing the propriety of the bill, and the legal liability of the party sought to be brought in, to the remedy sought by the suit. Such, however, is not the effect of the rule. It does not essentially change the practice as it before existed. In England and in this state, supplemental bills were allowed to be filed only by leave of the court. Daniell, Ch. Prac. (Am. Ed.) 1655, and notes; Eager v. Price, 2 Paige, 333; Lawrence v. Bolton, 3 Paige, 294. And the court, in addition, frequently ordered notice to be given of the application. Eager v. Price, 2 Paige, 333. The design of notice is to avoid precipitation and a needless accumulation of pleadings. But the court inquires no further than to see whether probable cause exists for the new proceeding. The petition, accordingly, need not embrace the averments intended to be inserted in the supplemental bill, but need only advise the opposite party and the court of the ground on which the relief is applied for. The court may, therefore, deny leave to file a supplemental bill, and yet permit an amendment of the original bill; and this ability to shape and abridge the pleadings may be the reason of the practice which requires the assent of the court to the filing of a supplemental bill. In my opinion, then, all that the court looks to on motions of this description, is to see that the plaintiff states facts or circumstances which, if properly pleaded, would sustain a supplemental bill.

The allegations in the petition in regard to Goddard would, undoubtedly, be insufficient as averments in a supplemental bill, but they embrace matters which, if well pleaded, may charge him as a party to the suit. The court will not decide this motion on the technical rules applicable to a demurrer. The petition is sufficiently definite in charging that Goddard has become connected with the subject-matter of the suit against Kinsman since the original bill was filed, and is, in that connection, doing those acts in relation to the interests of the plaintiff which this court, by injunction, has restrained Kinsman from doing; and that is, in substance, sufficient, according to all the authorities, to authorize the plaintiff to bring Goddard before the court, in the same suit, to answer for his proceedings. On these points, the plaintiff is entitled to a discovery from Goddard. It is a mistake to construe the petition as setting up, as the ground of complaint, an independent infringement by Goddard of the plaintiff's rights under his patent. Its bearing and manifest intent is to charge on Goddard a combination with Kinsman, and an acting in concert with him to defeat the right the plaintiff has to restrain Kinsman on the equities of the original bill. It is enough, on this motion, to allege such concert and combination on information and belief, whether such a charge would or would not be sufficient in the bill itself. The leave prayed for must, therefore, be granted in respect to Goddard.

Most of the matters sought to be inserted in the supplemental bill in respect to Kinsman would be proper subjects of amendment to the original bill, and could not lay the foundation for a supplemental bill. 1 Hoff. Ch. Prac. 393, 398; Story, Eq. Pl. § 333. But, as a discovery is sought from Kinsman in regard to particulars not stated in the original bill, and an answer to that has been already put in by him, the course of practice will justify the filing of a new bill. Mitf. Eq. Pl. 62 (3d Am. Ed. 99) and note.

The laches imputed to the plaintiff, in not pushing forward his suit since Kinsman's plea and answer were put in, might perhaps call for a fuller excuse, before the court would allow the plaintiff to change the issues by amending the original bill. Even then, however, the objection would not stand

upon the ground of any essential injury to the defendant to arise from permitting such amendment, for it is not shown that any proofs have been taken by either party under the issues, or that the defendant has availed himself of his privilege under our practice of speeding the cause. But a supplemental bill may be filed at any stage of a cause, even after decree rendered (Story, Eq. Pl. § 338), and the nature of the present litigation would induce the court to lend all reasonable aid to have every dispute between the parties in respect to their rights as involved in it, definitively settled, and to leave nothing to be called up and pursued hereafter. Upon these considerations, I shall authorize the supplemental bill to be filed as prayed for, with the insertion, as against Kinsman, of the allegations referred to in the petition, and which might not, if brought forward by themselves, justify more than an order for amendment.

[NOTE. A receiver was appointed in this case upon the supplemental bill, and an injunction granted against Kinsman and Goddard. Case No. 10,760. Subsequently Kinsman was arrested under attachment for a violation of this injunction, and held to answer certain interrogatories filed by the plaintiff. Certain of these interrogatories were held by the court bad, upon demurrer of defendant. In the case of those upon which issue was joined, a reference was had to a master to take proofs. Id. 10,759. Upon the hearing upon all the pleadings and proofs taken, a decree was entered in favor of the plaintiff, and for an account. Id. 10,757. Subsequently, upon the coming in of the master's report, a final decree for $23,220.28 was entered against the defendants. This decree was affirmed upon appeal by the supreme court. 18 How. (59 U. S.) 289.]

Case No. 10,759.

PARKHURST v. KINSMAN et al.

[2 Blatchf. 76; [1] 1 Fish. Pat. Rep. 173.]

Circuit Court, S. D. New York. Feb. 16, 1848.

INJUNCTION — ATTACHMENT FOR CONTEMPT — SPECIFIC ACTS—INTERROGATORIES.

1. A plaintiff, in moving for an attachment against a defendant for contempt of court in not obeying an injunction, must state, in the proofs on which the application is founded, the specific acts of omission or commission which constitute the alleged contempt.

2. When, in such a proceeding, the defendant is ordered to answer interrogatories to be filed, such interrogatories must be limited to the particular offences so alleged, and must not inquire in regard to matters not charged specifically in such proofs.

3. Nor can the plaintiff require the defendant to answer interrogatories as to particulars which are charged on information and belief, and are not established by direct evidence.

4. Interrogatories which were unauthorized having been demurred to by the defendant, and he having answered taking issue upon others: *held*, that he was entitled to recover his costs on the demurrer, but the enforcement of the costs was stayed until the issues on the interrogatories answered should be disposed of. *Held*, also, that the proper mode of proof on such issues was by testimony taken orally before a master.

[This was a bill in equity by Stephen R. Parkhurst against Israel Kinsman and James W. Hale, and is reported as first heard upon the application of the defendant Kinsman to have reduced the amount of the bail for which he was held under arrest. Case No. 10,761.]

An injunction having been granted against the defendant Kinsman, on the filing of the bill, restraining the sale by him of certain machines constructed according to a certain patent issued to the plaintiff (see Parkhurst v. Kinsman [Cases Nos. 10,757 and 10,758]), it was served upon him, and afterwards, on the filing of affidavits charging a violation of the injunction by sales of the machines, an attachment was issued against him. On his arrest, twenty-five interrogatories were filed by the plaintiff. To two of the interrogatories and part of a third the defendant answered, taking issue on them. He in substance denied or alleged matter in avoidance of a fourth, and demurred to twenty-two and part of another. The only interrogatories which related directly to the specific acts of contempt on the part of the defendant, in violation of the injunction, which were charged in the affidavits for the attachment, were two of those on which the defendant took issue. Three of the interrogatories demurred to inquired as to collections and receipts of money by the defendant generally, from sales of the patented machine, but did not apply directly to the collections and receipts on the sales specified in the said affidavits. The questions arising as to the proper mode of procedure on the issues of fact so joined and the demurrers so taken, were now argued.

James W. Gerard, for defendant.

Seth P. Staples and George Gifford, for plaintiff.

THE COURT held: 1. The proper mode of proof by the parties on the facts in issue between them in this case, is by testimony taken orally before a master.

2. It is incumbent on a plaintiff, in moving for an attachment against a defendant for contempt of court in not obeying its process of injunction, to state, in the proofs on which the application is founded, the specific acts of omission or commission on the part of the defendant which constitute the alleged contempt.

3. When, in such a proceeding, the defendant is ordered by the court to answer interrogatories to be filed by the plaintiff, such interrogatories must be limited to the particular offences so alleged against the defendant; and it is not competent for the plaintiff to file interrogatories inquiring in regard to matters not charged specifically against the defendant in the proofs fur-

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nished on the application for the attachment.

4. The plaintiff is not entitled to require the defendant to answer interrogatories as to particulars which are charged on the information and belief of the plaintiff or of other witnesses, and are not established by direct evidence.

5. The several interrogatories demurred to by the defendant are unauthorized by law, and are bad in substance; and the defendant must be exonerated from answering them, and is entitled to recover against the plaintiff his costs on the demurrers to be taxed, but the enforcement of such costs must be stayed until the matters in issue between the parties on the interrogatories answered shall have been disposed of.

6. There must be a reference to a master to take the proofs of the respective parties upon the issues joined, and report the same to the court with all convenient speed.

[NOTE. Upon the hearing upon the merits in this case there was a decree for plaintiff, with reference to master to take an account. Case No. 10,757. The final decree awarding damages was affirmed by the supreme court. 18 How. (59 U. S.) 289.]

Case No. 10,760.

PARKHURST v. KINSMAN et al.

[2 Blatchf. 78;[1] 1 Fish. Pat. Rep. 180.]

Circuit Court, S. D. New York. March 11, 1848.

PATENTS—SUPPLEMENTAL BILL AFTER INJUNCTION—EXTENSION OF INJUNCTION—RIGHTS OF DEFENDANT'S ASSIGNEE.

1. Where, on the filing of a bill against K. to restrain him from violating the plaintiff's patent, a provisional injunction was granted, and afterwards the court allowed a supplemental bill to be filed, bringing in, as a party to the suit, G., who it was alleged had become interested in the subject-matter of the suit since its commencement, and also allowed new charges in regard to K. to be inserted in the supplemental bill, so as to embrace transactions not covered by the injunction: *held* that, as the transactions of K. set forth in the supplemental bill were of the same character with those first enjoined, the injunction must be extended so as to include them.

2. It appearing that G., who was so made a party by supplemental bill, was the clerk of K. from the commencement of the suit to the hearing of the application for the injunction against K., and knew of the existence of the suit and of the proceedings for the injunction, and, on the day the application was heard, became assignee of K. of his rights in litigation in the suit: *held*, on a motion for a provisional injunction against G., that he took the subject-matter assigned to him, with no higher or other rights, as respected the plaintiff, than K. possessed, but was chargeable with the liabilities of K., and did not stand before the court as an independent infringer.

3. As G. was a sheer volunteer in the controversy, and the mere substitute for K., the like injunction as against K., must issue against him, and he cannot be allowed to give security and keep an account till the hearing.

4. The peril of a fund in litigation is cause for the interference of the court to secure and protect it by the appointment of a receiver.

[Cited in Wright v. Merchants' Nat. Bank, Case No. 18,084.]

[This case is first reported as heard upon the application of the defendant to have reduced the amount of the bail for which he was held under arrest. Case No. 10,761.]

In pursuance of the leave granted (Parkhurst v. Kinsman [Case No. 10,758]), a supplemental bill was filed in this case, making Calvin L. Goddard a defendant, and enlarging the charges in the original bill against the defendant [Israel] Kinsman, so as to embrace transactions of his not covered by the injunction originally awarded against him. On the supplemental bill and proofs offered in support of its allegations, the plaintiff [Stephen R. Parkhurst] now moved for an injunction against both Kinsman and Goddard, and also for a receiver, to collect and hold the outstanding moneys payable to them, and which were the subject of litigation in the suit.

Seth P. Staples and George Gifford, for plaintiff.

James W. Gerard, for defendants.

BETTS, District Judge. As the transactions of Kinsman, set forth in the supplemental bill, are of the same character with those heretofore enjoined, they come within the scope of the former injunction, and it must be extended as to him so as to include them.

It is contended that Goddard's case stands on independent ground, and that he is entitled to make an original defence to the plaintiff's motion, on its merits. He claims the privileges of a bona fide purchaser from Kinsman of his interest in the tools and materials for the manufacture of the machines in question, and insists that the plaintiff cannot ask the equitable interposition of the court against him, except upon the ground of his being an infringer of the plaintiff's patent; and that, as to that charge, he is entitled to defend himself, without regard to the condition of Kinsman, who, as was held by the court on the granting of the original injunction, was precluded, by his agreements, from denying the validity of the patent. But I think that Goddard is not entitled to these grounds of defence, and that he stands before the court, at this stage of the action, chargeable with the liabilities of Kinsman, and in no respect entitled to a higher or different order of defence.

The original bill rested on two grounds: the right of the plaintiff as patentee, and the special agreements made with him by Kinsman, as part owner of the patent, in relation to its use and enjoyment; alleged a violation of the plaintiff's rights in both respects; and demanded the restraining of Kinsman from the further use of the invention, and a discovery and account from him in respect to

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his past doings under the agreements. On all these points the decision of the court, on the motion for the injunction, was in favor of the plaintiff.

Goddard, from the commencement of this suit to the close of the application for the injunction, was the clerk of Kinsman, keeping his books, and knowing his transactions under the agreements, and was personally cognizant of the existence of the suit, having furnished his own affidavit on behalf of Kinsman to resist the application, and attended in court during the hearing. On the very day the argument closed, Goddard became assignee of Kinsman of all the rights of the latter, and now sets up that assignment as his protection. The order of the court granting the injunction was made two days afterwards. Here, then, the interest of Goddard was acquired, not only pendente lite, in the ordinary sense of the phrase, but with a full knowledge in fact of the nature and state of the litigation, and after some degree of personal participation in it; and, on well-settled principles, he took the subject-matter assigned to him, with no higher or other rights, as respected the plaintiff, than Kinsman possessed. Story, Eq. Pl. §§ 156, 342; 2 Story, Eq. Jur. § 908. To uphold such a transaction would, in the language of Chancellor Walworth, enable parties, by successive assignments, to render a litigation interminable. Sedgwick v. Cleveland, 7 Paige, 287. The plaintiff here might have enforced his decree against Goddard, without any new proceedings, (3 Daniell, Ch. Prac. 1894,) but he had also the option to bring him into the cause as a party, by supplemental bill, and there was reasonable cause for so doing, in order to enforce an account against him, and have the additional remedy of a receiver as to outstanding moneys on sales made by him.

The court was most strenuously urged not to make the injunction peremptory against Goddard, and thus completely close his business, and involve him in ruinous losses. At first, I was inclined to seek some mode, by exacting security and the keeping of an account, by which his operations might be continued till the final hearing. But, upon the whole, as he is sheerly a volunteer in the controversy, and intermeddled in the business after the decision of the court in Kinsman's case was known, he in truth stands before the court chargeable in every particular with the liability of Kinsman himself to submit to that decision, and cannot justly claim any exemption from its full design and effect. Most assuredly Kinsman would not be permitted to resume the manufacture of the machines, until the dissolution of the injunction; and Goddard stands in no other light than his substitute, acting with full knowledge of the decision of the court, and, in many instances, as appears by the proofs, professedly continuing operations in the name and under the authority of Kinsman. Under these circumstances, an injunction must be issued against Goddard, as prayed for.

A proper case is established against both defendants for the appointment of a receiver. It is shown that both of them have debts outstanding to a very large amount, for machines sold by them since the granting of the former injunction. The plaintiff, if his right is finally established, will be entitled to a large part of these moneys, and both defendants are proved to be irresponsible in their circumstances. The peril of a fund in litigation, is cause for the interference of the court to secure and protect it by the appointment of a receiver. Edw. Rec. c. 1; 3 Daniell, Ch. Prac. 1667–1669, 1949–1965; 2 Story, Eq. Jur. §§ 829, 831.

[NOTE. An attachment was issued against Kinsman for violation of this injunction. The case was heard upon plaintiff's interrogatories filed upon the arrest of the defendant. Case No. 10,759. Upon the hearing on the merits, a decree in favor of plaintiff was entered in this case, with reference to a master to take an account. Id. 10,757. The final decree awarding damages was affirmed, upon appeal to the supreme court. 18 How. (59 U. S.) 289.]

Case No. 10,761.

PARKHURST v. KINSMAN.

[3 Woodb. & M. 168.] [1]

Circuit Court, D. Massachusetts. May Term, 1847.

SPECIAL BAIL—TORTS—AFFIDAVITS AND PROOF—AMOUNT OF DEBT OR DAMAGES—ANOTHER SUIT PENDING.

1. In states where no statute exists regulating special bail, it may be required in cases of tort as well as contract, and without affidavit, as to the true amount of the debt or damges.

2. But a motion may be made to a judge of the court to which the writ is returnable, before the return day, to reduce the amount; and it will be complied with if affidavits or other evidence are produced which prove the present amount to be unreasonable.

3. The ad damnum in the writ, and the sum demanded in the declaration, are the primâ facie guides to the sheriff.

4. The affidavits and proof must show what is expected to be recovered in the present action; and not the whole claim of the plaintiff, some of which is not competent evidence under this form of action.

5. On this motion the court will not go into and decide a doubtful question as to jurisdiction over this action, but leave it to a motion or plea after the return of the writ.

6. If another suit is pending elsewhere for the same cause of action, the bail will be reduced to a nominal sum, or only common bail allowed.

This was an application to reduce the amount of bail which had been taken in an action by the above plaintiff [Stephen R. Parkhurst] against the defendant [Francis Kinsman]. The suit had been instituted on the 20th of August, 1847, returnable to the

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

next October term. The defendant was arrested the day after, and a bail-bond demanded and taken, for $20,000, with sureties. The motion was made early in September, A. D. 1847, during an adjourned session of the May term, and the respondent appearing and asking time to send to New York where the plaintiff resides, for evidence to resist the motion, it was granted, as the respondent was not in prison, but had obtained bail. The motion came on for final argument and decision, September 24th. The defendant showed that the plaintiff had instituted a bill in chancery against the defendant, and another person in New Jersey, and a like bill in New York against him and one F. W. Hale; the first sometime in 1846, and the last, February 9th, 1847. In those bills it was admitted or proved that after the patent had been obtained by the plaintiff, he conveyed one-third of it to the defendant for $3,000, and had been paid $2,000 of the same. That the defendant was to make and vend the machines, securing a profit of $100 on each, and account for his sales and receipts; and after paying himself for any advances for tools and stock, was to pay over to the plaintiff his proportion and allow him to make and vend the machines afterwards on certain terms then arranged, but which it is not necessary to detail. Such proceedings appeared to have been had in New York as to lead to a decree of injunction against the defendant, not to use the machine longer, and to render an account of his expenditures and receipts in connection with it. The defendant then filed an affidavit that he in truth owed the plaintiff nothing, and that the plaintiff had no cause of action against him except what was set out in the bill filed in New York, and that the present suit and arrest were vexatious, and he ought to be discharged without bail or merely on common bail. The plaintiff then showed that the declaration in this action was trespass on the case, for an infringement of a patent-right for a machine to clean cotton or wool, alleged to have been invented by him, and a patent obtained for it, May 1st, 1845; and that it was violated by the defendant on the 8th of July last, and divers other times; but not stating where, nor that either party was a citizen of Massachusetts. Both were described as belonging to New Jersey, but the defendant to be then "commorant" in Massachusetts. The plaintiff also filed evidence that he had attempted to get service of the injunction on the defendant in New York without success; that he believed the defendant justly owed him $25,000, the sum demanded in damages in the writ; and that the defendant was without property in New York, and according to his belief, insolvent.

Mr. King, for plaintiff.

Charles Levi Woodbury, for defendant.

WOODBURY, Circuit Justice. The question as to what is excessive bail and what are the proper grounds for fixing the true amount is in some cases difficult. But such is the jealousy in this country against requiring an unreasonable sum, that the constitutions of some states undertake expressly to prohibit it, as does the constitution of the United States. See Const. N. H. art. 33, Bill of Rights; Const. U. S. Amend. 8. Especially is it improper to require an unreasonable sum in criminal cases, where the data for fixing a proper one are more certain, and where personal prejudice can operate more freely without detection. At the same time, in both criminal and civil cases, a duty exists in public officers to require sufficient bail at the peril of a suit against themselves, if not acting honestly and fairly; and here, in revising the sum, no censure or correction is proper unless the amount is clearly unreasonable. Evans v. Foster, 1 N. H. 374, and cases cited; 2 Chit. Gen. Prac. 370; Craig v. Brown [Case No. 3,328].

The twenty-third rule of this court, under which this motion is made, requires that the sum be "unreasonable" in order to justify a reduction. In England and several of the states, there are statutes regulating, to some extent, where bail may be required and the amount; and sometimes the mode and time of fixing the amount of special bail are prescribed by express legislation. So in the District of Columbia, by congress, in 5 Stat. 499. The amount due in England to require any special bail has at times been as high as £20, in case of debt. Gilb. Ch. Prac. 35, 37; 1 Tidd, Prac. 187. And at times it has not been allowed at all, where the damages were uncertain, as in cases of tort. Gilb. Ch. Prac. 35. See the departures from this in extreme cases of personal injury in England. 1 Bac. Abr. "Bail." In respect to the time and mode of fixing the amount, it seems to be done frequently before the return day of the writ. Before the return of the writ, as in this case, the sheriff in England may give up the bail bond on proper facts. 1 Tidd, Prac. 251; Cowp. 71. And bail above, on a surrender of the principal at any time, may be discharged. 1 East, 383.

If a person, like an attorney, be improperly held to bail, he may on motion at any time be discharged. 1 Wils. 298. And apparently this may be before the writ is returned. Belifante v. Levy, 2 Strange, 1209. So, of a wife arrested. 1 East, 16; 2 Salk. 544. See a case of large reduction in the bail in New York, from $10,000 to $500, in a case of tort. Ballingall v. Burnie, 1 Hall, 237. But in some states, and especially in Massachusetts, the subject of special bail is left very loosely. 17 Mass. 177. In cases of contract there is some test in the debt as to the true amount, and statutes exist disallowing bail at all, unless the sum demanded exceeds a certain sum. In New Hamp-

shire since 1819, the sum demanded must exceed $13.33, the jurisdiction of a justice of the peace. 2 N. H. 492.

But the forms of process requiring bail being established by law, St. N. H. (1830 Ed.) 58, 65, it can usually be taken, whenever not prohibited, and is then by force of the statute regulating the form of process and by the principles of the English law in force when our ancestors emigrated hither, and not by any mere rule of this or other courts, as seems to have been supposed in the argument. Hence, we cannot dispense with it where the law has not dispensed with it. Hence, we must uphold it as not being dispensed with by statute, in all cases sounding in tort, though some sounding in contract, when small, are by statute excepted. I have no doubt, however, that under these circumstances, open as the requisition of large bail to any amount is, without even an oath required by the plaintiff to the amount of his damage, and leaving the defendant much at the mercy of the caprice or passion of a plaintiff, and subject as this matter is to great vexation and abuse when the defendant happens as here to be arrested among strangers, and for which an action for malicious prosecution or for demanding excessive bail is a very inadequate and procrastinated remedy, the course of a plaintiff is to be carefully scrutinized on motions like this. Some impartial officer or judicial tribunal should hold equal scales between the parties and fix the sum as security for them, since neither of them ex parte is very well fitted to regulate it impartially.

Legislation more in detail is certainly needed on this matter; and to show the views of congress in a place where its legislation is exclusive, it proceeded by the act of August 1st, 1842, to provide that in no civil suits special bail shall be required without an affidavit that the respondent is about to abscond, or was guilty of a breach of trust, or using fraud in the contract; and providing that a judge in vacation, or the court in term time, may inquire into these matters. 5 Stat. 499. Again, by act of June 17th, 1844, it was required that the debt should exceed $50 in order to hold to bail at all. 5 Stat. 678.

The statutes of New Hampshire exonerate from any bail administrators, when sued in autre droit, and tenants in real actions, being there a species of proceeding as if in rem. 1 St. N. H. (1830 Ed.) p. 338, § 19. These exceptions seem reasonable, per se, independent of any statute. But in cases of tort the statute of 12 Geo. I., allowing bail in no civil cases except suits on contracts and the debts sustained by affidavit, made a change there, which has but few exceptions. Yet this statute seems never to have been adopted here, either in practice or by statute. 17 Mass. 176, 177. Where the matter is unregulated by statute, as here, and the case is one which by the general laws of the state is open to the requisition of bail, though in tort, the chief guide in the first instance is the ad damnum. 1 Bac. Abr. "Bail." Next the declaration where the amount appears distinctly there. 8 East, 368. And next, when the amount is afterwards contested in justifying bail in England, or here, in listening to a motion like this to reduce the amount, the affidavits of the parties to the facts bearing on the true amount, are some guide. And finally, other evidence which may throw light on that pertinent and controlling inquiry.

But even then the court will not go into nice questions of law between the parties trying their strict rights, with additions or deductions from the damages, as those questions are settled the one way or the other on apices juris. 4 Barn. & Adol. 467. But the court will merely examine to see what is probably and apparently to be recovered on the general aspect of the action and the evidence. 2 East, 457; [Parassel v. Gautier] 2 Dall. [2 U. S.] 330. Otherwise, looking to legal exceptions, the present writ might not be considered as giving us any jurisdiction, or as justifying any bail. It is, on its face, not between persons, either of whom is averred to be a citizen of Massachusetts, but both citizens of New Jersey, and are merely "commorant" here. Gassies v. Ballon, 6 Pet. [31 U. S.] 761; Bank of U. S. v. Moss, 6 How. [47 U. S.] 31; Sullivan v. Fulton Steamboat Co., 6 Wheat. [19 U. S.] 450. Unless one is averred to be a citizen of the state where the arrest is made, and not merely commorant there, the jurisdiction is very doubtful. See last cases, and Conk. Prac. 74; Rabaud v. D'Wolf [Case No. 11,519]; Catlett v. Pacific Ins. Co. [Id. 2,517]; [Wood v. Wagnon] 2 Cranch [6 U. S.] 9; [Capron v. Van Noorden] Id. 126. At the same time, it is nowhere averred that the wrong was committed in this state or within this district or circuit of this court. The subject matter is, to be sure, alleged to be a violation of a patent-right; but it may be doubtful whether even then this court can exercise jurisdiction, when in no way, even under a videlicet, is the wrong averred to have happened in this district, or either party to have been a citizen of it. The facts, too, are understood to agree with these allegations, and hence no amendment except as to the place of the wrong, to be feasible hereafter, and even that amendment might exonerate the bail wholly. But leaving this matter on this motion and going to the case as appearing on the merits in the evidence and declaration, and other legal difficulties are presented. See Knox v. Greenleaf [Case No. 7,909].

It is first apparent that the bills in equity instituted by this plaintiff in New Jersey and New York, against the defendant and others, proceeded on the ground that he was a ten-

ant in common or copartner with the plaintiff in the patent and machines. And though another person was joined on account of other considerations, the liability to account, as a copartner, for his receipts, was the gravamen of the cases, as between the defendant and the plaintiff. It is, therefore, urged that in point of law the plaintiff could not sustain this action for trespass on the case, against his copartner, either for those same proceeds sought to be obtained by the bills or for any other violation of the patent. But without going into this legal objection on this motion, it being an objection which may be hereafter mooted, and on a different state of facts, perhaps, and hence decided differently; it may be observed that usually actions in tort at law will not lie between tenants in common. 2 Johns. 468; 3 Johns. 175; 15 Johns. 179; 1 Chit. Pl. 90; 8 Durn. & E. [8 Term R.] 145; 2 Saund. 476; 4 East, 121; 1 Durn. & E. [1 Term R.] 658; 1 Salk. 290. Though perhaps if one destroy, or violently damage the partnership property, an action might lie, considering the tenancy in common to be thus abolished or severed, and the act as one not done on joint account. Co. Litt. 200; 1 East, 363, 368; Bull. N. P. 9, 34; 4 East, 121; 1 Ld. Raym. 737. Because there he does the injury not as a partner, and it may be, not within the scope of his partnership powers and duties, and is prosecuted for what he does dehors, and beyond his interests in common, and which operates as a tortious wrong to others. Perhaps, too, in this case the plaintiff in this action means to go for damages by the defendant to his patent, caused by constructing a new and different machine, though on like principles, and thus infringing on this, but declining to account for the sales and the infringement. In such a suit it would be proper to join all the owners of the first patent if one of them was not the violator of it; and then the subtle question would arise, whether a copartner could not sue alone for the damage which he alone suffers, to the extent of his interest, by this separate and independent wrong committed by his copartner.

Without deciding this now, but supposing in the hearing of this motion that such a suit may be sustainable, the question then arises, which we are now prepared to dispose of, what is shown to be the probable amount of damages which have thus been sustained by the plaintiff? It is not, as has been argued, and as the plaintiff in a part of his affidavit seems to suppose, the amount claimed in the bills in chancery, for receipts of sales in the first patent, in which they are jointly interested and for which he promised to account, and the allegations as to which sound in contract. That is not the cause before us. But it is an action on the case against him for a misfeasance sounding in tort and not in contract, and claiming damages against him as a wrong-doer, and not an account from him as a copartner. If it was for the same matter, the arrest and bail required of the large sum of $25,000, when a proceeding in chancery for the same matter was still pending in both New Jersey and New York, would seem to be vexatious, if not, technically barred. Burnham v. Webster [Case No. 2,179]; Aspden v. Nixon, 4 How. [45 U. S.] 467. The parties, as to this special claim, being the same, though all the parties to the bill are not, and the subject in dispute the same, though in different forms of action, the difference would, by analogy to many other cases, be so small as not to justify anything but common or nominal bail. Tidd, Prac. 184, 185; 7 Durn. & E. [7 Term R.] 470; 2 East, 453. It would be enough to defeat a third suit for the same matter pending at the same time, or at least would defeat, as not just and reasonable, large bail being proper in it from the same party, prosecuted in all three of them, though having others associated with him here. The course would be oppressive and vexatious, and hence only common bail demandable. Taylor v. Wasteneys, 2 Strange, 1218; 3 East, 309.

The only plausible position then to justify, requiring any special bail in this action is, that the gist of it is different from the matter in those bills, and that it is not merely for the same matter, nor even as is argued, for like matter arising subsequent to bringing those bills. That last view is open to the objections first named of these parties being, as to that, partners, and not liable to each other for profits of their business, in an action at law, much less an action sounding in tort. Beside this, if it was for like matter, subsequent, the claim could cover only a few months' sales and profits, which from all the evidence, must be small in amount, and require only very reduced bail. If the gist be different, and relate to a new machine colorably different from the first one, which the defendant has built and sold, and appropriated all the profits to himself as if sole owner, then the action may perhaps be maintainable. At all events, I shall not on this motion, for reasons before stated. examine and decide so doubtful a question of law.

Considering this action, then, as maintainable like a suit against a third person for such an infringement, and treating the defendant in that as acting in a separate and independent capacity like a third person, what is the amount of damages that he appears on the evidence to have thus sustained? He does not himself swear that this separate injury is to the extent of $20.-000, or to any specific amount, though he intimates in a portion of his affidavit, that he has thus been injured. When he testifies to claims of $20,000 on the defendant as just, it is all his claims of every kind, including those litigated in New York and New Jersey as well as here, and claims against him as partner no less than those

against him as a violator of his patent-right by means of a new machine, founded on the same principles, though set up as new, and as belonging to the defendant, exclusively. There being then no evidence as to the separate amount of damage on this account, the only safe rule is to be governed by the average amount of damages which have been given usually in this class of cases in this state. The value of patents is unequal, the extent and duration of the infringement different; but the highest verdicts rendered here the last ten years have been only about $2,000. Many have been less, and where only $1,200, motions have been made to set verdicts aside as excessive. Allen v. Blunt [Case No. 217]. I see nothing in the facts of this case to justify an expectation of recovering more than $2,000, and the probabilities are in favor of a less sum. The sale of twelve to fifteen machines, not returned, at $100 profits on each would probably cover all. So the original value of the whole patent-right was estimated at only $9,000, as one-third of it was sold for $3,000, so that the whole of the plaintiff's share encroached on would be worth only $6,000, or less than $500 a year for the whole term of fourteen years. This patent had been used only about two years by the defendant. Supposing the cost to be not over an ordinary amount, and $500 more would cover that, it seems to me, then, that the bail should not be more than $2,500, in order to insure not only the appearance of the party, but his abiding the event of a trial.

One view as to the defendant's being among strangers here, and exposed to increased difficulty and expense in getting large bail; and this being the third suit against him for difficulties about their patent-rights, all pending at once, and this being brought, not in New Jersey or New York, where the parties reside, or do business, but in a remote state, would appear to justify reducing the sum still lower. On the contrary, there is some evidence that the defendant has kept out of the way of legal process in New York since the injunction there, and is carrying on his evasions of the plaintiff's rights. without due respect to judicial decisions. This might, perhaps, warrant a larger sum.

The counsel then agreed to a reduction of the bail bond to $4,000, and a rule to that effect was entered accordingly.

[NOTE. In this case leave was given plaintiff to file a supplemental bill making one Calvin L. Goddard a party defendant to the suit. Case No. 10,758. Subsequently, an injunction was granted against Kinsman and Goddard. Id. 10,760. An attachment was issued against Kinsman for violation of this injunction. Case heard upon plaintiff's interrogatories. Id. 10,759. Upon the hearing on the merits a decree in favor of plaintiff and for an account was entered. Id. 10,757. From the final decree awarding damages upon the master's report an appeal was taken by defendants to the supreme court. Decree affirmed. 18 How. (59 U. S.) 289.]

Case No. 10,762.

PARKINSON v. LASELLE.

[3 Sawy. 330; [1] 2 Am. Law T. Rep. (N. S.) 279; 7 Chi. Leg. News, 268; 21 Int. Rev. Rec. 163.]

Circuit Court, D. California. April 23, 1875.

COPYRIGHTS—DEMURRER TO BILL.

1. Under sections 4952 and 4956 of the Revised Statutes of the United States, an author cannot obtain an exclusive right to his work unless before publication he delivers to the librarian of congress, or deposits in the mail, addressed to him, a printed copy of the title of the work or map; and, also, within ten days from the publication, deliver to the said librarian, or deposit in the mail, addressed to him, two copies, thereof.

[Cited in Boucicault v. Hart, Case No. 1,692; Donnelley v. Ivers, 18 Fed. 594.]

2. A bill in chancery to restrain the infringement of a copyright, acquired under chapter 3, title 60, of the Revised Statutes, which does not allege the performance of the acts required to be performed by the author in section 4956 of said statute, is insufficient.

[Cited in Chapman v. Ferry, 18 Fed. 539; Trow City Directory Co. v. Curtin, 36 Fed. 829.]

Bill in equity [by T. D. Parkinson against E. B. Laselle] to restrain the infringement of a copyright to a map of the Comstock lode. The defendant demurred specially on the ground that the bill does not allege the delivery at the office of the librarian of congress, or a deposit in the mail addressed to said librarian, of a copy of the title of the map before its publication, or a delivery to said librarian, or a deposit in the mail, addressed to him, of two copies of said map within ten days from its publication. The copyright is claimed to have been obtained on October 2, 1874. Section 4952 of the Revised Statutes, then in force, provides, that "any citizen of the United States * * * who shall be the author * * * of any * * * map * * * shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same." Section 4956 provides that "no person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the librarian of congress or deposit in the mail addressed to the librarian of congress, at Washington, District of Columbia, a printed copy of the title of the book or other article * * * for which he desires a copyright, nor unless he shall also, within ten days from the publication thereof, deliver at the office of the librarian of congress or deposit in the mail addressed to the librarian of congress, at Washington, District of Columbia, two copies of such copyright book or other article." * * * Section 4959 provides that "the proprietors of every copyright book or other article, shall deliver at the office of the librarian of congress, or deposit in the mail, ad-

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

dressed to the librarian of congress, at Washington, District of Columbia, within ten days after its publication, two complete copies thereof, of the best edition issued." * * * Section 4960, that "for every failure on the part of the proprietor of any copyright to deliver or deposit in the mail either of the published copies, or description or photograph, required by sections 4956 and 4959, the proprietor of the copyright shall be liable to a penalty of twenty-five dollars, to be recovered by the librarian of congress in the name of the United States, in an action in the nature of an action of debt, in any district court of the United States within the jurisdiction of which the delinquent may reside or be found." And section 4962, that "no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following it, if it be a book, * * * or if a map * * * by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: 'Entered according to act of congress in the year —— by A. B. in the office of the librarian of congress at Washington.'"

B. Morgan, for complainant.
L. D. Latimer, for defendant.

SAWYER, Circuit Judge. It is settled by the supreme court in Wheaton v. Peters, 8 Pet. [33 U. S.] 591, that every act required by the act of congress of May 3, 1790 (1 Stat. 124), and of April 29, 1802 (2 Stat. 171), relative to copyrights, is essential to the title derived under those acts. Unless he performs every act required by these statutes, the author acquires no exclusive right. See, also, Jollie v. Jaques [Case No. 7,437] and Baker v. Taylor [Id. 782]. The authority of these decisions is not questioned by complainant, but it is insisted that the present statute is different and requires a different construction. On the contrary, it appears to me to be more difficult under the present statute to escape the construction adopted by the supreme court in Wheaton v. Peters [supra], than under the former acts.

Under section 3 of the act of 1790, there was some ground for claiming, that it was only necessary to deposit a printed copy of the title to a book or map, in order to secure a copyright; and that the provisions of the latter part of this section, and in section 4, for publication of a copy of the record, and the delivery of the copy of the work, were merely directory, or at most, conditions subsequent. But there is no ground for such claim under the present act. Under section 4952 of the Revised Statutes, an author of a book or map, is to "have the sole liberty of printing * * * and vending the same," only "upon complying with the provisions of this chapter," that is to say, all the provisions, for no exception is made. No one provision is referred to rather than another. As the statute has not limited the acts to be performed to any one provision less than the whole, the courts have no authority to say that any one rather than another, less than the whole is sufficient. Section 4956, in express terms, declares that "no person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the librarian of congress, or deposit in the mail addressed to the librarian of congress at Washington, District of Columbia, a printed copy of the title of the book or other article, etc.; nor unless he shall, also, within ten days from the publication thereof, deliver at the office of the librarian of congress, or deposit in the mail addressed to the librarian of congress at Washington, District of Columbia, two copies of such book, or other article," etc. There is no possible room for construction here. The statute says no right shall attach until these acts have been performed; and the court cannot say in the face of this express negative provision, that a right shall attach unless they are performed. Until the performance as prescribed, there is no right acquired under the statute that can be violated.

It is claimed by the complainant, that section 4962 prescribes the essentials necessary to authorize the maintenance of the action; and that the court cannot add others. It is upon this section that it is sought to distinguish this case from those arising under former acts, which did not contain the provision. The provision relied on is, that "no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in his several copies of every edition published * * * if it be * * * a map * * * by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: 'Entered according to act of congress, in the year ——, by A. B., in the office of the librarian of congress at Washington.'" But the difficulty in adopting the complainant's view, is, that a cause of action must exist before an action can be maintained; and there can be no cause of action till a right exists, and that right has been violated.

Under sections 4952 and 4956, the plaintiff can have no copyright till he has performed the prescribed conditions, and until he has acquired his copyright, there can be no violation of that right at all which can afford a ground of action. Instead of section 4962 being a limitation of the acts to be performed, or alleged in order to entitle a party to maintain an action, it imposes an additional duty upon him as a prerequisite to its maintenance. He must first acquire a copyright under the other provisions of the act, and then, in order to enforce his right against in-

fringers he must, also, give notice of his right by the means prescribed by section 4962, so that other parties may not copy his work in ignorance of his rights. This seems to be the object of the provision. An analogous provision, and for a similar purpose, copied from previous acts, is found in section 4900, relating to patent rights.

The complainant's claim can derive no argumentative support against the express negative provisions of the statute already cited and discussed, from section 4960, providing for a penalty to be recovered from the author on failure to perform all the conditions prescribed. This seems to be intended to furnish additional guarantees against attempts of parties to avail themselves of the benefits of a copyright without first performing all the conditions prescribed in order to confer the right.

The demurrer must be sustained, and it is so ordered, with leave to amend on the usual terms.

Case No. 10,763.

PARKMAN v. BOWDOIN et al.

[1 Sumn. 359.] [1]

Circuit Court, D. Massachusetts. May Term, 1833.

CONSTRUCTION OF DEVISE—FEE TAIL.

A devise to A for life, and after her death to her second son B, and to his lawful begotten children in fee simple for ever; but in case he should die without children lawfully begotten, to the other son of A, (C,) and to his lawfully begotten children in fee simple for ever. At the time of making the will, B had no children. *Held*, that B took a fee tail, with remainder to C, on an indefinite failure of issue of B.

[Cited in Davidson v. Koehler, 76 Ind. 410; Slade v. Patten, 68 Me. 384; Wheatland v. Dodge, 10 Metc. 504, 505; Re Paton, 111 N. Y. 485, 18 N. E. 626; Bowker v. Bowker, 148 Mass. 203, 19 N. E. 215; Prowitt v. Rodman, 37 N. Y. 57. Cited in brief in Sutton v. Miles, 10 R. I. 349.]

[This was an action at law by George Parkman against James Bowdoin and another.]

Covenant, for a breach of the covenants of a deed, dated the first day of March, 1833, conveying certain real estate in Boston. Among other covenants the defendants covenanted, that the said James Bowdoin (one of the grantors) was seised and possessed of the premises in fee tail, was of full age, and was duly entitled by law to give, grant, sell, and convey the same in fee simple to the plaintiff, &c., &c. The breach alleged was, that the said James Bowdoin was not so seised, &c., &c. The plea averred, that the said James Bowdoin was seised and possessed of the premises in fee tail, was of full age, and was duly entitled by law to give, grant, sell, and convey the premises in fee simple, &c., &c.; on which issue was joined. At the trial the jury found a special verdict.

Charles P. Curtis, for plaintiff.
Jeremiah Mason, for defendants.

STORY, Circuit Justice. The sole question arising under the special verdict is, whether James Bowdoin, the grantor, was at the time of the conveyance seised in fee tail of the estate in controversy. If so, then, under the statute of Massachusetts, of the 8th of March, 1792 (Act 1791, c. 61), as he was of full age, he was capable of passing a fee simple to the grantee, there being nothing to impeach the bona fides of the deed of conveyance. See Lithgow v. Kavenagh, 9 Mass. 161. The question, whether he was so seised in fee tail, turns altogether upon the true interpretation of the will of Mrs. Sarah Bowdoin, made on the 18th of July, 1812, which has been duly proved and approved by the proper court of probate. I pass over all consideration of her subsequent marriage with the late General Dearborn, and the trust deeds and settlements executed upon that occasion; because it is admitted that they do not change the legal posture of the case, the will being expressly upheld by them. The clause in the will, on which the case turns, is in the following words: "Eighthly. I give and devise to my beloved, affectionate, worthy niece, Mrs. Sarah Bowdoin Sullivan, wife of George Sullivan, Esq., of said Boston, for and during the term of her natural life, all my real estate in Milk street, in said Boston, with the house, stables, coach-house, and all the other buildings, and all the lands thereunto belonging, which I at present possess, agreeable to the last will of my late worthy husband; and at her death I give the said estate to her second son, James Bowdoin Sullivan, he dropping the name of Sullivan, and taking and retaining the name of Bowdoin, and to his lawful begotten children in fee simple for ever. But in case he should die without children lawfully begotten, I hereby give the estate to the oldest son of the said Sarah B. Sullivan, now named George Richard Sullivan, on condition of his dropping the name of Sullivan, and taking and retaining the name of George Richard James Bowdoin, and to his lawful begotten children in fee simple for ever. But in case of the death of the above named James Bowdoin Sullivan and George Richard Sullivan, without lawful begotten children, the said estate shall be a younger son's of the said Sarah Bowdoin Sullivan, on condition of his taking and retaining the name of James Bowdoin, and to his lawful begotten children in fee simple for ever. And in case of the failure of all such sons of the said Sarah Bowdoin Sullivan, and they dying without lawful begotten children, it shall be her oldest daughter's, or in case of the death of her oldest daughter without children, it shall be her second daughter's and so on to her youngest, and to her children in fee simple for ever."

Now, the special verdict finds, that Mrs. Sarah Bowdoin, the testatrix, died in 1826,

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

seised of the premises for her natural life; that the devisees, James Bowdoin Sullivan and George Richard Sullivan, (the grantors of the plaintiff,) have changed their names in conformity to the will; that they came of full age, namely, the said George on the 14th of November, 1830, and the said James on the 16th of March, 1832; and that Mrs. Sarah Bowdoin Sullivan, the devisee, and her husband, George Sullivan, on the 29th of December, 1832, duly conveyed her life estate in the premises to their son, the devisee, James Bowdoin. The effect of these facts is, that by the union of the life estate with the remainder under the will, if that remainder gave a fee tail, the devisee, James, was, at the time of the conveyance to the plaintiff, tenant in tail in possession, for it is found, that he had a seisin and possession of the premises according to his title. It may be well to add, what is apparent upon the face of the special verdict, that James and George, the devisees, at the time of the making of the will, were without issue, being then of very tender years. The devise, then, stripped of unnecessary appendages, is a devise in remainder to James, (the grantor,) and to his lawfully begotten children in fee simple for ever. But in case he should die without children lawfully begotten, then to George, (the grantor,) and his lawfully begotten children in fee simple for ever. And in case of the death of both, without lawfully begotten children, then to a younger son of Mrs. Sarah B. Sullivan, and his lawfully begotten children in fee simple for ever; and in case of the failure of all sons, then to the daughters successively, &c., &c.

The argument for the plaintiff is, that, taking all the clauses together, the intent of the testatrix was, that the devisee, James, should take a remainder in fee simple, with an executory devise over to the devisee, George, in fee simple, in the event of the failure of issue of James. But the argument is surrounded with this difficulty, that, if it can be maintained, it may defeat the very intention which it is supposed to support. If the executory devise over is to be on an indefinite failure of the issue, then it is too remote, and therefore void. If it is to be limited to a failure in the life-time of James, then if James should leave issue, who should die without issue, the remainder over to George would wholly fail; for the event would not have occurred, upon which it was to go over. See Bayley, J., Tenny v. Agar, 12 East, 253, 261; Doe v. Webber, 1 Barn. & Ald. 713, 720. It is plain, then, that if the testatrix intended, as I think she did intend, to create successive estates in the children of Mrs. Sarah B. Sullivan upon the total failure of the line in the elder branches, the construction contended for would or might, upon either supposition, defeat it. And I am of opinion, that this construction would directly defeat it; for upon principle, as well as authority, the words, "if he should die without children," ought to be construed an indefinite failure of issue, for want of suitable words limiting the failure to any other period; and, as I shall presently show, issue and children are in this devise precise equivalents. So that the executory devise over would be utterly void for remoteness.

On the other hand, if we construe the estate in James to be an estate tail, and, in default of his issue, successive estates tail in the other children, according to priority of birth and sex, the manifest object of the testatrix in keeping the estate in the family, so long as there are any descendants, may, by the rules of law, be accomplished. Why, then, should we not give this construction to the terms of the will? Certainly we ought so to do, if there be nothing repugnant to the just sense of the terms used, and it will further the intention of the testatrix; for in all cases of wills, the intention is to govern, if not inconsistent with the rules of law.

Let us, then, examine the terms of the devise. It is to James and to his lawfully begotten children in fee simple for ever. Now, it is plain, that as James had no children at the time, they could not take immediately by way of descriptio personarum, as joint tenants with their father, a fee simple; and therefore we are driven to construe the word "children" as words of limitation, and not as words of purchase. And this is in conformity to the rule laid down in Wild's Case, 6 Coke, 17, which has been constantly recognised as law down to our day.[2] "And this difference" (says Lord Coke) "was resolved for good law, that if A devises his lands to B and his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the testator is manifest and certain, that his children or issues should take; and as immediate devisees they cannot take, because they are not in rerum naturâ; and by way of remainder they cannot take, for that was not his intent, for the gift is immediate; therefore these such words shall be taken as words of limitation, scilicet, as much as children or issues of his body." The only distinction between the case thus put, and that now at bar, is, that here the estate to James and his children is in remainder, after a life estate to his mother. But that makes no difference in law, because it is still an immediate estate to the children in the remainder, as much as to their father, James, and not a remainder subsequent to his estate in the premises. So that the reasoning in Wild's Case is strictly applicable, as will ap-

[2] Wild's Case is always referred to with approbation. See Buffar v. Bradford, 2 Atk. 220; White v. White, Willes, 348; Wharton v. Gresham, 2 W. Bl. 1083; Cook v. Cook, 2 Vern. 545; Oates v. Jackson, 7 Mod. 439; King v. Melling, 1 Vent. 231; Hughes v. Sayer, 1 P. Wms. 534; Davie v. Stevens, 1 Doug. 321; Hodges v. Middleton, 2 Doug. 430; Seale v. Barter, 2 Bos. & P. 485; Broadhurst v. Morris, 2 Barn. & Adol. 1.

pear upon the next resolution in the same case: "But it was resolved, that if a man, as in the case at bar, devises land to husband and wife, and after their decease to their children, or the remainder to their children; in this case, although they have not any child at the time, yet any child, which they shall have after, may take by way of remainder, according to the rule of law; for his intent appears, that their children should not take immediately, but after the decease of R and his wife." Wild's Case, 6 Coke, 17. Indeed, Wild's Case itself presented the very point, if there had been any distinction between the case of a devise of an immediate estate in possession and such a case in remainder; for, there, the question arose upon a devise in remainder, after an estate to the testator's wife for life. And this last resolution puts the case expressly on the ground, that the children were to take after the decease of their parents, and not immediately with them. See Moore, 397; Seale v. Barter, 2 Bos. & P. 492, 493. And according to the opinion of Lord Alvanley, in Seale v. Barter, 2 Bos. & P. 493, who cites also the report in Moore, 397, all the judges thought, that if there were no children in esse at the date of the will, it would have been an estate tail. Lord Chief Justice Willes, in delivering the judgment of the court in Ginger v. White, Willes, 348, 353, pointedly affirms the same doctrine. See, also, King v. Melling, 1 Vent. 229, 231.

Now, it cannot be pretended, that James's children were, under the present devise, to take the estate solely in remainder after his decease, which could only be by a devise to him for life, and to the children after his decease in fee; whereas the devise is to him and his children in fee simple. And if the word "children" is to be construed as words of purchase, and not of limitation, he must take a fee simple jointly with them. And this is doubtless the ground, upon which Oates v. Jackson, 2 Strange, 1172, was decided. There, the devise was "to my wife A for her life, and after her death to her daughter, and her children on her body begotten or to be begotten by N her husband and their heirs for ever." At the time of making the will, J had one daughter, and afterwards had two sons and one daughter, who died without issue; and J survived her oldest daughter, who left issue. It was held, that J took a fee, as joint tenant, she having a child at the making of the will; and, as she survived all her children, the whole fee vested in her. And the court relied upon the doctrine stated in Co. Litt. 9: "B having eleven sons and daughters, A giveth lands to B et liberis suis et a lour heires, and father and all his children do take a fee simple jointly by force of the words, 'their heirs.' But if he had no child at the time of the feoffment, the child born afterwards shall not take." That the court rely for their decision upon the fact of J having a child at the time, is very clear from the more full and accurate report of the same case in 7 Mod. 439, (Leach's Ed.)

The case of Annable v. Patch, 3 Pick. 360, turned substantially upon the same considerations; for in that case there were several children born at the time of making the will. In neither case, either in the argument or the decision, was an allusion made to any supposed distinction between an immediate estate in possession and such an estate in remainder. The case of Buffar v. Bradford, 2 Atk. 220, was a case of personal estate, and turned upon that consideration; for if the parent in that case was held to take an estate tail, under a bequest to herself and the children born of her body, the parent would take the whole to the exclusion of the children. And as the intent seemed clear, that the children should take, though there were no children born at the time of making the will, the court construed the words to be words of purchase, and not words of limitation. In a devise of real estate, there is no such necessity to construe the words as words of purchase; for the children may take under the estate tail. It is well known, that there are great distinctions, in all this class of cases, between bequests of personalty and devises of real estate. This very case states it; and it is recognised in Cook v. Cook, 2 Vern. 545; Forth v. Chapman, 1 P. Wms. 663; Dingley v. Dingley, 5 Mass. 535, 537, and in many other cases. See, also, Doe v. Perryn, 3 Term R. 484, 494; Crooke v. De Vandes, 9 Ves. 197; Hawley v. Northampton, 8 Mass. 3, 38, 39. But there is no necessity, in the present case, of relying upon the doctrine in the foregoing cases; because, here, there is a devise over, (which did not exist in any of them,) which has always been held to have a most material bearing upon the construction of the antecedent clause, in making the words thereof words of limitation, and not of purchase. The devise is, "in case he (James) should die without children lawfully begotten," then the estate is to go over to George, and his children in fee simple. Now, this is utterly inconsistent with the notion of a fee in the children of James. For, suppose James should have children, and they should all die in his life-time, leaving issue, the estate would then, if construed to depend upon the contingency of leaving children at his death, pass over to George, thus entirely defeating the prior estate to the children of James, although they left issue. Yet no one can reasonably doubt, that the testatrix intended the devise over to take effect only upon an extinction of the issue of James; for she has added the words, "in fee simple," after children.

To give any just effect, then, to the original devise, as well as to the devise over, the word "children" must be construed, as meaning issue or heirs of the body. And, although in its primary sense, the word "children" is a descriptio personarum, who are to take, there is not the slightest difficulty in giving

it the other sense, when the structure of the devise requires it. There are many authorities to this effect in cases analogous to the present. In Hughes v. Sayer, 1 P. Wms. 534, the master of the rolls said, that the word "children," when unborn, had been in case of a will construed to be synonymous with "issue," and therefore would in a will create an estate tail. In Davie v. Stevens, 1 Doug. 321, the devise was of the fee simple and inheritance to W. S., to him and his child or children for ever; and if he happened to die before twenty-one years of age, then devise over. Lord Mansfield, in delivering the opinion of the court, said: "The words, 'child' or 'children,' are to the full as restrictive, as if the testator had said, 'and if my son die without heirs of his body.' To give the father a fee, would be to strike these words out of the will. They must operate to give an estate tail, for there were no children. born at the time, to take an immediate estate by purchase. The meaning is the same, as if the expression had been, 'to A and his heirs,' that is to say, his children or his issue." Ginger v. White, Willes, 348, Hodges v. Middleton, 2 Doug. 431, and Doe v. Perryn, 3 Term R. 484, point in the same direction. In this last case, Mr. Justice Buller said, "children" and "issue," in their natural sense, have the same meaning. In Wood v. Baron, 1 East, 259, the devise was to the testator's wife for life, and after her death to her daughter A, as a place of inheritance to her and her children or her issue for ever. And if she should die, leaving no child or children, then devise over. At the time of making the will, the daughter had a child. The court nevertheless held, that the daughter took an estate tail; and Lord Kenyon said, that if the words were construed to give the daughter a fee simple, the devise over, as an executory devise, would be too remote, being after an indefinite failure of issue. In Seale v. Barter, 2 Bos. & P. 485, the devise was to the testator's son A, and his children lawfully begotten; and for default of said issue to his daughter B, and her children lawfully to be begotten; and for default of such issue, to his son and daughter equally between them. At the time of this will, the son had no child, and his daughter was unmarried. The court held that the son took an estate tail; and the reasoning of Lord Alvanley, in giving the opinion of the court, is very cogent in its application to the present case. In Broadhurst v. Morris, 2 Barn. & Adol. 1, the devise was to his daughter A for life; and at her decease to her husband for life; and at his decease, to his grandson W and his children lawfully begotten for ever; but in default of such issue, at his decease to his grandson A, his heirs and assigns for ever. The court held, that W took an estate tail. This case is nearly identical with the present in its leading features.

There is a very late case, which is stronger than the present. It was a devise to trustees of all the testator's real estate, to permit his daughter to take the rents and profits, or to sell, &c., if occasion required; also to settle on any husband she might take, for life, should he survive her. But should she have a child, to the use of such child from and after his daughter's decease. Should none of these cases happen, after his daughter's decease devise over. It was held, that the daughter took an estate tail, the daughter having no child at the making of the will and the testator's death. And Bifield's Case, cited in 1 Vent. 231, was relied on, where "son" was held to be nomen collectivum, as "child" was here. Doe v. Davies, Mich. T. K. B. 1832; 4 Barn. & Adol. 43, 1 Law J. K. B. (1832) 244. See, also, Sonday's Case, 9 Coke, 127. It is plain, then, that upon authority there is no difficulty in the present case, in construing the word "children" to be a word of limitation, and not of purchase, if the sense of the devise requires it. And in reason it must be so also; for the intention of the party, when discovered, must in a will control any technical sense of particular words; since the intention, if legal, is universally admitted to govern. The strong ground, upon which the word "children" has been construed to be a word of limitation, when there is a devise over on failure of children, is, that otherwise, if there should be children born, who should die during the life-time of the parent, leaving issue, the latter would not take. This consideration has been always held decisive; and it strictly applies to the present case. Wyld v. Lewis, 1 Atk. 432; Doe v. Perryn, 3 Term R. 484; King v. Burchall, 4 Term R. 296, note; Tenny v. Agar, 12 East, 253, 261; and Doe v. Webber, 1 Barn. & Ald. 713, 720,—are in point. See, also, Hawley v. Northampton, 8 Mass. 3, 41.

The superadded words, "in fee simple," in the original devise, so far from impugning, absolutely require this construction. They demonstrate, that the devise over is not to take effect, while there are any issue of James in esse. "In fee simple" means the same as to their heirs and assigns; and the devise over being to a collateral heir, these words are necessarily cut down to heirs of the body, if the devise over is to take effect only upon an indefinite failure of issue; and that it is so, is established by all the authorities. The universal rule is, that a failure of children, issue, or heirs of the body, means an indefinite failure of issue, unless there are other qualifying words, limiting the contingency to the death of the parent, which there certainly are not here. See Denn v. Shenton, Cowp. 410; Ide v. Ide, 5 Mass. 500; Lillibridge v. Adie [Case No. 8,350]. The will, therefore, read according to the real meaning of the terms, is, to James and the heirs of his body lawfully begotten, and their heirs for ever; and if he should die without such heirs of his body, then devise over. This is precisely the devise in Denn v. Shenton, Cowp.

410, where the devise was held a fee tail, with a remainder to the second devisee. Under this aspect of the case, there is this additional reason for construing the devise to James a fee tail, that otherwise a devise over, (as has been already said,) being upon an indefinite failure of issue, would be utterly void for remoteness. Indeed, the argument at the bar surrenders the case, if the contingency is not to be limited to the decease of James. Not a single case has been cited at the bar, in which under similar circumstances a devise has been held to be upon such a limited contingency. Richardson v. Noyes, 2 Mass. R. 56, is distinguishable, (if indeed that case can be supported as law,) for there were words giving the estate to the survivor, &c., which were thought to indicate, that the devise over was to take effect at the death of A, without any children then living. In Doe v. Webber, 1 Barn. & Ald. 713, the devise was to the testatrix's niece A, her heirs, executors, administrators, and assigns for ever; which would clearly pass a fee simple to her. And the devise over was, in case A shall die, and leave no child or children, then to her niece B, to her and her heirs for ever, paying £1000 unto the executor of her niece A, or to such person as she by her last will shall direct. The court held, that the devise over did not cut down the fee to a fee tail; but upon the whole language, the words, "child" or "children," were to be construed issue; and it was an executory devise over, upon A's dying without leaving any issue at her death. The court laid great stress on the legacy of £1000 being paid in a proximate and not in a remote event. In that case, also, there were no such words, as "children," interposed in the first devise, as there are in the present. Porter v. Bradley, 3 Term R. 143, turned upon the peculiar force of the words, "leaving no issue behind him." So that in the present case there is an evident necessity of construing the words "children," &c., to mean issue or heirs of the body. If so, they are words of limitation, and not of purchase; and the estate of James is a fee tail, and not a fee simple. For this construction several reasons may be given. First, because the children were not in esse at the time of making the will; and therefore they could not take an immediate estate. Secondly, because otherwise, if children were born, and died in the life-time of James, leaving issue, they would be excluded: whereas the words, "fee simple," show, that an interest was intended to the issue. Thirdly, because if "children" in the devise were to be construed to mean, not the whole class of issue, but strictly children of James, descriptione personarum, living at his death, then the devise over would be defeated, if James should die leaving children, who should afterwards die without issue, which plainly could not have been intended. Fourthly, because if the devise over be, as in my judgment it is, upon an indefinite failure of issue, then, as an executory devise, it is too remote and void; but as a remainder after a fee tail, it is good. And I would add, that it is a clear rule of law, that every limitation is to be construed to take effect by way of remainder, if it may, and not by way of executory devise, unless it be unavoidable to carry the intention into effect. My judgment is, that the words and the intent of the testatrix manifestly require the estate in James to be construed a fee tail, with a remainder to George. It is a case as free from doubt, on this point, as the will of an unskilful person well could be. See Lees v. Mosley, 1 Younge & C. Exch. 589, 606 to 609.

The consequence is, that, upon the special verdict, judgment must pass for the defendants.

PARKMAN (LAMB v.). See Cases Nos. 8,019 and 8,020.

Case No. 10,764.

Ex parte PARKS.

[1 Hughes, 604.] [1]

Circuit Court, D. Virginia. May 20, 1876.

CRIMINAL JURISDICTION—REVIEW UPON HABEAS CORPUS.

Where the indictment by its averments gave the United States district court jurisdiction of the offence, and that court took jurisdiction, and the jury found the facts charged in the indictment, and the accused was sentenced by the district court, and imprisoned, error in the proceedings cannot be reviewed by the United States circuit court upon habeas corpus, and the accused will be remanded to the custody of the marshal.

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

At law.

BOND, Circuit Judge. The writ of habeas corpus issued in this case was upon the petition of the prisoner, Richard S. Parks, alleging he was illegally detained by the marshal of the Western district of Virginia, commanding the marshal to produce the person of the petitioner, and to make return thereto of the cause of said Park's capture and detention. The marshal has made return that the prisoner is in jail in Harrisonburg, Virginia, in his custody, by virtue of a mittimus of the district court of the United States for the Western district of Virginia, which is in the words following. (Here follows copy of mittimus.) The petitioner alleges, however, that the court had no jurisdiction to make such a commitment, because he was charged in the indictment mentioned therein with an offence which the district court of the Western district had no jurisdiction to try, and that its judgment upon the verdict rendered upon the indictment is absolutely

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

void. The petitioner produces the record of the proceedings in the district court in his case in support of his petition and in response to the marshal's return.

The indictment is drawn under section 5419 of the Revised Statutes, which provides that "every person who forges the signature of any judge, register, or other officer of any court of the United States, . . . for the purpose of authenticating any proceeding or document," shall be punished in the manner prescribed in that section. The indictment has three counts. The first charges that Parks "did forge the signature of C. Douglas Gray, a register in bankruptcy for the Sixth congressional district of Virginia, to a certain receipt, which said receipt is in the words and figures following, to wit: 'Harrisonburg, July 30th, 1875. Received of J. D. Martin by R. S. Parks, his attorney, the application with necessary papers for adjudication in bankruptcy of said Martin; also, fifty dollars, amount of requisite deposit. C. Douglas Gray, Register.' He, the said Richard S. Parks, having committed the forgery aforesaid, for the purpose of authenticating the commencement of proceedings in bankruptcy in the case of J. D. Martin, of Page county, in the state of Virginia." The second count varies from the first in alleging the purpose to have been "the authenticating a proceeding, to wit, the filing of the petition of J. D. Martin in bankruptcy." The third count sets out no intent or purpose. The indictment appears, therefore, to charge a crime in the words of the statute, which is uniformly held to be sufficient unless there be some ambiguity or technicality in the language of the statute which it is necessary to amplify or explain in order that the party charged may be certain of the offence with which he is charged. If it be an offence at common law, the indictment must set out the elements which constitute that offence. It appears to me that this indictment, upon its face, charges a crime which the district court had jurisdiction to try and determine. Whatever the facts may have been, the indictment, whether true or false, charges an offence which is prohibited by the statute. It charges that he forged the signature of a register in bankruptcy, who is the officer of the district court, and that he did it to authenticate a proceeding, which is all the statute requires. But the petitioner alleges the paper set out in the indictment would not authenticate any proceeding, and that even if he had used the paper for the purpose set out in the indictment it would not have had that effect; and that in fact there were no proceedings in bankruptcy of J. D. Martin, and that he could have had no such purpose. But these are facts to go to the jury to show the intent and purpose necessary to constitute the offence charged, and have nothing to do with the jurisdiction of the court. The jury has found the fact against the prisoner, and we are concluded by that verdict. But supposing the fact to be that the statute requires that the paper to which the signature of the officer is forged must be a paper which by law he is required to make and sign in the discharge of his official duty, and that though this in fact is not such a paper, the district court determined that it was, is this more than error in the court, and can a judge of the circuit court review the errors of the district court on habeas corpus?

My opinion is that the indictment, by its language, gave the district court jurisdiction which once having acquired, no error in its proceeding can be reviewed upon habeas corpus, and the party will be remanded to the custody of the marshal.

An order was entered accordingly by his honor, BOND, Circuit Judge, directing "that the said R. S. Parks be remanded to the custody of the marshal for the Western district of Virginia; and it being suggested to the court that the said petitioner desires to enter an appeal, or to make an application to the supreme court of the United States, or one of the justices of the same, for a writ of habeas corpus or other legal proceedings in behalf of said practitioner, the court orders and directs that the execution of the sentence in the said case of the United States v. Richard S. Parks, entered in the district court of the United States for the Western district of Virginia, at Harrisonburg, Virginia, on the 4th day of May, 1876, be stayed for the period of forty days from this date, and that a copy of this order be sent to the marshal for the Western district of Virginia. And it is ordered that the marshal retain the said Richard S. Parks in his custody meantime, and that at the end of the forty days above specified, he execute the sentence of the district court, unless otherwise directed."

On similar petition to the United States supreme court the principles of this decision were affirmed. See Ex parte Parks, 93 U. S. 18. But the accused was pardoned by the president.

Case No. 10,765.

In re PARKS.

[9 N. B. R. 270.][1]

District Court, E. D. Michigan. 1874.

BANKRUPTCY—EXEMPTION—PARTNERSHIP PROPERTY—DWELLING HOUSE AS REAL PROPERTY.

A member of a bankrupt firm filed a petition to have a dwelling house and lot occupied by himself and family set apart by the assignee as exempt property under the bankrupt act and the laws of Michigan. The lot was the sole property of the petitioner, the house was built of lumber and other materials belonging to the bankrupt firm, and with funds of the said firm, which were charged on the books to the house, and not specifically to the petitioner. At this time the firm was indebted to the petitioner to an amount exceeding the cost of the house, and was considered solvent. The assignee demurred to the

[1] [Reprinted by permission.]

petition: first, because the house was partnership property, and second, that there can be no exemption of partnership property under the bankrupt law or the law of Michigan. *Held*, that the house was part of the realty, and as much the separate property of the petitioner as the realty itself; that the firm had no interest or ownership in the house, and, as it was indebted to the petitioner, no claim for reimbursement; that nothing passed to the assignee except any excess there may be in the value of the property in question over fifteen hundred dollars.

This case comes up on the petition of John F. Parks, one of the bankrupts, to have a certain lot or part of lot in the city of Detroit, and the dwelling-house thereon, occupied by him with his family, claimed by the assignee as a part of the assets for the benefit of the creditors of the partnership of which the bankrupts [John F. & C. R. Parks] were the members, set-off to him as exempt under the bankrupt act and the constitution and laws of Michigan. It appears from the allegations of the petition, all of which are admitted by the assignee, that the lot was the sole property of the petitioner, John F. Parks. The business of the bankrupt partnership, composed of the said bankrupts, was dealing in lumber and building materials. And it further appears by the petition that the house was built of lumber and materials and with funds belonging to the partnership, and that the same were charged on the partnership books to the house and not specifically to the said petitioner; that the partnership was indebted to the petitioner, and that after deducting the charges for building the house there was still a balance due him, and that immediately upon the house being completed the petitioner took possession of the same, and has occupied the same ever since with his family, as and for his homestead. There were some other facts and circumstances attending the transaction and commented upon at the argument, but which, in the view taken by the court, are unnecessary to be noticed here. The transactions above recited were had in the summer and fall of 1871, and it does not appear, neither is there any pretence, that the firm was then insolvent, or that it was then indebted otherwise than to the petitioner, or that there was any fraud in the said transactions as against creditors or otherwise. The assignee demurred to the petition on two grounds: 1. That the house was not the sole property of the petitioner, but, on the contrary, was partnership property. 2. That there can be no homestead exemption of partnership property under the bankrupt law or the laws of Michigan.

Mr. Ward, for petitioner.
Mr. Kane, for assignee.

LONGYEAR, District Judge. By the bankrupt act [of 1867 (14 Stat. 522)] § 14 and amendments, exemptions by state laws are extended to debtors in bankruptcy. By the constitution and laws of Michigan (1 Comp. Laws 1871, p. 76; 2 Comp. Laws, p. 1749) every homestead of not exceeding forty acres of land, and the dwelling-house thereon, and the appurtenances, to be selected by the owner thereof, and not included in any town plat, city or village; or instead thereof, at the option of the owner, any lot in any city, village or recorded town plat, or such parts of lots as shall be equal thereto, and the dwelling-house thereon, and its appurtenances, owned and occupied by any resident of the state, not exceeding in value fifteen hundred dollars, shall be exempt, &c. In order to come within these provisions the dwelling-house must be owned by the occupant as well as the land upon which it is located. Did the dwelling-house in this case belong to the petitioner, the owner of the lot, or did it belong to him and his partner in common?

There being no fraud in the transactions as against the firm creditors, their rights must be worked out and determined through the rights of the co-partners as between themselves. The petitioner owned the lot. He built the house upon it. He so built it with partnership funds, and, for aught that appears in the case, with the knowledge and consent of his copartner. The house became a part of the realty, and as much the separate property of the petitioner as the realty itself. 1 Washb. Real Prop. 2. The property and funds used in its erection thereby became separated from the partnership effects, and the separate property of the petitioner, and as between him and his co-partner, all the latter could claim in any event would be reimbursement by the former to the firm for the property and funds used. Story, Partn. 144, note 1. But in this case no such reimbursement could be claimed, because the firm was owing the petitioner more than the amount of the property and funds so used. The firm, therefore, not only had no interest or ownership in the house, but no claim for reimbursement. From this it follows: 1. That the assignee has no claim to the house as partnership property. 2. That the house as well as the lot being owned and occupied by the petitioner as a homestead, the same is exempt by the bankrupt act and laws of Michigan. 3. That by the express provisions of the bankrupt act (section 14), nothing passed to the assignee by virtue of the assignment to him as the separate property of an individual partner, except any excess there may be in the value of the property in question over fifteen hundred dollars. 4. That the prayer of the petition must be granted.

The result arrived at renders it unnecessary to decide the second ground of demurrer, that is, whether under the laws of Michigan there can be a homestead exemption of property, owned by the occupant in common with others, as partners or otherwise. Upon this question the authorities are somewhat conflicting, but I shall do no more at the present time than to cite them for future

reference. Some of them are in point, and some have only a bearing upon the question. Thurston v. Maddocks, 6 Allen, 427; In re Hafer [Case No. 5,896]; Tomlin v. Hilyard, 43 Ill. 300; West v. Ward, 26 Wis. 579; Kingsley v. Kingsley, 39 Cal. 665. See, also, 5 Cal. 244; 6 Cal. 165; 27 Cal. 418; Radcliff v. Wood, 25 Barb. 52; Stewart v. Brown, 37 N. Y. 350; In re Young [Case No. 18,148]; In re Rupp [Id. 12,141[; Anon., 1 N. B. R. (Quarto) 187 [Append. Fed. Cas.].

Let an order be made in accordance with the foregoing opinion.

PARKS (BOOTH v.). See Case No. 1,648.

PARKS (UNITED STATES v.). See Cases Nos. 15,995 and 15,996.

PARMELE (UNITED STATES v.). See Case No. 15,997.

PARMELY v. IRON MOUNTAIN R. CO. See Case No. 10,845.

PARMENTER (CROWELL v.). See Case No. 3,446.

Case No. 10,766.

PARMLEE et al. v. The CHARLES MEARS.
[Newb. 197.] [1]

District Court, N. D. Ohio. Nov., 1856.

MARITIME LIENS—VESSEL IN HOME PORT—WHAT MUST BE SET FORTH IN LIBEL—VESSEL NOT YET EMPLOYED IN NAVIGATION — JURISDICTION ON THE LAKES.

1. Where a libel is filed to enforce a lien upon a domestic vessel, it must be distinctly set forth in the libel, by what municipal regulation or state law, such lien is conferred.

2. When a libel is filed to enforce a lien under the general maritime law, such facts must be set forth in the libel, which if proven, would satisfy the court, that the vessel was a foreign vessel at the time the lien attached.

3. The home port of a vessel, is the place where the law requires her to be registered, not necessarily the place where she was built.

4. When the general maritime law gives the mechanic or material man a lien for labor and materials, in the building of a vessel, the admiralty has jurisdiction to enforce it by a process in rem, even before the vessel is launched or employed in navigation.

[Cited in The Richard Busteed, Case No. 11,-764.]

5. When a libel is filed to enforce a lien against a vessel before she is actually employed in navigation, the libel must show that the vessel is of the size and build fitted for maritime employment, and that her business was to be maritime navigation upon the lakes or high seas.

6. Independent of the act of 1845 [5 Stat. 726], extending the jurisdiction of the district courts upon the lakes, the maritime law has the same application to cases upon the lakes, as it has to those upon tide waters, both as to jurisdiction, and to forms of procedure and practice.

7. Whatever are deemed material, and sufficient averments in a libel upon the seaboard to give jurisdiction, would be considered the same upon the lakes.

In admiralty. In December, 1855, Charles Mears & Co., of Chicago, Illinois, agreed with Luther Moses, of Cleveland, Ohio, to build the hull of and complete, with the exception of the engine, boiler, &c., a new propeller. At the same time, they agreed with libelants [Luman Parmlee and Joseph R. McGinnis] to build and furnish for said propeller, a new engine, boiler, &c., all to be completed and set up in the propeller ready for use. The agreement was in writing. The payments not having been made as agreed, the libelants filed their libel and allege substantially: 1st. That the propeller is of more than twenty tons burden, now lying at Cleveland, and that an agreement was made as above stated. 2d. That libelants performed their part of the contract. 3d. That C. Mears & Co. have not paid as they agreed. 4th to 9th, inclusive. That libelants were employed to superintend the work, and furnish other materials, &c., and claiming $1,587.27.

To this libel the respondents excepted substantially as follows, to the jurisdiction of the court: 1st. That the contracts of libelants having been made with the owners, there was no lien on the vessel. 2d. That the engine, &c., was furnished before the said propeller was employed in navigation, and before she was enrolled and licensed. 3d. That the libel does not allege enrollment and license; or, 4th, that she was a foreign vessel. 5th. The libel is insufficient, because it does not allege that the propeller was a vessel, or enrolled and licensed, &c. 6th. That it alleged, that the contracts were made with the owners, and consequently show there was no lien. 7th. That it alleges, that the contract was made, the work was done, the propeller was being built, and libelants resided in Cleveland, that consequently Cleveland was the home port of the vessel, &c.

S. B. Prentiss, for claimants, and sustaining the exceptions.

I. This is not a case within the act of February 26, 1845, and no jurisdiction is given by that act, it not being alleged in the libel that the propeller was, at the time of the contract or the furnishing the materials and performing the labor, or at the time of filing the libel, enrolled or licensed for the coasting trade, or at the time employed in business of commerce between ports and places in different states and territories upon the lakes and navigable waters connecting the said lakes. See stat. Conk. Adm. 3, 821, and note, 864, 865, and note; Ben. Adm. 141, 142. The libel must state every fact necessary to give the court jurisdiction. Ben. Adm. p. 218, § 402; Id. p. 221, § 408. There must be a lien upon the thing to proceed against it in rem. Id. pp. 213, 214, § 387; Id. p. 153, § 270; [The General Smith] 4 Wheat. [17 U. S.] 438; 4 Pet. Cond. R. 494.

II. If this was a foreign vessel the lien may exist either by virtue of the general maritime law or of the state law. Conk. Adm. 68, 69, 70. But if a domestic vessel, the general maritime law gives no lien; and

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

the lien, if any, exists by virtue of the state law. Conk. Adm. 68, 69, 70; Ben. Adm. pp. 154, 155, § 272. The libel shows no lien by virtue of the laws of this state.

Is there a lien in this case? The materials furnished and labor performed were furnished and performed under and by virtue of a contract with the owner, for a vessel that was then being built, the contract being made and the labor and materials furnished and performed at the place where the vessel was being built, and nothing appearing in the libel but that that place was her home port, or that she was otherwise than a domestic vessel, nor is it alleged that she was built or designed for maritime business or navigation.

1. The contract being made with the owner, is there a lien? The articles furnished, except the superintendence, were for the equipment of the vessel, and in furnishing them the libelants were strictly material men, and their rights must be regulated and governed by the law as applicable to material men. Ben. Adm. pp. 151, 152, §§ 266, 267. The ship consists of the hull and spars, everything else is her equipment. Ben. Adm. p. 151, § 266. No lien for materials is ever implied from contracts made by the owner in person. It is only those contracts that the master enters into in his character of master, that specifically bind the ship or affect it by way of lien or privilege in favor of the creditor. When the owner is present, acting in his own behalf as such, the contract is presumed to be made with him on his ordinary responsibility, without a view to the vessel as a fund from which compensation is to be derived. Conk. Adm. 59; Fland. Mar. Law, p. 186, § 241; Harper v. New Brig [Case No. 6,090]; [The St. Jago De Cuba] 9 Wheat. [22 U. S.] 409; 5 Pet. Cond. R. 635, 636; The Phœbe [Case No. 11,064]; Sarchet v. The General Isaac Davis [Id. 12,357]. And to this rule there is no exception in favor of persons furnishing materials or labor for the original construction or building of a vessel. Conk. Adm. 66.

2. For materials furnished to a domestic ship, the material man has no lien on the ship, except it be given by the state law. Abb. Shipp. 143, and note; Id. 148, and note; 1 Kent, Comm. 379; 3 Kent, Comm. 168-170; Fland. Mar. Law, 183-186; Conk. Adm. 56, 57; Zane v. The President [Case No. 18,201]; Harper v. New Brig [supra]; Davis v. New Brig [Case No. 3,643]; [The St. Jago De Cuba] 9 Wheat. [22 U. S.] 409; 5 Pet. Cond. R. 435, 436; The Robert Fulton [Case No. 11,890]; [The General Smith] 4 Wheat. [17 U. S.] 438; 4 Pet. Cond. R. 494; The Jerusalem [Case No. 7,294]; [Peyroux v. Howard] 7 Pet. [32 U. S.] 324; The Nestor [Case No. 10,126]; The Marion [Id. 9,087]; Read v. Hull of a New Brig [Id. 11,609]; Sarchet v. The General Isaac Davis [Id. 12,357]; Davis v. Child [Id. 3,628].

3. The materials and labor in this case being furnished and performed while the vessel was being built, and before she was enrolled and licensed for the coasting trade, or employed in business of commerce or navigation, etc., the claim is not within the jurisdiction of the court, either under the general maritime law or the act of February 26, 1845. See stat. in Conk. Adm. 3; Bains v. The James & Catherine [Case No. 756]; Sarchet v. The General Isaac Davis [supra].

C. W. Noble, for libelants.

1. The jurisdiction of this court in this case does not depend upon the statute of 1845. We have a general maritime lien. Fitzhugh v. The Genesee Chief, 12 How. [53 U. S.] 443; Ben. Adm. 471; Rules Sup. Ct. U. S. No. 12; De Lovio v. Boit [Case No. 3,776]; Ben. Adm. §§ 209, 211-213, 261, 265, 267, 270, 271; Const. U. S. art. 1, §§ 8, 10; Id. art. 3, § 2; 1 Term R. 109; Cowp. 639; The Nestor [supra]; Purinton v. Hull of a New Ship [Case No. 11,473]; Smith v. Eastern Railroad [Id. 13,039]; Read v. Hull of a New Brig [supra].

2. This is strictly, and to all intents and purposes, a foreign vessel, and the contract is strictly a maritime contract. The residence of the owners determines what is the home port of the vessel, and the residence of the owners is sufficiently stated in the libel to be at Chicago, Illinois. Abb. Shipp. 179, note; 1 Stat. 55, 288; 2 Stat. 35, 313; Ben. Adm. §§ 24, 26, 28, 273, also page 471; 15 Johns. 298; Law, Jur. 8; Raymond v. The Ellen Stewart [Case No. 11,594], last clause of judge's opinion; Conk. Adm. 419, 66, 67, 69.

3. It is not necessary that the vessel should be enrolled or licensed under the general maritime law, or engaged in commerce or navigation between ports and places in different states and territories upon the lakes or navigable waters connecting said lakes, nor need it be set forth in the libel. Read v. Hull of a New Brig [supra]; De Lovio v. Boit [supra]; The Nestor [supra].

4. The fact that the owners are personally liable does not destroy the lien. The master, when he pledges the ship, does so only by virtue of his agency for the owners, and his contracts bind not only the ship but also the owners. If he could not bind the owner he could not bind the ship. The Nestor [supra]; 10 Mo. 531; Zane v. The President [supra]; 1 Term R. 109; Cowp. 639; Ben. Adm. §§ 265, 266; The Pacific [Case No. 10,643]; Rule 12, Sup. Ct.; Law, Jur. 8, 190, 194; Davis v. New Brig [supra].

WILLSON, District Judge. A libel in rem is filed in this case for a balance claimed to be due on a contract alleged to have been made on the 8th day of December, 1855, between the owners of said propeller and the libelants, under which contract the libelants built and furnished a steam engine, boiler and other machinery for said vessel. The al-

leged consideration to be paid for the engine and other materials was $6,890; of which amount the sum of $1,290 is claimed to be due and unpaid. The libelants also claim the further sum of $150 for superintendence in the building of the propeller; and aver that, at the time of making said contract and furnishing the machinery under it, the vessel was in process of construction, at the port of Cleveland, in the state of Ohio. Thomas Mears, of the state of Illinois, has interposed his claim as sole owner of the propeller, and filed exceptions (seven in number), to the sufficiency of the libel, and to the jurisdiction of the court.

I deem it unnecessary to examine or consider these exceptions in detail. The libel is defective, for the want of two material allegations. It does not state the residence or citizenship of the owners of the propeller at the time of making the contract and obtaining the labor and materials for the vessel. Neither does it set forth specifically the tonnage, purposes and intended use of said propeller, when built. If the owners, at the time of entering into this agreement, and procuring the work and materials, were residents of the state of Ohio, then the propeller was a domestic vessel, and no lien attached unless the local law gave a lien; in which case it should have been distinctly set forth in the libel by what municipal regulation or state law such lien was conferred. If the libelants rely upon a general maritime lien, they should spread upon the record these facts, which, if proved, would satisfy the court that the propeller, at the time of her construction, was a vessel foreign to the port of Cleveland. The place of building a ship or vessel, does not necessarily determine her home port. The home port is the place where the law requires her to be registered or enrolled. By the 3d section of the registry act of December, 1792, it is provided, "that every ship or vessel hereafter to be registered, &c., shall be registered by the collector of the district in which shall be comprehended the port to which such ship or vessel shall belong at the time of her registry, which port shall be deemed to be that at or near to which the owner, if there be but one, or if more than one, then where the ship's husband or managing owner, usually resides." And by the 4th section of the act of 1789, it was declared that the port to which any such ship or vessel shall be deemed to belong, is that, or nearest that in which the owners usually reside.

If, in this case, the facts are as claimed by counsel in the argument (though not apparent on the record), that C. Mears & Co., the owners of the propeller, were residents of Chicago, at the time of making the contract, and of building the propeller at Cleveland, then the vessel had the status of a foreign ship, and as such became subjected to all the incidents and responsibilities of a general maritime lien to the material men in her building. All jurists agree, that contracts for the building of ships stand upon precisely the same ground as contracts for repairing, supplying and navigating them. They are maritime contracts, for maritime service, and the admiralty jurisdiction as rightfully attaches in the one case as the other. The Jerusalem [supra]; Davis v. New Brig [supra]; Read v. Hull of a New Brig [supra]. Where the general maritime law gives the mechanic or material man, a lien for labor and materials furnished in the building of a vessel, the admiralty has jurisdiction to enforce it by process in rem, even before the vessel is launched or employed in navigation. The law in such cases, gives the lien upon the water craft as an auxiliary to the personal security of the owner. It has its foundation in the same reasons that create a lien for repairs upon a ship in commission, when those repairs are made in a foreign port. In the case before us, it is no valid objection to the lien, that the labor was performed, and materials furnished in the building of the vessel, by virtue of a contract with the owners residing abroad. A contract with the ship's husband for supplies in a foreign port, is effectual to bind the owner in personam, while at the same time, the debt for the supplies is a lien upon the ship. The ship's husband in such a case binds the owner. The debt is created for the benefit, and on account of the owner. The contract is in effect with the owner, though made by his agent, the ship's husband; and the lien attaches to the ship to secure the payment of the debt created by the contract, for the sole reason, that the owner resides abroad. Now, it is for the same reason, the lien attaches to the vessel, where labor and materials are furnished in her building by virtue of a direct contract with the foreign owner. It is because the owner resides abroad. This policy of the law has a double purpose; it advances and facilitates the means of commerce, and secures and protects the material man against the necessity of resorting solely to the personal responsibility of a foreign debtor, in a foreign tribunal, to enforce a maritime contract. To give the admiralty court jurisdiction in such a case, however, the libel and record must show, that the vessel is of the size and build fitted for maritime employment, and that her business was to be maritime navigation upon the waters of the lakes, or upon the high seas. The libel in the present suit is defective in this particular, and for that cause the claimant's exception in that behalf, is sustained.

It is further objected by counsel for the claimant, that the libel does not contain averments, bringing the case within the provisions of the act of 26th February, 1845, entitled "An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same." It is provided in this act of con-

gress, "that the district courts of the United States shall have, possess and exercise the same jurisdiction in matters of contract and tort, arising in, upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories upon the lakes and navigable waters, connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats, and other vessels employed in navigation and commerce upon the high seas or tide waters, within the admiralty and maritime jurisdiction of the United States." It is insisted that this court has not admiralty jurisdiction to enforce a maritime lien, except such lien accrued while the water craft was actually enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories. The forms prescribed for proceeding under this statute, by the learned judge of the district court for the Northern district of New York, in his excellent treatise upon the jurisdiction of the United States courts in admiralty and maritime causes, would require the libelant to aver, that the debt accrued while the vessel was in actual commission and engaged at the time in the business of commerce and navigation. Such undoubtedly was the requirement of the law when Judge Conkling published his work upon the admiralty jurisdiction. It was in accordance with the decisions of the supreme court of the United States in the cases of The Thomas Jefferson, 10 Wheat. [23 U. S.] 428, and The Orleans v. Phœbus, 11 Pet. [36 U. S.] 175. But since then, those decisions have been reversed and overruled, and the supreme court, in the case of The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, has placed the admiralty jurisdiction of the lakes upon the same basis as that of the tide and salt waters. Hence now, independent of the act of February, 1845, the maritime law has the same application to cases upon the lakes as it has to those upon tide water, not only in matters of jurisdiction, but also in forms of procedure and practice. I certainly see nothing in the argument of counsel to change the views of this court, as expressed upon the same question, in the opinion delivered in the case of Wolverton v. Lacey [Case No. 17,932], and decided at the last February term. If the district court has jurisdiction in a given case upon the seaboard, like jurisdiction obtains upon the lakes. What would be deemed material and sufficient averments in the libel to give jurisdiction, in one case, would be regarded as material and sufficient averments in the other.

The exceptions to the jurisdiction of the court over the subject matter of the suit, are overruled, and the fourth and seventh exceptions to the sufficiency of the libel, are sustained. The libelants have leave to amend and the case is continued.

Case No. 10,767.

PARMLEY v. ST. LOUIS, I. M. & S. R. CO. PAUL v. PACIFIC R. CO. BAILEY v. ATLANTIC & P. R. CO. ST. JOHN v. MISSOURI, K. & T. RY. CO. COURTRIGHT v. CLARK et al.

[3 Dill. 13.] [1]

Circuit Court, E. D. Missouri. 1874.

RESTRAINING COLLECTION OF TAXES.

1. The nature and extent of the jurisdiction in equity to restrain the collection of taxes, considered.

[Cited in Paul v. Pacific R. Co., Case No. 10,845.]

[See Bailey v. Atlantic & P. R. Co., Case No. 732.]

2. Facts stated, which, if proved, would authorize a partial restraint of taxes, because of the illegal action of the state board of equalization.

[These were bills in equity by Duncan S. Parmley against St. Louis, Iron Mountain & Southern Railroad Company, Amos Paul against Pacific Railroad Company, Ozias Bailey against Atlantic & Pacific Railroad Company, Frederick St. John against Missouri, Kansas & Texas Railway Company, and Milton Courtright against Clark, state auditor, and others.] These are separate suits by non-resident stockholders in the several railroad companies above mentioned, brought against the directors of those companies and against the state auditor and the officers of the several counties and municipalities through which the respective roads run, to restrain the collection of taxes levied under the legislation of the state, for the year 1873. The bills, in their frame and theory, are like that which was considered and supported by the supreme court of the United States in Dodge v. Woolsey, 18 How. [59 U. S.] 351. Special grounds of relief, total or partial, in addition to the general one noticed in the following opinion, are set forth in the bills. The cases came before the circuit judge, at his chambers, August 5, 1874, upon motions by the respective plaintiffs for the allowance of temporary injunctions. No answers were filed, and the question argued was whether the bills, upon their face, and supposing their allegations to be true, made out a prima facie case for a preliminary injunction.

Mr. Dryden, Mr. Baker, Mr. Lytton, Mr. Low, Mr. Drury, and Mr. Waters, for plaintiffs.

Mr. Ewing, State Atty. Gen., and Mr. Clover, for defendants.

DILLON, Circuit Judge. Non-resident stockholders in the St. Louis, Iron Mountain &

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

Southern Railroad Company, in the Pacific Railroad Company, in the Atlantic & Pacific Railroad Company, in the Missouri, Kansas & Texas Railway Company, and in the Chicago & Southwestern Railway Company, corporations chartered or organized and operating their roads under the laws of the state of Missouri, have filed in the circuit courts for the Eastern and Western districts of the state, bills in equity for relief against alleged illegal and excessive taxation under the authority of the state, and praying for the allowance of temporary injunctions to stay the collection of the taxes until the merits of the respective complaints can be heard.

Special grounds of relief are set forth in several of the bills not common to all the cases; such, for example, as the alleged erroneous assessments to the Pacific Railroad Company, and to the Missouri, Kansas & Texas Railway Company, of cars exclusively belonging to the Pullman Company; and to the Chicago & Southwestern Railway Company, of rolling stock of several hundred thousand dollars in value owned by the Chicago, Rock Island & Pacific Railroad Company. And again, the Pacific Railroad Company and the Atlantic & Pacific Railroad Company claim exemption, total or partial, from the taxes of 1873, by virtue of an alleged contract to that effect with the state, contained in the twelfth section of the act of December 25, 1852, relating to these lines of road.

There is, however, a common ground of complaint in all the bills in respect to the action of the state board of equalization in fixing the valuation of the property of the respective companies for taxation. It is to this feature of the cases that I will now advert, omitting in this place reference to the grounds of relief peculiar to several of the cases.

In 1873 the legislature of Missouri passed an act specially providing for the assessment of railroad property, and the mode of collection of taxes thereon. Laws 1873, p. 63. The act was in some respects modified in 1874. Laws 1874, p. 130. By this legislation each railroad company in the state is required to make a statement, on oath, of its length of road and all its taxable property within the state, "and the actual cash value thereof." This statement is to be furnished to the state auditor, and a similar statement to the clerk of the county court of each county through which the road runs. The county court of each county is required to examine this statement and determine the correctness of the same as to description of property and valuation thereof. If correct, they so certify it to the state auditor. If property is omitted, they add it. And then, as to all property, they are required to forward to the state auditor "an official statement of what they believe to be the actual cash value." The auditor lays these statements received from the companies and from all the county courts before the state board of equalization, which meets in January of each year.

The state board of equalization is composed of "the members of the state senate and the lieutenant governor for the time being," of which "the lieutenant governor is ex officio president," a majority of whom shall constitute a quorum, "and each member is required to take an oath as a member of the board." Laws 1872, p. 86. As respects railroad property, the board are required, when they meet annually, "to proceed to adjust and equalize the aggregate valuation of the property of each railroad company." It is also provided that "the board shall have the power to summon witnesses, and to compel their attendance; to increase or reduce the aggregate valuation of the property of any railroad company included in the aforesaid statements or returns, and any other property belonging to the said railroad companies which may be otherwise known to them, as they shall see just and right." The board is required to apportion lands and buildings to the counties and towns in which such property is situate, and all the other property is to be apportioned to each county, town, etc., according to the ratio which the number of miles of road therein bears to the whole length of the road. It is upon the value thus determined that taxes are levied, the state taxes to be charged to the companies by the auditor, the county and other local taxes to be levied locally upon the valuation thus settled by the state board of equalization. The state taxes, as well as county taxes, are collected by the county authorities; the municipal taxes by the municipality.

It thus appears that the valuation of railroad property upon which all taxes, state and local, are levied, is determined by the state board of equalization, and all the powers and duties of this board are substantially set forth above.

The bills charge misconduct and illegal action on the part of the board in many particulars. It will suffice to refer to the statement of the more material of them in the case relating to the Iron Mountain Company. The bill sets forth that the board assessed the property of that company "at a sum more than three fold its cash value," and that in doing so they were not governed by any evidence adduced before them of values, nor by any knowledge they possessed of values, but were in fact moved and influenced by passion and prejudice against the company; that, though they were the same body substantially as fixed the value of the same property for the year 1872 at the total sum of $2,111,435, yet for 1873 (the year now in question) they raised it three fold, or to the sum of $6,266,334; that in 1872 they fixed the value of the road bed at $5,000 per mile, whilst in 1873 they fixed the same at $14,900 per mile; that the board, consisting of thirty-five members, referred the matter of the values of the company's property to a committee of five, which,

it is charged, they could not legally do; that the board, by rule, debarred the company from presenting evidence before the board, but compelled the company to appear before the committee of five to present its evidence to them, or not at all. It is directly charged that the board adopted rules which expressly debarred the company from being heard by the board on appeal from the action of the committee. It is also charged that although the board adopted a rule that the substance of the testimony of each witness should be taken down by the committee, and signed by the deponent, and be reported to the board by the committee, yet it is alleged that in many instances the evidence was not taken down, and "that not a single statement which was reduced to writing was reported to the board, nor was there ever any report to the board of any evidence before the committee, or even of the facts which the committee believed to have been established by the evidence."

It is stated that the committee of the board valued the road bed at $7,875 per mile, which the plaintiff alleges was in excess of the actual cash value, "yet the board, without any evidence whatever, and without any knowledge whatever in themselves of values, increased the committee's estimate to the enormous sum of $14,900 per mile," and this without any report from the committee of the testimony or the facts proved before them, and against the voice of the members of the committee, with one exception.

The bill also charges that the board, in violation of the constitutional provision requiring equal taxation in proportion to value, and intending to discriminate against railroad property, "knowingly and intentionally required such property to pay one-third more taxes in proportion to its value than other property of equal value. It is also charged that the state board exceeded its lawful powers by undertaking to make, and making, a new and original assessment, instead of confining themselves to the duty of equalizing assessments.

In the case of the Pacific Railroad, it is alleged that the board in like manner increased the aggregate value from $3,716,920, as returned by the company, to $9,654,423, and fixed the value of the road per mile at $26,000.

The board in like manner, it is charged, increased the taxable valuation of the Atlantic & Pacific Company's property from $2,368,504 to $6,215,503, and fixed the value of its road per mile at $10,000; the property of the Missouri, Kansas & Texas Company was increased by the board from $1,801,688, as valued by the company, or $3,481,246, as valued by the county court, to $5,698,950, and fixed the value of the road per mile at $18,000; the valuation of the Chicago & Southwestern Railway Company was increased from $650,000 to $1,849,339. Other complaints in the bill are made against the board of a minor character, such as the failure of an active member to take the oath of office; and intentionally assessing as the company's, property which did not belong to them.

Such are the grievances complained of; and the question now is whether, if the allegations of the bills are substantially true, they give a right in equity to relief, and to what extent. The cases are now before me, after notice to the defendants, for an allowance of a temporary injunction. No answers have been filed, and hence the material allegations of the bill, which are sworn to, are, on this hearing, and for the present purpose, to be considered as true, and the inquiry is, supposing the bills to be true, can a court of equity interfere, either preliminarily, by an injunction, or finally, by a decree?

The decisions as to what will give an equity to enjoin the collection of taxes are conflicting, and, to my mind, not very satisfactory. Since all regular governments subsist by means of taxes, which are assessed, levied, and collected under laws necessarily stringent and summary, in order to insure prompt payment, it is obvious that the courts should not interfere, by injunction, with the regular working of these laws, unless an injury to the citizen will be thereby inflicted, for which he has no other adequate remedy. When this is the case, however, the courts should not hesitate to interfere to protect the citizen against the action of the state; for the state, acting for all, is under the highest obligation to deal justly with each.

I confess to some doubts as to what will warrant the judicial tribunals in interfering with the results of the action of such a body as the state board of equalization. It is clear that such interference cannot be justified for reasons merely formal or technical, or for acts which do no substantial injury, or where the wrong could have been avoided or prevented by measures or steps open to the party at the time. Mistakes of judgment on the part of such a body in honestly over-valuing property cannot ordinarily, if ever, be corrected by a bill in equity.

On the other hand, I am unwilling, without further reflection, to say that in no possible case will a court of equity interfere with the result of the action of an assessing or equalizing body. Suppose local assessors purposely value the property of non-residents two or three times as high as the property of residents, and that this action is confirmed by the local board of equalization, which refuses to interfere because in sympathy with the feelings which actuated the assessors, is there no remedy? Now, if the charges in the present bill be true, the state board, actuated by passion and prejudice, and with a design to discriminate against railroads, and without evidence, have assessed the property not only higher than it was valued by the companies, on oath, but higher than it was valued by the county courts, and much higher than it was valued upon evidence by committees of their own

body, the result of which is, as alleged, an excessive valuation of at least one-third more than other property of equal value, thereby compelling the railroads to bear more than their share of the public burdens. If all this can be established, my impression is that equity ought to intervene—not, however, to annul the whole assessment, but only to reduce the inequality. So if the board should clearly exceed its lawful jurisdiction, there might be a remedy by injunction in a proper case. In stating that such are my impressions, I wish to add that they are not firm convictions, and that on questions of so much difficulty and importance, it is but just to both sides that any final views should be reserved until they can be brought upon full argument before the whole court. It is a fortunate circumstance that the court meets next month, and that these cases can be heard before all the judges, and perhaps a decision then had, or, at all events, the principles of decision settled, so as to involve no great delay in the collection of these taxes to the extent of the actual value of the property, except those roads, if there be any, which have a still subsisting legislative contract of exemption from taxation.

In order to bring this matter before a full court, and to give the defendants an opportunity to answer the charges in the bills, if they so desire, I have thought it best to allow temporary injunctions to issue, unless the defendants are willing to let the collection of the taxes rest until the views of the court can be had. We will give every facility for bringing the question to a speedy hearing, and the counties, etc., can at any time, if this is deemed desirable by them, have the injunctions modified so as to allow them to collect taxes so far as the admitted value of the property shows a liability, or so far as we see it to be equitable; or we can refuse to continue the injunction, except on condition that such a portion of the taxes be paid into court for the use of the state, counties, and towns entitled thereto. At present, and until the views of the court are settled concerning the right to maintain these bills, it is, perhaps, best not to complicate the cases by requiring payment of a proportion of the assessed taxes as a condition of the injunction. Inasmuch as there exist doubts as to the right to maintain these bills, and in view of the fact that the time is only a few weeks distant, it would seem best on all sides to let the matter rest until the court meets, without requiring injunctions to be formally issued, which will be attended with costs; but if the defendants are unwilling to allow this to be done, a temporary injunction may issue in each case, reserving the right of the defendants to move at the next term to dissolve it, with or without answer, as they may be advised. If answers are to be filed to resist the injunctions, let this be done by the September rules, and any affidavits in support thereof by September 15th, and counter-affidavits by September 25th. Motions to dissolve or modify the injunctions may be set down for the second Tuesday of the term. Ordered accordingly.

[NOTE. A temporary injunction was granted the plaintiffs. Case No. 732. The exemption from taxation claimed by the company was held not to exist. Id. 10,768. Upon the final hearing the injunctions were modified so as to permit the collection of the tax to an amount not in excess of that fixed by the various county courts through which the roads run. Id. 10,845.]

As to enjoining taxes, see First Nat. Bank v. County of Douglas [Case No. 4,799]; Union Pac. R. Co. v. McShane [Id. 14,382]; Hunnewell v. Burlington & M. R. R. Co. [Id. 6,879]; Oliver v. Omaha [Id. 10,499.]

Case No. 10,768.

PARMLEY v. ST. LOUIS, I. M. & S. R. CO. PAUL v. PACIFIC R. CO. BAILEY v. ATLANTIC & P. R. CO. ST. JOHN v. MISSOURI, K. & T. RY. CO. COURTRIGHT v. CLARK et al.

[3 Dill. 25.] [1]

Circuit Court, E. D. Missouri. 1874.

JURISDICTION OF EQUITY TO RESTRAIN COLLECTION OF TAXES—TERMS OF INTERFERENCE.

1. The nature and extent of the jurisdiction of a court of chancery to enjoin the collection of taxes, considered by Miller, Circuit Justice.

2. A distinction, on principle and policy, suggested between enjoining local or municipal taxes, and taxes levied by the state for purposes of general revenue.

3. A court of the United States will proceed with great caution in restraining the collection of the ordinary revenues of a state.

[Cited in Moore v. Holliday, Case No. 9,765.]

4. The court laid down the following principles as those which would hereafter govern it in respect to restraining the collection of taxes, viz: that whenever a party comes into this court to enjoin the collection of taxes, or the collection of part of a tax, if there is any part which he admits to be due or just, or which the court can see in the statement made in the bill ought to be paid, there must be an allegation in the bill conforming to the fact that he has paid it, or tendered it; and it is not a sufficient allegation to come and say that he is willing, or even that he has paid it into the court, because the state is not to be stayed in its revenue, which is admitted to be due, in that way; and a party claiming that he will not pay his taxes, or any portion of them, cannot screen himself during the course of a long litigation from paying that which must be paid, or ought to be paid, by setting up a contest over that which is doubtful, and which may, or may not, be necessary to be paid.

5. The specific exemption from taxation claimed by the Missouri Pacific Railroad and by the Atlantic and Pacific Railroad, under section 12 of the act of December 25, 1852, is not well founded.

[See Bailey v. Atlantic & P. R. Co., Case No. 732.]

[These were bills in equity by Duncan S. Parmley against the St. Louis, Iron Moun-

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

tain & Southern Railroad Company; Amos Paul against Pacific Railroad Company; Ozias Bailey against Atlantic & Pacific Railroad Company; Frederick St. John against Missouri, Kansas & Texas Railway Company, and Milton Courtright against Clark, state auditor, and others.]

These are the cases above reported, and at the September term, 1874, they came before the court (Miller and Dillon, JJ., and by their request Treat, J., sat at the argument).

The bills, as amended, in the several cases, in substance, set forth and allege that an illegal and excessive assessment of state, county, and municipal taxes has been made for the year 1873, in consequence of an excessive and exorbitant valuation of the property of all the railroad companies, alleged to have been illegally and improperly made by the state board of equalization, without jurisdiction.

The bills specifically charge that the members of the board were actuated by passion and prejudice, and that "in violation of the constitutional provisions requiring equal taxation in proportion to value, and intending to discriminate against railroad property," "knowingly and intentionally required such property to pay one-third more taxes in proportion to its value than other property of equal value." In the assessment of the St. Louis, Iron Mountain, and Southern Railroad, it is charged that, without evidence, the board fixed the value of the road at $6,268,334, and this sum it is alleged, is more than three times the actual cost value of the road. That in 1872 the board fixed the value of the property at $2,111,435.

It is also alleged that the state board of equalization referred to a committee of five members the taking of all evidence, as to the value of the property of the road, and that the attorneys and representatives of the road were only permitted to appear and be heard before this committee, and not before the whole board, and that the evidence, when so taken by the committee, was ordered by the board to be reduced to writing and reported to the board. Yet in many instances the evidence was not taken down, and it is alleged "that not a single statement which was reduced to writing was reported to the board, nor was there ever any report to the board of any evidence before the committee, or even of the facts which the committee believed to have been established by the evidence."

Similar allegations as to excessive valuation and alleged irregularities are made in each of the bills, as also the allegation that two of the members of the board were not sworn; that the lieutenant governor, although by law a member of the board, was not permitted to vote. And, in addition to these common grounds of complaint as to the action of the state board of equalization in fixing the value of the railroad property, there are special grounds of relief set forth in several of the bills not common to all. These special grounds are:

1. In the case of the Atlantic and Pacific Railroad Company, a total exemption is claimed from all state, county, and municipal taxes for the year 1873, under the provisions of the 12th section of the act of December 25, 1852, which provides that "the said Southwest Branch Railroad shall be exempt from taxation until the same shall be completed and in operation and shall declare a dividend. * * * Provided, that if said company shall fail for a period of two years after said road shall be completed and put in operation to declare a dividend, then said company shall be no longer exempt from the payment of said tax." It is alleged that the company did not complete its road until May, 1871, and that no dividend has been declared.

2. In the case of the Missouri Pacific, a perpetual exemption is claimed from all county, municipal and other local taxation under the provisions of the 12th section of the act of December 25, 1852.

3. In the cases of the Missouri Pacific Railroad and the Missouri, Kansas, and Texas Railway Company, it is alleged that the Pullman palace cars, used on their respective roads, have been erroneously assessed as property of the railway company; and in the case of the Chicago and Southwestern Railroad Company it is claimed that rolling stock of several hundred thousand dollars in value, belonging to the Rock Island and Pacific Railroad, has been erroneously assessed as the property of the Southwestern Railway Company.

4. There is also contained in each of the several bills an allegation that the several officers of the state, counties and municipalities are about to proceed to enforce, by commencement of suits and seizure of property, the payment of the taxes assessed, and that unless restrained irreparable injury will result. It is further alleged "that after the said illegal and unauthorized assessment was made, your orators, applied to and demanded of said railroad company, its board of directors and the defendants composing said board, that they should at once institute proceedings in the proper courts to prevent the collection of said taxes and the waste of said property, and to have said assessment and levy of said taxes set aside and annulled; but said company, its directors, officers, and managers have, and do refuse so to do, or to take any action whatever in the premises, and have declared their intention not to resist the collection of said taxes, although they well know that said taxes are unjust, illegal, and unauthorized by law."

The answers filed in the several cases, verified by affidavits, deny that any illegal or excessive assessment has been made against the railroad property of the several companies for state, county, or municipal purposes, for the year 1873, in consequence of any ex-

cessive valuation, and deny that the state board of equalization made an illegal or improper assessment and aver that the assessment, as made by the board, was a just and equitable assessment, and properly made.

The several answers deny that the members of the board of equalization were actuated by passion, prejudice, or by any improper motives, or that they intended to discriminate, or did discriminate, as against railroad property, or that they disregarded the provisions of the constitution in this regard, or that either knowingly or intentionally, or otherwise, they required such property "to pay one-third more taxes, in proportion to its value, than other property of equal value," as alleged. And it is denied that the board fixed the value of the St. Louis, Iron Mountain, and Southern Railway, property without evidence, and allege the fact to be that the valuation was made upon a careful examination and full information as to all the facts, as well as the sworn testimony of witnesses produced, sworn and examined, and whose testimony was reduced to writing for the use and information of the board; and it is denied that the valuation, as fixed, of $6,268,334, is three times the value of the road. On the contrary, it is averred that the actual value of the road is largely in excess of this sum.

1. As to the special exemption from taxation claimed by the Atlantic and Pacific Railroad, it is in the answer denied that the Atlantic and Pacific Railroad is exempted from taxation under the provisions of the 12th section of the act of December 25, 1852, and it is alleged that in 1866 all the rights, property, and franchises of the Southwest Branch of the Pacific Railroad became and were forfeited to the state of Missouri, and the property and franchises granted by the act of December 25, 1852, and other acts amendatory thereof, which took possession of and run the same for some time, when the state, as sole owner, sold the same to one John C. Fremont, on certain terms and conditions, which said Fremont on his part failed to keep and perform, and the said road, its property and franchises, again reverted to and vested in the state of Missouri, and that all the title that was ever vested in the South Pacific Railroad Company (from whom the Atlantic and Pacific Railroad claim title) in and to said property, was by virtue of an act of the legislature, approved March 17th, 1868. It is further shown that on the 8th of April, 1865, a new constitution of the state of Missouri was adopted, and the exemption of property from taxation by the legislature prohibited. It is therefore averred that the legislature, at the time of passing the act under the provisions of which the road claims title, had no power to exempt the property from further taxation, neither by the terms of that act did they assume or attempt so to do; and by the provisions of the act of March 15th, 1871, entitled "An act to authorize the South Pacific Railroad Company to merge in and consolidate with the Atlantic and Pacific Railroad Company," it was provided that such consolidated company should "be subject to all the duties, liabilities, obligations and provisions of the general laws of the state governing railroad companies."

2. The special claim of exemption made by the Missouri Pacific Railroad from county, municipal and other local taxation, under the provisions of the 12th section of the act of December 25, 1852, is denied. And it is claimed that the construction now contended for on behalf of the road, of the section referred to, is erroneous.

3. The errors of assessment of the Pullman palace cars is denied, and the liability of the railroad company for the taxes thereof is claimed to be perfect, and that the company is bound to pay taxes thereon.

4. And as to the pretended demand of the stockholders, and refusal of the companies to institute proceedings in the proper courts to prevent the collection of said taxes, "respondents deny that the complainants, or any one for them, demanded of said railroad company, its board of directors and the defendants composing said board, or any of them, that they should institute proceedings in the courts to prevent the collection of said taxes, and to have the assessment of levy and said taxes set aside and annulled, and respondents allege that any such pretended demand and refusal, if made, was not in good faith, but was a mere subterfuge for the purpose of giving to the United States courts jurisdiction in the premises."

Motions were made in behalf of the state and the various counties and cities to dissolve the temporary injunctions which had been allowed by the circuit judge, as appears in the report of the preceding cases [Cases Nos. 10,767 and 732].

H. Clay Ewing, attorney general of Missouri, Frank J. Bowman and Britton A. Hill, for the motions.

Mr. Baker, Mr. Low, Mr. Shankland, Mr. Clover, and Mr. Dryden, contra.

MILLER, Circuit Justice (orally). I will proceed to state what conclusions the court has come to in regard to the suits to enjoin the state and counties from collecting taxes of railroads, which have been argued before us for the last three days.

The counsel engaged in the cases will see that it has been almost impossible for us to give any full consideration to the arguments which have been presented, and which were the result of a great deal of labor and research, and upon one branch of the subject —at least upon one of the most interesting questions that can come before the court—I mean the extent to which a court of equity can interfere by injunction to restrain the collection of taxes. The authorities are by no means uniform, are not very specific, and

seem to be in a state of fluctuation, and for any satisfactory judgment, and I might also say any intelligent judgment, they need a more thorough examination than our opportunities, or at least my time, in this court will permit; and my Brother DILLON desires that, as far as we can dispose of the cases, it shall be done before I leave the court, as he adjourned the cases practically to this court, with the view of getting the benefit of the full bench.

The main question in these cases, the difficult one, or the one which has been argued most at length, is, as I said before, the extent and nature of the jurisdiction of a court of chancery to enjoin the collection of taxes.

Now, apart from any authorities on the subject, looking at it as a question open to all the general considerations which should govern it, it might seem that those principles should be different as they are applied to different classes of taxes. It certainly cannot be denied that these various forms of municipal taxation by communities and cities and townships are exercised by a class of men who are not very familiar with the laws under which they proceed; and, to say the least of it, are not always observant of the rights of all parties interested in taxation, and who do not always use the proceeds of that taxation, either in the wisest manner, or in the manner in which the law peremptorily declares they shall be used; and so for these reasons it would seem, looking at the general nature of the subject, that it ought to be within the power of some judicial body to arrest any unlawful proceeding of theirs in the levying and collection of taxes, and that no great harm would come in dealing with such bodies as they are, in subjecting them occasionally to the wholesome restraint of judicial proceedings, when they are levying their taxes upon the people and disbursing them in ways which are not warranted by law.

But looking at the question of a state levying her taxes and collecting her revenue, a state which, according to the old form of expression, has been called a sovereign—a body which, if you refer to it as a corporate body or as an organized system of civil government, is wholly dependent upon taxation for its existence—daily existence—and which, unless the taxation is paid, must fall to pieces and dissolve civil society, why, one must pause and hesitate whether an ordinary court shall interpose and say, none of these taxes shall be paid; and yet I do not find in any of the authorities which have been read here, that any such distinction has been made. The right of the court to interpose has been based upon the same principle so far as judicial authority cited here is concerned. But it is impossible that sitting here as a court of the United States, in some sense, not exactly a court of the state, certainly not a court created by authority of the state—a jurisdiction that in former times, exercising its power upon state rights, has always been looked upon with jealousy, it seems proper that, as judges of this court, we should proceed with very great caution and hesitation, when attempting to lay our hands on the authorities the state has provided for the collection of its revenue. I confess I have always had a very strong opinion that the circumstances under which a court of equity ought to interfere to restrain the collection of any taxes are very limited, but the cases cited on the argument show that the courts have gone further than I had supposed.

It is certainly true that a great many of the best courts in the Union have held the right to interfere in various classes of cases in regard to protecting the citizen against unlawful taxation. Now that is about as far as I can go on that subject. We want, before making up our minds decisively on any of these subjects, to look at the authorities and examine them very carefully, and when it is decided at all to decide it in a manner which we will be content to abide by, until directed by superior authority to do otherwise.

The result of this consideration is, we are not disposed to decide that branch of the case. But we are all united on another proposition which is essentially connected with this case, and which enables us, if not to make a final decree, to make a very important order at this term of court, and that is that we adopt this rule: That whenever a party comes into this court to ask the court to enjoin the collection of a tax or a part of a tax, if there is any part he admits to be due, or which the court can see upon the statement in the bill ought to be paid, there must be an allegation in the bill conforming to the fact that they have paid, or that they have tendered it; and it is not a sufficient allegation that they are willing to pay or that they will pay it into court, because the state is not to be stayed in its revenue, which is admitted to be due, in that way; and a party claiming that he will not pay his tax, or any portion of it, cannot screen himself during a course of long litigation from paying that which must be paid, and everybody can see must be paid, by setting up a contest over that which is doubtful, and which may or may not eventually, be necessary to be paid.

The result of those observations is, that so far as these cases are concerned in all of them we shall enter an order assuming that the reports of amounts for the roads to be assessed, made by the various county courts shall be assumed for the present, at least, as the lowest assessment which can be made, and we will make an order giving reasonable time to these plaintiffs or petitioners to go and pay the state and counties the tax assessed on that valuation, and the injunction will remain until that time has elapsed. But if the various railroads shall come up

within that time, or at the end of it, and show to the court that they have paid that proportion of their taxes, this injunction will stand for the remainder until final hearing; and if at the end of that time no such evidence is brought to this court as to any railroad, the whole injunction will be dissolved, and it can seek such other remedy as it chooses. The bill remains, but the injunction will be dissolved, if it is found it does not pay as required.

2. As to the Missouri Pacific Company. There is another branch of the subject upon which I ought, perhaps, to say something, but I do not feel inclined to say much. The first is the specific claim set up by the Missouri Pacific Railroad to a total exemption from all county taxation; and, second, to exemption from the present tax, because they claim that the 12th section of the act of December 25, 1852, is a contract as to the mode of levying taxes, which has been violated by the manner in which the taxation is levied on it. In regard, first, to the exemption from county taxation. I have no question at all that there is such exemption, and that the statute meant to say there is an exemption of this Missouri Railroad from all taxation until the road is completed and a dividend declared, or until two years after the road is completed. This, I think, is the intention of that section. Then all powers of rightful taxation revert to the legislature, and after that time has arrived the property becomes liable to county taxation as well as all other taxes. As to the other branch of the subject, I have a little more doubt. But my opinion is, and in that my Brother DILLON concurs, that the provision that the tax shall be assessed by the auditor, upon the report of the president of the board, is merely a provisional mode for the first taxation, because there was no mode existing at that time by which railroad property could be taxed, or was taxed. It was simply a provisional mode to be carried out and executed until that period should come, and it leaves the whole subject of taxation of railroads to the same general principles that govern all taxation. (This view was subsequently sustained by the supreme court. Bailey v. New York Cent. & H. R. R. Co., 22 Wall. [89 U. S. 604].)

That disposes of the special claim of the Missouri Pacific Railroad.

3. As to the Atlantic and Pacific Company. The Atlantic and Pacific Company maintain in the first place that they have all the rights and privileges of exemption from taxation which the said 12th section of the act of 1852 conferred on the Missouri Pacific, of which it was part at the time, and that they had not completed their road within the time which allows the tax to be levied at all. On that part of the subject I have only to say that the case of the Iron Mountain Railroad (Trask v. Maguire, 18 Wall. [85 U. S.] 391), decided by the supreme court of the United States at the last term, settles that question against the Atlantic and Pacific Railway. It settles this, that when the state of Missouri, after all those various sales, resumed the franchise and property of the railroad it held them subject to the constitutional provision which forbids any future exemption from taxation. That disposes of this case as far as the courts have gone into the subject, and as far as we propose to go at this time.

NOTE. Subsequently, upon agreement of counsel as to amount to be paid under the foregoing views, the court made an order applicable to each of the railroad companies concerned, by which some sixty per cent. of the amounts assessed against each of them was to be paid by the second of January next, or the bills would stand dismissed. Ordered accordingly.

[NOTE. The injunctions which had been granted in these cases (see Case No. 732) were upon final hearing modified so as to permit the collection of the tax to an amount not in excess of that fixed by the various county courts through which the roads run. Case No. 10,845.]

PARR (BOGGS v.). See Case No. 1,602.

Case No. 10,769.

In re PARRISH.

[9 N. B. R. 573.] [1]

Circuit Court, M. D. Tennessee. 1874.

BANKRUPTCY—VOTE ON DISCHARGE—DEBT CONTRACTED AFTER JANUARY 1, 1869.

1. A creditor whose debt was contracted before January 1, 1869, should not be allowed to vote on the question of a bankrupt's discharge as to debts contracted since January 1, 1869.

2. Where A., after January, 1869, pays a judgment rendered aginst him as surety of B., on a note given prior to 1869, the debt to him by B. thereby created is "contracted" after January 1, 1869, within the meaning of the 33d section of the act [of 1867 (14 Stat. 533)].

[In the matter of M. A. Parrish, a bankrupt.]

By JOHN RUHUR, Register:

A., on the first of January, 1868, becomes B.'s security on a note. On the 15th of April, 1870, judgment is rendered against B. as principal, and A. as surety. A.'s land is levied upon and sold in satisfaction of the judgment. B. is declared a bankrupt on the 1st of January, 1874. A. proves his debt against the estate of B. in bankruptcy. Under this state of facts, I ask the opinion of the court on the following questions: (1) Can a creditor whose debt was contracted prior to January 1, 1869, vote on the question of the bankrupt's discharge from debts contracted since January 1, 1869? (2) Was B.'s liability to A. contracted before or since January 1, 1869, within the meaning of the clause in the 33d section of the bankrupt law, as amended July 17, 1870 [16 Stat. 276], which provides: "In all proceedings in bank-

[1] [Reprinted by permission.]

rupt'cy * * * no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proven against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors, to whom he shall have become liable as a principal debtor, and who shall have proved their claims, is filed in the case at or before the time of the hearing of the application for discharge. But the provisions of the aforesaid section shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the 1st of January, 1869."

SWAYNE, Circuit Justice. The answer to the first of the above questions must be in the negative. The provisions in regard to the amount of assets to entitle the bankrupt to a discharge is intended for the benefit of creditors whose debts were contracted subsequent to the 1st of January, 1869, and only such creditors can join in the waiver of this provision. On the other question, B.'s liability to A. has been "contracted" since the 1st of January, 1869, within the meaning of the provision of the act of congress. The word "contracted" is not used in the technical or narrow sense, but means the same as "insured," or some other general word expressive of the occurrence of the liability, as a debt, whether that liability grows out of a transaction originating prior to the 1st of January, 1869, or subsequently thereto. The liability of the surety to the creditor undoubtedly originated previous to the 1st of January, 1869, but the liability of the principal to the surety, as a debt, only originated or was "contracted" in the broad sense of the statute, when the latter had paid the debt. Previous to that time the surety had no right of action against his principal, nor would the statute of limitations run against him. He cannot, therefore, be said to have had any debt against his principal until then. Unless, therefore, there is some positive provision of the bankrupt law in conflict with this view, I must hold that B.'s liability to A. was "contracted" after the 1st of January, 1869.

Case No. 10,770.

PARRISH v. DANFORD et al.

[1 Bond, 345.] [1]

Circuit Court, S. D. Ohio. April Term, 1860.

EXECUTION LEVY — WRONGFUL REMOVAL—RIGHT OF SHERIFF TO RETAKE — FRAUD — LAW AND FACT — PREFERENCES — INDEMNITY BOND TO SHERIFF—TRESPASSERS.

1. Where a valid levy was made upon property by a sheriff, and it was wrongfully removed from the place where the sheriff had left it, he had a right to take possession of the same wherever he could find it, if he used no more force in doing so than was absolutely necessary, and all who assisted him are also justified.

[Cited in Steers v. Daniel. 4 Fed. 596.]

2. The question of fraud is one of law and fact. The court declares what constitutes a legal fraud, and it is for the jury to say whether the evidence proves the fact of fraud.

3. In Ohio, a man may, under some circumstances, prefer one creditor to another, if it is done in good faith, and no fact appears from which a fraudulent intent can be inferred.

4. No man, knowing himself to be insolvent, can make a valid disposition of his property, except for the benefit of creditors.

5. If there has been a delivery of property and full payment made in good faith, the right of the purchaser will not be interfered with; but if the purchaser has notice of a fraud before getting possession and making payment of the consideration, the creditors may intervene and the contract will be set aside.

6. The execution of a bond of indemnity to a sheriff making a levy, makes the person so executing a trespasser, if the act of the sheriff was illegal. In trespass, all who are liable are liable as principals.

7. If the parties to a sale and purchase of property intend thereby to defraud creditors, the fact that a full consideration was paid will not make it valid.

[This was an action by Isaac Parrish against Samuel Danford and others.]

Mr. Evans, for plaintiff.
Lee & Fisher, for defendants.

CHARGE OF THE COURT: This is an action in trespass brought to recover damages for the unlawful seizure of the goods of the plaintiff. The defendants are Samuel Danford, the sheriff of Noble county, Ohio, John Brownrig, Wm. Brownrig, Hiram Caldwell, and Joseph Caldwell. Wm. C. Okey was also a defendant, but has been discharged. The defendants deny the allegations in the plaintiff's declaration by a plea of not guilty. The ground on which the plaintiff seeks to recover is, that Danford illegally levied on his property to satisfy an execution against other persons, and that the other defendants were aiders and abettors in the trespass. It is not controverted that if the property taken was the property of the plaintiff, the defendants are liable as trespassers. And, if liable at all, they are all liable, as in trespass all are principals. If the act was illegal, all who were present and aided in it are guilty. One of the defendants, John Brownrig, was not present, but he is party to a bond of indemnity to the sheriff, which makes him a trespasser if the act of the sheriff was illegal.

It appears that on October 20, 1859, an execution issued on a judgment in the common pleas of Noble county, in favor of Brooks, Fahnestock, and others, against John W. Brownrig, Edward M. Parrish, and John Brownrig, for more than $1,100 and costs, and was put into the hands of the sheriff on that day. On the 2d of November, the sheriff levied on a stock of goods in the town of

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

Sharon, in Noble county, which had been owned by E. M. Parrish and John Brownrig, who had been in business as the firm of Brownrig & Parrish, to satisfy the execution of Brooks, Fahnestock & Co. Before the levy, that is, on October 28, Brownrig & Parrish made a sale of these goods to the plaintiff, and the validity of that sale is the only question now in controversy. The goods were not removed at the time of the levy, but remained in the room in which Brownrig & Parrish had done business till the 14th of November, when they were removed by the sheriff to a room in Hopper's tavern, and were under lock and key there till the 20th of December, when they were removed by the plaintiff without the consent or knowledge of the sheriff, to a room in the basement of the Masonic Hall, in the town of Sharon. And on the 22d of December, the sheriff, with others as his assistants, forcibly, by breaking open the outer door, entered the room, retook the goods, and removed them to the town of Caldwell, the county seat of Noble county. As to these facts there is no controversy, and the question is, was the sheriff and his assistants guilty of a trespass in forcibly entering the Masonic Hall basement and retaking the goods? There is no dispute as to the regularity of the original levy. Having an execution against these defendants, the sheriff had a right to levy on the property of any one of the defendants, and the levy was a legal one, if the goods were the property of Brownrig & Parrish at the time they were levied on. It is clear, too, that if the original levy was valid, and the property was wrongfully removed from the place where the sheriff had left it, he had a right to reclaim it and take possession of it wherever he could find it, if he used no more force in doing so than was absolutely necessary. And if the sheriff was justified in retaking the property, all who assisted him are also justified. It is apparent that this case turns wholly on the question of the title to this property on the 2d of November, when the levy was made. If it was the property of the plaintiff on that day, the sheriff and all who aided him were trespassers, and liable for the injury sustained by plaintiff. If it belonged to the defendants in execution, the sheriff has done no more than his duty. A sheriff is bound to levy on the property of the defendant in execution, and is liable if he levies on the property of another person. In this case there was a claim of property interposed by the plaintiff under the statute, and a trial by a jury requested. The sheriff being indemnified, retained the property and refused to call a jury. The bond is an indemnity to the sheriff for selling the goods. The sheriff had an undoubted right to pursue this course, but in doing so exposed himself to an action of trespass and to damages, if the claimant of the property made good his title. The jury may consider whether the refusal of the sheriff to call a jury, as requested, is evidence of malice or a spirit of oppression, and this opens the way for the consideration of the question of the ownership of the property on the 2d of November. The plaintiff claims it under a written contract of sale to him by E. M. Parrish and John W. Brownrig, dated October 28, 1859, which was a few days before the levy. By this contract it is agreed, in substance, that Brownrig & Parrish sell to the plaintiff their entire stock of goods, estimated at $3,000, in consideration of which the plaintiff was to convey to Brownrig & Parrish twenty-five lots in Parrish City, in Iowa, at $10 a lot, and other lands in Harrison county, in that state, such as Brownrig & Parrish shall select out of 1,200 acres, at from $4.50 to $6 an acre. And it is provided that if they are not satisfied with the land, the plaintiff shall pay $3,000 in six, twelve, and eighteen months, from the time they make their election. And they agreed to furnish money to pay for the freight of the goods to Iowa, which was to be refunded in sixty days. On the 24th of November a supplemental contract was signed by plaintiff, and by E. M. Parrish, acting for the firm of Brownrig & Parrish, which recites that Brownrig & Parrish had failed to advance money to pay the freight, and that such part of the contract was released. It was then agreed that Iowa lands to the amount of $1,200 should be conveyed to E. M. Parrish, and $900 to the Brownrigs in land, and after deducting some credits to the plaintiff, there was due from him a balance of $441, which was payable in money. Was this a bona fide and valid sale? Fraud vitiates all contracts. The question of fraud is one of law and fact. The court declares what constitutes a legal fraud, and it is for the jury to say whether the evidence proves the fact of fraud. Fraud will not be presumed, and must be affirmatively proved by the party who avers it. The law guards the rights of creditors with great vigilance, and declares all sales and transfers made to hinder, delay, or defraud them absolutely void. The theory of the law is, that no man, knowing himself to be insolvent, can make a valid disposition of his property, except for the benefit of creditors. In Ohio, a man may, under some circumstances, prefer one creditor to another, if it is done in good faith, and no fact appears from which a fraudulent intent can be inferred. How far one who is a purchaser, without notice of any fraudulent intent on the part of a vendor, shall be protected in the transaction, is sometimes a question of great difficulty and nicety, and must depend somewhat on the circumstances of the case. If there has been a delivery of the property, and full payment made in good faith, the right of the purchaser will not be interfered with; but if the purchaser has notice of the fraud before getting possession and making the payment of the consideration, the creditor may intervene, and the contract will be set aside. In the present

case, it is not controverted that John B. Brownrig and E. M. Parrish each owed and were liable, individually, at the time of the sale to the plaintiff, for much more than they were worth; but the plaintiff insists that the firm was not insolvent, and that if not insolvent, though the effect of the sale would be to defeat and defraud individual creditors, the sale is valid unless the plaintiff had knowledge that such would be the effect, and that the vendors intended a fraud. I do not see readily how this distinction can be made, if the jury shall find that the firm was not insolvent. The insolvency of the individual members of a firm is equivalent to the insolvency of the firm itself, since it is clear that the whole assets and property of the individuals are liable for the whole amount of the firm debts. In other words, I can not understand how a firm can be said to be solvent if there exists an individual indebtedness of its members which exceeds the entire assets and property of the firm. It is clear that a firm, with a knowledge that its members are individually insolvent, has no right, moral or legal, to dispose of firm property under circumstances that will render such disposition a fraud on the creditors of the individual members.

It will be for the jury to inquire: 1. Whether Brownrig & Parrish, individually and as partners, were in debt beyond their means of payment; 2. Whether the plaintiff, from all the circumstances in proof, is chargeable with notice of such insolvency. If the jury are satisfied of the insolvency of Brownrig & Parrish, there is a strong presumption of fraud, so far as they are concerned, in making the sale to the plaintiff. It is not intended to refer to all the facts connected with this sale. The inquiry for the jury will be, did Brownrig & Parrish intend by the sale of the property to put it beyond the reach of their creditors? In determining this inquiry the jury will look to the facts: 1. Were they insolvent? 2. Was the property they were to receive so situated as that it could be made available to their creditors? In connection with the last inquiry, the jury will very properly consider the fact that the conveyances made by Stephen Parrish of the lands to be given by the plaintiff under the contract, were made to the wives of Brownrig and E. M. Parrish. This would seem clearly to justify the inference that the land was intended to be placed beyond the reach of creditors. If the jury are satisfied that there was a fraudulent purpose by Brownrig & Parrish in making this sale, their next inquiry will be, is the plaintiff chargeable with a knowledge of the fraud? It is insisted by plaintiff's counsel that plaintiff had been residing in a distant state for several years, and returning to Noble county, found Brownrig & Parrish in possession of a store, doing business, and in credit, and had no reason to suppose they were insolvent when he made the purchase, and is not chargeable with knowledge of the insolvency, or of any fraudulent intent in selling these goods. This subject has been so fully discussed that I will not detain the jury by restating the evidence. It will be for the jury to say whether, from all the facts, the plaintiff was a party to this transaction, with the knowledge that it would result in defrauding the creditors of Brownrig & Parrish. If they decide this affirmatively, it will result, necessarily, that the sale was fraudulent and void. If, on the other hand, the jury find the plaintiff had no grounds to conclude or suspect a fraud in the sale of the goods, and that he has paid a good consideration for them, the sale, so far as he is concerned, may be sustained. The plaintiff's knowledge can only be deduced from the circumstances of the case; but may be so presumed if the facts justify it. It is, however, insisted that the plaintiff was himself insolvent and unable to give or pay any fair consideration for the goods, and that thus he had no right to make the purchase, and that it was a fraud on his part to make such purchase. The court will not refer to the evidence on this point, but will say that if the plaintiff was insolvent at the time of the purchase, it would be a clear indication of fraud on his part. The jury will remember the evidence on this subject. It would appear that he has dealt largely in western lands, and has laid out a city in Iowa. Deeds have been produced showing the legal title to these lands to be in his brother, Stephen Parrish. It is claimed, however, that the land is really the plaintiff's and that it is of value. If the jury find a fraudulent intent by the parties to this sale and purchase, that is, a design to defraud creditors, the fact that a full consideration was paid will not make it valid. If the jury find the defendants trespassers, they will give such damages as they think just. The damages should be the value of the property taken from the plaintiff, and the expenses and trouble in prosecuting this suit. If the jury believe that the sheriff and those whose assistance he required have acted in a wanton and oppressive manner, they may give exemplary damages. If the jury believe that in issuing the writs of attachment, or in any other proceedings connected with this transaction, the defendants, or any of them, have been parties to a combination or conspiracy to injure the plaintiff, it may justly form an element in the assessment of damages.

The jury returned a verdict for defendants.

PARRISH (DRISKILL v.). See Case No. 4,089.

PARRISH v. SKIDDY. See Case No. 12,922.

Case No. 10,771.

PARROT v. HABERSHAM.

[1 Cranch, C. C. 14.] [1]

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

EXEMPLIFICATION OF RECORDS—CERTIFICATE.

The certificate of the presiding magistrate is not necessary to an exemplification of the records of Virginia and Maryland, for the purpose of obtaining executions under the 13th section of the act of 27th February, 1801 [2 Stat. 103].

[This was a proceeding by Richard Parrot against Joseph Habersham, garnishee of Ignatius Pigman.]

Motion to quash an execution issued upon an exemplification from Montgomery county, in Maryland, because the record was not authenticated by a certificate of the chief judge, or presiding magistrate. The motion was overruled by THE COURT, because the exemplification was such an one as seems to be contemplated by the 13th section of the act concerning the District of Columbia, of 27th February, 1801 (2 Stat. 103).

Case No. 10,772.

PARROT v. LAWRENCE et al.

[2 Dill. 332.] [2]

Circuit Court, D. Kansas. 1872.

BRIDGE AND FERRY FRANCHISES—PRINCIPLES OF CONSTRUCTION OF LEGISLATIVE GRANTS CONFERRING EXCLUSIVE PRIVILEGES.

1. The legislature, in the charter of the Lawrence Bridge Company, gave it "the exclusive right and privilege of building and maintaining a bridge across the Kansas river at the city of Lawrence, for the period of twenty-one years," but prior to the time of the passage of such charter the legislature had given to one Baldwin the exclusive right to maintain a ferry at said city for the term of fifteen years, which franchise, at the time the bridge charter was passed, had over twelve years to run. Subsequently Baldwin ceased to operate his ferry, but the state authorities, under an act of the legislature respecting public ferries, granted a license to keep a ferry at the city of Lawrence within the limits and period covered by the bridge company's charter. *Held*, that the establishment of a ferry was not an infringement of the charter of the bridge company.

[Cited in Kansas & A. V. Ry. Co. v. Payne, 1 C. C. A. 183, 49 Fed. 118.]

[Cited in Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 441, 4 S. E. 653.]

2. Principles of construction of legislative grants conferring exclusive privileges stated.

[Cited in Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 441, 4 S. E. 653.]

3. The particular mode of crossing the stream employed by the defendants, and described in the opinion of the court, was held to be a ferry, and not a bridge.

This cause is now before the court on the motion of the defendants to dissolve the temporary injunction which was granted at chambers without resistance, restraining the defendants, the Messrs. Wilson, from operating the ferry hereinafter described. The plaintiff [E. A. Parrot], a citizen of Ohio, is one of the principal stockholders in the Lawrence Bridge Company, and, to give the court jurisdiction, states in his bill that the said bridge company and its officers have refused to proceed in the courts of the state to obtain redress for the grievances complained of by him. He makes defendants, the bridge company, the city of Lawrence, and the Messrs. Wilson, the latter of whom are operating the ferry which is the subject matter of complaint. The question on which the right to the injunction depends is whether the ferry, which will presently be described, infringes the rights of the stockholders and owners of the Lawrence Bridge Company under the charter of that company, granted by the legislative assembly of the territory of Kansas, and subsequently recognized by the legislature of the state of Kansas.

The enactments relating to the Lawrence Bridge Company so far as material, are, in substance, these: On the 15th day of February, 1857, the legislative assembly of the territory of Kansas incorporated the Lawrence Bridge Company, granting to the corporators and their assigns "the exclusive right and privilege of building and maintaining a bridge across the Kansas (or Kaw) river at the city of Lawrence for the period of twenty-one years," &c., the capital stock to be $100,000 (afterwards $375,000), to be divided into shares of $100 each—with power to the company "to establish and collect tolls for crossing the said bridge"; said bridge to be commenced within three years, &c. On the 9th of February, 1858, the legislature re-enacted the charter in the same language as that above quoted; and on the 3d day of February, 1859, amended the charter as to the rates of toll on the bridge, and on the 3d day of March, 1863, gave to the company eighteen months from that date within which to "complete said bridge in a good and substantial manner, so as to facilitate travel over the same." The bill and affidavits show that the bridge was completed according to the requirement of the legislature, and has been used, and tolls charged, ever since.

Prior to the incorporation of the Lawrence Bridge Company, the legislative assembly of the territory of Kansas had, in 1855 (St. Kan. Ter. 1855, p. 773), granted to one John Baldwin "the exclusive right to establish a public ferry within two miles of the said town of Lawrence for the term of fifteen years from and after the passage of this act"—the county authorities being empowered to fix the rates. The answer of the defendants other than the company alleges that Baldwin established and kept this ferry in the immediate vicinity of the place where the

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

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

bridge is located for some time after the erection of the bridge, when, for reasons unknown to the defendants, he ceased to operate the ferry.

By the laws of Kansas the county commissioners have the power to grant ferry licenses, and from the pleadings and affidavits, it appears that in January, 1871, one Darling obtained, from the board of county commissioners of the county in which the city of Lawrence is situated, a license to keep a ferry at the said city for the term of one year. He built a flat-bottomed ferry boat, and operated it himself under his license until April, 1871, when the city of Lawrence purchased the flat-boat and other ferry fixtures for the sum of $3,000, paying therefor out of the funds of the city; after which the Wilsons (defendants) continued to operate the ferry, they owning the engine by which the boat was moved and the city the boat. At first the arrangement between the city and the Wilsons was that the ferry should be run free, the city to compensate them for their labor and the use of their engine; and afterwards, December 4, 1871, another arrangement was made, by which the city agreed to let the Wilsons have the use of the ferry boat, ropes, and fixtures, and was to charge no tolls except five cents on each team that crossed, which is much less than the rates of toll charged by the bridge company. On the 6th day of January, 1872, the county commissioners granted to the defendant, Wilson, "the right to keep and run a ferry on the Kansas river at the city of Lawrence for one year."

According to the bill, answer, and affidavits, it appears that the ferry boat, or, as the bill styles it, the floating bridge, is operated in this way: Two ropes, or cables, are thrown across the river, fastened on each side, one of which is an endless chain. A rope is fastened to the upper side of the boat, or "floating bridge," and this rope glides upon the upper cable by means of a pulley attached to the other end of the rope, said pulley passing from side to side of the river with the boat, the motive power moving the boat back and forth across the stream being a stationary steam engine located on the north bank of the river. The boat itself is an ordinary flat-bottomed boat.

Thacher & Banks and N. T. Stephens, for complainant.

Wilson Shannon, for Messrs. Wilson and city of Lawrence.

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

DILLON, Circuit Judge. The grant to the bridge company by its charter is "the exclusive right and privilege of building and maintaining a bridge across the Kansas river at the city of Lawrence," and "to establish and collect tolls for crossing said bridge." If this right has not been invaded, the complainant is not entitled to an injunction against the running of the ferry. I say the ferry, for, in my judgment, it is clear that the means used to cross the river by the defendant, Wilson—viz.; a flat-bottomed boat, connected with cables spanning the stream, and moved or propelled back and forth across it by power supplied by a stationary engine on the bank—is a ferry, as distinguished from a bridge, both under the legislation of the state and according to the usual meaning of the word.

The passage over streams is generally effected in one of two ways, viz: by bridges, which, as commonly constructed for the use of travelers and teams, are immovable structures or extentions of the highways over and across the water; and by boats, which are movable and propelled by steam-power, horse-power, the action of the current, or similar agencies. When the passage is by the latter mode it is called ferrying, which implies a boat that moves back and forth across the stream, from bank to bank. The legislation of Kansas everywhere recognizes this distinction between bridges and ferries. In the statutes of 1855 there are provisions for building bridges (chapter 18), and also for regulating ferries (chapter 71). At the first session of the legislature, in 1855, there were a great many special acts, some authorizing certain persons to build toll bridges, and others to establish and maintain ferries. Among these numerous acts was one giving to John Baldwin the exclusive right to keep a public ferry across the Kansas river at the town of Lawrence for the period of fifteen years. Two years afterwards the legislature incorporated the Lawrence Bridge Company, giving it the exclusive right to build and maintain a bridge across the river at the same place. Did this invade the franchise which had been granted to Baldwin? Clearly not, for the two grants are different; the one was to keep a ferry and collect tolls or ferriage for crossing the stream by this mode —the other was to erect and maintain a bridge, &c., "to collect tolls for crossing the same." So that during the period for which Baldwin's ferry charter was to run, there were two modes of crossing the river at Lawrence expressly authorized—the one by means of Baldwin's ferry, the other by means of the bridge of the Lawrence Bridge Company.

The contract of the legislature with the bridge company must be protected from subsequent invasion. But what was that contract? It was simply an exclusive right to build a bridge and to "collect tolls for crossing the same." It is argued that the contract with the bridge company was that the travel of a certain district, to-wit: those passing the river at Lawrence should pass over this bridge and pay tolls therefor. But it is clear that such was not the contract: 1st, because it is not so expressed, or fairly to be implied from the language used; and, 2d, be-

cause the existence of the Baldwin ferry charter, which must be presumed to have been in the mind of the legislature when it passed the bridge charter, and which, by its terms, would continue in force many years after the period fixed for the completion of the bridge, shows that the legislature did not intend to make a contract with the bridge company to the effect that all persons and property crossing at Lawrence should pass over the bridge.

When we consider that legislative grants creating monopolies, while they are not to be cut down by hostile or strained constructions, are nevertheless not to be enlarged beyond the fair meaning of the language used (Binghamton Bridge Case, 3 Wall. [70 U. S.] 74), this conclusion seems, to my mind, so clear as not to admit of fair doubt.

It has been settled by adjudication that the exclusive right to a toll bridge is not infringed by the erection of an ordinary railroad bridge within the limits over which the exclusive right extended (Mohawk Bridge Co. v. Railroad Co., 6 Paige, 564; Bridge Proprietors v. Hoboken Co., 1 Wall. [68 U. S.] 116, 150, and cases cited); and the reasoning upon which this conclusion rests shows that where the charter of the bridge company is silent upon the subject, its exclusive right would not be invaded by the establishment, under legislative authority, of a public ferry, although this would have the incidental effect to injure the value of the franchise of the bridge company. That this is the opinion of the presiding justice of this court is plain from an expression to that effect, by way of argument, in his opinion in the Hoboken Bridge Case, 1 Wall. [68 U. S.] 116, 149. In that case the legislature of New Jersey, in 1790, authorized the making of a contract with certain persons for the building of a bridge over the Hackensack river, and by the same statute enacted that it should not be lawful for any person to erect "any other bridge over or across the said river for ninety-nine years;" and it was held that the railroad bridge subsequently authorized, which was so constructed as that persons or property could not pass over it except in railway cars, did not impair the legal rights of the bridge proprietors. Mr. Justice Miller, in discussing the question as to what was the meaning of the act of 1790 and the contract with the persons who built the bridge, says: "There is no doubt that it was the intention of those who framed those two documents to confer on the persons now represented by the plaintiffs some exclusive privileges for ninety-nine years. If we can arrive at a clear and precise idea what that privilege is, we shall perhaps be enabled to decide whether the erection proposed by the defendants will infringe it. In the first place, it is not an exclusive right to transport passengers and property over the Hackensack and Passaic rivers, for there is no prohibition of ferries, nor is it pretended that they would violate the contract." [Bridge Proprietors v. Hoboken Co.] 1 Wall. [68 U. S.] 149.

In conclusion I may remark, that I have considered the very ingenious argument made by the complainant's counsel to show that the mode adopted by the defendants for transporting persons and property across the river is not a ferry, but a flying bridge, or a floating bridge, and hence it is a violation of the franchise of the bridge company. But the single boat which is made to cross the river by steam-power is not, in my judgment, a bridge of any kind, and certainly not a bridge within the meaning of legislation of the state of Kansas on the subject of bridges and ferries. It is argued, and perhaps with correctness, that the city of Lawrence transcended her powers in purchasing boats and in assisting Wilson to maintain his ferry under his license from the county authorities. But if this be granted, it falls far short of showing that the complainant is entitled, in consequence, to an injunction to prevent Wilson from running his ferry under his license.

Injunction dissolved.

As to the powers of municipal corporations with respect to ferries, see Dill. Mun. Corp. §§ 31, 78, 79, and cases there cited.

Case No. 10,773.

PARROTT v. BARNEY et al.

[1 Sawy. 423;[1] 2 Abb. U. S. 197.]

Circuit Court, D. California. Jan. 25, 1871.[2]

TENANTS' LIABILITY FOR WASTE—PUBLIC POLICY—COVENANT, WAIVER, ETC.—WASTE IN APARTMENTS—ACCIDENTS—DAMAGES TO ADJOINING PREMISES—CARRIER NOT ENTITLED TO KNOW CONTENTS OF PACKAGES—PERFORMANCE OF LEGAL DUTY MAY BE ASSUMED.

1. In the absence of some agreement to the contrary, the tenant is responsible for all waste, however, or by whomsoever committed, except it be occasioned by act of God, the public enemy, or the act of the reversioner himself.

[Cited in Powell v. Dayton, S. & G. R. Co., 16 Or. 33, 16 Pac. 868.]

2. The liability of tenants for waste does not depend on negligence, but is imposed on grounds of public policy.

3. A covenant in a lease to surrender the premises at the expiration of the term in as good condition as the reasonable wear thereof will permit, damages by the elements excepted, does not protect the tenant from liability for waste, resulting from accidents occurring without his fault.

4. A covenant in a lease requiring the tenant to occupy the premises for a specific purpose, as an express office, does not impose on the landlord, and exempt the tenant from, all the risks incident to such business, not resulting from the wrongful acts or negligence of the tenant.

5. Waste may be committed by a tenant of a portion of a building.

6. Defendants are expressmen carrying packages between New York and California. A wooden case containing nitro-glycerine was delivered to defendants at New York, to be carried

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

[2] [Affirmed in 15 Wall. (82 U. S.) 524.]

to Los Angeles, California, in the ordinary mode, and in the ordinary course of business. No questions were asked, and no information given, as to its contents. On arriving at San Francisco, a liquid resembling oil appeared to be leaking from the case, and it was taken to the office of defendants, the premises leased from plaintiff, for examination. While under examination it exploded, injuring the premises occupied by defendants, and other premises of the plaintiff leased to, and occupied by, other parties. Defendants had no knowledge of, and no reason to suspect, the dangerous character of the contents, and there was, under the circumstances, no negligence on their part. *Held*, that defendants were not liable for the damage resulting from the accident to plaintiff's premises, occupied by other parties adjoining the premises held and occupied by defendants, but were liable for waste resulting to the premises occupied by themselves.

7. A common carrier is not, under all circumstances, entitled to know the contents of packages tendered for carriage, and a mere failure to ascertain whether the package contains anything dangerous, there being no reasonable ground for suspicion, does not, of itself, constitute negligence.

[Cited in Hale v. Milwaukee Dock Co., 29 Wis. 489.]

8. In the exercise of his lawful rights, every man has a right to act upon the hypothesis that every other person will perform his duty, and obey the law; and in the absence of any reasonable ground to think otherwise, it is not negligence, to assume that he is not exposed to a danger, which can only come to him from a violation of law on the part of some other person.

The complaint contains four counts. The first is for technical waste by the landlord against his tenant from year to year, based on the statute. The waste is charged to have resulted from negligently introducing an explosive substance [namely, nitro-glycerine upon the premises],[3] etc. Treble damages are claimed. The second is in the nature of a count in case at common law, by the landlord against a stranger, for injury to his reversionary interest in the premises demised to his tenants, Bell and the Union Club. The injury is alleged to have resulted from negligently introducing, etc., the explosive substance. The third, is by the landlord against his tenant, for waste to the demised premises, and also, for injuries resulting from the same acts to the reversion in the other premises, demised to other tenants. It is in the nature of a count in case at common law. The injury is alleged to have resulted from negligence. The fourth, for waste committed on the premises demised to defendants [D. N. Barney and others], and for injuries committed by defendants vi et armis, to the premises demised by plaintiff [John Parrott], to Bell, and the Union Club. The answer takes issue on all the material allegations; also sets up a lease under which defendants occupied, and a right to carry on the business of expressmen in the demised premises; and also avers a repair of the demised premises, before suit brought, to plaintiff's satisfaction, and with his approbation.

The cause was tried by the court without a jury, the parties having waived a jury, in pursuance of the statute. The court found the facts to be as follows:

The defendants constitute the well-known express company doing business under the name of Wells, Fargo & Co. The plaintiff had for many years prior to the commission of the grievances complained of, been, and he then was, seized in fee of the premises in question. On the seventh day of November, 1855, said plaintiff leased to defendants for a period of two years from the first day of January, 1855, a portion of said premises described in the lease as "The basement and first floors contained in that certain granite building, situate in the city of San Francisco, on the northwest corner of California and Montgomery streets, together with all vaults and permanent banking fixtures therein contained; together with the use of a brick warehouse in the rear, thirty by sixty feet, and the right of way and for passage thereto through the back yard of said premises, and all appurtenances thereunto belonging." Said lease contained the following covenants on the part of defendants, viz.: "It is likewise agreed that the said parties of the second part shall not receive in said demised premises, either for their own account or on storage, or allow any person to place therein, gunpowder, alcohol, or any other articles dangerous from their combustibility; that they will, during the term of this lease, occupy the premises solely for the business of their calling, to wit, banking and express office, and that they are not to underlet the same to any other person or persons, for any other business in part or the whole, without the prior consent in writing of the party of the first part." The defendants, also, covenant, "At the expiration of the said term to quit and surrender the said demised premises, with all fixtures therein contained, in as good condition as the reasonable use and wear thereof will permit, damages by the elements excepted." The rent was twelve thousand dollars per annum, payable in monthly installments of one thousand dollars each in advance. The lease was afterwards renewed on the same terms, for two years, from January 1st, 1858, and again for a term of two years, from January 1st, 1860. After the expiration of the latter term, the premises were held over from year to year, without any further special agreement, until the sixteenth day of April, 1866, the time of the commission of the alleged grievance, the defendants all the time paying rent to the plaintiff, in accordance with the terms of said lease. Before, and at the last-mentioned time, one Garrett W. Bell, as tenant from year to year of said plaintiff, occupied a portion of the buildings described in the complaint, to wit: "The first, or lower floor of said iron building, and of that of the said brick building, situate to the northwest thereof, and called a furnace;" also, a certain

[3] [From 2 Abb. U. S. 197.]

corporation, called "The Union Club of San Francisco," as tenant of plaintiff, upon terms hereinafter stated, was in the possession and occupation of the remaining portions of the said premises, being the whole above the first, or lower floor of all the said buildings and premises. The immediate reversion of the whole of said premises, as well those demised to the defendants as those occupied by said Bell and the Union Club, remaining all the time in said plaintiff. The portion of the premises occupied by said defendants had been used for their banking and express business, as provided in the said lease, from the commencement of the term down to, and including, the sixteenth day of April, 1866. The defendants, during all that time, were carrying on the business of public express carriers throughout various parts of the United States, the states and territories of the Pacific Coast, and between the United States and Europe; also, between New York and San Francisco, by the way of the Isthmus of Panama, using on the latter route the steamships of the Pacific Mail Steamship Company's lines, running between New York and Aspinwall, and Panama and San Francisco, to convey their express matter, transporting the same across the Isthmus by the Panama Railroad. The said steamers at that time left New York three times each month—on the first, eleventh and twenty-first days of the month. It was a regulation established by defendants, that no express freight should be received at the wharf in New York on days appointed for the steamers to leave New York for Aspinwall. The said steamers sailed from pier No. 42, North river. On the afternoon of the last regular day for the steamer to leave New York for Aspinwall, prior to March 14, 1866, and after the steamer had left, a man brought to pier No. 42, North river, from which said steamers take their departure, a case in a wagon, and asked Patrick O'Leary, who was an employee of the defendants, to receive it. O'Leary was the defendants' freight measurer on pier No. 42. O'Leary informed him that they did not receive freight on the day of the steamer's sailing. The man said it would be hard to require him to take it back, as he had brought it a great way, from Harlem, some seven miles distant. O'Leary told him, that, since he had brought it so far, he could leave it there at his own risk, but that he could not give a receipt for it on that day; that the party must come the next day and get a receipt. The party then carried in the case and placed it opposite the freight office on the dock. O'Leary then noticed that the case had not been marked or weighed, or strapped, as required by defendants' regulations, and called the party's attention to these facts; whereupon he requested O'Leary to weigh, mark and strap the same, saying that he would pay for it. O'Leary then, in pursuance of the party's directions, marked upon the box the address, "W. H. Mills, Los Angeles, Cal. Fast." He also procured some wooden straps, or hoops, some nails and an adze, and strapped the case, driving the nails through the hoops, or straps, into the case, as required by defendants' regulations. The case then lay there ten days, till the next steamer left. Two days after the case had been thus left, the party who brought it came down and applied to O'Leary for a receipt, and O'Leary told Mr. Middlebrook to give a receipt for the case, and Mr. Middlebrook, who was the tally clerk at the time, and the proper party to give the receipt, did so in the presence of O'Leary. At the time the case was presented, it was clean and appeared to be in perfect condition. There was nothing suspicious about its appearance. The only thing wanting to make it conform to the regulations of the defendants was, it required strapping, weighing and marking, and when strapped, weighed and marked by O'Leary, it appeared to be in all respects in proper condition for shipment. The case was an ordinary wooden box used for shipping goods in, apparently some two and a half feet square by three feet long. It measured fourteen feet eleven inches cubic measure, and weighed three hundred and twenty-nine pounds. The usual course of business in receiving such freight is, that O'Leary received and marked it, Middlebrook gave a receipt for it, and it then remained on the wharf with other freight, without any one taking other special notice of it, till it was carried on board ship and stowed by the stevedores; and this case took the usual course. The party receiving the receipt subsequently presents it at the office to the express receipt clerk, who takes it up, and from it makes out the ordinary express receipt, and delivers it to the shipper. In this instance, the receipt thus given by Middlebrook was surrendered, and the usual express receipt given. The receipt given by the tally clerk (such as that given by Middlebrook in this instance) on the delivery of the freight, is the original from which the express receipts, bills of lading, manifest, and all others are made up. The clerk making out the express receipt for the shipper, or the bill of lading, as the case may be, is governed by this original, and he does not see or inspect the freight itself. After express matter is thus delivered, and the said original receipt is given to the party delivering it, it goes into the general mass of freight of that kind, and there remains till taken on board the steamer. Neither at the time of the delivery of the case in question, nor of the taking of said receipt, was there anything said about the contents of this box, either between O'Leary and the party bringing it, or between the latter and O'Leary and Middlebrook, nor at any other time; nor, so far as appears by the evidence, at any time to the defendants, or any of their employees, and neither of said employees or defendants had

any idea or suspicion that it contained anything dangerous. No questions were asked as to its contents, and no information given. The said case was shipped with a large quantity of other express freight, on the steamer that left New York for California on the twenty-first of March, 1866. At that time the defendants sometimes carried to California as many as six thousand packages, put up in cases of a similar character and appearance, per steamer, in addition to a large number shipped for Panama, South America, Mexico, and other places, and a fair average of such packages of merchandise, shipped to California by each steamer, was from four to five thousand. The steamer from Panama, connecting with the steamer which left New York on the twenty-first of March, arrived in San Francisco in due time, on the thirteenth or fourteenth of April, having the said case on board. On the afternoon of the fourteenth, the said case was taken from the vessel and placed upon the wharf, and was found to be leaking. The leakage had evidently commenced since the steamer left Panama, and the substance leaking from the case had the general appearance of sweet or salad oil. Said case was left on the wharf till the morning of the sixteenth day of April, when, in pursuance of the regular and ordinary course of defendants' business, where express freight is found to be damaged, it, together with another case of somewhat similar appearance, containing silverware, which had been stained by the substance leaking from the case in question, and appeared to be in a damaged condition, was sent by a dray to the defendants' office, the premises so occupied by defendants as aforesaid, for examination, and the steamship company notified to send an agent to be present and examine the package in conjunction with an agent of defendants, for the purpose of ascertaining the nature and extent of the damage, and of determining, if possible, whether the responsibility for the damage rested upon the steamship company. The two packages were taken to the said premises by defendants' servants, and deposited on said premises in the open court or yard, in the rear of the express office, and between it and the premises occupied by Bell, which was the usual place of examination of such packages when found to be damaged. About one o'clock p. m., Mr. Havens, as the representative of the Pacific Mail Steamship Company, and Mr. Webster, of the defendants, in company with another of defendants' employees, and in the presence of Mr. Knight, the second person in authority in the management of defendants' business on the Pacific coast, with a mallet and chisel proceeded to open the case for examination, and while engaged in opening the said case with the mallet and chisel, the substance contained in it exploded, instantly killing all the said parties and one or two others, besides destroying and greatly injuring the premises in the manner described in the complaint. The plan and mode of opening and examining the case in question, was the same usually adopted in the ordinary course of the defendants' business in respect to packages of a similar appearance. Upon a subsequent examination and experiment with chips saturated with the liquid which had leaked from the case, taken from the wharf and other places where said leakage had occurred, it was ascertained that the substance contained in the package was nitro-glycerine, or glonoin oil. The said case contained some thirty gallons of nitro-glycerine, and the explosion of this substance occasioned the loss of life and injuries stated. Nitro-glycerine, when pure, is a nearly colorless substance, but when impure, it is nearly the color and consistency of sweet or salad oil. It is a liquid, and violently explosive. It is exploded by percussion and concussion, and by a high degree of pressure, but not by the mere contact with fire, either with flame or a burning coal. It will burn slowly without exploding by applying a flame to it, while the flame is in actual contact, but when the flame is withdrawn, it will cease to burn. Although it will burn while in contact with flame, yet it takes fire with difficulty, and is not, in the common sense of the term, "apt to take fire." It is not dangerous from the mere application of flame—as the flame of a candle—but in explosion, combustion takes place, and in that view it is combustible and dangerous. It will also explode upon being heated to a temperature of some 360 degrees Fahrenheit. It gradually decomposes when kept, and decomposition in a closed vessel disengages gases, the pressure alone of which may spontaneously explode it. Pressure, or the application of force, is the immediate cause of the explosion. In this instance, the nitro-glycerine, in one or more of the cans contained in the case in question, had, doubtless, become partially decomposed, generating gases, which occasioned pressure within the can, and a greater tendency to explode from external forces, and the percussion, or concussion, resulting from opening the box with the mallet and chisel, operating in connection with such internal pressure, must have produced the explosion. Its discovery was announced in 1847, by Sobrero, a chemist at Paris: in 1848 or 1849, Dr. Herring, of Philadelphia, made experiments with it to test its medicinal properties, and proposed for it the name of "Glonoine." Thereafter it was experimented with by various chemists, and its constituents and properties were mentioned in chemical treatises and scientific publications, and were taught as part of a college course of chemistry in some colleges as early as 1862; but prior to 1864, experiments upon nitro-glycerine were confined wholly to the laboratory of the chemist. It was only made in small quantities for scientific purposes. In 1864, it was proposed by Noble, in England, for blasting purposes. In June, 1865, he made some experiments in

blasting, demonstrated its extraordinary power, and introduced it to a limited extent in some of the European quarries and mines. He also published in England, in the summer of 1865, a pamphlet setting forth its qualities and advocating such use of it as possessing in volume about thirteen times and in weight eight times the explosive force of gunpowder. He patented it in England as Noble's patent blasting oil.

An account of the constituents, mode of preparing, and properties of nitro-glycerine was published on the eighteenth of November, 1865, in the Scientific American, a weekly periodical published in the city of New York, devoted to the expositions of subjects connected with science and the useful arts. In said article, Noble proposed to use it for blasting purposes, and his claims of its superiority therefor over gunpowder are set forth and commented on, directions for its use given, etc. In December, 1865, an accidental explosion of nitro-glycerine occurred at a hotel in the city of New York, which was mentioned in the newspapers of the day. The second steamer arriving from Panama, prior to the arrival of the steamer bringing the case in question, being some twenty days prior to the latter's arrival, brought a consignment of nitro-glycerine to Bandmann, Nielsen & Co., of San Francisco, which had been shipped to that house by Noble for sale, direct from Hamburg, by way of Panama. Letters of advice of said shipment had come to Bandmann, Nielsen & Co. by a previous steamer, and the firm had published circulars, stating the fact that they would have the new blasting agent for sale, and stating its properties, and had sent them to various newspapers, some of which had noticed it in their columns. Among these, at the solicitation of said firm, the San Francisco Mining and Scientific Press, a weekly publication issued in San Francisco, devoted especially to mining and scientific matters, in the numbers of the twenty-third and thirtieth of December, 1865, called attention to nitro-glycerine as a blasting agent, in two articles, illustrating with cuts the mode of using it, and containing testimonials of its extraordinary explosive force, and accounts of experiments with it, made the summer preceding, in mines and quarries on the continent of Europe. The said defendants subscribed for and received at their place of business, in San Francisco, together with a large number of other periodicals and publications, the said periodical, but they seldom read it, and did not read or notice the said articles on nitro-glycerine. Upon the arrival of said shipment by said steamers from Panama, Bandmann, Nielsen & Co. made some experiments in the vicinity of San Francisco in private, excepting in the presence of two or three persons, testing its properties, which proved successful; and they let the Central Pacific Railroad Company have some for trial, and had just received a favorable report from the engineer, which Mr. Bandmann was in the act of copying at the moment of the explosion in question at defendants' office.

Until the receipt of the advice of the said shipment from Noble, Bandmann had never heard of nitro-glycerine, glonoin oil, or Noble's patent blasting oil, and he did not know of the existence of such a substance. A second shipment of nitro-glycerine was made by Noble to Bandmann, Nielsen & Co. from Hamburg by the steamer European, which exploded, destroying the said steamship at Aspinwall, on the eighth day of April, 1866, eight days before the said explosion at defendant's express office; but the news of the explosion at Aspinwall had not reached San Francisco on the day of the explosion now in question. Although Noble made some efforts to bring his nitro-glycerine into notice in 1865, and had made these two shipments to Bandmann, Nielsen & Co. early in 1866, and the latter had taken the steps indicated, to bring it to the notice of the public in California, at the time the case in question was shipped at New York and received at San Francisco, nitro-glycerine was generally unknown to the public as an article of commerce, of practical utility, or otherwise, and was unknown to parties engaged in the business of transportation; and, at that time, there was no oil or liquid, of an explosive character like nitro-glycerine, known to commerce; and even among scientific men, the properties of nitro-glycerine were not so well understood as at present. The two explosions at Aspinwall and San Francisco, and the subsequent ones at Sydney and in England, called the attention of scientific men to the subject, and led to fuller investigations, and more precise knowledge of its properties. Neither the defendants, nor any of the employees of the defendants, nor of the Pacific Mail Steamship Company, who had anything to do with the package in question, nor the managing agent of the defendants on the Pacific coast, nor any of those killed by the explosion, knew the contents of the case in question, or had any means of such knowledge, or had any reason to suspect its dangerous character, nor did they know anything about nitro-glycerine, or glonoin oil, or that it was dangerous. The case had the appearance of other cases usually received in the ordinary course of defendants' business; was received and handled by the employees of the defendants in the same way that other cases of similar appearance were usually received and handled, and in the mode that men of prudence engaged in the same business would have handled packages having a similar appearance in the ordinary course of business, when ignorant of its contents, and with similar means of knowledge, as that possessed by defendants and their employees in the instance under consideration. There was no negligence on the part of the defendants in receiving said pack-

age, or in their failure to ascertain the dangerous character of the contents; or, in view of the condition of their knowledge, of the want of means of knowledge, and the absence of any reasonable ground of suspicion, no negligence in the handling of the said package at the time of the explosion. The defendants either repaired or paid for the repairs (to the amount of about six thousand dollars) of the premises occupied by themselves, except a portion of certain repairs made by plaintiff, which were necessarily made in connection with repairs made to those portions of the premises occupied by the other tenants of the plaintiff, and which defendants omitted to pay for by mistake.

The value of the repairs to the said premises occupied by defendants, and chargeable thereto, thus omitted to be paid by them, is one thousand seven hundred and eighty-seven dollars and sixty-two cents. The damages resulting from said explosion to the premises not occupied or held by defendants, but occupied by the other tenants of plaintiff named in the complaint, viz.: Bell and the Union Club, is twelve thousand eight hundred and fourteen dollars and sixteen cents. The portions of the injured premises occupied by the Union Club, at the time of the explosion, were so occupied under a verbal agreement with the plaintiff, to hold for two years, from the first of February, 1866, at a rent of five hundred and sixty dollars per month. The said lessees were "to keep the premises in ordinary repair—in decent, tenantable repair." This rent was paid up to the date of the explosion. After the explosion the Union Club refused to pay rent, on the ground that the premises were in an untenantable condition, and did not pay rent from the fifteenth day of April, till the first day of August—a period of three and one half months—and the rents for said period, according to the terms of the said verbal agreement, and which said Union Club did not pay, amount to nineteen hundred and sixty dollars. The premises during all of said period were in an untenantable condition, in consequence of said explosion, and said time was occupied in making the necessary repairs, and the said time was a reasonable time for making said repairs. The said several amounts found are values and damages respectively in gold coin.

J. P. Hoge and John T. Doyle, for plaintiff.
S. M. Wilson, for defendants.

SAWYER, Circuit Judge. As to the waste on the premises demised to the defendants, I adopt the views expressed by the district judge, in his opinion on the demurrer, and I need not repeat the reasoning here. [Case No. 10,773a.] Whether the waste complained of is technically permissive, or commissive, I think it falls within the provisions of the statute. And on the facts found, I think the defendants liable, although, as will hereafter appear, there was, in my judgment, no negligence on their part. There was, doubtless, fault on the part of those who delivered the explosive substance to defendants for carriage over their express route, without informing them of the dangerous character of the article, for which they may be liable to defendants. The rule seems to be established, that, with respect to liability for waste, the tenant is in a position analogous to that of a common carrier, and without some special agreement to the contrary, responsible for all waste, however or by whom committed, except it be occasioned by act of God, the public enemy, or the act of the reversioner himself. 4 Kent, Comm. 77; Attersoll v. Stevens, 1 Taunt. 183; Cook v. Champlain Transp. Co., 1 Denio, 91; 2 Eden, Inj. 198, and notes. In White v. Wagner, 4 Har. & J. 373, this doctrine was carried out in an extreme case. The tenant is held responsible to the landlord, and left to his remedy over against the delinquent party. The liability does not depend on mere negligence, but it is imposed on the same grounds of public policy as those upon which the strict liabilities of common carriers are made to rest.

It is claimed in this case, that the covenant in the lease "at the expiration of the term to quit and surrender the said demised premises * * * in as good condition as the reasonable use and wear thereof will permit, damages by the elements excepted," is a waiver of the tort; that it only binds the defendants to reasonable care, and protects them from liability for waste, resulting from accidents occurring without their fault. Also, that the covenant to "occupy the premises solely for the business of their calling, to wit: banking and express offices, and that they are not to underlet the same to any other person or persons, for any other business in part or the whole, without the prior consent in writing of the plaintiff," both entitles and requires the defendants to occupy the premises as an express office, and that by authorizing and requiring the defendants so to occupy, the plaintiff took upon himself all the risks incident to such business, not resulting from the wrongful act or negligence of the defendants; and that the accident in question is one of the risks so incident to the business, and for which defendants are not liable. After some hesitation, I conclude that neither of these positions is tenable; as to the first, one or two authorities seem to favor that view, but the weight of authority appears to be the other way. The authorities cited to sustain the latter proposition do not appear to me to be applicable to the facts of this case. If the defendants' counsel is correct in his position, I do not perceive why a tenant, who is to occupy the premises for a lawful purpose, in accordance with the terms of his lease, should be liable in any case for waste resulting from the wrongful act or negligence of a stranger, he himself being faultless. This would be totally inconsistent with the

rule as stated in the authorities already cited.

It is also insisted that no waste can be found where the land itself is not the subject of the demise, and that, as defendants were only tenants of the basement and first story, there could be no waste. It does not appear to me that the authorities cited go to that extent. There may be a freehold estate in apartments. 1 Greenl. Cruise, p. 49, § 21. The absolute destruction of the basement and first floor, demised to defendants, in the building described in the complaint, falls clearly within the defendants' own definition of waste, viz.: "Waste is a spoil and destruction of the estate, either in houses, woods or lands, by demolishing not the temporary profits only, but the very substance of the thing." Here is the destruction of the substance of a house, and even on land in the legal sense of the term, which embraces the building. The result is, that the defendants are liable for the waste on the premises demised to them.

As to the premises demised to other tenants, the question of liability depends upon entirely different principles. The action is not based upon the covenants in the lease to defendants, and it is, therefore, unnecessary to inquire whether there was a breach of the covenant in that lease, not to introduce into the premises demised to defendants, any articles "dangerous from their combustibility." I do not perceive that the relation of landlord and tenant, between the plaintiff and defendants, as to other premises than those injured, has any bearing unfavorable to the defendants upon the question of their liability. The defendants, in my judgment, stand in this kind of action in no worse position as to the premises occupied by Bell and the Union Club, than they would have been in, had the explosion taken place upon the premises of which they themselves were seized in fee, and destroyed the adjoining premises, leased by plaintiff to said Bell and the Union Club. What are the rights and responsibilities of the parties upon the facts, considered as strangers to each other, with respect to those premises? If the defendants are liable, it must be upon one of two grounds, either, firstly: that a party who introduces upon his own premises a highly dangerous substance, which, in consequence of such introduction, in some way injures his neighbor, is liable for the damages at all events, and under any and all circumstances, without regard to fault or negligence; or secondly: that the injury has been caused through the negligence and want of proper precaution and care in the party in introducing, or in managing such a substance after its introduction. Plaintiff's counsel insist that defendants are liable upon both grounds. In support of the first ground, the strongest case cited is Fletcher v. Rylands, L. R. 1 Exch. 265; and the same case in the house of lords on appeal, affirming the judgment of the court below (L. R. 3 H. L. 330). The defendant in that case constructed a reservoir to supply water for a mill situate upon his own premises, into which he diverted from their natural course the waters of a stream. In the construction of the reservoir, the engineer and workmen found five old shafts, which had been filled up with marl and clay. The shafts led down to certain passages, which had been excavated in working a coal mine, and which extended to, and connected with, the mine of the plaintiffs on their own premises, adjacent to those of defendant. The defendant was not aware of the existence of either the shafts or passages on his premises, but his workmen and engineer, in constructing the reservoir found the shafts, although they did not know with what they connected. The water from the reservoir broke through one of the shafts, ran through the passages into plaintiffs' mine, and produced the injury in question in the action. The court found, as a fact, that there was negligence on the part of the defendant's engineer and workmen in the construction of the reservoir; but the decision was not put on that ground. The defendant was held liable, and it must be admitted that the court stated broadly, that when a party brings an article upon his premises known to be dangerous, and liable to escape upon his neighbor's premises, and do injury, he is bound to see that it does not escape and do harm. The other cases cited, are cases where parties in blasting with gun, or blasting powder, upon their own premises, have thrown rock upon, and injured their neighbors, or their neighbors' premises, and cases of a similar character, as Hay v. Cohoes Co., 2 N. Y. 159. The observations of the judges in delivering their opinions, must be considered with reference to the facts of the cases decided. In all these cases, and the examples cited by the judges as illustrations of the principle adopted, the liability to escape and do injury, and the dangerous character of the article introduced, were necessarily known to the party introducing it. The properties of water and gunpowder are known to everybody. The liability of water collected in large bodies to escape through pressure, and of gunpowder to violently explode and do injury, are known to all persons of common sense in civilized communities, no matter how ignorant they may be in literary and scientific matters. It is a part of the common and general knowledge of the community, of which everybody is presumed to be possessed and of which, as such, the courts are bound to take judicial notice. Any party who introduces these things into his premises, does so with a full knowledge of their dangerous properties, and of their liability, even with the utmost care and precaution, to elude his vigilance, baffle his control, escape and injure his neighbor. It is worthy attention, that in the case of Fletcher v. Rylands, in the court of exchequer, two of the judges were of opinion that defendant was not liable, and judgment was entered in accordance with this view; but the judgment was reversed on appeal in the exchequer

chamber, and this last judgment affirmed in the house of lords. Blackburn, J., who delivers the opinion of the court in the exchequer chamber, does not fail to note knowledge on the part of defendant of the liability to escape and do mischief, as an important element to be considered on the question of liability. He says: "It seems but reasonable and just, that the neighbor, who has brought something on his property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous, if it gets on his neighbors', should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property." L. R. 1 Exch. 280. And his illustrations clearly show, that knowledge is an important element in the liability. For instance, he says, that a man is answerable for damage done by the escape of his beasts into his neighbor's field, for the grass they eat and trample on; for this is the natural consequence of their escape; but he is not liable "for any injury to the persons of others, for our ancestors have settled that it is not the general nature of horses to kick or bulls to gore: but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that. Id. Again, "so in May v. Burdett [9 Q. B. 112], the court, after an elaborate examination of the old precedents and authorities, comes to the conclusion that, 'a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril.' And in 1 Hale, P. C. 430, Lord Hale states that when one keeps a beast, knowing its nature or habits are such that the natural consequence of his being loose is, that he will harm men, the owner 'must, at his peril, keep him up safe from doing hurt, for though he use his diligence to keep him up safe, if he escape and do harm, the owner is liable for damages.' * * * In these latter authorities, the point under consideration was damages to the person, and what was decided was, that when it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though when it was not known to be so, the owner was not responsible for such damages; but where the damage is like eating grass or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same." Id. 281. In affirming the judgment of the exchequer chamber, in the house of lords, the lord chancellor quoted the first passage above cited from the opinion of Blackburn, J., together with the context, and said, "In that opinion, I must say, I entirely concur." L. R. 3 H. L. 340. Thus, it is apparent from the language used and the illustrations cited, that knowledge of the dangerous character, or mischievous propensities of the thing or animal introduced on the part of the party introducing it, is an essential element in the cause of action. The "natural consequences" of the escape must be known, but the ordinary natural consequences of the escape of a tame beast, as the eating and trampling down of grain, grass, herbage, etc., the damage from flooding with water, filth, etc., are matters of universal knowledge, of which everybody is presumed to be cognizant, and of which everybody is bound to take notice. Since a party is bound to know those things, the law presumes that he does know them, and holds him responsible without special allegation or proof of knowledge. But all tame animals are not vicious—the goring of a man is not the ordinary consequence of an escape of a tame beast. When such a beast is vicious and liable to attack and gore people, or do other like kinds of mischief, it is an exception to the general rule, and all mankind are not presumed to know his vicious propensities; hence, in order to render his owner liable for such mischiefs done upon an escape, it is necessary to specially bring home to him knowledge of his vicious tendency. When this knowledge is brought home to him, he is presumed to know the ordinary consequences of the escape of such animal, and is liable for his vicious acts, as in other cases of knowledge. I know of no case, in which this doctrine has been held, unless knowledge of the propensities or character of the thing working the injury must be presumed by the law from its generally known character, or knowledge was specially brought home to the party dealing with it. Knowledge, therefore, in some form, must be an essential element in the cause of action. There is some reason for holding that a party who introduces into his premises a substance known to him, or which he is bound to know from the present universal knowledge of mankind, to be dangerous to his neighbor, shall do so at his own peril and be responsible for the consequences. He deals with the article with full knowledge of his peril, and knowingly assumes the risk. Should he suffer, it would be in consequence of his own folly, if not his fault. But why should a person innocently ignorant of the qualities of a dangerous thing unconsciously brought upon his premises in the pursuit of a lawful calling, not only be compelled to sustain the damage suffered himself, but, also, that suffered by his neighbor from an accident resulting therefrom without his fault. Upon what sound reason can such a doctrine be sustained? To carry the rule to that extent would be, to make every man an insurer of his neighbor against the consequences of all his acts, however faultless they may be. In my judgment, the law is not so rigorous and unreasonable.

But it is not clear, that even as to things universally known to be dangerous, the doctrine laid down can be sustained in the broad language sometimes used in discussing a given state of facts. Fire, for instance, is an element known to all men to be dan-

gerous, yet there are numerous cases where fires purposely set in a party's own grounds have spread to and damaged his neighbor's premises; as, for example, in clearing lands, in which the party setting the fire has been held not to be liable, unless there was negligence. So in the case of water, it was held that when one builds on his own land a mill-dam, on a proper model, and the work is faithfully done, he is not liable to an action though it breaks, and his neighbor's dam and mill are thereby destroyed. Livingstone v. Adams, 8 Cow. 175. To the same effect are Hoffman v. Tuolumne Water Co., 10 Cal. 413, and Campbell v. Bear River & A. Water Co., 35 Cal. 683. These were not cases that could be referred to vis major. I can perceive no good ground for distinction as to the question of liability, between thus accumulating upon one's land water in a natural stream largely beyond the natural quantity, and introducing it from abroad. See, also, as to bursting of water pipes, Blyth v. Birmingham Water Works, 11 Exch. 781. These are but examples of a very large number of cases of like character. Why were not the defendants in these instances responsible for all damages resulting to their neighbors, if a party introducing or dealing with a dangerous article, thing or element upon his own premises is liable at all events, and under all circumstances, without reference to negligence, or any fault on his part? And in these cases the parties had knowledge of the dangerous character of the matters with which they were dealing. If I am right in the views thus far suggested, the first proposition upon which the liability of defendants for the injuries to the premises occupied by Bell and the Union Club is rested, is untenable.

There must then have been knowledge, on the part of defendants, of the dangerous character of the explosive substance introduced upon the premises occupied by them, or there must have been what the law deems negligence on their part, or there is no liability. Upon the question of knowledge, I am satisfied from the evidence, and I so find the facts to be, that nitro-glycerine, at the time of the explosion in question, had not become so generally known to the world, commercial or otherwise, as to be a part of the ordinary knowledge of the people, even in intelligent communities. It had hardly yet emerged from the domain of strictly scientific research. It is true, that, at the time, it had recently, to a very limited extent, been introduced to the knowledge of miners and others in Europe; but only to a limited extent. At the very time, efforts were being made by a single person to introduce it into this country for blasting purposes. A short time (but a few weeks) before, an effort had been made—and the first effort of the kind—by one house, to whom a consignment had been made, to bring it into notice in this state; but it does not appear that it had been introduced into public use in other parts of the United States. This knowledge of the article, both of its name and its properties, was confined, comparatively speaking, to a very few. Of course, it is impossible to ascertain, even approximately, the exact extent to which it had become known; but from the general tenor of the evidence, I think it might be safely assumed that not one in a thousand in the United States, or California, would have known anything about the substance or its properties, had it been mentioned by its common name, glonoin oil, or nitro-glycerine. However that may be, it is very evident, that it was known outside of the laboratory of the chemist to a very limited extent, and not sufficiently to be recognized as a part of the common knowledge of the country, even in intelligent circles. It was new—I might say, almost entirely unknown—to commerce. It had not obtained such notoriety that ordinary people, or commercial men, can be presumed to be cognizant of its properties. As an illustration of the state of knowledge, even among scientific men and chemists, of several professors of that science in our colleges and university, examined as experts on behalf of the respective parties, not one had heard of nitro-glycerine, as an article of commerce, or of practical utility, or outside the domain of science, prior to the explosion in question in 1866. One professor, who appeared to be well informed in his profession, and as to the article in question, could not say that it had before that time been brought to his attention, even as a matter of scientific interest. Another, who had formerly been a professor of chemistry in the Normal College, in Swansea, Wales, and who has for several years been, and now is the analytical chemist of the San Francisco refining and assaying office, and professor of chemistry in the Toland Medical College, also in the City College, was so little familiar with nitro-glycerine and its properties, that after the explosion, when some of the chips, saturated with the substance which leaked from the case on the wharf, were taken to him for analysis, he did not know what it was. Even after he had proceeded some time with the analysis, applying various tests, and after an accidental explosion had taken place in the course of the process of the analysis, the name of the article did not suggest itself to him till he had consulted his toxicological works, and found that a substance apparently having the same properties, was called nitro-glycerine; yet, he had years before experimented with it in the laboratory as a matter of scientific interest, but the fact had passed from his recollection. In point of fact, attention appears from the evidence to have been but little directed towards the substance, even in the scientific world at large, until called to it by the explosion in question, the one at Aspinwall about the same time, and one or two

others occurring at a later date. Since then it has been the subject of extensive experiments, which have brought to light much of the present prevailing particular knowledge with reference to its properties. With so little general knowledge of the substance, at the time of the accident, outside the laboratory, even among chemists and scientific men, who usually take a special interest in such substances, and who are more likely to notice the progress of their introduction into the practical affairs of life, it could scarcely be expected that the public generally engaged in the ordinary pursuits of agriculture, manufactures and commerce, would be informed upon the subject; and, I am satisfied from the evidence, that the substance and its properties were, at the time of the shipment and explosion, almost wholly unknown to the public and to commerce; and further, that while the state of public knowledge was not such that the defendants were bound, or could be presumed in law, to know the existence or properties of the substance, I am also satisfied that they did not in fact, nor did any of their employees engaged in handling the case in question, have any knowledge on the subject; that the package was received and handled by the defendants and all in their employ, up to the time of the explosion, in utter ignorance of its contents, or the dangerous properties of the substance itself, had the contents been known, and that they had no ground to suspect its dangerous character—nothing to put them upon inquiry, as prudent men, as to what it was. I do not perceive that the fact of the arrival of the case on the sailing day of the steamer, and after its departure, or that it was not strapped or marked, as required by the regulations of the defendants, has anything in it to suggest to an ordinarily prudent man, engaged in the business of a common carrier, that the case contained anything dangerous. It was, at most, simply indicative that the party presenting it was not acquainted with the requirements of the company, which was, doubtless, no uncommon thing with those who were not in the habit of making frequent shipments. When the defendants' servant was requested to strap the case, he obtained a wooden hoop from a pile kept for the purpose, and the proper implements at hand, and strapped it, driving nails into the box with as much unconcern, as if it had been a case of boots and shoes. He evidently had no suspicion that it was liable to explode from the effects of his blows, or that it was in any respect dangerous; and the fact that hoops and implements were kept at hand for such purposes, indicates that this want of conformity to the regulations of the defendants was by no means singular—that such exigencies were anticipated, and provided for. The box appeared in all other respects in good condition and suitable for shipment—as much so as the thousands of others of a similar apparent character shipped by the same steamer. There was, then, in fact, no knowledge, and nothing that should necessarily excite the suspicions of a prudent man engaged in that business, and constantly receiving for carriage boxes of merchandise of similar appearance. Indeed, I think it would have been very remarkable, if one receiving and handling so many similar cases, upon the facts disclosed by the evidence, had suspected that it contained anything of a dangerous character.

It is insisted, further, by the plaintiff's counsel, that it was the duty of the defendants to acquaint themselves with the character of the merchandise delivered to them to be carried, and being bound to do so, they are chargeable with knowledge in fact; or that, at least, a failure to acquaint themselves with the character of the article to be carried is, of itself, such negligence as will render them liable. In my judgment, neither proposition is tenable. The numerous authorities cited to sustain these propositions, are cases where parties had sent valuable packages, or valuable articles in trunks as baggage, or frail goods requiring great care in handling, and cases of a similar character, and the party sending had either neglected, or upon request declined to inform the carrier of the character or value of the articles contained in such packages or trunks. The questions arose between the party sending and the carrier, in actions to recover for the loss or damage sustained in carrying. In none of these cases, which have fallen under my notice, has it been held that the carrier had an absolute right to know the contents of packages or baggage thus sent; but the consequence imposed on a failure of the owner to give the information when requested, or upon giving false information, is, that he shall not recover the extraordinary value of the articles lost, or for damage to articles requiring extraordinary care to prevent breakage or injury. I know of no case, in which it has been held, that a carrier has an absolute right to know the contents of a package tendered to him to be carried, or that imposes upon him a duty to make inquiry as to the contents of every package, without regard to circumstances exciting suspicion. In fact, the practice is usually otherwise, and bills of lading given to shippers by common carriers, often, if not usually, contain the clause, "contents unknown." Abb. Shipp. 339. The ordinary bill of lading of the Pacific Mail Steamship Company, which brought the case in question for defendants (a copy of which was introduced in evidence), contains the clause, "contents unknown." If the inquiry were made, there is no certainty that the contents of a package would be correctly given. In all probability, the servant delivering packages seldom knows the contents himself. The only way to obtain evidence would be to open the package, and examine it. The carrier,

certainly, would have no right to open every package tendered for carriage. And I apprehend a carrier would have no right to decline a package, on the ground that the owner refused to disclose the contents, unless there was some ground to suspect that it contained something dangerous, hurtful, offensive, or otherwise of a character not proper to be carried. In Crouch v. London & N. W. R. Co., 14 C. B. 255, which was an action for refusal to carry certain goods, the fifty-seventh plea to the first ten counts expressly set up as a defense, that defendant requested the plaintiff to inform it of the contents of the package tendered to be carried; that the plaintiff refused to give the information, and that defendant refused to carry it on that ground. Id. 260. The court held the plea bad. Jervis, C. J., said: "I am of opinion that the fifty-seventh plea is a bad plea. No authority has been cited to show that a carrier is in all cases entitled to know the nature of the goods contained in the packages which are tendered him to be carried; and there seems to be no good reason why he should be. * * * This plea founds itself upon the broad and general proposition, that whatever be the nature or quality of a package delivered to a carrier, he is not bound to receive it, unless informed of the description of its contents. That proposition involves consequences so highly inconvenient as, in my judgment, to require authority to sustain it. None has been shown." Id. 291, 292. And Maule, J., says: "To say that the company may in all cases insist upon being informed of the nature and contents of every package tendered to them, as a condition of their accepting it, seems to me to be a proposition perfectly untenable." Id. 295. Creswell and Williams, JJ., express individually the same views. Id. 297. If the owner is not bound to state the contents of a package under all circumstances, it follows that the carrier is not bound to ask the contents under all circumstances. He is only bound to make inquiries, when he is entitled to have them answered, or when he has ground to suspect that there is something wrong about the goods tendered for carriage. Says Lord Campbell, C. J., in Brass v. Maitland, 6 El. & Bl. 482: "It would be strange to suppose that a master, or mate, having no reason to suspect that goods offered to him for a general ship may not be safely stowed away in the hold, must ask every shipper the contents of every package." If the carrier has reason to believe that the package contains anything dangerous, or not proper to be carried, he, doubtless, may refuse to carry it, unless the contents are disclosed, or he is satisfied as to its character. He may, in England, for a statute upon the subject expressly authorizes him to do so; but if he refuses to carry on that ground, he must allege and prove the reasonable ground, or he will fail in his defense. 14 C. B. 291, 292. It is, however, the duty of the shipper, at least, if he himself has knowledge, to give notice of the dangerous character of any package delivered to a carrier, where the party receiving it may not, upon inspection, be reasonably presumed to know its character. There is an implied undertaking that they are not dangerous. Brass v. Maitland, 6 El. & Bl. 470; Farrant v. Barnes, 11 C. B. (N. S.) 561; Shear. & R. Neg. § 593; Pierce v. Winsor [Case No. 11,150]. But even in that class of cases, where the action is between the shipowner and the shipper, growing out of the contract of carriage, Compton, J., said, in Brass v. Maitland, 6 El. & Bl. 488, the count under consideration, "clearly falls within the principle of the case of Williams v. East India Co., 3 East, 192. In that case Lord Ellenborough remarks, in giving the judgment of the court, on page 200: 'In order to make the putting on board wrongful, the defendants must be cognizant of the dangerous qualities of the article put on board;'" and [6 El. & Bl.] 492: "It seems very difficult to hold that the shipper can be liable for not communicating what he does not know." After suggesting some illustrations, he says: "Again suppose that there is a new article of commerce, which neither shippers nor shipowners know to be dangerous; is the innocent shipper to be liable? Lord Ellenborough's dictum in Williams v. East India Co., 3 East, 192, above referred to, would tend to show that knowledge of the party shipping is an essential ingredient." 6 El. & Bl. 491, 492. And these views seems to be approved by the court in Hutchinson v. Guion, 5 C. B. (N. S.) 163. Perhaps this is the true legal principle as between the shipper and carrier, when the shipper has no means of knowledge or ground for suspicion, as well as none in fact; but, otherwise the doctrine, I think, can hardly be maintained in the broad terms in which it is stated by the learned judge. But in either view, the reasoning applies with much greater force, as between the carrier who receives the package without knowledge, or possible means of knowledge, or reason to suspect its dangerous character, in the due and ordinary course of his business to carry for another, and a stranger who happens to be injured by it through a faultless accident occurring in the ordinary course of transit. Whatever the true rule may be as between the shipper and carrier, it seems reasonable that there should be no liability as between the carrier and the stranger, when both are equally innocent. As between carriers and strangers, between whom no privity exists, the carrier cannot be held to the same rigid rules of responsibility as those which apply to dealings between the shipper and carrier. While a man is so bound to use his own as not to injure his neighbor, this maxim does not make him an insurer of his neighbor's property against all accidents that may happen through his

acts, but only requires of him reasonable care and precaution. I might as well here refer to Pierce v. Winsor, supra, cited by plaintiff's counsel as a strong case in their favor. That was a case between the shipowner and a party who had chartered a ship for the voyage, and then put her up as a general ship. The ship was at the sole use and disposal of the charterer, and it was stipulated that their own stevedores should be employed by the owner. Some mastic put on board in casks escaped, ran together among other goods and hardened, damaging said goods. The owner, having paid to the owners the damages to the other goods, sued the charterer. This case, however, does not appear to be inconsistent with the views of Compton, J., in Brass v. Maitland, with the limitations before suggested in this opinion. Neither the owner nor shipper had actual knowledge of the liability of the mastic to do injury. Both being equally ignorant in fact, the liability was put upon the ground, that, although the shipowners and their employees had no reasonable means during the lading to ascertain the quality of the goods, or narrowly examine the sufficiency of the packing, the shippers had such means; and that it seems expedient, that although in fact ignorant, the loss should fall on them rather than on the owners—on the party having the means of knowledge, rather than on the one who had them not. The case does not appear to me to be against the defendants in the case in hand. On the contrary, it recognizes the principle adopted in this opinion: that the carrier, in receiving goods for transportation, independent of any suspicious circumstances, has no means of knowledge of the contents and character of packages delivered to him for carriage. I think, therefore, that the defendants, without any ground of suspicion, as to the character of the contents of the case in question, had no means of knowing their dangerous qualities, and were not, as to the plaintiff—a stranger to the contract for carriage—bound in law at their peril to know their character. That they did not in fact know, and that they had no reason to suspect the dangerous character of the package, I am satisfied from the evidence, and so find the facts in the case to be.

For similar reasons, there was no negligence under the circumstances, in not inquiring as to the contents of the package. The defendants were acting in the ordinary course of their business. It was a culpable violation of duty on the part of the owner to deliver a dangerous article exhibiting no external indications of its real character, without informing them as to the danger. In the exercise of his lawful rights, every man has a right to act on the hypothesis that every other person will perform his duty and obey the law; and in the absence of any reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to a danger, which can only come to him through a disregard of law on the part of some other person. Jetter v. New York & H. R. Co., 2 Keyes [*41 N. Y.] 154; Earhart v. Youngblood, 27 Pa. St. 332; Deyo v. New York Cent. R. Co., 34 N. Y. 10, 11; Curtis v. Mills, 5 Car. & P. 489.

At this time there were regularly carried to California, by defendants, by each steamer, besides those carried to Panama, Central and South American ports, from four thousand to six thousand packages of a similar general external appearance. It would be unreasonable in the extreme, to expect them to know, or make inquiries as to the contents of each package. It is not the habit of ordinarily prudent men engaged in the business of common carriers to do so. No reasonable man would take such extraordinary precautions, and the law imposes upon carriers no such extreme degree of care. In Shearman & Redfield on Negligence (section 6), the rule of law is well stated, as follows: "The law makes no unreasonable demands. It does not require from any man, superhuman wisdom or foresight. Therefore no one is guilty of culpable negligence, by reason of failing to take precautions which no other man would take under the like circumstances. If one uses every precaution which the present state of science affords, and which a reasonable man would use under the circumstances, he is not held responsible for omitting other precautions which are conceivable, even though, if he had used them, the injury would certainly have been avoided." "In determining what is negligence, regard is to be had to the growth of science, and the improvement in the arts which takes place from generation to generation; and many acts or omissions are now evidence of gross carelessness, which a few years ago would not have been culpable at all; as many acts are now consistent with great care and skill, which in a few years will be considered the height of imprudence." Id. § 7. Having, then, no absolute right to know the contents of packages delivered for carriage, and there being no reasonable ground, to believe, that the case in question contained anything dangerous; and it not being the practice of ordinarily prudent men engaged in the business of carriers to ascertain the character of all goods carried; and having a right to rely upon the presumption that no breach of duty would be committed by the shipper, by delivering a highly dangerous package without giving notice of its character; there was no negligence on the part of the defendants in omitting to ascertain the contents of the case in question.

And for similar reasons, there was no culpable negligence on the part of defendants in opening the case with a mallet and chisel, in the mode pursued in this instance, for the purpose of ascertaining the extent of the damages. This was the ordinary mode of opening boxes of an apparently like charac-

ter. It was opened in the presence of a representative of both the steamship company and the express company, in the regular course of business, when it is found that a package has been damaged in order to ascertain both the extent and character of the damage, and which party is responsible. The parties engaged were wholly ignorant of the character of the substance with which they were dealing. At that time there was no oil known to commerce, or commonly known to be an article of practical utility, or known to defendants or their employees, which would explode by percussion or concussion. The oil which leaked out had the general appearance of sweet or salad oil, which as also any other oil known to commerce, would have been perfectly innoxious under similar treatment. The box was manipulated in the presence of Mr. Knight, the second in authority in the management of defendants' business on the Pacific coast, and of two others of the principal clerks of the two companies, and other employees, acting under their direction. They, as well as those who received the package in New York, who unloaded the package from the ship, those who tumbled it about on the wharf, and carted it to the premises in question on a dray, acted in all respects as men ordinarily would act, who are unconscious of danger, and as no man of common sense having reason to apprehend danger would have acted. They forfeited their own lives as the penalty of their faultless ignorance. Yet they acted as any other men of ordinary prudence, or even of extreme prudence, with the same knowledge, or means of knowledge, or want of reason to apprehend danger, would have acted—as any man of prudence would have acted under the same circumstances. It would not have been negligent to have opened the case of silverware, having a somewhat similar appearance, which was also saturated with oil, as the result shows, from the leaking case, and which was sent up with the latter for a similar examination, or, so far as is known, any of the other four or five thousand packages received by the same steamer. Yet there was no more ground for believing this package to be dangerous than any of the others. That it was not legal negligence to thus handle the package, under the circumstances, is recognized by the case of Pierce v. Winsor [supra], already noticed, cited by plaintiff. Says Mr. Justice Clifford: "The stowage of the mate was made in the usual way; and it is not disputed it would have been proper, if the article had been what it was supposed to be when it was received and ladened on board. Want of greater care in that behalf is not a fault, because the master had no knowledge, or means of knowledge, that the article required any extra care or attention beyond what is usual in respect to other goods."

These observations precisely fit the circumstances under consideration.

This being the case, there was, in my judgment, no negligence under the circumstances —nothing that the law deems negligence, and there was no liability to strangers for the consequences of the unfortunate accident. If defendants are liable under the circumstances, I do not perceive why they would not have been liable if they had made careful inquiry, and had been solemnly assured that the case contained olive or sweet oil, or some other harmless merchandise, and had relied on that assurance. To hold them liable upon the case supposed would be unreasonable and abhorrent to all ideas of justice. I think that, while the defendants will be obliged to bear the loss sustained by themselves, resulting from the deplorable accident, except so far as they may have a remedy against the guilty shipper, the plaintiff, also, will be compelled to submit to the loss sustained by him from the same lamentable cause. It is one of those misfortunes which are liable to occur in human affairs, wherein those upon whom the consequences chance to fall, must be the ones to suffer, unless they can find a remedy against those who are really culpable.

The plaintiff also insists, firstly: that the accident is of a class where the event itself makes out a prima facie case of negligence, and throws the burden of proving due care and circumspection on the defendants; and secondly: that every man is presumed to do his duty and conform to the law; that under this rule it must be presumed that the shipper in this instance performed his duty, and informed defendants of the dangerous character of the article, and that, although it required the proof of a negative, the burden of showing want of knowledge was thrown upon them.

I am not prepared to admit the correctness of, at least, the first proposition, whatever may be the rule as to the second. But under the view I take of the evidence, it is wholly unnecessary to controvert either position; for, conceding them to be correct, in my judgment the evidence on both points clearly overthrows the assumed presumption in favor of the plaintiff, and shows that there was no negligence on the part of defendants, or their servants, and that the dangerous character of the package was not communicated to them, and that there was nothing to excite even the suspicion of a reasonable man. The package was received when accepted by the freight-measurer, O'Leary, and the tally clerk, Middlebrook, in the mode stated in the findings, and from that time it went into the great mass of freight, and no further special notice was taken of it. The receipt given by Middlebrook, although but a temporary receipt, was the original receipt, from which all subsequent ones were made up. The general receipt, way bill, and bill of lading clerks made out their papers from this, without seeing or inspecting, or having any opportunity to in-

spect the merchandise. This receipt was their only guide. And proof of all that took place at the time of the delivery was given.

It is sometimes necessary to prove a negative, although from the nature of things, this is usually difficult, and for this reason, plenary proof of a negative is not always expected or required. 1 Greenl. Ev. § 78; Kohler v. Wells, Fargo & Co., 26 Cal. 611, 612. But in this case, the proof on those points is, to my mind, full and entirely satisfactory.

Fully impressed with the importance of this case, both in view of the large amount of damages claimed and of the important principle involved applicable to many other actions, which, I am informed, are pending in this state and elsewhere, arising out of the same and other similar accidents, I have given to it such thought and attention as my other onerous duties have allowed me to bestow; and the conclusion to which my mind is brought, is, that the defendants are liable for the injuries to the premises demised to and occupied by themselves, but are not liable for the injuries resulting to the premises occupied by Bell and the Union Club. This is the first case decided, so far as I am informed, arising out of these accidents, involving the points now determined. And no case involving the exact point has been brought to my attention. Should it turn out that my conclusion is wrong, I am glad to know that there is a tribunal which can, and will, correct my error. I have taken care to frame the findings in such a way that, if I have erred in my legal conclusions, on either branch of the case, the appellate court will have the means of correcting the error by directing the proper judgment upon the facts found, without ordering a new trial.

As to the premises occupied by Wells, Fargo & Co., the statute provides that, in an action for waste, "there may be judgment for triple damages." Prac. Act, § 250. As I understand this provision, it leaves the question as to whether the damage shall be tripled to the sound discretion of the court, to be determined according to the greater or less aggravating character of the circumstances. There are no circumstances in this case to justify inflicting damages beyond the actual amount sustained. In point of fact, the defendants repaired a large portion of the premises to the satisfaction of the plaintiff, and paid the expenses themselves, and supposed they had done so as to the whole; but it turns out in the evidence that a small portion of the expense of repairs, which, from the nature of the case, could not well be made except in connection with repairs made to other premises which defendants, according to the view taken, are not liable to repair, have been overlooked, and accordingly not been paid. For this amount the plaintiff must have judgment.

Let judgment be entered for the plaintiff for the sum of one thousand seven hundred and eighty-seven dollars and sixty-two cents, and interest at ten per cent. per annum, from August 1st, 1866, in gold coin, and costs of suit.

Judgment accordingly.

[The case was taken upon writ of error sued out by the plaintiff to the supreme court, where the judgment of this court was affirmed. 15 Wall. (82 U. S.) 524.]

Case No. 10,773a.

PARROTT v. BARNEY et al.

[Deady, 405.] [1]

Circuit Court, D. California. March 31, 1868.

WASTE—PERMISSIVE — BY TENANT AT WILL—BY STRANGER — STATUTES OF MARLEBRIDGE AND GLOCESTER—DEMURRER TO COMPLAINT.

1. Where a demurrer is taken to the complaint, if either count therein is good, it must be overruled.

2. The statutes of Marlebridge and Glocester concerning waste are a part of the common law, brought to this country by the colonists from England.

3. The statute of California (Prac. Act, § 250), which gives an action to the person aggrieved against a tenant who may commit waste, includes permissive waste.

[Cited in Parrott v. Barney, Case No. 10,773.]

4. If a tenant at will commit voluntary waste he is liable not as a tenant but as a trespasser, but for mere permissive waste—a neglect to keep the premises in repair—he is not liable.

5. A tenancy from year to year is not a tenancy at will, but for a term—a prescribed and certain time.

6. When waste is committed by a stranger during the term of the tenant, an action on the case may be maintained therefor, either against the tenant who suffered the waste or the stranger who committed it.

7. An allegation that the defendants held certain premises as tenants thereof to the plaintiffs under a demise to them for a certain rent, imports a tenancy for a term.

[This was an action at law by John Parrott against D. N. Barney and others.]

John Doyle, for plaintiff.

Eugene Casserly, for defendants.

DEADY, District Judge. This action was commenced on March 20, 1867, in the Twelfth district court of the state. On August 21, 1867, the defendants appeared to the action by attorney and petitioned to have the cause removed to this court. On September 21, 1867, the state court made an order allowing the petition for removal. The action has been tried in this court upon the complaint of the plaintiff and the demurrer of the defendants thereto. The complaint contains three counts: From the first count, it appears that on April 16, 1866, the plaintiff was the owner in fee of certain premises in the city of San Francisco, at the corner of Montgomery and California streets, and that the defendants then occupied and possessed certain portions of said premises, under the

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

plaintiff, "as his tenants thereof from year to year at and under a certain yearly rent"—the reversion thereof being in the plaintiff. That the defendants, during such occupation and possession, at the date aforesaid, "by themselves and their servants, carelessly, negligently, improperly and improvidently introduced and caused and procured to be introduced, and suffered and permitted to be introduced" into the premises certain explosive substances, which, by themselves and servants they so carelessly, negligently, etc., handled, managed, etc., "that the same then and there exploded with great force and violence, and then and there by means and force of the said explosion, broke down, wasted and destroyed divers," etc., "being parcel of the freehold of the said premises so held by them, the said defendants," of the value of $20,000, to the waste and injury of the reversion of the plaintiff and his damage, $20,000, and "against the form of the statute in such case made and provided." The second count alleges that a certain portion of the premises above mentioned, at the date aforesaid, were in the occupation and possession of Gerrit W. Bell and the Union Club, as tenants of the plaintiff's from month to month, the reversion thereof being in the plaintiff; and that the defendants doing business as aforesaid, in premises in the immediate vicinity of those occupied by Bell and the Union Club, caused and suffered the explosion above mentioned to take place, by means whereof, there was broken down, wasted and destroyed, divers, etc., being parcel of the freehold of the said premises, occupied by Bell and the Union Club, of the value of $30,000, to the waste and injury of the reversion of the plaintiff, and his damage $30,000. The third count alleges that a certain portion of the premises was held and occupied by the defendants, at the date aforesaid, as tenants thereof to the plaintiff, under a certain demise and rent, and that Gerrit W. Bell and the Union Club, occupied a certain other portion of the premises as tenants of the plaintiff, the reversion thereof being in the plaintiff; and that the defendants, while occupying the premises aforesaid, caused and suffered the explosion above mentioned to take place, by means whereof there was wasted and destroyed divers, etc., portions of the premises, to the injury of the reversion of the plaintiff, $50,000. The complaint concludes with a prayer for treble damages upon the first count, and single damages upon the others—in all $100,000.

The demurrer is taken "to the complaint," and not any particular part of it. The causes of demurrer assigned, are the same as to each count: that it does not state facts sufficient to constitute a cause of action. If either count in the complaint is sufficient, the demurrer being to the whole must be overruled. 1 Chit. Pl. 664, and note; Weaver v. Conger, 10 Cal. 237. It seems that by the ancient common law, tenants were not liable to an action for waste, except those who were in by operation of law—as tenant in dower or guardian in chivalry. To protect the inheritance against the waste of tenants in, by act of the parties, whether for life or years, the statute of Marlebridge was passed. 52 Hen. III. c. 23 (Year 1267). This statute provided: "Also fermers during their terms shall not make waste, sale or exile of house, woods and men, nor of anything belonging to the tenements, that they have to ferm, without special license had by writing of covenant making mention that they may do it; which thing if they do and thereof be convict, they shall yield full damages and shall be punished by amerciament." 1 Chit. St. pt. 1, 3. This statute proving insufficient, the statute of Glocester was passed. 6 Edw. I. c. 5 (Year 1278). This statute provided: "That a man from henceforth shall have a writ of waste in the chancery against him that holdeth by the law of England, or otherwise, for term of life or for term of years or a woman in dower; and he which shall be attainted of waste shall leese the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at," etc. 1 Chit. St. pt. 2, 1106. These ancient statutes are a part of the common law, brought to this country by the colonists from England. When the migration to America began, they had been in force in the mother country for four centuries, and were then practically as much a part of the English common law as the oldest traditions of the courts. Com. v. Knowlton, 2 Mass. 534; Sackett v. Sackett, 8 Pick. 314; 4 Kent, Comm. 81. These statutes were construed to comprehend permissive as well as commissive waste. To do or make waste in a legal sense includes negligent as well as voluntary waste. The words "shall not make waste," are construed as a prohibition to suffer waste. An averment that waste was committed is supported by proof of negligence from which waste ensued. 10 Bac. Abr. 421, 422; 4 Kent, Comm. 82; 2 Bl. Comm. 283; 2 Saund. 252; Robinson v. Wheeler, 25 N. Y. 259. In this state and at this day the remedy and compensation for waste are prescribed by the practice act (section 250). It reads: "If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for triple damages." For the defendants it is argued that this section does not include permissive waste—the waste set forth in this complaint. The argument presumes that the phrase "commit waste" must be taken in its narrowest literal signification, and that merely permitting waste, or suffering it to occur, does not bring a tenant within the statute. The California statute is a substantial condensation and enactment of sections 1, 2, 3, and 4 of the New York Revised Statutes. 2 Rev. St. 334. These sec-

tions of the Revised Statutes are a substantial copy of the statutes of Marlebridge and Glocester, including the subsequent one of 13 Edw. I. c. 22, which made joint tenant or tenant in common liable to his co-tenant for waste. The New York statute of waste, like its English prototype, was construed to include permissive waste. Cook v. Champlain Transportation Co., 1 Denio, 104; Robinson v. Wheeler, 25 N. Y. 259. This California statute must receive the same construction as the English and New York. In enacting the former, it must be presumed that the legislature intended to adopt as a part of it, the current and long established construction of the latter. The statutes all use the same language: "Shall not make waste" (Marlebridge); "be attainted of waste shall leese the thing that he hath wasted" (Glocester); "shall commit waste" (New York); "commit waste" (California). The cases cited by counsel for defendant—Torriano v. Young, 6 Car. & P. 8; Gibson v. Wells, 1 Bos. & P. (N. R.) 290; Holt, N. P. 7—only go to show that at that time the action on the case was not considered a proper remedy for permissive waste. They do not decide that tenant for years was not liable for permissive waste. The action on the case had then almost superseded the writ of waste for commissive waste, but as to permissive waste it was thought by some courts and judges that case would not lie.

Here the distinction between common law actions is abolished, and the ancient writ of waste was never known. The statute declares who shall be liable for waste, and to whom. It also prescribes the remedy and the measure of damages. This remedy is an action against the tenant—practically an action on the case—the circumstances. The action or remedy given is as broad as the statute, and may be maintained by the party aggrieved against the tenant for either commissive or permissive waste. What constitutes waste, the statutes have left to the courts and the common law to determine. The first count alleges a tenancy from year to year. Counsel for the defendants insist that this allegation only amounts to an averment of a tenancy at will, and that, therefore, defendants are not within the statute and not liable for waste. If tenant at will commit voluntary waste, he is not liable as a tenant, but as a trespasser for a trespass. The act of waste being inconsistent with such a tenure, it determines the tenancy or estate, and the tenant is deemed a trespasser. For mere permissive waste—a neglect or failure to keep the premises in repair—a tenant at will was never liable. His time in the premises is too uncertain for the law to impose that burden or duty upon him. The waste complained of in this count, is in one sense, and it may be the only sense, permissive. It was not intentional. Yet it was the direct and immediate result of the positive act of the tenants, and I am not prepared to admit that they are not liable for it as trespassers, even if they were merely tenants at will. But I am satisfied, upon both reason and authority, that the tenancy described in this count is a tenancy for years. All that is necessary to constitute a tenant for years, is, that he have a certain time in the premises, be it for a day or a thousand years. A tenancy from year to year is a tenancy for a definite recurring period, and not at will. During each of such periods it is a tenancy for the time or term of one year. How often it may be renewed and how long continued by such renewal, depends upon the future conduct of the parties, and is, therefore, uncertain. But for the current year—in this case the year of the alleged explosion and waste—these tenants held the premises independent of the will of their landlord. They had a term—a prescribed and certain time in the tenements. They were termors—tenants for a term—a time certain, and not at will. 10 Bac. Abr. 446; 4 Kent, Comm. 111-117; 2 Bl. Comm. 147, notes 12, 13. The defendants being tenants for a year, are within the statute giving the action for waste, and are, therefore, liable to the person aggrieved for waste done or suffered by them during their term. As to waste arising from non-repair merely, the liability of tenant for years would materially depend upon the duration of his term. Between a tenant for a term of one hundred years and one year, I think there should be a marked difference in this respect. But a tenant for one year or one day ought to be liable for waste which results directly from his negligent or unskillful manner of using the property. In the one case the tenant is merely passive, but in the other, in doing a lawful act, without lawful care or skill, he causes affirmative and positive injury to the premises. For instance, a tenant for a term of one year negligently leaves the orchard gate open, so that the beasts of the field enter and destroy the trees, or in conducting water to the garden he negligently or unskillfully allows the stream to undermine the dwelling-house, so as to overthrow it. Technically speaking, this may be what the books call permissive waste—I suppose it is. The result was not intended, but produced by negligence or want of skill. Yet a tenant ought to be liable for such waste without reference to the length or duration of his term. Because it is produced not by a failure to repair, but by positive misconduct. The first count is sufficient, and the demurrer being taken to the whole complaint, must therefore be overruled.

But, in my judgment, the second and third counts are also good.

The second count is simply an action on the case by one who has the inheritance against a stranger, for waste on the demised premises during the term. It having been shown in the consideration of the first count, that the injuries complained of amounted to

waste, for which the tenants were liable to the landlords, whether committed by themselves or others, it follows that the action can be maintained by the landlord, against either the tenant who suffered the waste or the stranger who committed or caused it. 6 Conn. 328; Short v. Wilson, 13 Johns. 37; Attersoll v. Stevens, 1 Taunt. 198. The special objection to the third count is, that the tenancy is not sufficiently alleged. The allegation is substantially, that the defendants held certain portions of the premises as tenants thereof to the plaintiff, under a demise to them, and for a certain rent. The allegation is an unqualified averment that there was a lease to the defendants for a certain rent, payable to the plaintiff, who had the inheritance and immediate reversion. True, it does not affirmatively appear that the lease was for a term of years, and it may have been at will. But the most reasonable conclusion is, that the allegation imports a tenancy for a term. Robinson v. Wheeler, 25 N. Y. 263.

In the course of the oral argument upon the demurrer, the prayer of the complaint was criticised. In passing upon the demurrer I have paid no attention to the prayer of the complaint. In a common law action the demand for relief is a mere matter of form, except it be considered in the light of a proposition to the adverse party. What relief the plaintiff is entitled to, will depend upon the facts stated and the law arising thereon, and not the prayer. Upon this complaint, the plaintiff being entitled to recover something, must have damages commensurate with the injury which the proof may show that he has sustained in consequence of the waste. An action for waste cannot be maintained unless authorized by the statute. The court will take notice of the statute, and the complaint need not notice it or conclude against the form of it. A verdict for the plaintiff should, as in ordinary actions for tort, be for the amount of damage actually sustained. The judgment of the court, by authority of the statute, may be given for treble that sum, or not, depending upon the circumstances of aggravation or mitigation that attended the commission of the waste.

[NOTE. This case was subsequently heard by consent without jury. The court held that there was no negligence on the part of the defendants, and upon the main issue found for them. It appeared during the trial that the defendants, by mistake, had not paid for a part of the repairs contracted by them to be paid for, and so for this sum judgment was given for the plaintiff. Case No. 10,773. The case was then taken, upon writ of error sued out by the plaintiff, to the supreme court, where the judgment of this court was affirmed. 15 Wall. (82 U. S.) 524.]

PARROTT (KNOWLES v.). See Case No. 7,-898.

PARROTT (OFFUTT v.). See Cases Nos. 10,-452 and 10,453.

PARROTT (RICH v.). See Cases Nos. 11,760 and 11,761.

PARROTT (TIBBS v.). See Cases Nos. 14,022 and 14,023.

PARROTT (TREADWELL v.). See Case No. 14,158.

PARROTT (UNITED STATES v.). See Cases Nos. 15,998 and 15,999.

PARRY (BOLLMANS v.). See Case No. 1,-612.

Case No. 10,774.

Ex parte PARSONS.

[1 Hughes (1877) 282.] [1]

Circuit Court, E. D. South Carolina.

MUNICIPAL CORPORATIONS — POWER TO CREATE DEBT BY BOND—TAXATION—SPECIAL LEVY—MANDAMUS.

1. Where a municipal corporation is empowered by law to create a debt by bond, that power carries with it the authority and obligation to levy sufficient taxes to fulfil its contract with its creditor.

[Cited in Avery v. Job (Or.) 36 Pac. 295.]

2. Where such tax has not been levied sufficient to meet the debt due to a particular creditor by general levy, it is the duty of the corporation to make a special levy for that purpose or add the required amount to the general levy.

3. A court of justice may, by mandamus, compel such a special levy where no general levy has provided revenues sufficient to meet the debt, and a circuit court of the United States may enforce a judgment which it has rendered upon a contract of this character by such a mandamus.

[This was an application by Charles Parsons, Jr., for a writ of mandamus.]

Before WAITE, Circuit Justice, and BOND, Circuit Judge.

WAITE, Circuit Justice. The relator recovered a judgment in this court, November 19th, 1874, against the city of Charleston, upon certain overdue certificates of stock or bonds of the city, issued under the general powers of its charter, but without any special requirement or undertaking, either in the charter, ordinances, or certificates, for the levy of a tax to provide the means of payment. Execution has been issued upon the judgment, to which the marshal returned "that he could find no property subject to said judgment and execution, except such as is in public use." Payment of the judgment has been demanded of the city and refused. The city council has also been requested to "levy a tax and provide for the collection of the same, to be applied to the payment of said judgment, principal, interest, and costs," and this, too, has been refused. The city has no property subject to execution. This is an application for a writ of mandamus requiring the city "to provide for the payment of the aforesaid judgment by enacting an ordinance for the levying and collect-

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

ing of a special tax to be paid out and applied" for that purpose. The defence is, in substance, that it is not the duty of the city to make such a levy, because no special provision for such a tax entered into the contract upon which the judgment is predicated, and there is no power in the city to make the levy. The only question, therefore, presented for our consideration is whether such a mandamus can issue without a provision for a specific tax for the payment of the debt, either in the contract or in some statute of the state or ordinance of the city. The authority of the city to issue the stock and become obligated for its payment was conclusively settled by the judgment which has been rendered, and in which this court followed the decisions of the highest court of South Carolina, in Copes v. City of Charleston, 10 Rich. Law, 491, and Gage v. Charleston, 3 Rich. (N. S.) 491.

The supreme court of the United States, at its last term, in Loan Company v. Topeka, 20 Wall. [87 U. S.] 660, held that the power to contract a debt by issuing municipal bonds, or what is the same thing, municipal stock, carried with it, by necessary implication, the power to provide for the payment or redemption thereof by the levy and collection of a tax, unless the contrary expressly appeared. The language of the court is, that "it is to be inferred that when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference." To the same effect are Madison County Court v. Alexander, Walk. (Miss.) 526; Lowell v. City of Boston, 111 Mass. 460; Armstrong v. Perkins, 43 Pa. St. 403, and Armstrong v. Allegheny Co., 37 Pa. St. 290. In the last case the objection was, as in this, that there was no authority to levy a tax, but the court said, "The authority to create the debt implies an obligation to pay it, and when no special mode of doing so is provided, it is also implied that it is to be done in the ordinary way—by levy and collection of taxes."

The city of Charleston has, by its charter, granted as early as 1783, "full power and authority to make such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit, and advantage of said city, as shall appear to them prudent." Art. 9, sec. 8, of the present constitution of the state, adopted in 1868, provides that "the corporate authorities of * * * cities * * * may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the general assembly shall require that all the property, except that heretofore exempted, within the limits of municipal corporations, shall be taxed for the payment of debts contracted under the authority of law." Chapter 14, Rev. St., provides:

"Section 1. That all municipal corporations created under or by the laws of this state, and vested with power to lay and collect taxes, are authorized and required to assess all property, real and personal, within their corporate limits, at its actual value, and lay all taxes thereon at a uniform and equal rate.

"Sec. 2. That all property, and no other, exempted from taxation by section 6 of chapter 12, shall be exempted from taxation by municipal corporations."

Thus it will be seen that there is no legislative limit upon the amount of money that may be raised by taxation in the city. Ample power is given to levy and collect all that may be necessary to discharge the corporate obligations. And as the general assembly has provided that all property, except that exempted by law, shall be taxed at a uniform and equal rate for all purposes, the constitutional requirements of uniformity and the taxation of all property within the corporate limits for the payment of debts have been complied with. The new constitution did not make additional legislation necessary to authorize a tax to pay a lawful debt. That power has existed since 1783. All it did require was, that provision should be made for placing the tax, when levied, uniformly and with equality upon all the property in the city. This has been done by the Revised Statutes.

We have, then, a case where the duty of the city to pay has been established by a judgment of this court, and where that duty can only be performed by the exercise of the power of taxation which the city possesses. Upon demand made the city has refused to make the payment, and has also refused to levy and collect the necessary tax. We are, therefore, called upon to determine whether this court has the power by its writ of mandamus to enforce the performance of this duty, and thus give effect to its judgment. It is not denied that this power exists where the legislative authority to contract the debt is accompanied by a provision for the levy and collection of a specific tax for its payment. The supreme court of the United States has many times so decided. Knox County v. Aspinwall, 24 How. [65 U. S.] 376; Van Hoffman v. Quincy, 4 Wall. [71 U. S.] 535; Benbow v. Iowa City, 7 Wall. [74 U. S.] 313; Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166; U. S. v. Keokuk, Id. 514; Supervisors v. Durant, 9 Wall. [76 U. S.] 415; Mayor v. Lord, Id. 409. The same court also held, in Supervisors v. U. S., 4 Wall. [71 U. S.] 435, that the writ could issue in cases where the power to tax was not specially conferred by the act authorizing the contract, but by an independent statute subsequently passed, in the following words: "The board of su-

pervisors, under township organization, in such counties as may be owing debts which the current revenue, under existing laws, is not sufficient to pay, may, if deemed advisable, levy a special tax, not to exceed in any one year one per cent., upon the taxable property in any such county," to be collected and kept as a separate fund and expended in liquidation of such indebtedness. So, too, in Galena v. Amy, 5 Wall. [72 U. S.] 705, the writ was sustained, where the only specific authority for the tax was contained in the act incorporating the city, in force at the time the debt was contracted, and which provided that the city council might, if they believed the public good and the best interests of the city required it, levy and collect an annual tax, not exceeding one per cent. on a dollar, on the assessed value of all estate taxable in the city, in addition to all other taxes, the fund to be kept separate, and annually, on the 1st of January, paid over pro rata, upon the funded indebtedness of the city. In all these cases particular taxes had been provided for to enable the corporate authorities to meet specific obligations. The taxes did not create the obligation. They only furnished the means by which it was to be met. The special provision for this levy and collection served to restrict, rather than enlarge, the corporate power of taxation for the payment of debts. As has been seen, the authority to contract a debt carries with it the power to provide the means of payment by taxation, if necessary. If the power to make a contract is accompanied by a provision for special taxation to meet its obligations when made, such taxation may, under some circumstances, exclude all other. But in the absence of any such restrictive provision, the general power of corporate taxation may, as a rule, be invoked.

In the present case there is no restriction. The obligation to pay exists, and the power to tax for its discharge is included in the general power to tax for all corporate purposes. There is no legal necessity for a separation of funds. All moneys necessary to meet all obligations may be collected by one general tax and placed in one common fund. But while this power for a general levy exists there is no prohibition against more specific levies. The city is, in express terms, authorized to make any and all regulations it may deem "requisite and necessary for its security, welfare, and convenience," and there seems to be no good reason why, if deemed necessary by the corporate authorities, taxation may not be classified, and one fund raised for poor purposes, another for the support of schools, another to pay the expenses of the police, another for the payment of corporate debts, and so on to any extent that may be convenient or desirable. All this is left to the discretion of those who have, for the time being, the official control of the city government. It is the special duty of the city to raise money by taxation and apply it, when raised, to the payment of this judgment. It is not a matter of any importance to this relator whether it is raised by general or specific tax, if it be in fact raised and applied. If, therefore, upon the rule to show cause in this case, the city had returned that it had included this judgment in its estimates for current taxation, and, in good faith, either had levied, or at the proper time would levy, a tax sufficient in the aggregate to meet this, with its other accruing and maturing obligations, such a return, if accompanied by assurances of a readiness and willingness to pay when the collection should be made, might have been accepted as showing sufficient cause why the writ asked for ought not now to issue. But this has not been done. On the contrary, the city, having refused to levy a tax in any form for the payment of the judgment, insists that it is not in the power of the court to compel it to do so. This presents the issue.

One of the offices of a writ of mandamus is to compel municipal corporations to perform their plain and positive duties. It may issue upon the application of one who has a clear right to require the performance of such a duty, if he has no other adequate remedy. There must exist both the right and the corresponding duty. Here, as we have seen, the relator has the right to require the levy and collection of a tax to provide the means for the payment of his judgment, and it is the duty of the city to do what he requires. Unless it is done he is without remedy for the collection of his debt. Therefore, a writ may lawfully issue to enforce the right by requiring the performance of the duty. This gives the relator the right to a writ requiring a tax to be levied which shall include provision for the payment of his judgment. It only remains to consider whether he is entitled to have so much of the tax as is intended for his benefit separated from the general levy and set apart for his exclusive use. We cannot create new rights in favor of the relator, or confer new powers upon the city, but we can require the city to make use of any existing power it possesses adapted to the end to be accomplished. If it is not already in the power of the city to make a separate levy to pay this judgment we cannot require it to be done. But if it is we can. We have already shown, as we think, that the city has the power. Consequently it is proper that a writ should issue requiring the separation to be made, in order that we may enforce the further order we are asked to make directing the application of the money, when collected, to the payment of the judgment.

The prayer of the petition is granted.

Case No. 10,775.

PARSONS et al. v. CUMMING et al.

[1 Woods, 461.][1]

Circuit Court, S. D. Georgia. April Term, 1871.

EQUITY—SPECIFIC INTERROGATORIES — ANSWERS—GENERAL ANSWER—EXAMINATION OF PARTIES —MATERIAL ALLEGATION—DISCOVERY.

1. If a bill does not contain specific interrogatories, the complainant must be satisfied with such answer to its allegations as would fairly occur to the professional mind as meeting them in a substantial manner.

2. Defendant is not bound to exercise ingenuity in finding out all the aspects in which a statement in a bill may be taken.

3. A general answer is sufficient for a general allegation.

4. Under the act of congress parties can be called to the stand and be examined on oath, and be compelled to answer every possible interrogatory that can be deemed at all material to the case.

5. If it is apparent that defendant has omitted to answer any material allegation, or has evaded giving an answer, or has answered disingenuously, the court will compel another answer.

6. Where discovery is a principal object, distinct interrogatories should be affixed to the bill.

In equity. Heard upon exceptions to answer.

Wm. Daugherty and A. W. Stone, for complainants.

A. R. Lawton, for defendant.

BRADLEY, Circuit Justice. If a bill does not contain specific interrogatories, the complainant must be satisfied with such answer to its allegations as would fairly occur to the professional mind as meeting them in a substantial manner. The defendant is not bound to exercise ingenuity in finding out all the aspects in which a statement may be taken. For example, if the bill contain a general allegation of fraud or breach of duty, or failure to fulfil a trust, it may be the foundation of many specific interrogatories as to particular facts going to prove the allegation made; but if such interrogatories be not propounded, the defendant's answer may be as general as the allegations of the bill.

If a complainant wants to go into particulars, he must put pointed questions. A general answer is sufficient for a general allegation. Looking at the answer in question, I am not satisfied that it is not a substantial response to the bill. It denies that the bank had any assets shortly before the assignment, except what are in the schedule annexed to the original answer. That certainly answers the charge of passing away such assets. It denies the appropriation of any property of the bank to the use of the assignees or any other persons, except for the purposes of the trust. It explains satisfactorily the use of the banking house and lot, and the repairs thereon, provided the explanation is well founded. It asserts the truth and necessity of all expenditures for which credit is claimed. And, by the way, if the accounts of the assignees are complained of, they should be referred to a master for auditing, and exceptions taken to them there. It explains the sale of confederate and other securities—the manner of which is complained of in the bill. It admits that no payment or distribution has been made, except as ordered by the court; and the defendants throw themselves on the court for its directions, professing their willingness to pay over the money as the court may direct.

It seems to me that all the material allegations of the bill have been substantially met. But if they have not, no great harm can arise, since by recent act of congress parties can be called to the stand and examined on oath, and compelled to meet every possible interrogatory that can be deemed at all material to the case. It is therefore unnecessary for the court to be astute in finding defects in the answer, where no interrogatories have been appended to the bill, and where the allegations of the latter have perhaps not been expressed in those brief and succinct terms which the rules in equity propounded by the supreme court require. Had the bill contained a series of distinct, articulate propositions, briefly expressed, a comparison of the answer therewith would have been more easy and satisfactory. Of course, if it is apparent that the defendant has omitted to answer any material allegation, or has evaded giving an answer, or has answered disingenuously, the court will compel him to file another answer. And the character of the answer will always be a subject of criticism on the hearing. Where discovery is the object, or a principal object, distinct interrogatories should be affixed to the bill; and then it can be readily ascertained whether the defendant has answered them or not.

The exceptions are overruled.

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

PARSONS (FORBES v.). See Case No. 4,929.

Case No. 10,776.

PARSONS v. GREENVILLE & C. R. CO.

[1 Hughes (1877) 279.][1]

Circuit Court, E. D. South Carolina.

CREDITOR'S BILL—PENDENCY OF GENERAL CREDITOR'S BILL IN ANOTHER COURT—JURISDICTION AND CITIZENSHIP.

1. The pendency of a general creditor's bill against a defendant in a court of a state, accompanied by the usual orders of injunction, does not necessarily forbid a creditor who is not a party to the bill from suing the same defendant in another court.

[Cited in Brooks v. Vermont Cent. R. Co., Case No. 1,964; Logan v. Greenlaw, 12 Fed. 14.]

[See Ex parte Balch, Case No. 790.]

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

2. Especially is this so where the prosecution of this creditor's suit is merely for obtaining judgment, and is by proceedings not affecting the property of the defendant.

[Cited in Logan v. Greenlaw, 12 Fed. 14; Rawitzer v. Wyatt, 40 Fed. 610.]

3. More especially is this so where this creditor is the resident of a different state, and brings his suit in a circuit court of the United States.

[This was an action at law by Charles Parsons, Jr., against the Greenville & Columbia Railroad Company.]

WAITE, Circuit Justice. This action is brought to recover the amount due upon certain matured coupons of the second mortgage bonds of the Greenville & Columbia Railroad Company. The only question submitted for our determination is, whether the pendency of a suit instituted by the state of South Carolina against the company in the court of common pleas of Richland county, on the 11th June, 1872, and the injunction granted therein on the 18th of the same month, can be pleaded as a bar to this action. The state is a creditor of the railroad company, and claims to have a lien upon all the property of the company as security. There are conflicting interests between the creditors, and disputes as to the order of liens. The validity of the bonds, to which the coupons in this suit belong, is denied by some creditors. The object of the suit commenced by the state is to adjust the rights of all parties, by ascertaining the amount due to each creditor, and determining the order in which he is entitled to payment out of the property of the company.

The prayer is as follows: "Wherefore the plaintiff herein, as well to protect the interests of the state in respect to her guarantee of the bonds of said company as to preserve unimpaired the rights and interests of the creditors of the company in respect to its property, prays judgment against the defendants. 1. That all the judgment creditors of the defendants be restrained by an order of this court from enforcing their judgment against the property of the defendants. 2. That all the other creditors of the defendants be restrained by an order of this court from instituting suit against the defendants, or, where they have already instituted suits, from further prosecuting the same. 3. That a receiver be appointed of all the property, assets, and effects of the defendants, to hold and keep the same subject to the further orders of this court. 4. That all the creditors of the defendants be required to prove their several debts, claims, and demands against the defendants, in accordance with an order to be herein made by this court. 5. That all the property of the defendants and the chartered rights and priorities therefor be sold to foreclose the mortgage to the plaintiff hereinbefore set forth and to bar the equity of redemption of all persons whomsoever, at such time and place as may hereafter be directed by this court. 6. That the defendants may be adjudged to pay any deficiency that may remain due to this plaintiff after applying all the proceeds of said sale applicable thereto. 7. That this court will make such other and further orders in the premises as may from time to time be necessary for the protection of the rights and interests of the plaintiff, and to preserve the rights of all creditors of the defendants and such as to equity and justice may appertain."

The injunction asked for was granted, and a further order entered as follows: "That John T. Green be appointed referee, with directions, by public advertisement for three months in one or more gazettes of this state, New York, and such other places as he may think proper, to call in the creditors of the said Greenville & Columbia Railroad Company to make proof before him of their several and respective claims, with liberty to the Greenville & Columbia Railroad or other parties to reply to such proof; that the said referee shall also take testimony as to the liens set up against the said company, their order of priority, and the amount respectively secured by such liens, with liberty to the said Greenville & Columbia Railroad Company or other parties to be heard in relation to the same; that the said referee make his report in all matters now referred, with leave also to consider and report any special matter which may come before him."

The plaintiff in this action was not named as a defendant in the suit instituted by the state, and has not been served with process therein. He has not appeared or presented his claim before the referee, neither has any receiver been appointed in that action. So far as anything appears in the case, the railroad company is still in the possession and enjoyment of all its property. The mere pendency of a suit to which a person may be made a party, but has not been, is certainly no bar to an action by him in another court, to enforce his own rights. An injunction binds no one except a party to the suit in which it has been granted, who has been actually subjected to the jurisdiction of the court, either by service of process or voluntary appearance. If the action relates to property, which the court has taken into its possession, it may protect its possession by appropriate orders, but it cannot operate upon the person of the owner until he has in some form been brought within its jurisdiction. An injunction acts upon persons, and not upon property except through persons. In this action, Parsons does not seek to subject the property of the company. His only object is to reduce his debt to judgment. For this purpose he has brought the company into court. His judgment when obtained will only bind the company and those who are bound by its acts. The rights of no other parties will be affected. Being a citizen of the state of New York, and the

railroad company a citizen of the state of South Carolina, he had the right to sue in the courts of the United States. Neither the state nor the company could deprive him of this right by any act of their own. This court has obtained jurisdiction of both the company and himself. We can therefore proceed to adjudicate between them. As no defence is made upon the merits, Parsons is entitled to his judgment for the amount of his claim. It will be time enough to consider how he can reach any portion of the property involved in the litigation pending in the state court for the purpose of subjecting it to the payment of his judgment, when he attempts to do so.

Case No. 10,777.

PARSONS et al. v. HOWARD et al.

[2 Woods, 1.][1]

Circuit Court, D. Louisiana. Nov., 1873.

EQUITY — SUIT FOR DEMAND DUE PARTNERSHIP— NECESSARY PARTIES—CITIZENSHIP AND JURISDICTION.

1. In a suit in equity for a demand due to a partnership, all the partners must be joined either as complainants or defendants. They are not merely proper but necessary parties,

[Cited in Summerlin v. Fronteriza Silver Min. & Milling Co., 41 Fed. 255.]

2. The United States courts have no power to effect a constructive service of process on nonresidents. If nonresidents are necessary parties, unless they voluntarily appear, the suit cannot be maintained in the federal courts. If they do appear as defendants and are citizens of the same state with the complainants, the court is ousted of jurisdiction.[2]

[Cited in Boston Elec. Co. v. Electric Gas Lighting Co., 23 Fed. 839; Romaine v. Union Ins. Co., 28 Fed. 639.]

3. Semble, that a suit against partners may be brought in a federal court although some of them may not be found within the jurisdiction of the court.

In equity. The bill in this case stated in substance that the complainants together with some of the defendants and certain other persons whose names appeared in the bill, and who were citizens of the same state (New York) with the complainants, were associated together in the lottery business, being proprietors of several lottery grants from various states; and that to facilitate the business and avoid conflict of interest, they had put the entire business into the hands of certain trustees (including two of the defendants), and that it was carried on in various states by these trustees under the name of C. H. Murray & Co., the several associates being interested in certain shares and proportions. Among the terms of the engagement and trust, under which the business was conducted, was one, that if any of the associates should at any time acquire any other lottery grants or privileges, the same should be transferred to the trustees as part of the common stock. Monthly settlements and dividends of profits were to be made. Howard, one of the defendants, was agent of the concern in New Orleans. The bill complained that he and other defendants, and also some of the associates not made defendants, on account of their residence as above stated, procured a charter from the state of Louisiana, conferring the exclusive right to draw lotteries; and then took a contract from that corporation to carry on the business and perform its obligations to the state; and that they excluded the complainants and other associates in the original combination from all participation in the profits of this business. The bill prayed that the defendants might be declared trustees for the original concern, and might account for all profits made, and for a sale of the business, division of proceeds, and a temporary injunction. Among the allegations made, was one, that the defendants used the funds of C. H. Murray & Co., in establishing the separate business in Louisiana. One of the complainants, Parsons, died, and certain persons claiming to be his representatives filed a bill of revivor. The defendants demurred to the original bill, and filed a plea to the bill of revivor. The other facts material to the understanding of the case will be found stated in the opinion.

James Emott, for complainants.

E. C. Billings and A. de B. Hughes, for defendants.

BRADLEY, Circuit Justice. The plea to the bill of revivor in this case is good, if true, and if the suit proceeds farther, the complainants must reply to it, and proceed to proofs. I observe that the only allegation in the bill of revivor is, that the complainants therein have obtained letters of executorship on the estate of Reuben Parsons, deceased, without specifying any last will, any state or place, or court, in which the letters were issued. This is extremely informal. All these particulars should have been stated, so that the court could see that the complainants were fully entitled to be substituted in the place of Parsons. Letters testamentary, issued in New York, have no efficacy in Louisiana, unless the laws of the latter state make provision to that effect. The demurrer to the original bill states as causes of objection, want of parties, multifariousness, immorality of the transactions on which the prayer for relief is founded, and general want of equity. The substantive charge of the bill is, that the defendants, together with Zachariah E. Simmons and John A. Morris,

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

[2] By a late statute absent defendants may be cited by an order of publication when the suit is brought to enforce a legal or equitable claim or lien on real or personal property within the district. See Act June 1, 1872 [17 Stat. 198]; Rev. St. § 738.

are carrying on a lucrative lottery business in New Orleans, and in the state of Louisiana, and appropriating the profits to their own use, whilst in equity the complainants and certain other persons are entitled to a share of said business, of which the defendants, together with Simmons and Morris, unjustly deprive them; and the relief sought is an account of the profits of the said business, a declaration that the defendants are trustees for the complainants, and the other parties really interested, and a sale of the whole property and business and division of the proceeds. The ground on which this claim is based is, that Murray, one of the defendants, and Simmons and Morris, were formerly associated in the lottery business with the complainants and other persons, jointly as partners in a firm, whose style was generally C. H. Murray & Co., under an arrangement which commenced September 1, 1863, to last for ten years, by which the parties to the arrangement, having transferred all their interest in the lottery business, and grants to trustees (Simmons, Murray and Davis), for the purpose of being carried on by them for the mutual benefit of the proprietors, agreed to do the same with any other lottery grants, or interests therein, which they might severally acquire, under penalty of forfeiting the interest they already possessed in the joint business—the object of the assignments and trust being declared to be the avoiding of conflict of interest between the parties and the advantages of a consolidation and joint control of the whole business. The complainants were not originally parties to this arrangement; but in December, 1867, they became parties thereto, by the purchase with others of certain of the shares, and in January, 1868, they became further interested by consolidating certain lottery interests of themselves and others with the said lottery business of the associates. The whole concern then consisted of one hundred and fifteen shares, of which the complainants owned two and a half shares. The defendant Howard was not an associate, but was the agent of the concern in New Orleans.

The gravamen of complaint is, that in the summer of 1868, whilst the business was thus carried on jointly, the defendants, Howard and Murray, with Zachariah E. Simmons, John A. Morris and other parties concerned and interested in the said business, procured from the legislature of Louisiana an exclusive lottery grant in the shape of a legislative act under which a corporation, called the Louisiana State Lottery Company, was organized by them and a contract made with that corporation for carrying on the lottery business in Louisiana, and that the funds of the joint concern of C. H. Murray & Co. were used by them in procuring said grant, and establishing said business, and that by this contrivance they have monopolized the lottery business in that state and excluded the complainants and their other associates from all participation therein. This is the business which the complainants claim as in equity belonging to the joint concern of C. H. Murray & Co., and for the proceeds of which they seek an account and settlement. The bill states that Morris, Simmons, Wm. F. Simmons, Wm. C. France, Benj. Wood and Henry Cotton are not made parties, because they are citizens of the same state with the complainants.

Conceding as I am inclined to do, that if the facts stated in the bill are true, the claim is well founded and free from the taint of immorality, and that there is no ground for the charge of multifariousness, a question of much gravity still remains in reference to the alleged want of proper parties. I do not perceive any reason for making the Louisiana State Lottery Company a party. Nothing is demanded of it, and no charges of misconduct are made against it. It is no concern of the corporation that its stockholders are responsible to third parties for dividends and profits received. It has nothing to do with their controversies, unless in some way involved therein as a corporate body. Much less is the corporation concerned in the responsibility under which its contractors or agents may have brought themselves in reference to third parties. As to Simmons and Morris, regarded as jointly guilty with the defendants, it is sufficient to say that a breach of trust or an act of bad faith, like a tort at common law, renders the parties, severally as well as jointly, liable as tort-feasors or breakers of trust; therefore they are not necessary parties. There is more force in the objection that the other associates and copartners of the complainants, interested in the same manner as they, are not made parties. If this were the case of an ordinary bill for the settlement of partnership accounts, it is clear that all the partners would be necessary parties, because each has not only an interest in the general balance according to his share in the concern, but has an equitable lien for all advances made by him in its behalf, and is liable in equity as a partner for the advances made by the others; so that no settlement could be made without the actual or constructive presence of all. Hence all must be made parties; and if any of them are nonresidents, process must nevertheless be issued; and in the old English practice, certain forms had to be observed (terminating in the commission of rebellion) before the case could be heard. See Daniell, Ch. Prac. 1253.

In this country, constructive service by publication is generally prescribed and allowed; but as it has been held that the federal courts have no means of effecting constructive service, such cases cannot be brought in them, unless the nonresident defendants voluntarily appear; and not even then, if they are citizens of the same state with the complainants. The present case, it

is true, is not that of the settlement of a partnership concern. The bill seeks to make the defendants account for property in their hands, alleged to be partnership property, and make them trustees for the copartnership in respect thereof. The suit is brought, therefore, for the equal benefit of all the copartners who are not implicated in the transactions complained of. The fact that some of the defendants are copartners does not divest it of the character of a joint partnership demand. If the firm had held a mortgage on the lands of some of the partners for money lent, the complainants could as well have filed a bill to foreclose that mortgage, without making the other partners parties, as to file this bill. They do not even allege that they file it on behalf of themselves and the other partners, which, perhaps, they might do if the number were so great as to render it impracticable that all should be joined. It is simply the case of one or two partners suing alone for a partnership demand without joining the other partners. To this, the defendants have a right to object; for if these complainants can maintain this suit, the other partners similarly interested might maintain similar suits in other courts, for the recovery of the same demand. The excuse given, that to make the others parties would oust the court of jurisdiction, is not sufficient. That consequence cannot make it regular to proceed without them. That only proves that this court is not the proper tribunal to settle the controversy. If it be once settled that the other partners are not merely proper but necessary parties, the complainants cannot set up the limited jurisdiction of the court for not making them such. If, like legatees and distributees of a deceased person's estate, they were entitled to an aliquot share of the moneys sought to be recovered, irrespective of the shares and accounts of their colegatees or cosuccessors; or, in the language of the common law, if they were tenants in common as contradistinguished from joint tenants, or if their titles were both joint and several, they might with more reason be entitled to sue alone for their aliquot share, although an accounting might be necessary to ascertain the amount due. But the moneys sought to be recovered in this case are confessedly partnership moneys, and the complainants pray that they may be accounted for as such, and paid into the common partnership fund. In this state of things, it is evident that all the other partners are equally interested in the suit with the complainants themselves, and are virtually parties to it whether made such or not; and as no sufficient excuse is alleged for not joining therein, the bill is necessarily defective. The case is essentially different from that of a suit brought against partners. In that case, as all are jointly liable in solido, or, according to the civil law, each is liable only for his virile share, a suit could probably be sustained against some of the partners, though the others could not be found within this jurisdiction. The demurrer must be allowed, with costs.

Case No. 10,778.

PARSONS v. HUNTER.

[2 Sumn. 419.][1]

Circuit Court, D. New Hampshire. Oct. Term, 1836.

ACTION FOR PENALTY—LIMITATIONS—CONSULAR ACT OF 1803.

1. Under Consular Act 1803, c. 62, § 2 [2 Story's Laws, 884; 2 Stat. 203, c. 9], the penalty of $500 for not depositing the ship's register with the consul, on arrival in a foreign port, must be sued for within two years, the limitation prescribed by Act 1790, c. 36, § 31 [1 Story's Laws, 90; 1 Stat. 119, c. 9], it not being a revenue law within the meaning of Act 1804, c. 40, § 3 [2 Story's Laws, 941; 2 Stat. 290].

[Cited in U. S. v. Six Fermenting Tubs, Case No. 16,296.]

2. Semble, that an information does not lie for such penalty; but an action of debt, in the name of the consul is the proper remedy.

[Cited in Walsh v. U. S., Case No. 17,116; Gould v. Staples, 9 Fed. 161.]

3. Semble, that any voluntary arrival in a foreign port, in the course of the voyage, although for advices only, and not the port of final destination, is within the purview of the act.

[Cited in Passenger Cases, 7 How. (48 U. S.) 537; Harrison v. Vose, 9 How. (50 U. S.) 384.]

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

Information for the penalty of $500 for not depositing the ship's register, &c. with the consul of the United States, on arrival in a foreign port, contrary to Consular Act Feb. 28, 1803, c. 62, § 2 [2 Story's Laws, 884; 2 Stat. 203, c. 9]. The parties in the district court of New Hampshire, agreed to the following statement of facts: That Robert R. Hunter, Esq., is the lawful accredited American consul, resident at the port of Cowes, in the Isle of Wight, and the dependencies thereof. That the said Isle of Wight, is a foreign port. That the said Isaac D. Parsons was, on the 5th day of August, A. D. 1832, master of a certain ship, called the Olive and Eliza. That the said ship then belonged, and was owned by citizens of the United States. That the said Parsons sailed the ship to Matanzas, in the island of Cuba, whence he took in a cargo of sugars, consigned to a certain mercantile house in the city of London, in the United Kingdom of Great Britain and Ireland. That as he was directed by his consignees at the city of London, the 7th day of August A. D. 1832, on his way from Matanzas to the city of London, touched at Cowes, in the Isle of Wight aforesaid for advices, that he neglected to deposit the register of the said ship, with the American consul at that place. That this was not, but that London was, his port of destination. That he touched at the port

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

of Cowes merely for advices, and for no other cause. That he made no entry at the last mentioned port. That he arrived in the harbor thereof on Sunday morning, the 7th day of August aforesaid, and left the said port for London on Monday morning, the 8th day of the said August; at which last place, he arrived in safety, made a legal report and entry at the custom house of the said city of London, and deposited the register of the said ship Olive and Eliza, with Mr. Aspinwall, the American consul, at the port of London aforesaid, which said register remained with the said consul, till he obtained a clearance of the said ship at the said custom house, for her return to the United States aforesaid. If the court, upon the above statement of facts, shall be of opinion, that the said Isaac has incurred the penalty mentioned in the said information, then judgment shall be rendered against the said Parsons, for the sum of five hundred dollars and costs—otherwise the United States shall become nonsuit. Upon these facts, the district court gave judgment for the penalty, in favor of the United States [case unreported]; and upon that judgment, the present writ of error was brought by the original defendant.

C. B. Goodrich, for plaintiff in error.

Mr. Hale, Dist. Atty., for defendant in error.

STORY, Circuit Justice. Act 1803, c. 62, § 2 [2 Story's Laws, 884; 2 Stat. 203, c. 9], makes it the duty of every master of a ship, belonging to citizens of the United States, "on his arrival at a foreign port, to deposit his register, sea-letter and mediterranean passport," with the consul at such port, if any there be; and in case of refusal or neglect of the master to deposit such papers, he is "to forfeit and pay five hundred dollars, to be recovered by the said consul, &c. in his own name, for the benefit of the United States, in any court of competent jurisdiction." There is no question, but that an action of debt in the name of the consul would lie for the recovery of the penalty. But the present is an information of debt, in which the district attorney "comes into court and in the name of Robert P. Hunter, consul of the United States for the port of Cowes, Isle of Wight, and the dependencies thereof, who sues for the benefit of the United States, gives the court to understand, &c." And one of the questions raised upon this writ of error is, whether an information in such a form lies in this case.

Upon the more general question presented by the facts, I own that I have felt no inconsiderable doubt and difficulty. It appears, that the ship voluntarily arrived at Cowes, having on board a cargo destined for London, and remained there for one whole day, and then departed for London. The sole object of the touching at Cowes was for advices, and no entry was made at the custom house there. The master did not deposit his register, &c. with Hunter, the American consul at Cowes; and the question is, whether under such circumstances the forfeiture has been incurred. The statute in express terms declares, that every master of an American ship "on his arrival at a foreign port," shall deposit his papers; and if by this is meant a mere technical arrival in a foreign port, it is not denied, that the penalty has been incurred. But the argument for the plaintiff in error is, that by "arrival" the statute does not mean a mere coming within the limits of a port, but a coming into the port for the lading or unlading of goods, or for other purposes of trade, and making an entry there; and that a mere touching at a port for advices or orders, or to ascertain the state of the market, is not an "arrival" in the sense of the statute. In support of the argument the case of Hopeful Tyler, Consul, v. John White [unreported], before the district judge of Maine at December term, 1834, has been cited; and it must be admitted, that the decision has been drawn up with great care and ability by that learned judge, and is directly in point. It is, however, encountered, on the present occasion, by the opposing opinion of my learned brother, the district judge of New Hampshire, who has not hesitated to declare, that whenever the master of a ship voluntarily enters a foreign port, whether it be the port of final destination or not, and anchors his ship, and there waits either a longer or a shorter time and for any purpose whatsoever, it is an arrival at a foreign port within the meaning of the statute.

That this latter opinion is in exact coincidence with the literal import of the terms of the statute will not be disputed; and the real difficulty in the case is to find in the language the just materials for a more liberal construction, suited to the common exigencies of commerce and navigation. There is no doubt, that the term "arrival" is sometimes used in our revenue and navigation laws in the common sense of coming into a port, and sometimes in the sense of coming into a port of entry or destination for particular objects connected with the voyage. No universal rule of construction, therefore, can be adopted, which is applicable to all cases; and we must be governed mainly in the interpretation of the word by the particular context, with which it stands connected. That was the view entertained by this court in the case of U. S. v. Shackford [Case No. 16,262]. But, I think, I may say, that unless there be something in the context, which deflects the word from its ordinary meaning, and shows a clear intention to use it in a more general or a more limited sense, the former ought to prevail. That the construction given to the statute by the judge of the district court of Maine is eminently calculated to facilitate the operations of commerce and navigation I readily admit; and the reasons urged by him are of great cogency to sustain his interpretation, that the term "arrival" means arrival at a voluntary port of destination for purposes of

trade. But the difficulty is to find any such purposes either avowed or implied by the language of the statute. Cowes was a port of destination, though not of final destination. The arrival there was voluntary and intentional and constituted a terminus of the voyage for the purpose of receiving or waiting for advices. Suppose the ship had remained there ten or twenty days, waiting for advices, would the case have been without the statute? If the object of the statute is to ascertain the genuineness of the character of vessels professing to be American, or that they have at all times on board the proper American papers, that policy would be equally promoted by requiring the production of the papers in all cases of a voluntary arrival. If the protection of all vessels, bearing the American flag, as such, on their arrival in foreign ports, be the object of the statute, whenever their title to protection is, or may be vouched by a public officer or consul, then it equally applies to every case of a voluntary arrival. But I do not profess to see, from the terms of the act, what is the main policy, on which this particular provision is founded. The case stands naked upon the dry terms of the section; and I feel great embarrassment in limiting those terms to an arrival in the foreign port for the purpose of trade. In the view, however, which I take of the present case, it is not absolutely necessary to decide this question.

The other question already suggested, whether this is a case, in which an information lies, is one, upon which I have far less difficulty. The statute has prescribed no form of action for the recovery of the penalty. An action of debt is the known, and usual remedy for penalties, when the suit is brought by a private person. An information of debt for a penalty doubtless lies in all cases, where the government sues for a penalty in whole or in part. But it is a prerogative remedy. I have not been able to find a single case, where, independent of some statute provision, any information for a penalty has been brought or maintained by a private person in his own name alone. In Bacon's Abridgment (A), it is said that "where by many penal statutes the prosecution upon them is by the acts themselves limited to be by bill, plaint, information or indictment, there, without doubt, the prosecution may be by information, as well as by any other of these methods. Also of common right such an information, or an action in the nature thereof, may be brought for offences against statutes, whether they be mentioned by such statutes or not, unless other methods of proceeding be particularly appointed, by which all others are impliedly excluded." See, also, Hawk. P. C. (by Curwood) c. 26, §§ 2, 17; Bac. Abr. "Actions Qui Tam," A; Com. Dig. "Action upon Statute," F, 1; Id. "Information," A, 3. To language so general, general verity only can, at most, be attributed. It is clear, that in cases of penal statutes, if the whole or a part of the penalty is given to the crown, an information will lie. But there the king sues proprio jure, in his own name. That a private informer or other private person may sue by information "of common right" for a penalty, independent of any statute authority, requires some authority to support it. Mr. Justice Blackstone (4 Bl. Comm. 308) says: "Informations are of two sorts, those, which are partly at the suit of the king and partly at that of a subject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon the conviction of the offender, one part to the use of the king, and another to the use of the informer." So that an information in the name of a private person alone seems not to have been deemed by that learned commentator to be a process known to the common law. By St. 18 Eliz. c. 5, § 1, it is provided "that none shall be admitted or received to pursue against any person or persons upon a penal statute, but by way of information or original action, and not otherwise;" which seems to authorize by implication the suing by information on penal statutes generally. But this is merely by force of the statute.

In the present case the suit is required to be brought exclusively in the name of the consul for the benefit of the United States. It is, therefore, to be treated as a private suit, and not as a prerogative suit. And I can perceive no ground, upon which the district attorney is ex officio entitled to proceed by way of information in the name of the consul for the benefit of the United States. The consul must sue in his own name; and not under the protection of the district attorney. But the case need not be disposed of upon this point; for there is another objection, which in my judgment is clearly fatal. Act 1790, c. 36, § 31 [1 Story's Laws, 90; 1 Stat. 119, c. 9], provides that "no person shall be prosecuted for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence or incurring the fine or forfeiture." Act 1804, c. 40, § 3 [2 Story's Laws, 941; 2 Stat. 290], provides that "any person or persons guilty of any crime arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of the said laws, may be prosecuted, &c., provided the indictment or information be found at any time within five years after committing the offence, or incurring the fine or forfeiture." It appears to me, that the act, on which the present information is founded, is in no just sense a revenue law; and, therefore, if the present information be maintainable at all, it can be so only, if brought within two years after the penalty was incurred. The statement of facts finds the offence was committed, if at all, between the 5th and 7th day of August, 1832. The

information was not filed until the March term of the district court, 1835; so that the two years had then fully elapsed. In suits on penal statutes, the statute of limitations need not be pleaded; but may be taken advantage of under the general issue. Bull. N. P. 195. A fortiori, it constitutes a good bar upon a statement of facts agreed by the parties, when the facts establish, that no suit lies from the lapse of time.

Upon this last ground the judgment must be reversed; but without costs. I am authorized to say, that the point as to the statute of limitations was not made before the district judge; and that the point, whether an information would lie was considered doubtful by him; and that he yielded his opinion to the suggestion, that it was the usual form of the suit in Massachusetts.

PARSONS (KNIGHT v.). See Case No. 7,886.

Case No. 10,779.

PARSONS et al. v. LYMAN et al.

[4 Blatchf. 432.][1]

Circuit Court, D. Connecticut. April, 1860.

CO-PLAINTIFFS IN EQUITY—ADVERSE INTERESTS.

Persons having adverse and conflicting interests cannot be joined as co-plaintiffs, in a suit in equity.

[Cited in Bland v. Fleeman, 29 Fed. 671.]

This was a bill in equity for the construction of the will of the late Samuel Parsons, of Durham, Connecticut, and for an account. The defendants [David Lyman and others] were trustees and executors under the will, Lyman being the active trustee. The trustees had discretionary powers as to the amounts to be paid, under certain limitations, to the legatees. An answer was filed, setting up, among other things, that two of the plaintiffs had infant children, who were interested in the determination of the questions involved in the suit, and had not been made parties to the suit. A motion was now made by the plaintiffs [Joseph H. Parsons and others], to insert the names of the infants, by prochein ami, as co-plaintiffs. The motion was opposed by the defendant Lyman.

Henry Dutton, for plaintiffs.

Roger S. Baldwin, for defendants.

SHIPMAN, District Judge. The only question presented for the determination of the court, in the present stage of this case, arises on the motion of the next friend of William Stanley, Junior, and Samuel Parsons, Junior, infants, to amend the bill, by inserting their names as co-plaintiffs. The proposed amendment alleges, that William Stanley, Junior, is the son of William Stanley and Catherine A., his wife, two of the plaintiffs, and that Samuel Parsons, Junior, is the son of Samuel Parsons, another of the plaintiffs. The proposed amendment is objected to by the defendant Lyman.

By an examination of the plaintiffs' bill, and the will of Samuel Parsons, deceased, a copy of which is thereto annexed, it is clear, that William Stanley, Junior, and Samuel Parsons, Junior, have or may have interests involved in the determination of questions presented by the bill, directly at variance with those of the present plaintiffs. Should the amendment be allowed, the bill would then present the case of a joinder of co-plaintiffs having adverse and conflicting interests.

It is believed to be a well settled rule of proceeding in equity, that the interests of plaintiffs should be consistent, although it is immaterial whether the interests of defendants are or are not in conflict with each other. Chancellor Walworth, in Grant v. Van Schoonhoven, 9 Paige, 255, remarks, that "persons having adverse and conflicting interests in reference to the subject-matter of the litigation, ought not to join as complainants in the same suit;" and he held, in that case, which was a bill brought in the name of husband and wife, as complainants, against their infant children, to set aside a conveyance of property to trustees for the separate use of the wife and children, that the wife was improperly joined as co-plaintiff, and should have been made a defendant.

In the present case, the interest of the infants whose names it is proposed to insert as co-plaintiffs, is to have the fund remaining in the hands of the trustees or executors, from time to time, as large as possible, so that, in the event of the death of their parents, before the final determination of the trust, leaving them surviving, the sums they would be entitled to receive from the estate of their grandfather would be proportionably large. On the other hand, the present plaintiffs are seeking to diminish the funds that may be in the hands of the executors from time to time, and, consequently, to diminish the amount which, in the event of their death, the surviving children would be entitled to receive from the estate of the testator. The interests of the parents are, therefore, in the eye of the law, adverse to those of their children, and these conflicting interests would be presented for adjudication in this bill, if amended as proposed.

In the case of Saumarez v. Saumarez, 4 Mylne & C. 331, the testator gave and bequeathed to his son, Richard Saumarez, (who was his heir at law,) his freehold estate in Dorsetshire, and directed that the residue of the property which he might leave at his death, should be divided between that son and his two sisters, in equal portions, with a provision that, whatever portion might devolve to him should be placed in the names of trustees, and the interest be paid to him during his life, and that, after his death, his share should be divided between his children, and placed in the names of trustees, with a

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

discretionary power to employ a portion of the capital for their advancement, and, on the children respectively attaining the age of twenty-five years, their shares to be transferred to them. Should the son die without issue, the whole of his portion was to devolve to his two sisters, during their life, and, after their death, to their children. A bill was filed by the testator's son and heir at law, Richard Saumarez, and his wife, and their infant children, as co-plaintiffs, against the executors of the will and the testator's widow and younger children, (including his two daughters,) and the husbands and issue of the two daughters. The bill prayed, that the trusts of the will might be performed, and the rights of all parties under it be declared and secured. On the hearing before the master of the rolls, and on appeal before the lord chancellor, it was claimed by the counsel for the plaintiffs, that, under the will, Richard Saumarez took a fee simple in the Dorsetshire estate, or, if not, it remained undisposed of and he took it as heir at law. On the other hand, it was insisted by the defendants, that he took only a life estate, and that the reversion passed under the residuary clause. Of course, the interests of Richard Saumarez's children were adverse to his, for, if the claim of their father was sustained, the amount they would be entitled to receive from the grandfather's estate would be diminished to the extent of the value of the reversion of the Dorsetshire estate. And, although no notice seems to have been taken by the counsel, before the master of the rolls, of the peculiarity of the bill, yet, on hearing of the case on appeal, the lord chancellor (Lord Cottenham) said: "As the present record is framed, it would be quite irregular to make any adjudication on the point raised by the appeal, the interests of the appellant's children, who joined with him, as co-plaintiffs, in the suit, being directly at variance with his own." The result was, that so much of the proceedings, as involved the conflicting interests of the father and children was struck out, and a new bill was brought, in which the parties were properly arranged, the plaintiffs having consistent interests. See, also, Bill v. Cureton, 2 Mylne & K. 503.

It is clear, then, that, to allow this amendment to the bill, as it now stands, would make the bill irregular on its face, and render any adjudication upon some of the most important questions presented by it improper.

There are other difficulties in the way of the joinder, in the same bill, of co-plaintiffs having conflicting interests, especially touching the power of one co-plaintiff to appeal from a decree in favor of the other. But these it is unnecessary to discuss.

The motion to amend in the particular specified must, therefore, be denied.

[For a motion to dismiss the bill for want of jurisdiction, see Case No. 10,780.]

Case No. 10,780.

PARSONS et al. v. LYMAN et al.

[5 Blatchf. 170;[1] 32 Conn. 566.]

Circuit Court, D. Connecticut. Oct. 16, 1863.

CONCURRENT JURISDICTION—COURT FIRST TAKING JURISDICTION—DEVISE IN TRUST TO EXECUTOR—COURTS OF PROBATE IN CONNECTICUT — EQUITY POWERS OF FEDERAL COURTS.

1. Where the jurisdiction of courts over a subject matter is concurrent, that tribunal which is first in possession of jurisdiction exercises it, to the exclusion of all others.

[Cited in Wilmer v. Atlanta & Richmond Air-Line Ry. Co., Case No. 17,775; Bruce v. Manchester & K. R. R., 19 Fed. 344; Reinach v. Atlanta & G. W. R. Co., 58 Fed. 44.]

2. Where a will appointed an executor and created a trust by saying, "I devise and bequeath to my executor herein named, in trust," certain property: *Held*, that the relation of the executor to the trust estate, as trustee, was the same as if he had not been named executor in the will, and as if the property had been devised and bequeathed to him in trust, by his individual name.

[Cited in Pomroy v. Lewis, 14 R. I. 352.]

3. The nature and extent of the jurisdiction of the courts of probate of the state of Connecticut over the accounts of a testamentary trustee, considered.

4. Such courts have control over all matters that properly pertain to probate tribunals, but a general grant of jurisdiction to them of all matters properly cognizable by such tribunals, does not embrace all the powers and duties of executors as such, or the dealings of testamentary trustees.

5. Such courts have no jurisdiction, by statute, over the administration of testamentary trusts, or over the settlement of the accounts of such trustees, or over any controversy between a trustee and a cestui que trust, pertaining thereto.

6. The equity powers of the courts of the United States cannot be abridged by state legislation.

7. A controversy between a cestui que trust and his trustee, touching the accounts of the latter for services and disbursements in the management of the trust, belongs peculiarly to a court of equity.

8. The settlement, by a probate court, of the accounts of a testamentary trustee, must, in order to bind the cestui que trust, be made upon due previous notice to him of the time and place of settlement.

This was a motion, founded on bill and answer, in a suit in equity [by Joseph H. Parsons and others against David Lyman and others], to dismiss the bill for want of jurisdiction in the court to entertain the suit. [Prior to this a motion had been made to have the names of certain infants interested in the suit, and who had not been made parties to it, inserted in the bill. The motion was denied. Case No. 10,779.]

SHIPMAN, District Judge. On the 24th of October, 1848, Samuel Parsons, of Durham, in the state of Connecticut, died, leaving a large estate, and a last will and testament. By this will the defendants in this bill were appointed his executors. They

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qualified and proceeded to settle the estate in the court of probate for the district of Middletown, that tribunal, under the law of Connecticut, having exclusive original jurisdiction thereof. The settlement of the estate, so far as that court had exclusive jurisdiction, was substantially completed on the 20th of November, 1849, by the adjustment of the executors' accounts, after due notice of the time and place of hearing, to all parties interested, according to law. But the connection of the defendants with the property left by the deceased and disposed of by his will, did not terminate with the settlement of the estate, as a mere testate estate in the appropriate tribunal, for they were not only appointed executors by the will, with the usual powers of executors, but, by the instrument itself, they were made special trustees of a large portion of the property. After providing for his widow, and disposing of a single article of personal property by way of bequest to a daughter, the will provides as follows: "All the rest, residue, and remainder of my estate, real and personal, of every nature and description, that shall belong to me, or to which I shall be in any way or manner entitled, at law or in equity, at the time of my decease, subject to the foregoing provision for my said wife, I give, devise, and bequeath to my executors hereinafter named, and to their heirs, executors, administrators, and assigns, in trust." Then follow various provisions defining the trust (which was for the benefit of the testator's children and their heirs), directing as to its execution, and conferring, in particular instances, discretionary powers upon the trustees as to the amounts to be paid to the cestuis que trust from time to time. It will be seen, from this statement, that the defendants sustained two relations to the will and the estate of the deceased, namely, that of executors, and that of trustees. As executors it was their duty to prove the will, to give the requisite bond, with the aid of appraisers to prepare and file an inventory, to pay the funeral expenses and debts of the deceased, and the disbursements necessary in the progress of administration, and to perform all that the law requires of those who administer on testate estates, including the final settlement of their accounts in the court where all their proceedings were had. All these duties the defendants, as executors, performed, the last one being completed on the 20th of November, 1849, when their accounts as executors were adjusted, and substantially closed. From that time to the present, they have continued to discharge their duties as trustees. For this latter service they have claimed compensation, and have deducted the same from the income of the estate in their hands. The will creating the trust expressly provides, that they shall be allowed a fair compensation for their services in the administration of the trust, and exempts them from giving bonds therefor, although, by the law of the state, they were required to, and did, give bonds for the faithful performance of their duties as executors. The present bill is brought in this court by the cestuis que trust, who are citizens of the state of New York, alleging, that the defendants, or one of them, David Lyman, upon whom most of the care of the estate has fallen, have charged and retained, out of the trust funds, an unreasonable sum for such services, and praying an account. The defendant Lyman has filed an answer, setting forth the will, and the various proceedings in the court of probate, showing the action of the defendants touching the estate, both as executors and trustees, and, upon the facts thus set up in the answer, the defendants move to dismiss the bill for want of jurisdiction. The objection to the jurisdiction of this court must rest upon one of two grounds: Either, first, that the original jurisdiction of the court of probate for the district of Middletown is exclusive over the subject matter of this controversy; or, second, that it is concurrent with that of this court, and that the court of probate has already become possessed of the litigation by an adjudication thereon or by proceedings at present pending therein. If the probate court has adjudicated upon this controversy, then it is res judicata, the subject of litigation is exhausted, and there is no jurisdiction left for this court to exercise. No appeal lies to it from the probate court, or from any other state tribunal; nor can it revise in any manner the doings of the local courts. If the controversy is pending in the court of probate, the jurisdiction of this court equally fails, from the well-known rule that, where the jurisdiction of courts is concurrent over a subject matter, that tribunal which is first in possession of it exercises its jurisdiction to the exclusion of all others.

The first question to determine is, whether the court of probate for the district of Middletown has exclusive jurisdiction of the subject matter of this controversy; and, in deciding this point, it is not necessary to consider the question whether or not the circuit courts of the United States have concurrent jurisdiction with the state probate courts over the accounts of executors and administrators. For, as already intimated, I hold that the relation of the defendants to this trust estate, as trustees, is the same as if they had not been named executors in the will, and the property had been devised and bequeathed to them in trust by their individual names. It would, of course, have been competent for the testator to confer this trust upon them by his will, and still name any other person as sole executor of the latter. In that case, there would have been no clashing of duties and powers, between such executor and the trustees. The duties and powers of the latter would have begun where those of the former ended. And, although the defendants are appointed by the will to act in both capacities, this fact does not obliterate the distinction which the

law makes between the duties and powers that pertain to these respective offices. The defendants seem to have properly recognized this distinction, by filing in the court of probate, since the settlement of their executors' account, an annual account, at first voluntary, and, since 1853, in accordance with a statute of Connecticut relating solely to guardians of minors, conservators, and trustees of estates. We come, then, to consider what are the nature and extent of the jurisdiction of the courts of probate of Connecticut over the accounts of these defendants as trustees. These courts in Connecticut have always been considered as possessing only a limited jurisdiction. 1 Swift, Dig. 606; Wattles v. Hyde, 9 Conn. 10, and cases there cited. The statute of Connecticut conferring jurisdiction upon these tribunals provides, that they "shall have cognizance of the probate of wills, the granting of administration, the appointing and approving of guardians, and shall act in all testamentary matters, and every other matter in which it shall be legal and proper for a court of probate to act, and shall have and exercise all the powers conferred on them by the act relating to the settlements of estates, by the law relating to guardians, the law relating to idiots, lunatics, and spendthrifts, the law relating to escheats, and all other powers conferred on them by law." This grant of jurisdiction, in its general provisions, clearly gives to these courts control over all matters that properly pertain to probate tribunals. But it does not necessarily include all matters that relate to the disposition of property under the directions given in a will. In Strong v. Strong, 8 Conn. 408, where real estate was given by will to the sons of the testator, and he ordered it to be divided by his executors among them, and such executors made a division and returned it to the court of probate, by which it was accepted and approved, on appeal from that decree, it was held, that the question whether the division was according to the will or not, was not a subject of probate cognizance, and, therefore, not within the appellate jurisdiction of the superior court. The opinion in that case will be found instructive, as stating the limitation of the powers of courts of probate, under the statutes of Connecticut, over the distribution of testate estates. There is a distinction made by those statutes relating to distribution, between testate and intestate estates, but this distinction was derived from the English law, and is not a mere arbitrary one made for local convenience. Even in intestate estates, under the English system, equity had a concurrent jurisdiction with the ordinary. "But equity has an exclusive cognizance of those cases in which there is an executor, and the residue is undisposed of, for then the executor is a trustee for the residue, and the ordinary cannot compel a distribution of it, because he cannot enforce the execution of a trust." Williams, Ex'rs, p. 1783. In the case of Strong v. Strong, already cited, Peters, J., remarks: "Real estate is given by will, and is ordered by the testator to be divided. Two persons are appointed to divide the same. They are both alive, and have not neglected or refused to make the division. Whether they have done right or wrong, or whether the division be according to the will or not, are not questions of probate cognizance." These remarks and citations are made to show that a general grant of jurisdiction to courts of probate of all matters properly cognizable by such tribunals does not embrace all the powers and duties of executors as such. Much less would it embrace the dealings of testamentary trustees. "Courts of equity, from their inherent jurisdiction, assumed, from the beginning, the exclusive control over trustees in the discharge of their duties, whether affecting real or personal estate." Hill, Trustees, p. 42; Id. (Whart. Ed.) p. 50. The statute of Connecticut which I have already cited, embraces, in its enumeration of subjects committed to the probate courts, some that are peculiarly cognizable by courts of chancery generally, but it nowhere includes trustees of the character of the defendants. True, it says that they "shall act in all testamentary and probate matters;" but I apprehend that the administration of a testamentary trust like the one before us is, strictly speaking, neither a testamentary nor a probate matter. A trust of this character, whether created by will or by deed, is to be administered in the same manner, and the trustees in either case are amenable to the courts of chancery. The jurisdiction over such trusts and trustees has peculiarly pertained to these courts from the earliest times, and an act withdrawing them from that jurisdiction must be plain and specific. That jurisdiction will not be ousted by mere implication. I find nothing in the terms of the act in question which embraces these trusts, and, after a careful examination of the various statutes of Connecticut referred to in the act itself, and of those acts which directly confer powers on the court of probate, I find none giving jurisdiction to that court, of the character claimed by the defendants. There are several acts (Comp. St. Conn. 1854, pp. 490, 491) which empower these courts to remove and appoint trustees, but these special grants of power do not draw after them into these courts jurisdiction over the administration of the trusts.

But the defendants rely especially upon the act relating to guardians, trustees, and conservators (Comp. St. Conn. 1854, p. 283) which provides that such guardians, trustees, and conservators shall annually render their respective accounts to the court of probate for their respective districts, for the year next preceding the date of such accounts so rendered, and embrace therein a schedule of the estate, with various other particulars. The

same act also requires them to make oath to the accounts so rendered. Now, it is not necessary to inquire, in this place, whether this act, in connection with others relating exclusively to guardians of minors and conservators, confers upon probate courts exclusive jurisdiction over the accounts of the latter two. I confine myself to the accounts of trustees of the character in question. I have looked in vain through the statutes of Connecticut for any express power conferred on the courts of probate to settle the accounts of such trustees, or to adjudicate upon any controversy between the trustees and the cestuis que trust, pertaining thereto. There is no provision in the law requiring notice to be given to the parties interested, of the time and place of such settlement, or of any hearing thereon, as is required in the case of the accounts of executors and administrators. It is quite true, that the act of 1854 (Comp. St. Conn. 1854, p. 492) speaks of the final "settlement of the account of any executor, administrator, or trustee," and requires them to make oath thereto. But this latter act clearly refers to a different class of persons from that referred to in the act of 1853, requiring annual accounts to be filed. It omits guardians of minors and conservators, and includes executors and administrators. It includes trustees, eo nomine, but not, as I think, trustees created by deed or will, and administering trusts of the character of the one before the court. It evidently refers to the trustees of insolvent estates assigned for the benefit of creditors, or in course of settlement under the act of 1853 for the relief of insolvent debtors. The principal object of the statute of 1854 was to require the parties accounting to make oath to their accounts. But testamentary trustees were already required to make oath to their annual accounts, by the act of 1853, which imposes the duty of rendering them. Courts of probate are expressly authorized to call executors and administrators and trustees of assigned and insolvent estates to account, and to proceed, on notice to all parties concerned, to final settlement. I conclude, therefore, that no jurisdiction is given to courts of probate over the settlement of the accounts of trustees of the character of the defendants. The terms "shall render," in the act of 1853, do not necessarily imply that the tribunal to whom the account is to be "rendered" shall have power to judicially settle it. The rendition and the settlement of an account are distinct matters. As Chancellor Walworth remarks, in Westervelt v. Gregg, 1 Barb. Ch. 469, 476, "the rendering of an account by an executor or administrator, and the settlement of that account after it has been rendered, are not one and the same proceeding, though the latter is frequently a mere continuation of the former proceeding." But, if it be assumed that the requirement of the act of 1853, compelling trustees to file their annual accounts in the court of probate, draws after it the power enabling these courts to settle them, I apprehend that, so far as controversies between citizens of another state and trustees who are citizens of this state, arising on these accounts, are concerned, such jurisdiction of the court of probate would only be concurrent with that of this court. If the jurisdiction of the probate courts is made, by the statutes of the state, exclusive as against the other state tribunals, it by no means follows that it is exclusive as against this court. The equity powers of the courts of the United States cannot be abridged by state legislation. Though the jurisdiction of all matters properly cognizable by courts of chancery were to be confined, by the law of the state, to the court of probate, or to any other tribunal, the equitable jurisdiction of this court would remain untouched. If the controversy be between a citizen of another state and a citizen of this state, and exceeds five hundred dollars, exclusive of costs, and is properly cognizable by a court of chancery, under the general principles which regulate equity jurisdiction, this court is fully empowered, by the constitution and laws of the United States to take cognizance of it. The courts of the United States neither exercise nor claim any probate jurisdiction. That jurisdiction belongs exclusively to the state tribunals. It is local and domestic in its character, and rightfully belongs, where the federal constitution and laws have left it, with the local and domestic courts. But, over all matters of equity jurisdiction, properly speaking, the federal courts, when the proper parties are before them, and the required sum is in dispute, have original cognizance, concurrent with the courts of the several states. Nor can they be deprived of this jurisdiction or of any portion of it, by its absorption, through state legislation, into any particular state tribunals, or by any attempted transfer of the subjects of litigation from one department of jurisprudence to another, such as the transmutation by statute of a subject-matter of equitable jurisdiction into one of merely probate cognizance. That the controversy which arises on this bill and answer, between the cestuis que trust and their trustees, touching the accounts of the latter for services and disbursements in the management of the trust, belongs, upon general and acknowledged principles, peculiarly to a court of chancery, requires no argument or authority to prove. In this view of the case, this court would clearly have jurisdiction of the controversy, so far as it relates to the accounts of the defendants which have not been rendered in the court of probate previous to the filing of this bill. It cannot, with reason, be said, that the rendering to, and approval by, the court of probate, of the annual accounts of these trustees, is a continuous accounting, and thus a perpetual lis pendens, in that tribunal. Each separate annual account is a distinct

matter, and each presentation to, and approval by, the court of probate is a separate proceeding. It follows, therefore, that this court has jurisdiction of the accounts of the defendants which have accrued since the rendition to the court of probate of their last annual account next preceding the bringing of this bill.

We come now to consider the question of jurisdiction, so far as it relates to the annual accounts of these trustees, which had been rendered to the court of probate prior to the commencement of this suit. I think that the probate court had no power to "settle" these accounts, in any judicial sense. No such power is expressly conferred upon it, and none, I think, ought to be inferred from the mere fact that the trustees are required to render them in writing and under oath. There are cogent reasons why such a duty should be imposed on trustees. Their annual accounts, showing the apparent condition of the trust estate, and the manner in which it is managed by them, are thus put in possession of a public officer, and become a part of the files in his office, where they are open to the inspection of all concerned. The reason of the statute is, therefore, satisfied, without attributing to it the intent to confer the power to judicially settle and adjust the accounts, upon the courts of probate. But, if it is insisted that, upon a comparison of all the statutes of this state relating to trustees and trust estates, it is fairly to be inferred that this power is vested in the probate courts, then, I think, it must also be inferred, that it is to be exercised only on due notice to the parties interested. For, it was well said by Chief Justice Marshall, in The Mary, 9 Cranch [13 U. S.] 126, that "it is a principle of natural justice, of universal obligation, that, before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. When the proceedings are against the person, notice is served personally or by publication; where they are in rem, notice is served upon the thing itself." I apprehend, that the settlement of the trustees' account is not, properly speaking, a proceeding in rem. It is a proceeding for the judicial adjustment of the charges for personal services and disbursements, of a person acting in a fiduciary capacity. It is analogous to the settlement of the accounts of executors and administrators, where notice is expressly required by the statutes of Connecticut. And, if notice is required in case of the latter, where the whole settlement of the estate is peculiarly within the cognizance of the court of probate, by the general principles of law regulating the jurisdiction of such tribunals, a fortiori should it be required in cases of special trust, created by will or deed, for the benefit of minors and married women, which the law and the courts regard with jealous solicitude. In a case involving the necessity of commissioners on an insolvent debtor's estate giving notice, as an indispensable prerequisite to their exercise of jurisdiction, Judge Bissell, after remarking that the statute required such notice, says: "But this conclusion, drawn from the statute, may be maintained on general principles. The judgment of a court of even general jurisdiction cannot affect a person who had no notice to appear. As to him, the proceedings are coram non judice." Starr v. Scott, 8 Conn. 480, 484. In Case v. Humphrey, 6 Conn. 130, 139, Chief Justice Hosmer remarks: '"The jurisdiction of a court, if it extend to the parties and subject matter, when legally before it, can never be called into exercise, unless through the medium of a process complete in law and duly served; or, in other words, the court must have cognizance of the process, before it can do any legal act in the cause." The fact, that, in cases like the one before us, there may be an appeal, if the cestuis que trust happen to learn of the proceeding in the court of probate in time, can make no difference. They are bound, if the position of the defendants here is correct, by the proceeding, until and unless an appeal is taken. I cannot infer, therefore, that the legislature has empowered the probate courts to judicially determine the rights of parties, often involving delicate and important questions, in a purely ex parte proceeding, in violation of what is termed, by numerous and eminent authorities, a fundamental principle of natural justice. If the power to judicially settle and adjust these accounts is to be deemed as inferentially given, then, I think, the duty to give reasonable notice of the time and place of its exercise, to the parties interested, must be deemed to be inferentially imposed upon the tribunal exercising it.

No notice appears to have been given to the plaintiffs of the intended settlement of these accounts. The answer impliedly admits this fact. They involve considerable sums, and their presentation and approval seem to have been simultaneous acts. No judicial proceeding was ever "pending" in the court of probate, upon which it could pronounce a binding decree on the plaintiffs, and, if it has assumed to exercise such a power, its exercise, so far as its judicial character is concerned, must be deemed void. But I do not infer that the court of probate has assumed to act judicially upon any of these trustee accounts, since November 20th, 1849. As already intimated, the answer concedes that no notice was given of the time or place of hearing, and the only entries on the record warrant the inference that the action of the judge of probate in the premises was rather clerical than judicial. I am aware of the case of Hiscox's Appeal, 29 Conn. 561. In the opinion of the court of errors, Mr. Justice Sanford remarks, that "there is no law which requires that notice shall be given to the ward to be present at the settle-

ment with the court of probate of his guardian's account, nor is the jurisdiction of that court, or the validity of its proceedings in regard to such settlement, affected by want of such notice, or by the absence of the ward; the only effect of such want of notice and absence being, to extend the time allowed by law for appealing from the decree of the court of probate to the superior court." I have felt some embarrassment from this language of the court, but I do not see that that precise question was necessarily involved in the case then before it. The superior court found that notice was in fact given, and that the party was present by attorney, but that he failed to appeal within the time limited by the statute. It also appears, that the statutes relating to guardians expressly confer jurisdiction upon the court of probate to settle their accounts, and to hold that this can be done without notice certainly should require an express and unmistakable act of the legislature. Whether the relation of guardian and ward is the same as that of trustee and cestui que trust, I am not prepared to determine. But, if the statute had expressly given this power over trustees' accounts and dispensed with notice, I think the question, whether it would not be a proceeding in which persons might be "deprived of their property without due process of law," would be a very grave one indeed. It follows, from these views, that the defendants must account in this court, for all charges for services and disbursements made and rendered in the management of this trust since the 20th of November, 1849. There may be some items, in the earlier annual accounts, that properly pertain to their duties and disbursements as executors. The trustees will be fully protected in the premises on the hearing.

Case No. 10,781.

PARSONS et al. v. OGDEN.

[4 Blatchf. 99;[1] 37 Hunt, Mer. Mag. 710; 38 Hunt, Mer. Mag. 710.]

Circuit Court, S. D. New York. Sept. 23, 1857.[2]

CHARTER PARTY—BREACH OF CONDITION—DEDUCTION OF DAMAGE FROM FREIGHT.

1. In this case, which was a suit for freight money on the charter of a vessel, the court *held* that the master of the vessel wrongfully refused to permit her to be laden in accordance with the charter-party, and that the damage sustained by the charterer on account of such non-compliance with the charter-party ought to be deducted from the freight.

[Cited in Elwell v. Skiddy, 77 N. Y. 294.]

2. But, to save expense and prevent delay, the court, instead of sending the case to the clerk, to take proof as to such damage, made the deduction itself, and modified the decree below to that extent.

3. No costs were allowed to either party, on the appeal.

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

This was a libel in personam, filed in the district court, by the owners of the ship Hemisphere, to recover the freight money on a charter-party. The whole of the vessel, except the deck, room for crew, &c., was chartered to the respondent, for a voyage from Liverpool to New York. He was to supply her with a full cargo of general merchandise, and not exceeding five hundred and thirteen passengers, second cabin and steerage, and the ship was not to take exceeding her registered tonnage of iron. This was one thousand and twenty tons. The charterer was to pay, for the hire of the vessel, the round sum of £1,500 sterling. A dispute arose between the captain and the consignee at Liverpool, in respect to the stowing of the goods. The former refused to stow the iron in the hold, to the extent of the quantity mentioned in the charter-party, but stowed part of it between decks; and, in consequence, the vessel was unable to carry the number of passengers mentioned. She was laden with only some 923 tons of dead freight, and 374 tons admeasurement, together with 363 passengers. She had, on a previous voyage from Liverpool to New York, carried a larger freight of the same description, and her full complement of passengers. The district court decreed for the libellants [Case No. 11,160], and the respondent appealed to this court.

Charles Donohue and John E. Parsons, for libellants.

Francis B. Cutting, for respondent.

NELSON, Circuit Justice. The charter-party is carelessly drawn, and it is perhaps difficult to say that it contains a warranty or covenant to carry the freight and passengers mentioned in it, as was probably intended. But I am satisfied that both parties contemplated, at the time, that freight and passengers to the extent and number mentioned were to be carried, if furnished by the charterer. The measure of compensation was doubtless regulated very much thereby. I am, also, satisfied that the vessel had sufficient capacity to comply, in this respect, with the terms of the charter; and that the captain wrongfully refused to permit her to be thus laden. I had doubts, on the first hearing, whether or not the testimony of J. C. Taylor was admissible, or the case would then have been disposed of according to the view above stated. It is pretty certain, upon the further testimony on this point, that a release was executed to him by the respondent, before his testimony was taken.

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

[2] [Modifying Case No. 11,160; decree of circuit court affirmed in 23 How. (64 U. S.) 167.]

The vessel should have carried some 150 passengers more than were taken on board. I think the proof full that they could have been furnished, and that a considerable number had been engaged, and were obliged to be sent by other vessels.

The case, upon the view I have taken, should be sent to the clerk, to take proofs as to the damage sustained on account of the non-compliance with the charter-party, and which should be deducted from the freight. But, to save expense, and prevent further delay, I shall make the deduction myself, and shall accordingly direct that the decree below be modified, by deducting therefrom the sum of $1,200, and that no costs be recovered by either party on the appeal.

This decision was affirmed by the supreme court, on appeal. See Ogden v. Parsons, 23 How. [64 U. S.] 167.

PARSONS (SOUTHWESTERN RAILROAD BANK v.). See Case No. 13,193.

Case No. 10,782.

PARSONS v. TERRY et al.

[1 Lowell, 60.] [1]

District Court, D. Massachusetts. April, 1866.

SHIPPING ARTICLES—DEPRIVING MASTER OF WHALING SHIP OF HIS COMMAND—DAMAGES—DISTILLED SPIRITS ON BOARD VESSEL.

1. The master and co-owner of a whaling ship who has contracted for a cruise of four seasons at a certain lay, and is wrongfully deprived of his command at the end of three seasons, may have an action against his co-owners for damages for his removal.

[Cited in Brown v. Hicks, 24 Fed. 813.]

2. The measure of damages in such a case is the probable value of his lay for the season on which he was about to enter when displaced.

3. A clause of the shipping articles, prohibiting the bringing on board ship of distilled spirits, is not broken by carrying Madeira wine on freight.

Libel in personam by [William C. Parsons] the late master, who was also a part-owner of the whaling ship William & Henry, of Fairhaven, against [Isaiah F. Terry and others] his co-owners. As originally framed, it included a demand for the libellant's lay as master for the voyage in controversy, but that ground of action was abandoned, and the cause proceeded as one seeking damages for an alleged tort in depriving the libellant of his command before the end of his term of service, which was a long one. The owners sent out another master from home, who, at Tombas, in Peru, took possession of the vessel in the temporary absence of the libellant on shore; and the consul told the libellant that he would be displaced by force, if necessary, and he therefore yielded possession of the ship, and came home, arriving in December, 1862. His engagement extended to one off-shore cruise or season beyond that time. The respondents set up that the master was removed for due cause; if not, that no cause of action existed, because owners may remove a master at their pleasure; and lastly, that no damages could be given, because none can be ascertained with any legal certainty in regard to a cruise which never took place, and which might have resulted in a loss instead of a gain. The master, after being out some three years, was obliged to put into Valparaiso for repairs; the owners did not receive his accounts for these repairs, and became alarmed by this and by some expressions in his letters, and determined to recall him. The master, in fact, took the usual course with his accounts, and they miscarried through some fault or accident not attributable to him.

R. H. Dana, Jr., and T. K. Lothrop, for libellant.

T. D. Eliot and T. M. Stetson, for respondents.

LOWELL, District Judge. I am unable to see in the letters of the master any thing that should alarm a constant mind. That he reports the price at which he can sell the vessel, and even that the price reported was less after the repairs than before, and says that if a power of attorney shall be sent him he can dispose of the vessel thus or so, cannot fairly raise the inference that he means to sell the vessel, whether power is given him or not, and run away with the money, especially as he had sent home the oil which was the most valuable property in his charge. Yet this is the inference the respondents say they drew from these apparently innocent letters. If they did, it must have been upon the report of what some other masters had done in those distant regions, and not on the face of this correspondence. But the great powers which they had intrusted to the master were as well known to them before he sailed as afterwards, and the appropriate time to consider whether they would run the risk was before his appointment. After the trial is made he must be judged by his conduct.

Upon a careful examination of his conduct in all its particulars,—and it was most fully disclosed in the course of the trial,—I am of opinion with the experienced shipmaster who went out to supersede the libellant, that the owners acted upon a mistaken and unfounded apprehension, and that Captain Parsons' conduct is not open to the imputations cast upon it. And this I desire to say with emphasis, because the charges have not been retracted.

This being so, is the libellant entitled to any, and if any, what damages? It is said to be one of the reserved rights of ship-owners to remove a master at pleasure, and so must be presumed to enter into their contracts as

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

an implied condition; and the exercise of the right, therefore, will give no cause of action. It is certain that this right is often exercised, though always, no doubt, as in this case, upon cause real or supposed, justifying the measure. And it has been thought that the trust reposed in the master is of so high a nature, and the interests of the owners are so important and overruling, as compared with his, that from motives of large policy, the appointment must be considered revocable. See 1 Bell, Com. Laws of Scotland, 412, No. 432. In the only reported case in this country which I have found, a court of admiralty refused to compel owners at the suit of the master, to perform their contract specifically and send him on the voyage against their wish, though he had signed the bills of lading and shipped the men. Montgomery v. Wharton [Case No. 9,737], and on appeal, 1 Dall. [1 U. S.] 49. But both the learned author above cited, and the court and bar in the reported case, say that the master could have an action for damages if his removal was without due cause arising out of his own conduct. And so is the law of England. The merchant shipping act of that country provides for a judicial investigation before a master is removed in the course of a voyage; and if the mode pointed out by the law is not followed, the master may have his action. The Camilla, Swab. 312. The law of France gives large (exorbitante is the word used by M. Pardessus), though fixed damages, in like cases.

Mr. Curtis, in his treatise on Merchant Seamen, says the question is still an open one; but he himself concludes, after an examination of the authorities, and relying especially upon the weighty opinion of Valin, that by the general maritime law the owners may remove a master, but if they do so without good cause after an engagement for a particular voyage, they will be bound to pay him damages for the loss of his employment. Curt. Merch. Seam. 165. Chancellor Kent does not discuss the point, but cites the opinion of Mr. Curtis without comment. 3 Kent, Comm. (5th Ed.) 162, note b. In the recent case of Dennis v. Maxwell (which will appear in the tenth volume of Mr. Allen's reports) 10 Allen, 138, the supreme court of Massachusetts gave damages in such a case; but this point was not raised. So far as it goes it is in favor of the libellant. I have found no authority or dictum against him; and I can hardly see room for doubt at common law.

It appears to be the better opinion that, by the general maritime law, an action for damages can be sustained. We are not particularly concerned here with the extent of the owners' powers, but only with the master's rights. It may be that the owners can remove, and yet the master can claim indemnity. A person cannot ordinarily be held responsible in damages for the exercise of an undoubted right. Still there are such cases. The right of eminent domain, in some modes of its exercise, is a conspicuous example of this; for there exists on the one side a clear right to take private property for public uses, and on the other a clear right to be paid for the property taken. But however this may be, I am clear that this action can be maintained. The engagement of a master of a ship is not only an agency, but also a hiring of services. If the principals can revoke the agency, the employers must pay the servant his hire. The mere relation of principal and agent may be renounced by either party; but the master of a ship cannot lawfully desert her during the voyage; neither can the owners turn him out without compensation.

What is the measure of damages? Upon this point the above-mentioned case of Dennis v. Maxwell is explicit. The court there gave the plaintiff the sum which his lay would probably have amounted to. And I have no doubt this is the true rule. Courts are always reluctant to examine into conjectural damages, and where there is any standard or market price, will adopt it. For instance, if masters of whaling vessels were paid by the month, as other commanders of merchant vessels are, we should take the current rate of pay at the time, in the absence of express contract, rather than any more uncertain and contingent rule. But there is no such standard applicable to this case, and so we are obliged to ascertain what the contract was actually worth to the libellant, by discovering, as the jury did in that case, the average catch of vessels on that ground during the season, and calculating the libellant's lay accordingly. An experienced assessor will perhaps be as competent to arrive at the true result as a jury would be.

There is one other point of damages which was rather taken for granted on both sides than argued, but upon which a great deal of evidence was given; it is whether injury to the plaintiff's reputation can be considered in this action. From the consideration which, without a special argument or examination of authorities, I have given the subject, I do not see how that matter can be gone into here. This is not an action of slander, nor has this court jurisdiction of such an action. It is in fact, however the form may be, a suit for breach of contract; and damages are to be assessed on the same rule for the same injury whatever the form of action. As the point was not fully discussed, the libellant may, if he chooses, be heard further upon it upon the coming in of the assessor's report, upon notice to the other side that he shall bring it up at that time.[2]

With regard to the allegation that the libellant has forfeited all his wages by carrying some casks of Madeira wine, when the shipping articles prohibit the bringing distilled spirits on board the ship under pain of such

[2] After a hearing on the assessor's report this view was adhered to.

forfeiture, I can only say that wine is not distilled spirits, and cannot be made so by a usage of the port of New Bedford, or any other process that I am acquainted with, except distillation.

Interlocutory decree for the libellant.

PARSONS (UNITED STATES v.). See Cases Nos. 16,000–16,002.

Case No. 10,783.

PARTER et al. v. The FRIENDSHIP.

[Oliver's Forms (Ed. 1842) 492.]

District Court, D. Massachusetts. Sept., 1831.

SALVAGE—COMPENSATION—SALVORS AS JOINT OWNERS.

[The ship Friendship, laden with a cargo of pepper, was seized off the coast of Sumatra, by the native Malays, and upon an appeal for aid by the master, the libelants succeeded in rescuing the ship and cargo from the pirates. *Held*, that the libelants are entitled to two-fifths of the net proceeds of the sale of the ship and cargo, and that the expenses of the homeward voyage, including the wages of the crew, are to be borne by them as joint owners, and to be deducted, together with all the expenses of the suit, from the gross amount in determining the net proceeds.]

[Cited in The Henry Ewbank, Case No. 6,376.]

In admiralty.

Benjamin Merrill, for libellants.

Leverett Saltonstall, for respondents.

DAVIS, District Judge. This is a suit for salvage, instituted by Jeremiah Parter, master of the ship James Monroe, of New York, Horace H. Jenks, master of the brig Gov. Endicott, of Salem, and Michael Powers, master of the brig Palmer, of Boston, in behalf of themselves and the owners, officers, and crews of said vessels, respectively, for the recovery of the ship Friendship and cargo, on the 9th day of February last past, out of the possession of certain assailing thieves of the barbarian tribes, called Malays, on the coast of Sumatra. The ship Friendship was seized by surprise by the natives, on the 7th of February, at a place called Quatta Mattoo, on the coast of Sumatra; the captain, Charles M. Endicott, with four men and his second officer, being at that time on shore, engaged in weighing pepper, part of the destined cargo of the ship, and with which commodity she was then nearly fully laden. It was soon perceived that the pirates were of such overpowering force, that every possible exertion which Captain Endicott could make in his forlorn situation, with all the aid which he could command at that place, would be unavailing; and his only hope for the recovery of his ship and cargo, and for saving the lives of the men on board who might be surviving, was by procuring the assistance of the libellants, their ships then lying at a place called Muchee, about twenty-five miles from Quatta Mattoo. Captain Endicott immediately proceeded to Muchee in his boat, and his call for relief was generously and promptly regarded. The libellants' ships immediately got under way for the place of outrage; and on the 9th, after a spirited conflict with the Malays in possession of the Friendship, recovered the ship, with the greater proportion of the cargo; and after rendering afterwards all necessary assistance to Captain Endicott, delivered the ship and cargo into his possession.

The particulars of the conflict, in which the libellants were engaged, are minutely and faithfully stated in Captain Endicott's deposition; and there can be no question that the whole transaction presents a case of distinguished merit on the part of the libellants, who, with the assistance of Captain Endicott and his surviving crew, three of the men having lost their lives by the natives, rescued the ship and cargo from their desperate situation, with undaunted resolution and imminent hazard. It would have been gratifying, if this manly and meritorious service could have been recompensed by voluntary offer, or by mutual agreement. But circumstances have rendered an adjudication indispensable; a course which has been taken without any disinclination, it is presumed, on the part of the owners, to make all just and proper satisfaction for the services which have been rendered. It is left to the court, after a very satisfactory exposition of the case on both sides to determine on the amount of salvage to be awarded to the libellants.

The general principles regulating the amount of salvage are very familiar. In their application, however, we find great diversity in the rates, leaving no very precise guide in the various cases presented—in the books, foreign and domestic; each case depending on its own particular circumstances. The case of The Trelawney, 4 C. Rob. Adm. 223, is, in many respects, analogous to the one before the court. But the risk and danger to those who attempted the rescue of that slave ship, and succeeded in the attempt, was less than in this case of the Friendship. The Malays, it is believed, being in possession of arms, and expert in their use, would be a more formidable foe, and of better capacity to manage a ship, than the negroes who had possession of the Trelawney. Besides, the assailants who had possession of the Friendship had the countenance and aid of the authorities and people on shore, who refusing all compromise, kept up a fire from their fort with twelve guns, on the rescuing ships.

In awarding salvage in the case of The Trelawney, Sir William Scott gave one tenth part of £10,000, the estimated value of the property saved. The decision appears to have been influenced by a consideration of the implied engagement of vessels, concerned in that trade, to assist each other in case of extremity, especially in the exigency most likely to occur in that inhuman traffic,—an insurrection of the slaves. How far the character of

the pepper voyages on the coast of Sumatra, would occasion similar understanding or engagements, among ships engaged in it, I am unable to estimate. No such understanding is proved or announced to exist. I am led to believe, however, that something of the sort may be rationally supposed; but the circumstances leading to such implied understanding are not of so decisive a character as in the slave trade. One ground of salvage, which is always of considerable influence, and which is eminently applicable in this instance could not be urged in the case of the Trelawney. The slave trade was, indeed, at that time, sustained by the law and policy of Great Britain. But the spirit which has since abolished it in that empire, was doubtless then in generous, though unavailing exercise. The encouragement of such a trade, it is presumed, would not even then have been pronounced by Sir William Scott, or any British judges, proper ground of enlargement of salvage.

A deliberate view of the features of this case, which are honorable to all the parties, united with a proper regard to the great interests of navigation and commerce, have in combined consideration, led me to pronounce, that the libellants recover two fifth parts of the whole property saved. The ship and cargo thus saved, were delivered to the master, Captain Endicott, on the coast. I consider him, however, as receiving the property on trust, and that the libellants are to be regarded as joint owners in the homeward voyage, and are to receive two fifths of the net proceeds of the sale of ship and cargo, sustaining, of course, their proportion of the expenses of homeward voyage. The charge of insurance, made in the respondent's statement, must, I think, be disallowed; and the wages of the crew are to be charged to the joint concern for the homeward voyage only, to be deducted, together with all the expenses of the suit, from the gross amount in determining the net proceeds.

NOTE. For a concise, practical view of the subject of salvage in general, see Law Summary, 339. As a general rule, a party not actually occupied in effecting a salvage service, is not entitled to salvage. The principal exception is in favor of owners of vessels, which, in rendering assistance have been diverted from their proper employment, or have experienced a special mischief. The Vine, 2 Hagg. Adm. 2; The Baltimore, 2 Dod. 132. A passenger on board the vessel saved, who assists in saving the vessel, has no claim for salvage. The Branston [2 Hagg. Adm. 3], cited in the case preceding. But where a vessel has been wrecked, and part of the crew were taken on board of a vessel, which afterwards was thrown into a very dangerous situation, from which she was rescued, and the crew so taken on board contributed to that object, by working day and night, it was thought they might be entitled to some remuneration. The Salacia, 2 Hagg. Adm. 269. The part of a ship's company that go on board a distressed vessel, are no more entitled to claim salvage, than those who remain behind, provided they are equally ready to go. The Baltimore, 2 Dod. 132. Where two vessels sail together under a special agreement to give mutual assistance, there can be no claim for salvage between them on account of services rendered. The Zephyr, 2 Hagg. Adm. 43. Where a vessel in distress agrees with the master of another vessel for assistance for a sum certain, the court cannot entertain a claim from the owner for salvage. The Mulgrave, 2 Hagg. 77.

As to what constitute salvage services, it was held, in the case of The Emulous, that whenever the service has been rendered in saving property on the sea, or wrecked on the coast of the sea, the service is a salvage service. Whether the services have been rendered for an agreed compensation, or upon the ordinary terms of a quantum meruerunt, the services are still salvage services, and if the compensation is stipulated, it merely fixes the rule, by which the court will be governed in awarding salvage. See [Case No. 4,480]. In that case, the circuit judge, Story, observes: "Contracts made for salvage services are not ordinarily held obligatory by the court of admiralty, upon the persons whose property is saved, unless the court can clearly see that no advantage is taken of the parties' situation, and that the rate of compensation is just and reasonable. The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. No system of jurisprudence, purporting to be founded upon moral, or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others, to force upon them a contract, unjust, oppressive, and exorbitant." In the case of Schutz v. The Nancy [Case No. 12,493], Judge Bee held all such agreements void, as made under a species of duress.

Salvage is forfeited in cases of embezzlement, or concealment of the property saved. See the case of the ship Blaireau, 2 Cranch [6 U. S.] 240. So even by gross neglect. The Bello Corrunes, 6 Wheat. [19 U. S.] 152. In that case, Mr. Justice Johnson observes, in delivering the opinion of the court: "As to the claims of the salvors, it may be remarked, that maritime courts always approach them with favor. Yet, in proportion to the inclination to favor where there is merit, is the indignation with which they view every indication of a disposition to take advantage of the unfortunate. Spoliation, and even gross neglect, may forfeit all the pretensions of salvors to compensation." See, also, the remarks of Story, J., in the case of The Boston [Case No. 1,673]. To entitle a person to salvage, the danger must be real and imminent, and not merely speculative. But it is not necessary that it should be such, that escape from it by other means is impossible. See Talbot v. Seemen, 1 Cranch [5 U. S.] 1. The salvors have a lien on property saved, so long as it remains in their possession. If they deliver it to the owner, though the lien is gone, the right to salvage remains. If the owner refuses to receive the property, he is not answerable for salvage, the property alone being then answerable. See Brevoor v. The Fair American [Case No. 1,847].

The salvors are admitted as witnesses from the necessity of the case, notwithstanding their interest. But their competency is limited by that necessity; since they are not competent witnesses as to facts occurring after the property has been brought into port. The Boston [supra].

Case No. 10,784.

PARTON v. PRANG.

[3 Cliff. 537; 2 O. G. 619; 6 Am. Law T. Rep. 105; 7 Am. Law Rev. 357.] [1]

Circuit Court, D. Massachusetts. Oct. 8, 1872.

COPYRIGHT — PICTURES — "PAINTING" — "MANUSCRIPT"—LITERARY PROPERTY—SALE—COMMUNICATION OF CONTENTS—LIMITATIONS AS TO USE.

1. The word manuscript in section 9 of the copyright act [4 Stat. 438] does not include a picture, and the purchaser of a painting may acquire a title to the same by an oral contract with the lawful owner: the difference between "manuscript" and "painting" defined.

2. The consent of the author or proprietor in writing, signed in the presence of two credible witnesses, was not necessary under that act to obtain the right to reproduce, or chromo, a picture, provided such consent was fairly and understandingly obtained and for a valuable consideration.

3. At common law the sole proprietorship of a manuscript is in the author or his assigns before publication, but an unqualified publication, such as is made by printing and offering copies for sale, dedicates the contents to the public, unless the sole right of printing, reprinting, publishing, and vending the same is secured by copyright.

[Cited in Yuengling v. Schile, 12 Fed. 106; Henry Bill Pub. Co. v. Smythe, 27 Fed. 923; Werckmeister v. Pierce & Bushnell Manuf'g Co., 63 Fed. 447.]

4. In communicating the contents of his manuscript, the author may prescribe limitations and impose such restrictions as he pleases upon the extent of its use.

[Cited in Werckmeister v. Springer Lith. Co., 63 Fed. 811.]

This was a bill in equity to restrain the respondent from publishing and selling chromo lithographic copies of a painting, representing a view on Claverack creek, Columbia county, in the state of New York, executed by the complainant and praying for an account. [Arthur] Parton alleged that he was an artist earning his living by designing, composing, and painting landscapes and other pictures, and selling the same; that he designed from nature and executed the picture of rural scenery described in the bill of complaint, that having so designed and composed the same, he executed a large copy thereof in oils and sold the same, that he did not give or sell to the purchaser the right to copy, print, engrave, lithograph, chromo, or reproduce the picture in any way, or to publish the same in any form; that the respondent [Louis Prang] is a lithographer and publisher of chromos so called, that he made or caused to be made a chromo of the picture, and marked or engraved on the face of the chromo, the words and figures: "Arthur Parton, 1869, chromo, lithographed, and published by L. Prang & Co. Entered according to act of congress in the office of the librarian of congress"; that he was informed and believed that the respondent had caused an entry of copyright to be made of said chromo under the title "Close of Day" and that he claimed the sole right to copy, print, and publish said picture and chromo thereof under said pretended entry of copyright. Wherefore he prayed for an account and for an injunction. Service was made and the respondent appeared and filed answer. Respondent admitted that the complainant was an artist, that he excuted the picture of rural scenery and made a copy thereof in oils as alleged, that the complainant sold the picture to the person named in the bill, but he expressly denied that he sold it to that person for his private collection. He also admitted that he, the respondent, was a lithographer and publisher of chromos, and that he made or caused to be made a chromo of said picture and marked or engraved upon the face of the chromo, the words and figures alleged in the bill, and that he caused an entry of copyright to be made of the chromo, and that he claimed the sole right to copy, print, and publish the said chromo; that to the time of the sale mentioned in the bill, the complainant retained possession of the picture; that the picture to that time had been on public exhibition and exposed to the public for sale in his studio in the city of New York; that the said purchaser there saw and examined the picture, and that the complainant there absolutely and unconditionally sold the same to the purchaser for a valuable consideration in money without any restriction or reservation of any kind whatsoever, and that the said picture in pursuance of the said sale was delivered and transferred by the complainant to the purchaser unconditionally and without any reservation; that the purchaser bought the picture for the purpose of re-selling the same; that he immediately sent the picture to a firm in this city engaged in the business of buying and selling pictures and engravings for themselves and others; that the picture was there publicly exposed for sale in their store; that the respondent saw the picture in their store and that they, acting in behalf of the purchaser and owner of the same, sold it to the respondent for a valuable consideration in money; that the sale to the respondent was made absolutely and unconditionally and without any restriction or reservation of any kind whatsoever, and that the picture was then and there delivered and transferred to the respondent unconditionally and without any reservation; that the respondent called upon the complainant and informed him that he had purchased the picture and that he intended to publish it as a chromo; that the complainant made no objection to the proposed publication, but advised the respondent as to the best manner of making the chromo, suggesting that if he change the tint of the background, as the respondent had told the complainant he proposed to do, he would injure the chromo, and advised him to copy the picture exactly as it was at

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission. 6 Am. Law T. Rep. 105, and 7 Am. Law Rev. 357, contain only partial reports.]

the time of purchase; that the said chromos were made and prepared for the market at great expense of time, trouble, and money, as the complainant well knew, and that the complainant during all the time the respondent was engaged in preparing and making the same, made no objection to his acts and never claimed that he had any right to prevent the publication. Instead of filing the general replication denying the allegations of the answer, the complainant elected to set down the cause for hearing upon bill and answer.

Thomas W. Clark and William D. Booth, for complainant.

By sale of an oil painting, does the artist convey his ideal property in the conception of the subject, the combination and effect of its treatment, as well as the particular, tangible, and visible embodiment of that ideal? We say, as an undoubted proposition of law, at the same time of the sale of this picture by Parton, at the time of purchase by Prang, at the time of the conversation in March, 1870,—no person could acquire any right to make copies of the picture by engraving or other reproduction, but the first designer or by his express authority in apt words and form. Curtis, Copyr. 146; Binns v. Woodruff [Case No. 1,424]; Pierpont v. Fowle [Id. 11,152]; Atwill v. Ferrett [Id. 640].

Prang could only register the copyright as Parton's assignee,—as the assignee of the incorporeal contents of Parton's manuscript. This assignment he never had in any form, and no pretence is made of even remotely following the form prescribed by statute, in writing, in presence of two witnesses, even to give him title to the picture itself. At most he claims a verbal license to publish without copyrighting. But he has copyrighted. This is a wrong to us which demands a remedy. His copyright pretends to exclude all the world from that formulation. He claims by the conversation a license simply, a license he might share with others. He claims by his copyright an exclusive right, an assignment by Parton, whose name appears as designer on the picture. In other words, he asserts the absurdity that an equitable non-exclusive license is equivalent to an absolute assignment.

Three cases of infringement of copyright in pictures appear in the English Reports; in each the title was derived from the author after a sale of the picture. Turner v. Robinson, 10 Ir. Ch. 121, 150; Martin v. Wright, 6 Sim. 297; In re Graves, L. R. 4 Q. B. 715, 10 Best & S. 680; Ex parte Beal, L. R. 3 Q. B. 387.

On principle and authority, the following propositions are law, and they are decisive for the plaintiff: That, by designing a work of art, the artist acquires an exclusive right to multiply the same, which continues till publication in print by his authority, independently of his physical control of the embodiment he has given it. This right he may assign by deed, like a land deed, but not otherwise. The exercise of this right he may license by writing, in presence of two witnesses, but not otherwise. The transfer of one or more manuscript embodiments of his ideal conveys no part of this right, unless apt written words of conveyance are duly set in order, and signed by him. When there is a statute of frauds, there is no presumption of license or laches from any act or thing which is within the terms of the statute. Neglect to warn a man against a trespass is no license to him to commit it. No personal prohibition or restrictive notice is necessary to prevent a man from acquiring adverse rights in an unlawful way. The rights plaintiff once had, and has never assigned, are in him yet, and exclude Prang's claims and title.

O. S. Knapp, S. Z. Bowman, and H. W. Chaplin, for respondent.

An author, or artist, has at common law an exclusive property in his unpublished works, in the enjoyment of which equity will protect him. This property continues, however, only until publication. Jefferys v. Boosey, 4 H. L. Cas. 815; Turner v. Robinson, 10 Ir. Ch. 121, on appeal, Id. 510; Wheaton v. Peters, 8 Pet. [33 U. S.] 591; Keene v. Wheatley [Case No. 7,644]; Bartlett v. Crittenden [Id. 1,076]; 2 Kent, Comm. 495.

The painting has been published, the facts of this case bringing it neither within the letter nor within the reason of the established rules which protect unpublished works. But even if the painting has not been "published," the complainant cannot maintain his bill. The defendant has succeeded to the complainant's literary property in the picture. It is only under the United States statute of 1831 that the complainant can assert the claim (which his bill indicates), that an assignment or license of this kind must be in writing. Except by that act either might be verbal. This statute expressly, and in terms, applies only to "manuscripts."

Copyright Act 1831, § 13: "Any person or persons who shall print or publish any manuscript whatever without the consent of the author," etc. Now, under no possible definition or use of the language, either in law or literature, can it be held that the word "painting" means "manuscript," or vice versa.

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

CLIFFORD, Circuit Justice. The case now stands in the same posture as if a demurrer had been filed to the bill, which would admit that everything well pleaded in the answer was fully proved. 2 Daniell, Ch. Prac. (3d Ed.) 998; Gettings v. Burch, 9 Cranch [13 U. S.] 372; Leeds v. Marine Ins. Co., 2 Wheat. [15 U. S.] 380; Brinckerhoff v. Brown, 7 Johns. Ch. 217; Dale v. McEvers, 2 Cow. 118. Viewed in the light of that well-settled rule of practice, it must be assumed as fully

proved that the complainant sold the picture for a valuable consideration to the vendor of the respondent, and that the same was delivered by the complainant to the purchaser unconditionally and without any reservation, and that the purchaser from the complainant in like manner sold the picture for a valuable consideration to the respondent, and that he delivered the same to the respondent unconditionally and without any reservation.

Copyright may be granted under the copyright act, to the author of any book, map, chart, or musical composition falling within the classes described in section 1 of the act, if the author is a citizen of the United States or permanently resident therein, and the same privilege is also extended by the same section to any such citizen or permanent resident, who shall invent, design, etch, engrave, work, or cause to be engraved, etched, or worked from his own design any print or engraving; and section 1 also provides that such persons and their executors, administrators, or legal assigns, shall have the sole right and liberty of printing, reprinting, publishing, and vending such book, map, chart, musical composition, print, cut, or engraving for the term of twenty-eight years from the time of recording the title as therein directed. 4 Stat. 436. Persons printing, publishing, or importing any copy of a book so copyrighted, or causing the same to be printed, published, or imported without the consent of the person legally entitled to the copyright first had and obtained in writing, signed in presence of two or more credible witnesses, shall forfeit every copy of such to the person legally entitled at the time to the copyright thereof, and the same penalty is imposed upon any person who knowing the same to be so printed or imported, shall publish, sell, or expose to sale any copy of such book without such consent in writing, and that the offender shall also forfeit and pay fifty cents for every such sheet which may be found in his possession, either printed or printing, published, imported, or exposed to sale contrary to the intent of that act. Id. 438. Protection is also afforded by section 7 of the act, to any cut or engraving, map, chart, or musical composition so copyrighted; and the provision is that if any person shall within the term engrave, etch or work, sell or copy, or cause to be engraved, etched, worked or sold, or copied, or shall print or import for sale, or cause to be imprinted or imported for sale, any such map, chart, musical composition, print, cut, or engraving, without the consent in writing of the proprietor signed in the presence of two credible witnesses, or knowing the same to be so printed or imported without such consent, shall publish, sell, or expose to sale any such map, chart, musical composition, engraving, cut or print, shall forfeit to the proprietor the plate or plates, on which such map, chart, musical composition, cut or print shall be copied, and also one dollar for every sheet of such map, chart, musical composition, print, cut, or engraving which may be found in his possession, printed or published, or exposed to sale contrary to the true intent and meaning of that act. Id. 438. Provision is also made by section 9 of the same act, that any person or persons who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained as aforesaid, if a citizen of the United States or resident therein, shall be liable to suffer and pay to the author or proprietor all damages occasioned by such injury, to be recovered by a special action on the case, and the federal courts empowered to grant injunctions to prevent the violation of the rights of authors and inventors, are thereby empowered to grant injunctions in like manner, to restrain such publication of any manuscript. Id. 438.

Based upon that section of the copyright act, the proposition of the complainant is, that the respondent did not acquire, by the alleged purchase of the picture, any right whatever to reproduce the picture, or to make a chromo of the same, as he admits in his answer he has done, that he could not acquire such a right by any oral contract of sale, or of sale and delivery, even though the sale and delivery were for a valuable consideration, and were absolute and unconditional; that he could only acquire such a right by the consent of the author or legal proprietor in writing, signed in the presence of two credible witnesses, as required by that section, in order to acquire the right to print or publish a manuscript, which the pleadings show the respondent in that form never obtained. Manuscripts of every kind are embraced in that section, but pictures are not named in the provision, and cannot be regarded as entitled to that special protection, unless it be held that the word manuscript includes pictures, which is affirmed by the complainant and denied by the respondent, and that issue presents the principal question in the case. Standard lexicographers certainly do not concur with the complainant, as for example, Webster treats the word as derived from Latin, manus, the hand, and scribere, scriptum, to write, and as synonymous with manuscriptum, meaning literally, something written with the hand, a book or paper written with the hand or a written, as distinguished from a printed, document. On the other hand, the same learned author treats the word picture as derived from Latin pingere, pictum, to paint, and as synonymous with pictura, and defines the word as meaning that which is painted, a likeness drawn in colors, hence, any graphic representation, as of a person, a landscape or a building; and he adopts the language of Bacon, in which he says that pictures and shapes are but secondary objects, showing that in his view the picture presents the objects to the observer as a

whole, whereas the manuscript only describes the parts or elements of the object, leaving the mind of the reader to aggregate those parts or elements into an entire figure or whole. Worcester's definition of those two words is substantially the same as the definitions given by Webster. He treats the word manuscript as derived from the Latin words, manus, the hand, and scriptum, something written, and defines its meaning as a paper written, a writing of any kind, in contradistinction to printed matter. His definition of the word "picture" also corresponds with that given by the first-named author. He derives it from the Latin word, pictura, and defines it as a representation or likeness in colors, a painting or drawing. Bouvier also defines manuscript as a writing, a writing which has never been printed, and refers to the right of an author as secured by the copyright act, and as conceded at common law, but adds that these rights will be considered as abandoned, if the author publishes his manuscript without securing the copyright under the act of congress. Mere definitions, however, do not portray the difference between a manuscript and a picture as fully or as strikingly as it is seen when the two things are compared and contrasted as means of instruction, or of imparting an idea or description of the object or subject matter of the manuscript or picture. Separate description of each element of the object is required in the manuscript describing the several parts of which it is composed, the nature, material, appearance, size, color, dimensions, use, and everything essential to enable the reader to form an idea of what the object is which is embraced in the description given in the manuscript, all these must be considered and combined by the reader in order that he may be able to form an ideal picture of the object described or the subject-matter of the entire description. His ideal picture may or may not be in accordance with the object actually described in the manuscript, as the object itself is not presented to the senses of the reader. On the contrary, he is left to portray in his own mind the outlines of the object from the written description, and so to combine the same as to suggest an ideal picture of the object described.

Whatever conclusion the reader of the manuscript may form, it is but an ideal picture, made in his own mind from the written description of the object, and necessarily calls into exercise all the creative faculties of the mind. No such operation of the mind is involved, where the picture or painting of the object is presented to the observer, as the object itself in a secondary form, "drawn in colors," is presented externally to the sense of sight. In the latter case, no ideal of the mind is necessary, as the thing itself is presented physically to the natural eye. Briefly stated. the picture is the thing itself, but the manuscript is only the description of it in language, and leaves the mind of the reader to make the picture, or, in other words, the picture presents, at a glance, all the characteristics of the object exactly as it exists, but the manuscript only enumerates and describes those characteristics one by one, imposing upon the mind of the reader the labor of aggregating the same into a whole and presenting to his perceptions an ideal of the described object. Different communities employ diverse characters for letters and even for phrases, but it can make no difference what the characters are that are employed in describing such an object, not even if they are arbitrary signs, so long as it remains true that the manuscript is a description of the object and not the presentation of the object itself or its portrait, as the manuscript, while it retains that character, is simply the registry of certain thoughts or ideas about a thing and not the exhibition of the thing itself, as in the case of a picture. Unsupported as the proposition of the complainant is, by any legal adjudication, the argument of the respondent is a forcible one that the construction of § 9 of the copyright act must be controlled by the well-established rule that the words of a statute, if of common use, are to be taken in their natural, plain, obvious, and ordinary signification and import, unless it clearly appears from the context or other parts of the enactment, that the words were intended to be applied differently from their ordinary or their legal acceptation. 1 Kent, Comm. (11th Ed.) 462; Martin v. Hunter's Lessee, 1 Wheat. [14 U. S.] 326; Waller v. Harris, 20 Wend. 561; Doane v. Phillips, 12 Pick. 226. Nothing is shown in the context of the enactment to favor the theory of the complainant, and inasmuch as the usual and ordinary signification and import of the two words is opposed to such a theory, it is difficult to see how it can be adopted without doing violence to the most approved canons of construction. Dwar. St. (2d Ed.) 573; Smith, Const. Law, §§ 505, 545.

Strong support to the opposite view is derived as a legislative expression, from section 86 of the subsequent and recent copyright act, which, in terms, extends the privilege of copyright to the author, inventor, designer, or proprietor of a painting, drawing, chromo, statue, statuary, and models and designs intended to be perfected as works of the fine arts as well as to the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, giving to such authors, inventors, designers, and proprietors, the sole liberty of printing, publishing, completing, copying, executing, finishing, and vending the same for the term of years therein mentioned. All persons without the consent of the proprietor of the copyright in writing, signed in the presence of two or more credible witnesses, are forbidden to engrave, etch,

work, copy, print, publish, or import any copy of such map or other article, and the provision of section 100 is that if any person shall violate the prohibition as therein expressed, he shall forfeit to the said proprietor all the plates on which the same shall be copied, and every sheet thereof, and in case of a painting, statue, or statuary, he shall also forfeit ten dollars for every copy of the same in his possession. Unquestionably the provision, so far as it relates to a picture, is entirely new, and it will be observed that it does not embrace a manuscript, but section 102 is substantially the same as section 9 in the prior act, and that both alike are in terms confined exclusively to the protection of manuscripts. 16 Stat. 212, 214. Viewed in the light of these suggestions, the court is of the opinion that the word "manuscript," as used in section 9 of the copyright act, does not include a picture, and that a purchaser of a picture, such as the one described in the bill, may acquire a title to the same by an oral contract with the lawful owner, that the consent of the author or proprietor in writing, signed in the presence of two credible witnesses, was not necessary under that act to obtain the right to reproduce or chromo the same, provided such consent was fairly and understandingly obtained, and for a valuable consideration.

Suppose it is not necessary that the consent of the author or proprietor of a picture should be in writing to render the sale valid, still it is contended by the complainant that neither the sale in this case to the vendor of the respondent, nor the purchase of the same by the respondent from the vendee of the complainant, even though the sale and delivery of the picture in each case was absolute and unconditional or both combined, had the effect to transfer to the respondent the right to reproduce or chromo the picture, that in selling and delivering the picture, and subsequently suffering his vendee to sell and deliver the same to the respondent, he only parted with the result of his labor as property, that he did not part with the right to reproduce or chromo-lithograph the picture, that the right to multiply copies of the picture was vested in him as the author and proprietor of the same, and that he still retains that right notwithstanding the sale and delivery by himself and the subsequent purchase by the respondent. Undoubtedly, the author of a book or of an unpublished manuscript, or of any work of art, has at common law and independently of any statute, a property in his work until he publishes it or it is published by his consent or allowance, and that property unquestionably exists in pictures as well as in any other work of art. He has the undisputed right to his manuscript, he may withhold or he may communicate it, and communicating, he may limit the number of persons to whom it shall be imparted, and impose such restrictions as he pleases upon the use of it. He may annex conditions and proceed to enforce them, and for their breach he may claim compensation. Jefferys v. Boosey, 4 H. L. Cas. 815–961; Millar v. Taylor, 4 Burrows, 2396; Queensberry v. Shebbeare, 2 Eden, 329. Numerous other decided cases also affirm the same proposition, that the author of an unpublished manuscript has the exclusive right of property therein, and that he may determine for himself whether the manuscript shall be made public at all, that he may in all cases forbid its publication by another before it has been published by him or by his consent or allowance, that a painter also has at common law the same right before publication to prevent any person from copying it, and that the purchaser and owner of the picture holding the title from the painter or his assigns, has the same right before publication, to prevent another from multiplying copies of it or reproducing the picture, but the authorities all agree that after publication, that right is lost. Turner v. Robinson, 10 Ir. Ch. 121, on appeal, Id., 510; Fisher v. Folds, 1 Jones, 12; Wheaton v. Peters, 8 Pet. [33 U.S.] 591; Keene v. Wheatley [Case No. 7,644]; Bartlett v. Crittenden [Id. 1,076]. An author, said Hoar, J., in Keene v. Kimball, 16 Gray, 549, has at common law a property in his unpublished works, which he may assign, and in the enjoyment of which, equity will protect his assignee as well as himself. This property continues until by publication, a right to its use has been conferred upon or dedicated to the public.

Independently of legislation, the sole proprietorship of a manuscript is in the author and his assigns until he publishes it, but an unqualified publication, such as is made by printing and offering copies for sale, dedicates the contents to the public unless the sole right and liberty of printing, reprinting, publishing, and vending the same is secured to the author or proprietor by copyright. But there may be a limited publication by communication of the contents by reading, representation, or restricted private circulation which will not abridge the right of the author any further than necessarily results from the nature and extent of such limited use as he has made or allowed others to make of the manuscript or painting, or, as Lord Brougham said in Jefferys v. Boosey, 4 H. L. Cas. 961, he may withhold or he may communicate it, and communicating, he may prescribe limitation and impose such restrictions as he please as to the extent of its use, which fully justifies the conclusion in Keene v. Kimball, that when a literary proprietor has made a publication in any mode not restricted by any condition, other persons acquire unlimited rights of republishing in any mode in which his publication may enable them to exercise such a right. Keene v. Kimball, 16 Gray, 550. Assignments of a manuscript are required to be in writing by the copyright act, but enough has been remarked to show that a picture under that act might be trans-

ferred by an oral contract, and it is well settled law that even copyright is an incident to the ownership of a manuscript, and that it passes at common law with the transfer of a work of art. Turner v. Robinson, 10 Ir. Ch. 121; Power v. Walker, 3 Maule & S. 9. Hence the remark of the court in Turner v. Robinson, that it was a strange proposition that the transfer of property should destroy and extinguish that which principally constitutes the value of the thing transferred, meaning not that the right to publish did not pass by the sale, but that the exclusive right of publication which attached to the manuscript was not lost by the transfer. Such a transfer of the manuscript or picture is not a publication of the same unless it was so intended by the parties, but if the sale was an absolute and unconditional one, and the article was absolutely and unconditionally delivered to the purchaser, the whole property in the manuscript or picture passes to the purchaser, including the right of publication, unless the same is protected by copyright, in which case the rule is different. Baker v. Taylor [Case No. 782]; Ryan v. Goodwin [Id. 12,186]; Wood v. Zimmer, Holt, N. P. 60; Pennock v. Dialogue, 2 Pet. [27 U. S.] 14.

Personal property is transferable by sale and delivery, and there is no distinction in that respect, independent of statute, between literary property and property of any other description. [Palmer v. De Witt, 2 Sickles (47 N. Y.) 532; Id., 7 Rob. (N. Y.) 530.][2] Owners of personal property have the right to sell and transfer the same as inseparable incidents of the property, and the author or proprietor of a manuscript or picture possesses that right as fully and to the same extent as the owner of any other personal property; the same being incident to the ownership. Sales may be absolute or conditional, and they may be with or without qualifications, limitations, and restrictions, and the rules of law applicable in such cases to other personal property must be applied in determining the real character of a sale of literary property. Proper attention to these considerations will furnish the true explanation of many, if not all the cases referred to by the complainant, which are supposed to support the second proposition for which he contends. Prince Albert v. Strange, 1 Hall & T. 1; Queensberry v. Shebbeare, 2 Eden, 329; Bishop of Hereford v. Griffin, 16 Sim. 196; Steven v. Cady, 14 How. [55 U. S.] 528; Stevens v. Gladding, 17 How. [58 U. S.] 447; Abernethy v. Hutchinson, 1 Hall & T. 28.

Beyond doubt, the right of first publication is vested in the author; but he may sell and assign the entire property to another, and if he does so his assignee takes the entire property, and it is a great mistake to suppose that any act of congress, at the date of the sales of the picture in this case, required that such an assignment should be in writing; and the pleadings show that the sale and delivery in each case were absolute and unconditional, and without any qualification, limitation, or restriction, showing that the entire property was transferred from the complainant and became vested in the respondent. Sims v. Marryatt, 17 Adol. & E. [N. S.] 281; Adderley v. Dixon, 1 Sim. & S. 607. Confirmation of that view, if any be needed beyond what appears in the express allegations of the answer to that effect, is also found in the further allegation that the respondent called upon the complainant immediately after the sale and delivery to him, and informed the complainant that he intended to publish the picture as a chromo, and that the complainant made no objection to the proposed publication, showing that the complainant as well as the respondent understood that the entire property of the picture was vested in the respondent. It is insisted by the respondent that the acts and declarations of the complainant on that occasion, as more fully set forth in the answer, estop the complainant from making any such claim as that set up in the bill; but it is unnecessary to decide that question, as the court is of the opinion that those acts and declarations amount to a practical affirmance of the contract of sale and delivery of the entire property of the picture, as understood and claimed by the respondent. Freeman v. Cooke, 6 Dow. & L. 187; Boucicault v. Fox [Case No. 1,691]; Bigelow, Estop. 475. Neither a conditional sale nor any unfairness is shown, and as neither exists in the case, it must be held that the complainant parted with the entire property in the picture. Pope v. Curl, 2 Atk. 342; Thompson v. Stanhope, Amb. 737; Mayall v. Higbey, 1 Hurl. & C. 148; Jones v. Thorne, 1 N. Y. Leg. Obs. 408; Dalglish v. Jarvie, 2 Macn. & G. 231; Martin v. Wright, 6 Sim. 297; Reade v. Conquest, 9 C. B. (N. S.) 755. Unfairness is not pretended in this case, and inasmuch as the sale and delivery were in their terms absolute and unconditional and without any reservation, restriction, or qualification of any kind, the court is of the opinion that complainant is not entitled to relief.

[2] [From 2 O. G. 619.]

Case No. 10,785.

PARTRIDGE v. DEARBORN et al.

[2 Lowell, 286;[1] 9 N. B. R. 474.]

District Court, D. Massachusetts. Dec., 1873.

BANKRUPTCY—PREFERENCE—JUDGMENT FOR DEBT NOT DUE.

1. It seems to be decided in Wilson v. City Bank, 17 Wall. [84 U. S.] 473, that a fraudulent preference cannot be committed by the mere neglect of an insolvent debtor to go into bankruptcy.

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

2. Distinction between Wilson v. City Bank, 17 Wall. [84 U. S.] 473, and Buchanan v. Smith, 16 Wall. [83 U. S.] 277, considered.

3. Where a creditor obtained judgment for a debt not yet payable, and thereby obtained a lien by levy on the goods of the debtor, *held*, the lien was invalid against the assignee in bankruptcy of the debtor, though the circumstances did not prove a statute preference.

Bill in equity by [H. Partridge] the assignee of Isaac Seabury against three judgment creditors [J. B. Dearborn and two others] who levied their several executions on the goods of Seabury a few days before he filed his petition in bankruptcy, and caused them to be sold soon afterwards. The proceeds of sale were in the hands of the officer, who was made a party defendant. The bill charged that the judgments were obtained and realized by way of fraudulent preference. There was evidence that Seabury was a trader, and was insolvent, and known to the defendants to be so before they obtained their judgments. The bankrupt testified that he failed, through inadvertence, to enter his appearance in the suits, and had no intention that the defendants should obtain a preference.

C. S. Lincoln, for plaintiff.

Boardman & Blodgett (C. J. Noyes, with them), for defendants.

LOWELL, District Judge. No objection has been taken to the bill for multifariousness; and I understand that the convenience of all parties has been promoted by trying the several cases as one.

The late case of Wilson v. City Bank, 17 Wall. [84 U. S.] 473, disposes of the most important part of the present controversy. It decides that no inference of an intent to prefer a creditor can be derived from the facts that the debtor is insolvent, and knows that the creditor is about to procure a judgment against him by virtue of which an actual preference can be obtained. The reason is that it is no part of the legal or moral duty of an insolvent person to file a petition in bankruptcy, nor to defend against a just debt sued for by one creditor in order to give time to other creditors to file such a petition. The next step in the reasoning is inevitable: that the state of mind in which a man omits to do what he is neither legally nor morally bound to do, is immaterial.

That case does, in a certain sense, overrule Buchanan v. Smith, 16 Wall. [83 U. S.] 277, by rejecting the arguments on which the decision in that case was rested; but the decisions can be reconciled in this way: In Buchanan v. Smith, the insolvent debtor was sued by Buchanan, and before judgment had been obtained, made an assignment to a third person for the benefit of creditors; this assignment was, of course, invalid as against the assignee in bankruptcy; but, when set aside in the court of bankruptcy, the property would go to the benefit of the general creditors, and not for the advantage of an intervening judgment creditor. It would be neither the duty nor the right of an assignee in bankruptcy to inquire into a fraud on a single creditor, unless the consequence would be to bring the assets, or some part of them, into the general fund. If I have not misread Buchanan v. Smith [supra], it may stand upon these supports; but the theory on which it was decided, that a debtor can by mere neglect, from whatever motive, commit a fraudulent preference, seems to me to be wholly inconsistent with the reasoning and the conclusion in Wilson v. City Bank [supra], and, if the earlier case cannot be thus explained, it is overruled.

That a creditor may obtain an actual preference by pursuing his legal remedies, is one of the difficulties in the operation of all bankrupt laws, as was pointed out by Curtis, J., delivering the judgment of the supreme court in Buckingham v. McLean, 13 How. [54 U. S.] 169; and it was there suggested that the statute might guard against such inequalities, as has been done by some of the English acts. The latest revision of the statute in that country (32 & 33 Vict. c. 71, § 87) provides that, where the goods of a trader have been taken in execution and sold, the officer shall retain the proceeds for fourteen days; and if within that period notice of a petition in bankruptcy is served on him, he shall hold such proceeds, after deducting expenses, in trust for the assignee. Our courts, in endeavoring to work out an equitable rule from the existing law, adopted a construction which the supreme court have now pronounced to be unsound, as they did upon an analogous point under the act of 1841 [5 Stat. 440], in Buckingham v. McLean, ubi supra.

Although I am of opinion that the motive of the debtor in such a case is immaterial, yet as that precise question is left open in the late decision, I have carefully examined the evidence in this case, and am satisfied that Seabury, the bankrupt, is not proved to have wished that any preference should be obtained by the defendants.

There remains, however, in respect to the defendants, Scott & Co., a point both new and important. They obtained judgment for a debt, part of which had not matured when they brought their action. This fact was very properly urged as evidence of actual collusion on the bankrupt's part; and such collusion, if proved, would, beyond doubt, be "suffering" his property to be taken on legal process. But, upon all the evidence, I do not find the collusion. In my opinion, however, the assignee has a remedy for this wrong, though it is not a statute preference. The assignment conveys to the assignee all the debtor's property, subject to lawful incumbrances. The lien created in favor of Scott & Co., by the judgment and seizure, is an incumbrance to be preserved, so far as it is lawful, and no farther; and a court of equity can inquire into its lawfulness.

An assignee, in so far as he represents creditors, is not absolutely bound by judgments against the debtor. In England, he is held not to be bound at all. Ex parte Chatteris, 26 Law T. (N. S.) 174; In re Fowler [Case No. 4,998], and cases cited. In Fowler's Case I refused to adopt the rule, that the bankrupt court could reopen all judgments; but expressed the opinion, to which I adhere, that creditors, and the assignee representing them, may collaterally impeach judgments against the bankrupt for fraud or error. This is always the right of third persons who have had no day in court. In the state court, no doubt, the assignee is a privy with the debtor; but he could not there avail himself of any fraud which merely tends to give the judgment creditor an advantage over others, for that is the very purpose of a judgment at law.

If, then, Scott & Co. have committed a technical fraud on the other creditors in obtaining their judgment, it may be inquired into here. And it seems to me to be such a fraud on their part, that they sued for a debt as being payable which was not payable. In the state court they filed a bill of particulars, resembling in all respects their accounts rendered the bankrupt, excepting in the very important circumstance that it omitted the words "cash in three months" and "cash in four months," which appear on the face of two of their accounts respectively. This suppressio veri must be presumed to have been wilful, since without it they could not have procured the judgment and consequent lien which they now rely on. The adaptation of means to the end proves the design. Such a contrivance to obtain an advantage through the forms of law cannot be upheld by a court of equity, although it may not happen to be described in the statute as a fraudulent preference, or to have ever been undertaken before by any creditor; and though it may be a fraud that could hardly be committed if there were no bankrupt law, I do not set it aside as a fraudulent preference under the statute, but as a lien fraudulently obtained by the creditor without any assistance from the bankrupt. Decree accordingly.

Case No. 10,786.

PARTRIDGE v. LIFE INS. CO.

[1 Dill. 139.] [1]

Circuit Court, D. Missouri. 1871. [2]

LIFE INSURANCE—COMPENSATION OF AGENTS—USAGE.

In an action by the former local agent of a foreign life insurance company against the company to recover the commuted value of commissions on the renewal of policies after the plaintiff was discharged, it appeared that the contract fixing the plaintiff's compensation, was contained in a letter from the secretary of the company, to him, which stated: "You are there working up a business for yourself, and are to be paid the highest commissions we pay to any agent,"—it was *held*, in substance, that the plaintiff could not show a local usage among other companies, not including the defendant's company, to pay the commuted value of premiums during the whole existence of the policy, should the agent who procured the policy be discharged, or cease to act for the company.

[This was an action by B. Frank Partridge against the Phoenix Mutual Life Insurance Company to recover for services rendered defendant as agent in its business of life insurance.]

Harding & Thayer, for plaintiff.

Eno, Cline, Jamison & Day, for defendant.

PER CURIAM. The plaintiff had been the local agent in St. Louis, of the defendant, a foreign insurance company, and in this action sought to recover commissions, or commuted value thereof, for renewals of policies after he ceased to be the agent. The plaintiff served as such agent, under a letter from the company, to him, which stated: "Your status is this: You are there working up a business for yourself, and are to be paid the highest commissions we pay to any agent." To this the plaintiff assented. Held, on the trial: 1st. That the whole sentence was to be taken together, and that the plaintiff could not introduce the parol testimony of insurance men or agents, to show that the words "working up a business for yourself" (separating them from the rest of the connected sentence) had a peculiar meaning, and meant that he should be entitled to continuing, or future commissions after he had ceased to be agent, and of which he could not be deprived by being discharged from the service of the company. 2d. That while the plaintiff might show by parol what were the highest commissions, or best terms paid by the defendant to any of its agents with like duties as the plaintiff, he could not show that there was a usage among other life insurance companies in St. Louis, or doing business there, to pay commissions for renewals, or the commuted value thereof, during the whole existence of the policy, and after the agent ceased to act for the company. Such usage on the part of other companies being regarded as inconsistent with the special contract, which was, that the plaintiff was to have the highest commissions paid by the defendant, and not the highest paid by others, and, besides, such usage was not alleged or shown to be known to the defendant, which was a foreign corporation.

[There was a judgment in favor of the defendant, which was affirmed by the supreme court, where it was carried on writ of error. 15 Wall. (82 U. S.) 573.]

(NOTE. Function of usage or custom in the interpretation of contracts explained. Barnard v. Kellogg, 10 Wall. [77 U. S.] 383. Never admissible to contradict or eat away an express contract. Stagg v. Insurance Co., Id. 589.)

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

[2] [Affirmed in 15 Wall. (82 U. S.) 573.]

Case No. 10,787.

PARTRIDGE v. SMITH.

[2 Biss. 183.][1]

Circuit Court, N. D. Illinois. Sept., 1869.

MISDESCRIPTION IN DEED—NOTICE.

1. A deed filed for record, misdescribing the premises — the numbers of the township and range having been transposed, but there being in the county no premises corresponding to the description in the deed—is sufficient notice to put a purchaser upon inquiry, and charge him with knowledge that the premises had been conveyed.

[Doubted in Bailey v. Galpin, 40 Minn. 322, 41 N. W. 1054. Cited in Schweiss v. Woodruff, 73 Mich. 479, 41 N. W. 511.]

2. The misdescription is not of such a character as to do away with the effect of the registry laws.

3. A mortgagee of real estate is a bona fide purchaser, even though the mortgage was given to secure a pre-existing debt.

On the 9th day of October, 1867, in the city of New York, Alice B. Smith executed to the complainants a mortgage on an eighty-acre tract of land in McHenry county, Illinois, which was described as follows: "The south half of the south-east quarter of section 15, in township No. 8 north, of range No. 43 east of the 4th principal meridian, being in the county of McHenry and state of Illinois." This mortgage was given as security for an indebtedness already over due. On the 1st of October, Mrs. Smith had executed a deed of trust to William C. Goudy, to secure a debt due the Merchants', Farmers' & Mechanics' Savings Bank of Chicago. This deed properly described the premises, but was not filed for record until October 16th. It was not shown that the complainants had actual knowledge of this deed. This was a bill to foreclose the mortgage, making the bank a party defendant, who answered, claiming priority by virtue of the deed of trust.

Williams & Thompson, for complainants.
Goudy & Chandler, for defendants.

DRUMMOND, Circuit Judge. It would be known, of course, at once, to any person familiar with the government surveys, of which the court takes judicial notice, that there is no such tract of land in McHenry county as the one described in the mortgage. It is claimed on the part of the plaintiffs that the land should be "the south half of the south-east quarter of section 15, in town 43 north, range 8 east of the third principal meridian." This mortgage was filed for record in McHenry county, on the 14th of October, 1867. Mrs. Smith was indebted to the mortgagees, the plaintiffs, for a bill of goods which had been previously sold, and she being in New York at that time, they asked for some security upon this bill, and at their request this mortgage was executed, she stating at the time, that as she was to give a mortgage, although the debt had been due for some time, she would ask for thirty days. A thirty day note for $2,204.36 was accordingly executed, to secure which the mortgage was given.

At the time this mortgage was executed and given to the plaintiffs, Mrs. Smith had in point of fact, on the 1st day of October, 1867, nine days before, executed a deed of trust to William C. Goudy, to secure a debt that was due by her, to the Merchants', Farmers' & Mechanics' Savings Bank, in this city, for the sum of $1,200, money loaned by that institution to her; but this deed of trust was not filed for record in the recorder's office in McHenry county, where the land was situated, until the 16th day of October, two days after the mortgage to the plaintiffs was filed for record. Hence the controversy between the parties. The question is, which takes the priority over the other.

Of course, if the mortgage to the plaintiffs had truly described the land, and there was no notice to plaintiffs of the prior deed of trust, the registry laws would place the question beyond controversy, but the misdescription of the land in the mortgage gives rise to the controversy. There is no question made in the case but that Mrs. Smith intended to mortgage to the plaintiffs the south half of the south-east quarter of section 15, town 43 north, range 8 east of the third principal meridian, in McHenry county. The description was inserted in the mortgage as the witnesses say, at the instance of Mrs. Smith herself, and as given by her in the city of New York, and it is presumable to parties who were unacquainted with the fact that there was no such land as thus described in McHenry county.

Mrs. Smith states that in going from the hotel to the office of the Messrs. Cottrell, she informed one of the plaintiffs that she had borrowed money on this land, and had given a deed of trust, and if that fact were established, of course it would put an end to the controversy. But three witnesses expressly state that she told them that there was no encumbrance whatever upon the property. Their whole conduct at the time is inconsistent with their knowledge or understanding of this communication. If she did make any statement, it is clear that they have either testified untruly, or they did not understand it. Mr. Ballard, the only one of the plaintiffs who had anything to do with it, is the one that went to the hotel where Mrs. Smith was, and she accompanied him to the office of the attorneys, and it must have been to him that communication was made; and his testimony, as well as that of both of the Cottrells (the attorneys), is entirely inconsistent with such a communication being made; so the court must assume that the weight of the evidence is that there was not notice to plain-

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

tiffs of the existence of this prior deed of trust, and the case must be decided on that hypothesis.

That being so, what is the law upon the subject? Here was a deed of trust executed the 1st of October, 1867, to Mr. Goudy, and a mortgage on the 9th of the same month to these plaintiffs, to the same land, the latter having no knowledge of the existence of the prior deed of trust. As between these parties I understand the law to be that the mortgage and deed of trust take effect from the time that they are filed for record. As already stated, the defendants concede this, if the property had been truly described in the mortgage, and admit that if the mortgagees had no notice of the prior deed of trust, the mortgage would be prior in point of law to the deed of trust.

Then, these two instruments having taken effect from the time they were filed for record, when the deed of trust took effect on the 16th day of October, what was the condition of the property? There was a mortgage upon the record, or filed for record, which is the same thing, two days before, by Mrs. Smith to plaintiffs, of a tract of land in McHenry county, described, as the south half of the south-east quarter of section 15, town 8 north, range 43 east of the fourth principal meridian, and the Savings Bank and Mr. Goudy are presumed to know that fact. With this knowledge, the question is whether there was not, upon the record, enough to put a prudent man upon inquiry in order to determine whether Mrs. Smith had not previously mortgaged this property covered by the deed of trust; and I think there was.

It may be admitted—and I think the authorities go that far—that if there had been any land in McHenry county to which this description would apply, it would not be the duty of the parties to trace up and determine what the actual truth was; but, upon a mere inspection of the record, which these parties are presumed to have seen, it would appear that Mrs. Smith undertook to mortgage a particular tract of land in McHenry county; that it was east of the fourth principal meridian; that it was in town 8 north; that it was in range 43 east. The inquiry would naturally be, what does this mean? There is no fourth meridian in McHenry county; there is no range 43 east. In point of fact the range and town are simply transposed. It should be "town 43" instead of "range," and "range 8" instead of "town." I think that, with this before them there were facts from which they could infer, or any prudent man might infer, that this property upon which their deed of trust operated, was encumbered, and that encumbrance was upon the record two days before their own. The property was actually mortgaged. It was the intention of the parties that it should be mortgaged. There is simply a misdescription of the property. The question is, whether it is of such a character as to do away with the effect of the registry laws as against a person whose deed took effect subsequent to the recording of this mortgage. I think there was enough upon the record to put a prudent man upon inquiry and compel him to follow it up and to affect him with the consequences of that pursuit.

That being so, the only other question in the case is, whether these plaintiffs were bona fide purchasers or mortgagees. It is claimed on the part of the defendants that they were not, because the mortgage was given for a pre-existing debt. The authorities upon that point are undoubtedly in conflict, but this court has always held that a pre-existing debt constitutes a party a bona fide purchaser in the case of real estate, and a bona fide holder of a note in the case of a transfer of a note. It is claimed on the part of the defendants that the supreme court of the state has settled this question the other way in the case of Metropolitan Bank v. Godfrey, 23 Ill. 579. How they would decide it now, since the case of Manning v. McClure, 36 Ill. 490, I am not prepared to say. In this last case they hold that an indorsee was a bona fide holder of a promissory note, although he took it for a pre-existing debt, and that latent equities between the maker and payee did not apply to him. I have however, a decided opinion on this point, and shall rule always, until I am corrected by the supreme court of the United States, that the giving of a security for a pre-existing debt does not, in itself, prevent the party to whom it is given from being a bona fide holder; and does not prevent it from being a bona fide security. That being so, I think the plaintiffs have the right secured to them by the statute of having their mortgage first satisfied. The decree will be accordingly.

NOTE. A description "two entire sections of land in the marine settlement and state of Illinois, and patented to the said John Rice Jones," has been held sufficient, as upon examination it could have been ascertained which two sections had been patented by said Jones. Choteau v. Jones, 11 Ill. 300.

The following description has also been held sufficient: "A tract situated in the county of Hancock, in the state of Illinois, containing 160 acres, be the same more or less, being northwest 26, north 5, west 8 of the county lands, and being the same quarter section patented by the United States to Edward Crow." Dickenson v. Breeden, 30 Ill. 279. Also a description omitting the range and base line, as from the description given a surveyor could locate the land. White v. Hermann, 51 Ill. 243.

That a mortgagee is a bona fide purchaser, see Bayley v. Greenleaf, 7 Wheat. [20 U. S.] 46; Clark v. Hunt, 3 J. J. Marsh. 553; Cole v. Scot, 2 Wash. (Va.) 141; Wood v. Bank of Kentucky, 5 T. B. Mon. 194; Duval v. Bibb, 4 Hen. & M. 113; Newton v. McLean, 41 Barb. 285; Frisbey v. Thayer, 25 Wend. 396; Pond v. Clarke, 14 Conn. 334; Lewis v. Stevenson, 2 Hall, 63.

A person taking a note or bill in satisfaction of a precedent debt is protected as a bona fide

purchaser. Russell v. Hadduck, 3 Gilman, 233; Foy v. Blackstone, 31 Ill. 538; Saylor v. Daniels, 37 Ill. 331.

PARYNTHA DAVIS, The (UNITED STATES v.). See Cases Nos. 16,003 and 16,004.

Case No. 10,788.

Ex parte PASQUALT.

[1 Cranch, C. C. 243.] [1]

Circuit Court, District of Columbia. June Term, 1805.

NATURALIZATION.

A foreign mariner, residing in Alexandria five years, but sailing occasionally during that time in American vessels from that port, may be naturalized.

Application to be naturalized. Affidavit that he has resided upwards of five years in Alexandria, and that he has during that time sailed from the port of Alexandria, in American vessels, as a mariner. Good moral character, &c. Admitted.

In re PASSAIC BRIDGE CASES. See Case No. 9,620.

Case No. 10,789.

PASSAIC ZINC CO. v. SPEAR et al.

[32 Leg. Int. 362; 23 Pittsb. Leg. J. 34.]

Circuit Court, E. D. Pennsylvania. Oct. 4, 1875.

PATENTS—NOVELTY.

Where the process described and claimed is proved to have been practiced by others some time before the date of the patent, and before the period anterior to that when the patentee claims to have discovered it, the bill in equity will be dismissed.

[This was a bill in equity by the Passaic Zinc Company against Spear & Richards.]

L. C. Cleeman and George H. Fletcher, for complainants.

Edward L. Perkins and Charles B. Collier, for respondents.

McKENNAN, Circuit Judge. The decisive question in this case is one of fact, and it would be a superfluous task to collate and discuss the proofs touching it. It is sufficient to say that they satisfactorily show that the process described and claimed in the complainants' patent was practiced by others some time before the date of the patent, and the period anterior to that, when the patentee claims to have discovered it.

The bill must, therefore, be dismissed with costs.

PASSAIC ZINC CO. (WETHERILL v.). See Case No. 17,465.

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

Case No. 10,790.

PASSAVANT v. The COLLECTOR.

[Cited in Oelberman v. Merritt, 19 Fed. 409. Nowhere reported, and no opinion was written.]

Case No. 10,791.

PASSENGER ACT OF MARCH 3, 1855.

[35 Hunt, Mer. Mag. 451.]

District Court, D. California. 1856.

CARRIERS OF PASSENGERS—VESSELS—LIMITATIONS AS TO NUMBER AND SPACE ALLOWED.

In the United States district court (California), at the suggestion of Colonel Inge, United States district attorney, McALLISTER, Circuit Judge, delivered a special charge to the grand jury on the construction of the provisions of the passenger act of March 3, 1855 [10 Stat. 715].

His honor said: Since the year 1819, about which time there was press of European immigration to this country, congress has passed various laws in relation to the carriage of passengers in vessels. When, in the course of circumstances, such measures became matters of great necessity, congress followed out the legislation on the subject by an act in the year 1847, and different acts in the ensuing years,—all these acts having for their object the safety and the health of passengers. The act of the 3d of March, 1855, repeals, and, as it were, codifies all the laws passed by congress in relation to the transportation of passengers by sea. This act was passed by congress on the last day of its session, and its provisions are somewhat obscure, and to a certain extent, difficult of construction.

The court proceeded to construe the law by a course of reasoning, and concluded that, under the provisions of the first section, two distinct offenses were specified: (1) The taking on board a greater number of passengers than in proportion of one to every two tons of the vessel. (2) The following portion of the section referred to appropriated certain spaces on the deck for the use of the passengers, viz. 16 superficial feet on the main and poop deck and deck houses, and 18 superficial feet on the lower deck, for each passenger. The proper construction of this provision was that if the whole number of passengers exceeded the aggregate amount of space appropriated, without reference to their actual distribution on the different decks, the master of the vessel was liable to prosecution for misdemeanor, and to pay a fine of $50 for each passenger in excess.

His honor referred to the 10th section of the law making the provisions relating to the space in vessels appropriated to the use of passengers applicable to the carriage of steerage passengers in steamers. According to the principle of a strict construction of penal statutes and the rule, "expressio unius, exclusio alterius," his honor decided that the

number of steerage passengers which a steamer was entitled to transport was to be estimated exclusively by the proportion of space, and not by the proportion referred to, of one passenger to two tons of the vessel.

PASSENGER FARE ENUMERATOR, ETC., CO. v. METROPOLITAN R. CO. See Case No. 11,535.

PASSMORE (UNITED STATES v.). See Case No. 16,005.

PATAPSCO, The (BOYCE v.). See Case No. 1,744.

Case No. 10,792.

PATAPSCO GUANO CO. v. MORRISON et al.

[2 Woods, 395.] [1]

Circuit Court, S. D. Georgia. April Term, 1876.

TRUSTS—POWER TO SELL — AUTHORITY TO MORTGAGE—CONSTRUCTION OF STATE STATUTES.

1. A power in a trust deed to sell and reinvest on the same limitations and trusts does not include by implication the power to mortgage.

[Cited in Jeffrey v. Hursh, 49 Mich. 32, 12 N. W. 898.]

2. Nor does a statutory provision giving power to the judge of a court to pass an order authorizing the trustee to sell or convey the corpus of the trust estate confer power to authorize the trustee to mortgage it.

3. The federal courts are not bound to follow the construction put upon a state statute by an inferior state court.

[Cited in Lookout Mountain R. Co. v. Houston, 44 Fed. 450.]

4. A trustee, unless expressly authorized, cannot issue negotiable paper executed in his trust character so as to bind the trust estate.

The cause was heard for final decree upon the pleadings and evidence.

The facts were as follows: In the year 1843, the defendants Gideon A. Dowse and Sarah A. Dowse, then Sarah A. Morrison, being about to marry, entered into an ante nuptial contract with George Harris, since deceased, and the defendant Robert J. Morrison as trustees. This contract, after reciting that it was desirable that a proper settlement and provision should be made for said Sarah A., and any child or children she might have, and that the said Sarah A. was then the owner of several slaves and about eight thousand dollars in money, provided that the money should be invested in a plantation, which was done. The contract declared that all the property of said Sarah A. was to remain her sole estate until her marriage with said Gideon Dowse, and then should vest in said trustees in trust for the use and joint lives of her and her said husband, and should she survive him, to her in fee; but should she die before her said husband, leaving a child or children, or the issue of a child or children, then to said Gideon and them for their joint use until the eldest child became of age or married, when the estate was to be divided, share and share alike. And if the said Sarah A. should die before the said Gideon A., leaving no child or children or the issue thereof, then to Gideon A. in fee.

The contract contained the following power: "That should a sale or exchange of any portion of said property be desired, it may take place by the written consent of the parties in interest, the proceeds of said sale to be vested in other property, to be held in trust, and upon the same limitations as are herein stated." It also provided that in case it should be necessary from the death or disability of one or both of said trustees, another or others might be appointed by Sarah A. and Gideon, or, if he refuse, by her alone.

The Code of Georgia (section 2327) declares: "A trustee, unless expressly authorized by the act creating the trust, or with the voluntary consent of all the beneficiaries, has no authority to sell or convey the corpus of the estate; but such sale must be by virtue of an order of the court of chancery, upon a regular application to the same. Such application may be made to the judge in vacation, on full notice to all the parties in interest, and the order for such sale may be granted at chambers, the proceedings to be recorded as an application for appointment of trustees."

Relying upon this section of the Code, in February, 1871, Robert J. Morrison, surviving trustee, Gideon Dowse for himself and as next friend for his wife Sarah A., Mary Low by her next friend, her husband, Samuel Dowse, and James Dowse, a minor, by his next friend, Samuel Dowse, "being all the parties in interest," presented, by Mr. Perry as attorney, a petition to the judge of the superior court of Burke county, for leave to mortgage the trust estate, stating, inter alia, that the management of the property was in charge of Gideon and Samuel Dowse; that provisions and money were necessary to carry on the farm and support the cestuis que trust, and they, being unable to procure such aid, under the laws of the state regulating trusts, pray the said judge to grant a decretal order authorizing the trustee to execute a mortgage deed to any proper person, merchant, factor or money lender, for such supplies, commercial manures, farming implements, or money—pledging said trust property to insure any debt created in such manner and for such consideration, the mortgage to comply in form and substance with the laws of this state, and to be valid in every intent and meaning thereof. That said Gideon and Samuel had wholly failed in their endeavor to procure supplies, money, etc., and that the only relief promised them had been made in view of the granting of a decretal order, and execution of a mortgage in accordance with the same. This "bill of complaint" was verified by Samuel Dowse, before the judge, on

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

the 21st of February, 1871, and a copy of the marriage contract was annexed to it as an exhibit. On the same day, the judge granted the decretal order; which order, after reciting the substance of bill and marriage articles, concluded as follows: "It is, therefore, ordered and decreed that said Robert J. Morrison be, and he is hereby authorized and empowered to execute a mortgage deed to all or any part of said trust land as may be required, to any person who will furnish said trustee or his agent either with such necescessaries as the circumstances of the case require, or money to purchase the same, and that the mortgage so created shall be in every respect valid and binding upon said trustee, and shall attach to the land so conveyed until the debt is satisfied. It is further ordered that this proceeding constitute the records of the superior court of Burke county; provided, further, that the sum borrowed or amount furnished shall not exceed the amount or sum of $2,000; and that a first lien be also taken upon the crop to be raised the present year to secure the same also."

In pursuance of this authority as it is claimed, Morrison, the trustee, executed a note for two thousand dollars to one Wilkins, which he signed "R. J. Morrison, trustee for S. A. Dowse and children," and to secure the same, executed a mortgage to Wilkins on the trust property, which he signed under the name and description of "R. J. Morrison, trustee." Wilkins transferred the note and mortgage before maturity to the complainant in this cause. The object and prayer of the bill was that the complainant might have a decree for the amount due on the said note, and that the mortgaged premises might be sold to pay the same.

W. W. Montgomery and H. C. Cunningham, for complainant, argued that the authority of Morrison, the trustee, to execute the note and mortgage, was complete, and that even, if this authority were defective, the transfer of the note and mortgage to complainant as a bona fide holder before maturity cured any defect of authority for their execution, and made the note and mortgage binding on the trust estate.

R. E. Lester and T. M. Berrian, for defendants, relied, as a defense, upon the absence of authority in Morrison, the trustee, to execute the note and mortgage, and claimed that no such authority was contained in the ante nuptial contract, and that the superior court of Burke county had no power under the Code of Georgia to confer such authority. They further claimed that a trustee, unless expressly authorized, could not issue commercial paper to bind the trust estate, and the form on which the note and mortgage were executed put the transferee in inquiry, which, if followed up, would have shown that Morrison had no authority to execute them.

The cases cited by counsel are referred to in the opinion of the court.

ERSKINE, District Judge. Two distinct views of this cause were presented by counsel for plaintiffs; and it was argued that the maintenance of either would warrant a decree for the plaintiff. First, that the power in the marriage articles, to sell or exchange any portion of the trust estate and reinvest the proceeds in other property upon the same limitations and trusts, conferred authority to execute a mortgage. Or, secondly, the authority to mortgage was valid under the decretal order of the chancellor by virtue of section 2327 of the Code. In support of the first view, Allan v. Backhouse, 2 Ves. & B. 65, was relied on. There, the testatrix, after devising leasehold estates, held upon bishops' leases for lives, and all her other real estate, to certain uses, directed the renewal of her leaseholds, and that the expenses should be raised out of the rents and profits of the leaseholds, or any part of the freehold estates, to the end that they might be enjoyed therewith as long as might be. The vice chancellor said, that the word "profits," ex vi termini, includes the whole interest, as a devise of the profits would pass the land itself. And he held, that as the purpose for which the money was to be raised out of the rents and profits might require it suddenly, for the lessors could not be expected to wait for the gradual payment out of the rents, and as there was nothing in the will to give these words the abridged sense of annual profits, except the purpose to preserve the estate entire, he warranted the sacrifice of part for the preservation of the remainder, and decreed that the gross sum for fines on renewal of leases, as well as to raise portions, might be raised by sale or mortgage, and thereby effect the purposes of the testatrix.

On perusing that case, it will there be found admitted, that the natural signification of the words "issues and profits" is annual "rents and profits." Yet the vice chancellor extended their meaning, "when applied," as he said, "to the object of raising a gross sum at a fixed time; when it must be raised and paid without delay, to a power to raise by sale or mortgage, unless restrained by other words." In Bloomer v. Waldron, 3 Hill, 361, Cowen, J., speaking of Allan v. Backhouse, called it "an extraordinary case." And in the late case of Earl of Shaftesbury v. Duke of Marlborough, 2 Mylne & K. 111, which was a trust to renew out of the "rents, issues and profits," it was held, by Sir John Leach, M. R., to be confined to annual rents, issues and profits, on the authority of Stone v. Theed, 2 Brown, Ch. 243, in opposition to Allan v. Backhouse.

They likewise relied on the case of Wayne v. Myddleton, 2 Ga. 383. There, four slaves were conveyed in trust for the sole use of Mrs. P., and after her death, to her children; the deed gave her the power, with the consent of the trustee, to sell and dispose of the trust property, whenever she should deem it proper to do so, the proceeds to be reinvest-

ed upon like trusts. She purchased land and the growing crop thereon from one M., and hired his slaves to assist in the crop, and to secure the purchase money and hire of the hands, she, with the consent of the trustee, made a mortgage on the trust property to M. The court held the power well executed, remarking, inter alia, that it "was a power without limitation, except that the property substituted for the slaves shall be covered with the same trusts." The decision was based upon the fact that the mortgage was given "for the purpose of acquiring, by purchase, other trust property to stand in the place of, and be substituted for the property mortgaged." Counsel also cited 4 Kent, Comm. 147, 148, where the author in speaking of powers of sale inserted in mortgages, says that "the better opinion would seem to be, that a power of sale for the purpose of raising money will imply a power to mortgage, which is a conditional sale." It is too evident to need citations, that the chancellor referred solely to mortgages at the common law, where the title passed to the mortgagee immediately on delivery of the conveyance in mortgage, the law investing the mortgagee with authority to sue out a writ of right or ejectment against the mortgagor in possession, even before condition broken. But in this state, a mortgage is not a conditional sale; it does not clothe the mortgagee with a power coupled with an interest, nor pass any estate; it creates a lien only, and the title remains in the mortgagor until foreclosure and sale. Code, § 1954; Davis v. Anderson, 1 Kelly, 176; U. S. v. Athens Armory, 35 Ga. 344; Lockett v. Hill [Case No. 8,443].

But the chancellor, in his lecture on Powers (4 Kent, 331], says: "As a general rule, a power to sell and convey does not confer a power to mortgage," and he cites 1 Sugd. Powers, 528; 2 Chance, Powers, 388. And here let it be inquired whether the power conferred by the marriage contract is an exception to the rule. The language is: "That should a sale or exchange of any portion of said property be desired, it may take place by the written consent of the parties in interest; and the proceeds from said sale to be vested in other property to be held in trust, and upon the same limitations as are herein stated." Some cases will now be referred to as illustrative of the rule: In Haldenby v. Spofforth, 1 Beav. 390, the power was "to make sale and dispose of the testator's lands by private sale or at auction;" and it was held by the master of the rolls, Lord Langdale, not to authorize a mortgage. He said: "I think that the clear and manifest intention of the testator was to have a sale out and out; to have a complete conversion of his real estate. * * * I think that the terms of this will do not authorize a mortgage, and therefore the mortgagee has not got a valid title."

In Stroughill v. Anstey, 1 De Gex, M. & G. 635, a devise was to trustees, charged with debts, etc., with direction for, or trusts which require further, an out and out conversion; and the lord chancellor held that a mortgage was not a proper mode of raising the charges.

In Bloomer v. Waldron, supra, the testator gave to his wife "full power to sell and convey all or any part of the real estate, provided A. B. shall consent to such sale, etc.; the moneys from such sales to be vested and secured in such manner as the said A. B. shall direct for the purposes of this my will." She executed a mortgage in fee to H. R., with the consent of A. B.; but the court decided that this was not a proper execution of the power, and declared the mortgage to be a nullity.

In Coutant v. Servoss, 3 Barb. 133, the deed conveyed lands to the grantee, in fee, in trust for the benefit of others, and conferred upon the grantee the power to grant, bargain, sell and convey the same, and to make and execute the necessary conveyances for the benefit of the cestuis que trust. The court held that these terms did not confer a power to mortgage. And citing Bloomer v. Waldron, and other authorities, the court said: "These cases are explicit that the power to sell, when, as in this case, it is general and unqualified, does not include the right to mortgage, and this is in accordance with the well known rule that powers should be construed strictly."

In Albany Ins. Co. v. Bay, 4 Comst. (N. Y.) 9, S. had devised lands in trust, to trustees, with power to "sell and dispose of such parts, in fee simple or otherwise, as Mrs. T., the cestui que trust, by writing under her hand, should from time to time request and desire." The court (two of the eight judges dissenting, and apparently laying stress upon the word "otherwise") decided that the power did not include authority to execute a mortgage. See Cummings v. Williamson, 1 Sandf. 17; Wood v. Goodridge, 6 Cush. 117; Hubbard v. German Catholic Congregation, 34 Iowa, 31; Head v. Temple, 4 Heisk. 34; Page v. Cooper, 16 Beav. 400; Devaynes v. Robinson, 24 Beav. 86.

Viewed in the light of those principles which govern the interpretation of powers inserted in marriage settlements and other instruments, and applying the cases just cited to the power under consideration, and looking to the natural and obvious import of the words employed in creating the power to sell or exchange any portion of the property, and reinvest the proceeds arising from the sale in other property upon the same limitations, trusts, etc., it is, to my mind, manifest and put beyond question or doubt that it was not the intention of the settler to confer authority to mortgage the whole or any portion of the estate for any purpose. And I think the authorities well warrant the conclusion that "a trust for sale, with nothing to negative the settler's intention to convert the estate absolutely, will not authorize the trustees to ex-

ecute a mortgage." Perry, Trusts (1st Ed.) § 768.

Although the bill is framed solely on the alleged authority of the decretal order to the trustee, yet the discussion, no objection being interposed, was as prominent on the marriage settlement as on the order. And having ruled upon the settlement, I pass to section 2327 of the Code, and the decretal order of the judge, upon which the decree must be based.

The arguments presented by counsel were, in substance: That the promissory note of February 21, 1871, for $2,000, made by Morrison and payable to G. A. Wilkins, or order, on the 1st of January, 1872, and the mortgage on the trust estate of even date with the note, and given to secure the payment thereof were, at the same time, delivered to Wilkins, who, before maturity of the note, indorsed it and also assigned the mortgage to the plaintiff for value; that the note and mortgage are a valid and binding debt against, and a lien upon the trust property, the trustee having been judicially authorized to bind the estate by the decretal order of the judge, of February 21, 1871, rendered in accordance with the section of the Code referred to.

It declares that "a trustee, unless expressly authorized by the act creating the trust, or with the voluntary consent of all the beneficiaries, has no authority to sell or convey the corpus of the trust estate, but such sales must be by virtue of an order of the court of chancery upon a regular application to the same. Such application may be made to the judge in vacation, on full notice to all the parties in interest, and the order for such sale may be granted at chambers," etc.

Counsel for defendants insisted that this section did not empower the judge of the superior court to authorize the trustee to execute the mortgage. For the plaintiff, it was urged that he did possess authority to decree the making of the mortgage; that in entertaining the application of the trustee and cestuis que trust for leave to mortgage the trust estate, he acted within the jurisdiction given by the section; that he had cognizance of the parties and the subject matter, and that the decretal order was, in all respects, a valid act, and binding on the estate. And possessing jurisdiction in the premises, as was contended, if the judge made an erroneous decree, still, that matter could not be questioned in this court. Such is the substance of the views presented by the respective counsel on this branch of the case.

Now, does the section in question really confer on the superior court or judge the jurisdiction claimed by the plaintiff—the power, under any circumstances, to authorize a trustee to mortgage trust property? If I comprehend the meaning and scope of the section, it is when no express authority is given by the instrument creating the trust, to the donee or trustee of the power, to sell or convey the corpus of the trust property, that the superior court or judge can act and order a sale. Then if this be so, this section, so far as the case before this court is concerned, has no application whatever, for the marriage settlement of 1843 expressly declares that should a sale or exchange of any portion of the trust property be desired, it may take place by the written consent of the parties in interest. So, unless the words in the section "to sell or convey the corpus of the trust estate," when tested by the rules of interpretation, include authority to mortgage, the decretal order was, I think, unauthorized.

But it was contended for the plaintiff, that this court cannot question the construction given to this enactment by a state court, or in this particular case, by a state judge, unless the statute itself or its construction conflicts with the constitution or laws of the United States; that when a state court or judge expounds a state statute, such exposition becomes a rule binding on the national courts, and that if the decision of the superior court judge is incorrect, the state supreme court is the tribunal to review and revise it, and not the United States circuit court.

But this court does not claim any supervisory or appellate power over the state court or judge; it merely entertains jurisdiction of this suit because of the citizenship of the plaintiff; and being thus called on to administer a law of the state of Georgia, it will, if possible, follow the decision of the state judge. A state statute, when it appertains to rights and titles in things having a permanent locality, and a construction is placed upon it by the highest state court, becomes a rule of decision in the federal courts; but the rule does not apply to the construction of contracts. To which class section 2327 belongs is of no consequence here; for no part of it has ever been expounded by the supreme court of this state. Judiciary Act, § 34; Van Bokelen v. City R. R. Co. [Case No. 16,830]; Leffingwell v. Warren, 2 Black [67 U. S.] 599; Williams v. Kirtland, 13 Wall. [80 U. S.] 306.

The power prescribed in the section to sell or convey the corpus of the trust estate is, to my mind, susceptible of no other meaning than that the legislature intended to negative any authority to decree a mortgage. If this view is correct, then the word "sale," as there employed, is to be understood in its general legal sense: that a sale decreed by the court or judge means an out and out alienation, and not a sale subject to a charge, or conjoined with a defeasance. I am also of opinion that the term "convey," which is in signification and effect sufficient to answer the requisites of a grant at common law (Patterson v. Carneal, 3 A. K. Marsh. 618), is there used as synonymous with "to sell." The language of the section or statute is "to sell or convey the corpus of the trust estate." As already remarked, a mortgage in Georgia passes no estate; the title remains in the

mortgagor until subsequent foreclosure and sale. I may add, that when powers are derived under a legislative act, the mode and directions for the execution of these powers must be sought for in the act. And in support of the views here expressed, the cases cited on the power in the marriage settlement are referred to.

The right and title of the plaintiff in and to the two thousand dollar promissory note, and the mortgage given to secure it, will now be passed upon. Plaintiff relied upon Carpenter v. Longan, 16 Wall. [83 U. S.] 271, and Taylor v. Page, 6 Allen, 86. In the first case, the court held that where a negotiable note, secured by a mortgage, is transferred to a bona fide holder for value before maturity, and a bill is filed to foreclose the mortgage, no other nor further defenses are allowed as against the mortgage than would be allowed were the action on the note brought in a court of law. In the other case, a negotiable note secured by mortgage was given for the price of liquor sold in violation of law; and the court ruled that though the note and mortgage were void as between the original parties, it was valid in the hands of a bona fide indorsee for value, without notice of the illegal consideration. The presumption is, that the $2,000 note was indorsed, and the mortgage transferred to the plaintiff by Wilkins while the note was under due. The transfer on the mortgage bears date prior to the maturity of the note. The note is signed "R. J. Morrison, trustee for S. A. Dowse and children;" the mortgage "R. J. Morrison, trustee," and it recites that it is made "in pursuance of a decretal order passed by William Gibson, as judge of the Augusta circuit, having jurisdiction in equity, passed on the 21st of February, eighteen hundred and seventy." And the mortgage deed is made "between Robert J. Morrison, trustee for Sarah A. Dowse and her children, of the first part, and Gilbert A. Wilkins of the second part."

In Carpenter v. Longan [supra], the court said: "The assignment of the note under due raises the presumption of want of notice, and this presumption stands until overcome by sufficient proof. The case is a different one from what it would be if the mortgage stood alone, or the note was nonnegotiable." The promissory note given by Morrison to Wilkins, who indorsed it to the plaintiff, and for which the mortgage is intended to be collateral security, was a negotiable instrument; and though the words "trustee for S. A. Dowse and children" were appended to the name of the maker, they are mere descriptio personarum, and carry no power to bind the trust property, unless the marriage settlement, or the decretal order authorized him, as such trustee, to make and issue commercial paper binding on the trust estate. It will not, I suppose, seriously be said that such authority was conferred by the marriage settlement, or by the Code, or that it could be by the decretal order. A trustee has no power to bind, ex directo, the trust estate by promissory notes or bills of exchange, though such acts may make him personally liable. Story, Prom. Notes, § 63, and cases there cited; Lovelace v. Smith, 39 Ga. 130. Still, it was contended that the rule laid down in Carpenter v. Longan and Taylor v. Page, controls this case; that as the plaintiff, the indorsee, acquired the note before it fell due, fairly, and for value, and without notice of any defect or infirmity in the instrument, the plaintiff holds it free from all equities and defenses existing between the antecedent parties. In those cases, the question for determination was not whether the notes bore marks of caution or carried defects on their face; but whether there was proof dehors the instruments themselves to impeach the holders' title and right to recover. In both cases the question was one of fact; here, the question is matter of law. In the case before this court, no proof, outside of the note itself, has been produced, therefore the presumption is that none exists; but there are indicia on its face—facts and circumstances accompanying it, sufficient to have put the plaintiff, whose agent Graffiin received the note and mortgage simultaneously from Wilkins, the indorser of the former and transferer of the latter, on guard and inquiry before acquiring dominion over the note. If the plaintiff mistook the law by supposing that the words "trustee for S. A. Dowse and children," added to the signature of Morrison, were potent to bind the trust property, such ignorance is a misfortune against which this court has no power to relieve.

It is ordered and decreed by the court that the bill be dismissed.

Case No. 10,793.

PATCH v. MARSHALL.

[1 Curt. 452.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1853.

ADMIRALTY JURISDICTION — FOREIGN VESSEL — AMERICAN SEAMEN—TERMINATION OF VOYAGE—DOMICIL OF MASTER—OFFICIAL ACT OF CONSUL.

1. This court will not decline jurisdiction of an appeal, in a case of personal damage, brought by an American seaman, serving on board a British vessel, when the voyage was terminated here, and the master was domiciled in the United States.

[Cited in Lorway v. Lousada, Case No. 8,517; The Lilian M. Vigus, Id. 8,346; The Topsy, 44 Fed. 633.]

2. Though the court will not call in question the official acts of a British consul, in a foreign port, respecting the crew of a British vessel, it does not follow that it will not investigate the conduct of the master, in procuring the intervention of the consul, by which the seaman was imprisoned; if that amounts to a tort, so as to

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

render the master liable for the imprisonment, it stands on the same ground as other torts.

[Applied in Bernhard v. Creene, Case No. 1,-349.]

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

[This was a libel for personal damages by James Marshall against Edward Patch, master of the brig Hope. From a decree of the district court in favor of libellant (case unreported), respondent appealed.]

Mr. Wheelock, for appellant.

Mr. Sawyer, for appellee.

Mr. Hillard, in support of the protest.

CURTIS, Circuit Justice. The district court having made a decree in favor of the libellant, and awarded to him damages, in the sum of four hundred dollars, together with his costs, the respondent appealed to this court, and entered his appeal at the present term. Some days afterwards, the consul of her Britannic majesty at the port of Boston, filed a protest against the jurisdiction of this court, assigning for causes, in substance: (1) That the brig Hope, on board which the libellant and respondent sailed, was a British vessel; and the respondent, her commander, a British subject. (2) That an investigation of some of the alleged causes of damage must call in question official acts and conduct of a British functionary in regard to British subjects, for which he is responsible only to his own government.

This objection to the jurisdiction must be first disposed of. The facts upon which its validity depends are, that the brig Hope was a registered vessel of Great Britain, and the master a British subject; that the voyage in question was made for account of merchants domiciled in Boston, who hired the master on wages, and provisioned and manned the vessel; but whether under a charter-party, or by reason of their ownership of the brig, does not appear.

The voyage, described in the shipping articles, signed by the libellant, is from the port of Boston to St. Jago de Cuba, and back to a port in the United States. The voyage actually performed was terminated in Boston, in July last; and the crew, including the libellant, were then and there discharged. The libellant was born in the United States, and is described in the articles as of Baltimore, in the state of Maryland. There is evidence tending to show that the libellant was not aware the brig was not a vessel of the United States, until after she sailed from Boston. The family of the master has, for a considerable time, resided in the neighborhood of Boston; and it did not appear that he has any other domicil.

Upon these facts, I am of opinion this protest must be overruled. It is not easy to perceive how it can be allowed, without impairing the rights of the respondent himself. It must be remembered that he is the appellant. The protest is, therefore, an objection against entertaining his appeal. But if not entertained, what is to be done? If the appeal should be dismissed, upon the ground that this court would not exercise its jurisdiction in the case, the decree of the district court would stand unreversed; and upon a certificate from this court, that the appeal had been so dismissed, the district court might find itself obliged to execute its decree; because the decision would not be that the district court had not jurisdiction, or under the circumstances did not properly exercise it, no objection thereto being there made; but only, that after a protest by the consul, this court would not entertain the appeal.

If, however, this difficulty were overcome, I should not see sufficient ground upon which I could decline to exercise jurisdiction. It is evident there must be a failure of justice, if I were to do so. The claim is in personam. The actual domicil of the master is here. The voyage was ended at this port. The libellant is a native of the United States, and here has his home. To require him to follow this master over the world, until he can find him in a British port, would practically deprive him of all remedy. I do not think any considerations of public convenience, or the comity extended by the courts of admiralty of one country to those of another, have any applicability to such a case. I do not consider it necessary to review the decisions in England and this country, on the subject of the exercise of the admiralty jurisdiction over foreigners. None of them apply to a case where the claim is for a personal tort, and the libellant is not a foreigner, and the respondent, though an alien, is domiciled here, and the voyage was begun and terminated in the United States.

It is true this court should not call in question a British consul, for his official acts respecting the crew of a British vessel in a foreign port. It is correctly stated in the protest, that he is responsible solely to his own government; or if to individuals, such responsibility grows out of the municipal laws of his country, which this court would not undertake to administer.

But it does not follow that the conduct of the master of such a vessel, in procuring the official intervention of the consul, upon false allegations, to the injury of an American citizen by imprisonment in a foreign jail, is not to be here investigated. That depends on other considerations, and is not distinguishable from any other wrong done by the master, of which this court should take or refuse jurisdiction according to the national character and domicil of the parties, and the place of termination of the voyage. The Courtney, Edw. Adm. 239; The Calypso, 2 Hagg. Adm. 209; The Sal-

acia, Id. 262; The Madonna, 1 Dod. 37; The Two Friends, 1 C. Rob. Adm. 271; The Johann Friederich, 1 W. Rob. Adm. 38; The Bee [Case No. 1,219]; The Jerusalem [Id. 7,293]. The protest, therefore, must be overruled.

The court then examined the evidence, and affirmed the decree of the district court.

Case No. 10,794.

PATCHIN v. The A. D. PATCHIN.

[12 Law Rep. 21.]

District Court, N. D. New York. 1850.

SEAMEN—ASSIGNMENT OF WAGES—RIGHT OF ASSIGNEE.

An assignment by a mariner of his wages confers upon his assignee no right to maintain a suit in rem against the vessel for the recovery of the wages assigned.

[Quoted in Sturtevant v. The George Nicholaus, Case No. 13,578. Cited in The Champion, Id. 2,583; The Napoleon, Id. 10,011; M'Carty v. The City of New Bedford, 4 Fed. 827; Ross v. Bourne, 14 Fed. 862.]

[This was a libel for wages by Aaron D. Patchin against the steamboat A. D. Patchin, Harry Whitaker, claimant.]

Mr. Daniels, for petitioner.
Mr. Talcot, for claimant.

CONKLING, District Judge. A libel having been filed, and a warrant of arrest issued and executed against the Patchin, in behalf of two seamen, for wages, the petitioner soon afterwards presented his petition, setting forth that he was the assignee of the wages due to a large number of other seamen who had also served on board the Patchin, whose claims in the aggregate amounted to the sum of $2,385.11, as appeared by certificates given to them respectively, at the time of their discharge in September last, by the check of the Patchin. The petitioner further states that this sum was advanced by him to P. S. Marsh, at his request, and upon his representation that the seamen had become clamorous for their pay, for the purpose of enabling Marsh to pay them off. Marsh, in making this application to the petitioner, appears to have been acting in behalf of D. N. Barney, who was absent at the time, and who claimed to be the owner of the Patchin as purchaser at a sale by the sheriff of Erie county, in virtue of a mortgage. When the money was paid to the seamen by Marsh, he took from each of them an assignment of his demand to Barney; which assignments the petitioner alleges were taken by his direction and for his benefit, with the expectation on his part, that the money would soon be refunded, and that the mariners' lien would remain valid.

These transactions occurred in September last; and in November last, Barney executed assignments of the same demands to the petitioner. The demands of the original libellants have in the meantime been satisfied, and the petitioner now asks for a decree in his favor for the amount so by him advanced, and for the sale of the vessel. The claimant, in his answer, insists that Barney claimed to be the owner of the Patchin, and that the money was in fact paid by him in that character; and he denies that the mariners' lien passed to the petitioner in virtue of the assignments, admitting the money to have been furnished by the petitioner on his own account. The evidence proves that the petitioner did in fact advance the money to Marsh, and that assignments were executed, as already stated; but it sheds no light upon the motives or expectations which governed the petitioner. Without adverting more particularly to the allegations of the answer, it is evident that under any view of the case unwarranted by the facts appearing before the court, it is incumbent on the petitioner to maintain that an assignment by a mariner of his claim to unpaid wages confers upon his assignee a right to maintain a suit in rem in his own name for the recovery of such wages against the vessel on board of which the services of the mariner were performed.

The counsel for the petitioner insists that although choses in action are at law held not to be assignable, yet that being held valid in chancery, this court administering justice, as it is required to do, according to the principles of equity, is bound to recognize and enforce the title set up by the petitioner. No judicial decision to this effect has been cited, nor have I been able to find any. Undoubtedly, a court of admiralty, in the exercise of its powers as such, may, and sometimes should, disregard the narrow and technical distinctions of common law proceedings, and apply those which under like circumstances, would govern the decision of a court of chancery. But this is true with regard only to these matters, which, independently of these principles, fall strictly within the scope of the admiralty jurisdiction. It was correctly argued by the counsel for the petitioner, that in cases arising ex contractu, the admiralty jurisdiction depends on the nature of the contract; and it is true, also that this jurisdiction is not always confined to the immediate parties to the contract. Thus a bottomry bond is assignable and may be enforced in the name of the assignee. But bottomry is an express hypothecation, and binds the ship to the lender and his assigns. So also is a bill of lading assignable, or rather negotiable, and the holder may in this country maintain an action in the admiralty upon it, in his own name. But the quality of negotiability is given to this instrument by law for the benefit of trade, and its transfer moreover carries with it the title to the goods shipped, and of course the right to maintain a suit upon it for their value in case of their loss. The right of the mariner to proceed

against the ship in specie, is conferred upon him for his own exclusive benefit. It arises by implication, and exists independently of possession. Its object is the more certainly to secure to him the hardly earned fruits of his perilous and useful services. When, therefore, his wages are paid, no matter by whom, the design of the privilege is answered; and, to say the least, it is very questionable whether he would be benefited by the capacity to transfer it to another: for if this power would sometimes enable him to obtain immediate payment, it would also expose him to imposition through his credulity and proverbial improvidence. It may well be apprehended, also, should this become the established and known law, that advantage would be taken of it for the gratification of unworthy feelings, at the expense of ship owners. The power to arrest a ship for the purpose of enforcing the payment of a debt, however insignificant, is a privilege liable to great abuse, even when confined to the mariner; insomuch that congress has seen fit by well known special legislation, to regulate and restrict this right. No process against the vessel can lawfully issue without a magistrate's certificate granted after summons to the master; and when the amount recovered is less than $100, the costs recoverable are limited to one half of the amount. A privilege regarded with so much jealousy by the legislature ought not to be unnecessarily extended by the courts. Implied liens are admitted with unsparing caution by the common law. Being allowed for the benefit of trade, they are limited to that object, and are held, also, to be strictly personal. The right of lien depends on the actual possession by the person claiming it, of the goods to which it is attached; and if he parts with the possession, the lien is irretrievably lost.

In the absence of any authority to the contrary, I am of opinion that the mariner's lien ought in like manner to be considered as restricted to its design, and as merely personal. The petitioner cannot justly complain of being denied the privilege of maintaining a suit in rem in the admiralty. The ordinary forms of remedy in favor of an assignee of a chose in action are open to him in common with all others.

The petition must be dismissed, with costs.[1]

[1] We suppose the principle of this decision is undisputed. A mariner's right to proceed in rem for wages, is a personal privilege, and the jurisdiction of the court is referable to the position of the libellant quite as much as to the character of the contract. The reason assigned in the reign of James I. by the common law courts in refusing a prohibition to the admiralty in a case of mariner's wages, was that the case was one of "poor mariners, who might not be delayed in the admiral's court." The practice in this part of the country has uniformly proceeded on this principle, but we are happy, in the present crude state of the admiralty law in the Western country, to publish an opinion of so able a judge.

PATCHIN, The A. D. See Case No. 87.

Case No. 10,794a.

PATE v. GRAY.

[Hempst. 155.] [1]

Superior Court, Territory of Arkansas. July, 1831.

SET-OFF—LIBERAL CONSTRUCTION OF STATUTES—MUTUAL DEBTS—ASSIGNEE OF CHOSE IN ACTION—JOINT AND SEVERAL NOTE—PLEA—INTEREST.

1. The statutes of set-off are to be liberally expounded, so as to advance justice and prevent circuity of action.

2. The expressions "mutual debts" and "dealing together," and "indebted to each other," convey the same meaning in these statutes.

3. The demands of plaintiff and defendant must be specific and mutual, and there must exist a simultaneous right of action at the institution of suit, to enable one to set off against the other.

4. Assignee of a chose in action may sue in his own name, and a release of the obligor by the assignor after assignment is a nullity.

5. Joint and several note may be set off.

6. A plea of set-off cannot be considered as an action, within the meaning of the twenty-eighth section of the administration law (Terr. Dig. 58), so as to deprive a party of costs.

7. On a note payable on demand, with ten per cent. interest until paid, the interest is to be computed from date, that being clearly the intention of the parties.

[Error to the circuit court of Hempstead county.]

Before ESKRIDGE and BATES, JJ.

ESKRIDGE, Judge. This was an action of debt, brought by [Jeremiah Pate] the administrator of John Johnson, against Matthew Gray, in the Hempstead circuit court, founded upon the following note: "In the month of January in the year 1829, I, for value received, promise to pay John Johnson or order five hundred and fifty dollars; witness my hand and seal 19th day of September, 1829. (Signed) Matthew Gray. (Seal.)

There were three several pleas pleaded by the defendant: First, payment on the day; secondly, payment subsequent to the day; and thirdly, a special plea of set-off in bar. Upon the two former the plaintiff joined issue, and to the latter interposed a general demurrer. The circuit court decided that the plea of set-off was a bar to the plaintiff's action, overruled the plaintiff's demurrer, and rendered a judgment in favor of the defendant for the sum of $127 and costs; to which opinion of the circuit court plaintiff excepted, and to reverse which he has brought the cause to this court by writ of error. The evidence adduced by the defendant, in support of the plea of set-off, was a promissory note, in the following language: "$508 42/100. New Orleans, 19th May, 1827. On demand, we jointly and severally promise to pay to the order of T. R.

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

Hyde five hundred eight dollars and forty-two cents for value received, with interest at the rate of ten per cent. per annum until paid. (Signed) John Johnson, L. W. Maddox,"—upon which promissory note there was the following indorsement: "Transferred and assigned to Matthew Gray for value received, without recourse to me. (Signed) T. R. Hyde. March 30th, 1829."

The questions presented for our consideration depend upon the statutes of set-off. It is well to premise that the statute of set-off ought to be, as it always has been, liberally expounded, to advance justice and prevent circuity of action. The statute of 1804 provided, that if two or more dealing together be indebted to each other upon bill, bond, &c. &c., and the statute of 1818, supplementary to the former, provides that if two or more be mutually indebted to each other by judgments, &c., one debt may be set off against the other. Our statutes of 1804 and 1818 are to be construed in connection; and if so, they mean precisely the same thing. The words "mutual debts" in the English statute of 2 Geo. II. c. 22, § 13, and "dealing together" and being "indebted to each other," in the statute of New York, are considered as expressions of the same import. Gordon v. Bowne, 2 Johns. 155. And so the expressions in our statutes should be considered as conveying the same meanings; and it was doubtless so intended by the legislature. I do not deem it necessary to examine several points discussed at the bar. The general rule on the subject of set-off is, that the demand of the plaintiff, as well as that of the defendant, must be specific and certain; there must be mutuality, that is, on each side a debt, to authorize a set-off. There must exist in both plaintiff and defendant, at the time of the institution of the suit, a simultaneous right of action.

From the view which I take of the case, it will be only necessary to notice four of the points relied upon in argument for reversing the judgment. First, that Gray, holding the note relied on as a set-off as assignee, was not evidence under the plea of set-off; second, that the note ought not to have been received in evidence, because it was the joint and several note of John Johnson and L. W. Maddox; third, that interest was improperly allowed on the note from its date; and fourth, that a judgment for costs was improperly rendered against the plaintiff.

This court has repeatedly recognized the rights of an assignee of a chose in action, and our statute on the subject of assignment is explicit. The supreme court of New York, in the case of Andrews v. Beecher, 1 Johns. Cas. 411, went so far as to say that release by the obligee of a bond, after an assignment of it, was a nullity and not to be regarded. The decision just quoted conforms to the English decisions. See Legh v. Legh, 1 Bos. & P. 448. The assignee is the real party in interest. Gray, after he acquired the note from Hyde by assignment, stood precisely in his place, and succeeded to all his rights. What was originally a debt due from Johnson to Hyde became, by virtue of the assignment, a debt due from Johnson to Gray, and created the mutual indebtedness contemplated by the statute of set-off; a debt existed on each side, and a simultaneous cause of action accrued to each party. The right of the assignee to avail himself of a set-off in a case precisely like the present, has been recognized by the supreme court of South Carolina (see Compty's Adm'r v. Aiken, 2 Bay, 481), and also by the supreme court of New York, in the case of Tuttle v. Bebee, 8 Johns. 152. If it, however, appeared from the record, that Gray acquired the note by assignment subject to the death of Johnson, he could not plead it as a set-off, according to the case of Edwards' Adm'r v. Taylor, 20 Johns. 137.

But it was objected, secondly, that the note being joint and several, the liability of Johnson and Maddox could not. on that account, be received in evidence. I cannot perceive any force in this position. The note being the joint and several note of Johnson and Maddox, it was competent for Hyde, to whom it was originally executed, and for Gray, after its acquisition by assignment, to sue Johnson alone, or to sue Johnson and Maddox. It was entirely optional with the holder of the note to proceed jointly or severally against the makers. Gray has chosen to hold Johnson individually liable, and he had a right to do so.

Third, the propriety of the allowance of interest on the note offered as a set-off, from its date, is questioned. The question then occurs, what was the intention of the parties at the time of the execution of the note, upon a fair and sound interpretation of it? It is conceded, that upon a promissory note payable on demand, without any stipulation in relation to interest, interest does not accrue until demand made; and in such case, if no demand be made prior to the institution of the suit, interest will begin to run from that time, the institution of the suit being considered a demand. Why, it may be asked, if it had been the intention of the parties at the time of the execution of the note that interest should not accrue until a demand made, did they not so frame the note? They did not do so, but expressly stipulated for interest at the rate of ten per cent. per annum until paid. The parties could have meant nothing else, but that this note should bear interest from the day of its execution. To say that this note only bears interest from a demand, would be rejecting that portion of the note which stipulated for the payment of interest; and this is the rule of decision in the state of Kentucky. See Whitton v. Swope's Adm'r, 1 Litt. 160, a case directly in point.

The fourth and last point that I shall notice calls in question the propriety of the judgment for costs in the circuit court. The

twenty-eighth section of the act concerning executions and administrations provides, that if any person shall bring an action against any executor or administrator within one year, such person, although he may obtain judgment, shall not recover any costs of suit. Terr. Dig. p. 58, § 28. A plea of set-off in bar, it is true, is considered in the nature of a cross action, so far as it regards the proof; but it cannot in this, nor in any other case, be considered as the institution of an action, and is consequently not embraced by the provisions of the twenty-eighth section of the administration law. Gray was not a voluntary litigant of his claim. He was sued, and having succeeded in his defence, and recovered a judgment by virtue of a statute equally obligatory upon this court with that just referred to, he is entitled to costs, as a necessary consequence of the judgment. Judgment affirmed.

PATENT (VOWELL v.). See Case No. 17,-022.

Case No. 10,795.

The PATERSON.

[3 Ben. 299.] [1]

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

COLLISION—AT PIER BETWEEN STEAMBOATS—LOOKOUT—COSTS.

1. A steamboat, whose berth was on the north side of a pier, was unable to get into it, and came to the end of the pier, and, for the purpose of making a landing, was backed down across a ferry slip on the south side of the pier, without any one on her stern to look out, and was run into by a ferryboat, which was coming into the ferry slip: *Held*, that the steamboat was in fault, in thus backing without keeping at her stern a proper lookout, and without paying attention to the approach of the ferryboat.

2. The ferryboat was also in fault, in not stopping sooner, and in not approaching with greater caution, especially as her pilot saw that there was no one on the steamboat's deck noticing the ferryboat's approach.

3. The damages must be divided, and the libellant should have his costs.

[Cited in The Mary Patten, Case No. 9,223; Vanderbilt v. Reynolds, Id. 16,839; The Hercules, 20 Fed. 205.]

In admiralty.

C. M. Da Costa, for libellant.

W. J. A. Fuller, for claimants.

BLATCHFORD, District Judge. The libellant, owner of the steamboat Thomas E. Hulse, brings this suit against the steamboat Paterson, to recover for the damages done to the former vessel by a collision, which took place between them on the morning of the 15th of August, 1867, about eight o'clock. The bow of the Paterson came in contact with the stern of the Hulse, and broke her stern-post, and otherwise damaged her. The Paterson was a ferryboat, plying on a regular ferry between Christopher street, New York, and Hoboken. The Hulse plied to Fort Lee. Her regular landing place was on the north side of the pier at the foot of Christopher street. The ferry slip of the Paterson was in the basin next south of that pier, the pier projecting into the river some distance beyond the mouth of the ferry slip proper, which latter was formed by racks. The Paterson was on a trip from Hoboken to New York, bound for the said slip. The Hulse had arrived from Fort Lee, with passengers, and, not being able, in consequence of the presence of other vessels, to effect a landing, either on the north side of the pier, or at the end of it, worked herself around the south corner of the end of the pier, with a line out thereto, for the purpose of trying to make a landing, with her bow in, at the south side of another steamboat, which lay at the south side of the pier. This manœuvre of hers was seen by the pilot of the Paterson at a distance of about 600 yards, and he immediately slowed his engine to half speed, and proceeded towards his slip. It is claimed, on the part of the Paterson, that her pilot saw the line referred to let go, and saw the Hulse move off in a southerly direction, inside of the slip, until her stem had reached a point to the eastward of the western end of the southerly ferry rack, and until he could see a clear path on the port side of the Hulse, for the Paterson to go into the ferry slip. Before that time, the Hulse, on the evidence, had been going first ahead and then backward in the slip, with the design, in fact, of effecting a landing at the south side of the steamboat which lay at the south side of the pier, and with no other design. In pursuance of that design, and while the Paterson was still running ahead at half speed, and when, as claimed on the part of the Paterson, the Hulse was in such a position that the pilot of the Paterson thought that the Hulse was intending to make a landing at a pier that lay south of the southerly ferry rack, the engine of the Hulse was started to move the boat backwards, her stern being towards the Paterson, and the pilot of the Paterson, seeing her coming backwards towards him, immediately stopped and reversed his engine, and it had made two or three revolutions back before the collision, so that the Paterson was going ahead very little, if she was not about dead in the water, at the time of the collision. When the engine of the Hulse was thus started to move her backwards, no attention was paid by her to the approaching Paterson, and no lookout was stationed aft, to see whether something might not be in her way, but she continued to back, until a passenger on board of her notified her engineer that the Paterson was right under the stern of the Hulse, whereupon he stopped the backward motion of the engine, after it

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

had been working back about five turns, and started it in the other direction, and it had turned ahead about three-quarters of a turn, and was turning ahead, at the time of the collision, but the backward motion of the Hulse in the water had not been stopped.

On the above facts, the Hulse was in fault, in backing without keeping a proper lookout at her stern, and without paying attention to the approach of the Paterson. But I think that the Paterson was also in fault, in not sooner stopping and reversing. Notwithstanding the appearance the Hulse may have presented to her pilot, the Paterson ought not to have kept on at half speed as long as she did. The manœuvres of the Hulse were such as to call for greater caution on the part of the Paterson than she exhibited, particularly as her pilot says that he could see no one on the the deck of the Hulse noticing the approach of the Paterson.

When the damages are ascertained by a reference, they must be divided. The libellant will be entitled to costs.

Case No. 10,796.

PATERSON v. EVANS.

[3 Wall. Jr. 215; 20 Leg. Int. 28.]

Circuit Court, W. D. Pennsylvania. Nov., 1856.

PRACTICE—EJECTMENT.

A judgment in ejectment by default for want of a plea, without a rule to plead and thus putting the defendant in default, is irregular; and this whether the suit be brought in the way usual in the state courts of Pennsylvania, and now allowed by rule of court, in the federal court of the Third circuit, or whether it be brought in the English way formerly used and still allowable in this court.

This was a motion to set aside a judgment by default in ejectment; the case being thus: By a statute of 1806, the legislature of Pennsylvania abolished the common law mode of instituting actions in ejectment, and substituted a writ of summons in a certain form; ordering, also, a declaration to be filed. This act requires the plaintiff to file on or before the first term, a description of the land, and number of acres claimed. It provides also, that the defendant shall enter his defence (if any he hath) before the next term. A supplementary act of 1807, provides that the sheriff may serve the writ on persons found in possession and not named in the writ, who may be made parties by the prothonotary on return of the writ; and also, that in case of any of the defendants not appearing, on affidavit by the sheriff of service of the writ, the plaintiff may have judgment by default. By the rules of this court, a case cannot be set for trial without an issue. If the plaintiff wishes to set the cause down for trial, he may either order the clerk to enter the plea, and thus set the case at issue, or he may rule the defendant to plead, and have a judgment in default of plea. In this state of the law and rules, the plaintiff, James Paterson, had brought ejectment against Elihu Evans, in the form prescribed by the statute of Pennsylvania; that form or the English one, being allowed in this circuit, at the plaintiff's option. The suit had been brought to May, 1855. The defendants appeared by counsel, but entered no plea. The plaintiff's counsel ordered the case on the trial list for November, 1856. When the list was called, Mr. Williams, for defendant, moved to have the case struck off the list, because, not being at issue, it was improperly, under the rules, set down for trial. The court (Irvin, J.) granted the motion. Mr. Shaler, for the plaintiff, then moved for judgment by default, which the same court also granted. Mr. Williams now moved to set aside this judgment as irregular, contending that there could be no judgment without a default. Mr. Shaler, on the other side, arguing that the defendant, by not pleading at the second term, as the act of 1806 required him to do, was in default, and that the judgment was regular.

GRIER, Circuit Justice. In our circuit, the plaintiff may bring his suit either in the old-fashioned English way, or in that practised in the state courts. If he adopt the latter way, he must conform to it in all respects. He cannot have a rule on the tenant to appear and plead, and confess lease, entry and ouster, and enter an office judgment in six weeks in case of default, as he might by the old mode. If the defendant does not appear, the plaintiff may have a judgment by default, as provided for by the act of assembly. If the defendant appears, he has till the next term to enter his plea, by the act of 1806, and although the act of 1807 might seem to admit of a judgment in default of appearance at the first term, the courts of Pennsylvania have decided that the two acts must be construed together, and that the judgment cannot be entered for such default till the second term. In Vanderslice v. Garven, 14 Serg. & R. 273, it is said, "The plaintiff could take no step except filing his description, until the second term. The defendant was not bound to do anything till the second term." Traer v. Bowman, 3 Pen. & W. 70, which says that the judgment "must be founded in an affidavit of service, and must be at the term when the default was made"—must, therefore, mean the second term, otherwise, between the two decisions, the plaintiff could have no judgment at all under the act. But the act of assembly does not provide that if the defendant has appeared, but has not entered his plea at the second term, that plaintiff may on motion have judgment for want of such plea without putting defendant in default by a rule to plead by a certain time. If there be no plea the plaintiff must proceed as in other cases instituted by summons. He must enter a rule to plead or judgment. If this rule be not complied

with, he may demand judgment for want of plea as in other cases. We have no special rule in this court providing any peculiar practice in this respect in actions of ejectment. It is the practice in the district court of the state, in this county, for the plaintiff's attorney to order the plea of "not guilty" to be entered by the clerk, in order to put the case at issue. If any plea in abatement was intended, it should have been entered by the second term at least, if not at the first. The defendant, therefore, has no right to complain if the only plea he can enter be entered for him. So much is it considered a matter of mere form, that a verdict and judgment are valid in ejectment where there is no plea.

The plaintiff has not pursued either of the courses, usual in this court; I mean has neither directed the clerk to enter a plea, nor himself ruled the defendant, but having set the cause for trial without an issue, he has obtained a judgment for want of plea, without any rule to put the defendant in default. This is irregular, and the judgment must be set aside. The plaintiff can always avoid the delay incident to proceeding by summons according to the state practice, if he pursues the old common law form of serving a declaration, and ruling the tenant to plead and confess leave, entry and ouster. Judgment set aside.

[At the trial of this case there was a judgment in favor of the plaintiff, which was affirmed by the supreme court, where it was carried on writ of error. 4 Wall. (71 U. S.) 224.]

Case No. 10,797.

The PATHFINDER.

[4 Wkly. Notes Cas. 528.]

District Court, E. D. Pennsylvania. Dec., 1877.

MARITIME LIENS—PRIORITIES—SUPPLIES.

[As between supply men, who all obtain decrees before the sale of the vessel, he who first obtained the seizure of the vessel, is entitled to priority over others who afterwards filed intervening libels.]

Motion for distribution.

On September 3d, 1877, Casselberry filed a libel for supplies against the schooner. The court thereupon issued a writ of attachment, which was duly returned "Attached," etc. Pending the writ another libel was filed for supplies, and two for wages. These were libels of intervention. None of the claims were contested. Upon September 28, an application having been made for the sale of the vessel, and having been refused, the proctor for the original libellant then moved for and obtained a decree pro confesso, and an order of appraisement and sale. A few days afterwards, but before the sale, the intervening libellants obtained decrees in their favor for the amount of their several claims. The fund in court was not sufficient to pay all the decrees. The original libellant claimed the whole fund.

The motion for distribution was three times argued, and at the second argument the court decided that the wages of the mariners were to be paid first. The question of priority between the decrees for supplies was now argued.

Henry Flanders, for the original libellant: It is the established rule in England that the superior diligence of the first suitor will be rewarded by payment in full, in such cases. The Saracen, 6 Moore, P. C. 56; The Clara, Swab. 1; The Gustaf, 6 Law. T. (N. S.) 660; Coote, Adm. 134, 135; Macl. Shipp. c. 15. This doctrine of prior petens has been adopted in the United States. Woodworth v. Insurance Co., 5 Wall. [72 U. S.] 87. Priority of seizure entitles the libellant to priority in payment. The Globe [Case No. 5,483]; The Triumph [Id. 14,182].

C. H. Howell (with whom was J. Warren Coulston), for the intervening libellant: The doctrine of prior petens is inapplicable. There are no cases in England where all the decrees were obtained before the sale, as in this case, and that makes a material difference.

CADWALADER, District Judge (orally). I am not willing to adopt the English decisions. They seem to proceed on the doctrine that the court of admiralty is not a court of equity in regard to the marshalling of assets.

The Desdemona, Swab. 159, is an English case, where the court made a ratable distribution between judgments obtained at different dates. In Woodworth v. Insurance Co., supra, the first suitor had established the facts on which the recovery of both was based. Here there was no contest. The libel of intervention was proper and regular, and is entitled to all benefits to be derived from the writs of attachment and sale. Rev. St. § 921; The Young Mechanic [Case No. 18,181]; Salmon Falls Manuf'g Co. v. The Tangier [Id. 12,267]; The R. P. Chase [Id. 12,099].

THE COURT. The question is, does the prior seizure entitle the material man to priority in payment? The cases in Blatchford seem to indicate that it does. The case of The Globe, supra, merely decides that the lien of the suitor for supplies was divested by the sale of the vessel under process of the state courts. The lien for supplies was held paramount to that of forfeiture, which depends on seizure, in The St. Jago de Cuba, 9 Wheat. [22 U. S.] 416. C. a. v.

THE COURT. After consideration I must decide in favor of the original libellant, but with great doubt. The case of The Globe is not applicable, but the decision of Judge Betts in The Triumph [Case No. 14,182] is, and is approved by Judge Nelson.

The case rests on very narrow grounds. The lien, as it is loosely called, for supplies is a peculiar one, dependent on the justice-seat or forum, and merely gives the plaintiff a right of seizure. When he has exercised this right, the court will not keep the case open for other claims of like nature, which may come in from all parts of the world, but must award the fund to the first suitor.

Decree accordingly.

PATHFINDER, The. See Cases Nos. 646 and 647.

Case No. 10,798.

PATLEN v. The ILLINOIS.

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

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

TUG AND TOW—INJURIES TO TOW INCIDENT TO NAVIGATION OF TOW BY A HAWSER.

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

The libel in this case was filed by [George W. Patlen] the owner of the canal boat John W. Williams, to recover damages occasioned to her by a collision, which occurred while she was being towed from Albany to New-York, by the steamboat. The court below held that the steamboat had been guilty of no negligence, and dismissed the libel [case unreported], from which decree the libelant appealed.

Mr. Dimmick, for appellant.

Mr. Van Santvoord, for appellees.

NELSON, Circuit Justice. The question whether the injury to the tow was occasioned by the improper navigation of the tug was one of fact upon the proofs, and we cannot say that the conclusion arrived at by the court below is not fairly sustained, or that the tug was in fault. The injury seems to have happened from dangers incident to the navigation of a tow by a hawser.

Decree affirmed.

PATON, Ex parte. See Case No. 6,322.

PATON (NATIONAL SCHOOL FURNITURE CO. v.). See Case No. 10,050.

Case No. 10,799.

PATON v. RENNIE.

[Cited in Day v. New England Car Spring Co., Case No. 3,687. Nowhere reported; opinion not now accessible.]

PATON, The JUNIATA. See Case No. 7,584.

Case No. 10,800.

PATONS et al. v. LEE.

[2 Cranch, C. C. 646.][1]

Circuit Court, District of Columbia. April Term, 1826.

CLERK OF COURT — HONEST ERROR IN INDORSING EXECUTION AS TO AMOUNT DUE—CONFIRMING OFFICE JUDGMENT.

1. The clerk of the circuit court of the District of Columbia for the county of Alexandria, is not liable for the honest error of judgment of his deputy, in indorsing, upon an execution, the amount upon payment of which the execution was to be discharged, if no minutes or instructions to the contrary were given to the said clerk or his deputy; if the deputy was a person of good understanding and correct demeanor, and capable of performing with propriety and correctness the duties of a deputy-clerk; if, in issuing the execution, and making the indorsement thereon, he exercised honestly his best judgment as to the nature and terms of the judgment which ought to have been entered up in the case; and if the clerk has been guilty of no negligence in superintending his deputy in the discharge of the duties of his office in issuing the execution.

2. It is not necessary that the court should do any act to confirm an office-judgment. If not set aside it becomes the judgment of the court.

Action upon the case. The declaration states that the plaintiffs [Patons and Butcher] in November, 1818, recovered judgment, in this court, against John W. Bronaugh, and George Johnston, his appearance-bail, for $1,411.10 and costs, and that by a memorandum at the foot of the judgment it was directed to be discharged by the payment of $705.55 with legal interest thereon from the 5th of September, 1809, till paid, as appears by the record thereof. That the defendant [E. J. Lee] being clerk, &c., on the 20th of January, 1819, issued a ca. sa. upon that judgment, but negligently instead of issuing the same for $1,411.10 and costs, together with a memorandum on the execution, expressing that the said execution (costs excepted) was to be discharged by the payment of $705.55 with legal interest thereon from September 5th, 1809, till paid, in conformity with the said judgment and memorandum, issued the said execution for $1,411.10 and costs, together with a memorandum thereon expressing that the said execution (costs excepted) was to be discharged by the payment of $705.55, with legal interest thereon from the 5th of September, 1809, till the 1st of June, 1812, and thus then and there omitted to mention and include, in the said memorandum, the interest from the 1st of June, 1812, till paid, as he ought to have done, whereby the plaintiffs say they have lost the same, amounting to $284.52, for they aver that the said sum of $705.55 was not paid till the 20th of February, 1819; and they aver that at the time of the issuing and service of the said execution the said John W. Bronaugh was in good credit and able to pay the whole of

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

the said debt and interest, but has since become totally insolvent; and that the said George Johnston also has become entirely insolvent, so that the said sum of $284.52 is entirely lost to the plaintiffs; to their damage $800. The defendant pleaded "not guilty," and upon the trial of the issue at November term, 1825, Mr. Taylor, for the defendant, contended that there was no judgment to warrant the original execution against Bronaugh. There was only an office-judgment, which was not confirmed by the court, and entered as of the last day of the term.

By Act Cong. March 3, 1801, § 3 (2 Stat. 115), this court is to possess and exercise the same powers and jurisdiction, civil and criminal, as were then possessed and exercised by the district courts of Virginia; and this court has adopted the same practice. By Act Va. Dec. 19, 1792, p. 111, § 21, it is enacted, "that in all actions which shall be brought upon any bond or bonds for the payment of money, wherein the plaintiff shall recover, judgment shall be entered for the penalty of such bond, to be discharged by payment of the principal and interest due thereon, and the other costs of suit, and execution shall issue accordingly." By Act Va. Dec. 12, 1792, p. 80, § 42, respecting the district courts of that state, it is enacted, that "all judgments by default for want of an appearance or special bail, or pleas, as aforesaid, and nonsuits or dismissions, obtained in the office, and not set aside on some day of the next succeeding court, shall be entered by the clerk as of the last day of the term, which judgment shall be final in actions of debt founded on any specialty bill or note in writing ascertaining the demand, unless the plaintiff shall choose in any such case to have a writ of inquiry," &c. No final judgment can be entered in the office. It does not become a judgment of the court unless entered in the records of the court as a judgment of the court.

Mr. Hewitt, contra, for the plaintiffs, contended that it is not necessary that the court should do any act to confirm office judgments, nor to sign any order confirming them. They are valid if not set aside on some day of the next succeeding court. It has not been the practice to enter the office-judgments on the court's docket.

(Upon inquiry it appeared that it was not the practice, until after November term, 1818, to enter the office-judgments on the docket of the court on the last day of the term.)

THE COURT (MORSELL, Circuit Judge, contra,) was of opinion, that it was not necessary that an office-judgment should be entered upon the docket of the court on the last day of the term, or that the court should do any act to confirm the office-judgments; but that, if not set aside during the first term after the judgment in the office, it becomes the judgment of the court, and is to be entered, by the clerk, as of the last day of that term, such being the express words of the act.

Mr. Hewitt, for plaintiff, prayed the court to instruct the jury, that it is not necessary for him to prove the defendant guilty of gross negligence.

Mr. Taylor, for defendant, contra, cited Pitt v. Yalden, 4 Burrows, 2060; Jenkins v. Waldron, 11 Johns. 114; Stephens v. White, 2 Wash. [Va.] 212.

THE COURT (THRUSTON, Circuit Judge, absent,) refused to give the instruction, because it was abstract; but afterwards, upon a statement of the evidence, gave an instruction in favor of the defendant, which was reduced to writing, but is lost or mislaid.

The jury, however, found a verdict for the plaintiff, and $400.22 damages.

But THE COURT granted a new trial, on the ground that the verdict was against the law as laid down by the court.

The cause now came on again for trial upon the general issue, and THE COURT (THRUSTON, Circuit Judge, absent), still adhered to its former opinion, and stated it to be in substance, that if the jury should be of opinion, from the evidence, that Mountjoy Bailey, the deputy-clerk, was of competent skill and knowledge to discharge the duty of deputy-clerk, and exercised faithfully and honestly his best judgment in making the indorsement, the defendant, the principal clerk, is not liable for the error of his deputy.

The plaintiff's counsel took a bill of exceptions, which stated that, on the trial of the issue in this cause, the plaintiff, to support the issue on his part, [2] gave in evidence to the jury the record of proceedings in the action against John W. Bronaugh, and the ca. sa. issued against him and George Johnston, his appearance-bail, dated January 20, 1819, with the indorsement thereon in these words: "Memorandum. This execution (costs excepted) is to be discharged by the payment of $705.55, with legal interest thereon, from the 5th of September, 1809, to the 1st day of June, 1812." And also the bond of the said Bronaugh to the said Patons and Butcher, upon which the said judgment was rendered; the condition of which was, that he should pay them $705.55, with legal interest from the 5th of September, 1809, on the 1st day of June, 1812. Also the forthcoming bond taken under the said execution, and the notice and judgment and execution thereon, dated the 30th of April, 1819, on which the money called for thereby was made and paid over to the plaintiff's attorney. And further proved, that the defendant was clerk of this court when those executions were issued, and up to the time

[2] Mr. Patons, one of the plaintiffs, had departed this life since the commencement of the action.

of the trial. That Brobaugh and Johnston were both insolvent; the former having been discharged under the insolvent act on the 20th of November, 1820.

The defendant then proved, that the executions and forthcoming bond aforesaid, were all delivered to the plaintiff's attorney, who obtained judgment on that forthcoming bond, dated June 18, 1819. That the execution of the 20th of January, 1819, had been issued by Mountjoy Bailey, who was then the defendant's deputy; and that in issuing that execution, he had examined the record and bond, and had issued the execution according to his construction of the true interpretation of the said bond, and of the condition thereof. The defendant also adduced evidence to prove, that the said Mountjoy Bailey was a person of good understanding and correct demeanor, and capable of performing with propriety and correctness the duties of a deputy-clerk. It was admitted, that neither the plaintiffs nor their attorney had given any instructions to the clerk or his deputy, as to the mode of entering up the judgment, or awarding the execution; and that the execution had been issued and delivered to the plaintiff's attorney under general orders from him, before any record at large had been made up in the suit. The defendant further gave evidence to show, that on the night of the 25th of January, 1819, his arm had been broken, by which accident he had been confined to his house all the residue of that month, and the whole of the months of February and March. That about 220 executions had been issued on the judgments of November term, 1818, all dated on the 20th of January, 1819. That the issuing and docketing of those executions occupied at least two weeks after the 20th of January, 1819, and the execution in this case being upon a forthcoming bond, was among the last issued.

On which evidence, the defendant's counsel prayed the court to instruct the jury that the same was not sufficient in law, if believed by the jury, to charge the defendant in this action, or to subject him to damages for the error in the execution of the 20th of January, 1819.

Which instruction THE COURT refused to give, but instructed them, that if they should believe the facts to be as above stated, and should also believe from the evidence aforesaid, that there were no minutes nor instructions furnished to the clerk, by the plaintiffs, or their attorney, at the time the said short entry of the judgment was made, and that the said short entry, and the other docket entries, and the said bond, were the guides by which the said deputy-clerk issued the said execution, and made the said indorsement thereon; and that in issuing the said execution, and in making the said indorsement thereon, he exercised honestly his best judgment as to the nature and terms of the judgment which ought to have been entered up in the case; then his error in misunderstanding the inference at law, which entitled the plaintiff to interest until the time of payment, is not such a want of skill, or such negligence as will charge the defendant in this action.

The defendant further prayed the court to instruct the jury, that if, from the evidence so as aforesaid given, they should be of opinion that the mistake charged in the declaration in issuing the execution therein mentioned, was committed by Mountjoy Bailey, the deputy of the defendant, duly appointed and sworn as such, and that the said Mountjoy Bailey was, at the time of issuing the said execution, competent to the correct discharge of the duties of the said office, and that the defendant has been guilty of no neglect in superintending the said deputy in the discharge of the duties of his said office in issuing the said execution; then the defendant is not liable to the plaintiffs in this action, for the said mistake of his said deputy. Which instruction THE COURT gave as prayed.

To which instructions the plaintiffs' counsel excepted.

Verdict for the defendant.

The plaintiffs' counsel moved the court for a new trial, and cited Russell v. Clayton, 3 Call, 37, 41, and Stuart v. Madison, 1 Call, 417, side p. 481. (THRUSTON, Circuit Judge, absent.)

THE COURT continued the cause to November term, 1826, for consideration, and at that term (November 16, 1826,) refused to grant a new trial. (THRUSTON, Circuit Judge, absent.)

Case No. 10,801.

The PATRAS.

[Blatchf. Pr. Cas. 269.] [1]

District Court, S. D. New York. Dec. 10, 1862. [2]

PRIZE—ATTEMPT TO VIOLATE BLOCKADE—CARRYING CONTRABAND ARTICLES.

Vessel and cargo condemned for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured at sea as prize, by the United States steamer Bienville, May 27, 1862, and were brought into this port for adjudication. A libel was filed July 11, 1862, against the vessel and cargo, and, on return by the marshal to the monition of due service thereof, no appearance being given for the cargo, a decree of default was regularly entered against that; and, a claimant having intervened in behalf of the vessel, and a claim therefor having been duly filed July 29, 1862, the cause was brought to hearing on that issue, and was

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

[2] [Affirmed in Case No. 10,802.]

argued for the libellants, the claimants appearing in court without contesting the suit further. Intermediate the capture and the final hearing, portions of the cargo, consisting of military equipments and supplies, were, by an interlocutory decree of the court, appraised, and, on application in behalf of the United States, were delivered over to the use of the government. The vessel had a British registry, and her shipping articles, dated April 2, 1862, were for a voyage, not to exceed twelve months, from London to Bermuda, and any other port in the West Indies, North and South America, or the Mediterranean, and back to a final port of discharge in the United Kingdom or continent of Europe, between the Elbe and Brest. It appears from an indorsement on the articles that they were deposited by the vessel at the British consulate in Havana, May 21, 1862. No instructions, manifest, bill of lading, or other shipping papers were delivered from the vessel to the captors, denoting the time she left Havana, or the direction or cargo she took thence, or her or its destination; and the shipping agreement plainly leaves ample authority to her master to manage the voyage at his discretion. Some important papers of that description were, after the capture, found on the vessel, but they are not of a character to afford a clear account of the lading, or of its destination or owners. The ship's log is equally void of perspicuity and certainty in its statements. The entries are made in a common sized pocket memorandum book, ruled and bound in flexible leather. The heading is: "Left Falmouth for Madeira." The entries are in paragraphs for each consecutive day, are written quite across two pages of the book, beginning April 13, 1862, and terminating May 9th, and were apparently written at the same time, and with the same ink, and only one stoppage of the vessel is stated in that log. The vessel is alleged to have coaled at Funchal, Madeira, April 19th. The official log enters the commencement of the voyage as "April 3, 1862," and the nature of it as "West Indies and Mexico." This log states that the ship was at St. Thomas May 10th, taking in coal and had a disturbance on board among the crew, and also another in the night at Havana, May 18th. No mention is made in either log of any other port or place at which the vessel touched on her outward voyage, and there is no entry in either log respecting the vessel, her cargo, or her proceedings, after the 21st of May, 1862.

The master testifies that the vessel was bound to St. John, New Brunswick, on the voyage upon which she was taken, and that it began at London and was to have ended in the United Kingdom, or on the continent of Europe. The carpenter states the voyage to have been undertaken according to the shipping articles, and that he did not know that St. John was contemplated to be included within it, except that he learned so from the master at Havana. The master further asserts that he was wholly ignorant of the lading of the vessel, that he did not know what the various boxes, casks, etc., on board of her contained, and that the same cargo was on board at the time of her capture. The carpenter and the cook, or the seaman, say that they understood that a large quantity of powder, in casks, and of muskets or rifles, in boxes, were shipped for the voyage in England, and the carpenter also says that he understood that the vessel was intended to make the port of Charleston. The master makes a widely differing estimate of the nearness of the vessel to Charleston when captured, from that made by the carpenter and the seaman; the master alleging that she was 30 miles from the bar, the carpenter that she was 10 or 12 miles, and the cook or seaman that she was 8 or 10 miles. No affirmative fact is stated by any one of the witnesses on his examination, going to mitigate the pressure of the presumptive evidence, showing the culpability of the voyage as one plainly arranged with intent to violate the blockade at Charleston, and also to introduce into that port articles contraband of war. All three of the witnesses admit their knowledge of the existence of the war and of the blockade of Charleston when the voyage was undertaken, and at the time of the approach of the vessel to the port, and no suggestion is offered in proof justifying her position when arrested, directly in the vicinity of the port and heading for it.

A decree of condemnation and forfeiture must be entered because of the intention and endeavor of the vessel to run the blockade of Charleston.

This decree was affirmed, on appeal, by the circuit court, November 14, 1863 [Case No. 10,802].

Case No. 10,802.

The PATRAS.

[Blatchf. Pr. Cas. 664.] [1]

Circuit Court, S. D. New York. Nov. 14, 1863. [2]

PRIZE—ATTEMPT TO VIOLATE BLOCKADE.

Decree of the district court, condemning vessel and cargo for an attempt to violate the blockade, affirmed.

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

In admiralty.

NELSON, Circuit Justice. This steamer, with a cargo consisting of powder, arms, ammunition, coffee, and quinine, was captured off Charleston harbor, South Carolina, May 27, 1862, by the United States steamer Bienville. The proofs are full that she was captured while attempting to break the blockade of the port of Charleston, and that

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

[2] [Affirming Case No. 10,801.]

she attempted to escape, but was pursued and captured. The vessel was from Hull, England, and was ostensibly bound, on the voyage on which she was taken, from Havana to St. John's, N. B. The court below condemned the vessel and cargo. [Case No. 10,801.] Most of the cargo has heretofore been sold or appraised and delivered to the government. The decree of the court below is affirmed. [Case No. 10,801.]

Case No. 10,803.

PATRICK v. CENTRAL BANK et al.

[1 Dill. 303.][1]

Circuit Court, D. Nebraska. 1870.

BANKRUPTCY—FRAUDULENT CONVEYANCE—REMEDY.

Where real property purchased with firm means stands in the name of one of the partners, and the same is conveyed by him in fraud of the bankrupt act [of 1867 (14 Stat. 517)], the assignee of the firm may bring a bill to recover the property.

This is a bill by the assignee in bankruptcy of Mackoy & Co. to have declared fraudulent a certain conveyance of real estate made to, or for the benefit of, the defendant, by J. C. Mackoy (one of the firm) and his wife. It is alleged in the bill that the property was purchased by J. C. Mackoy "with money beloging to the firm;" that the deed was taken in the name of his wife; that Mackoy and wife made the conveyance to the bank, or to its president, for the bank, in payment of a debt due to the bank by the firm, and that such conveyance was made and received in fraud of the bankrupt act, the bill duly alleging the facts which in law would show such fraud. There is no allegation that the individual members of the firm have been declared bankrupts or that the plaintiff is their assignee, or that they have any separate property or separate creditors. The demurrer to the bill presents the point that the plaintiff, as the assignee of the firm, has no right to property sought to be reached by the bill, and no right to have inquired into the bona fides of the conveyance to the bank; that this is a matter which alone concerns the individual creditors of Mackoy.

Mr. Ambrose, for plaintiff.

Mr. Redick, for defendant.

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

DILLON, Circuit Judge. This is a bill by the assignee of the firm of Mackoy & Co. to have declared fraudulent a certain conveyance of real estate made for the benefit of the bank, by one of the members of the firm and his wife. The object of the bill is to obtain the property for the benefit of the creditors of the firm. The objection taken by the defendant, and the only one now to be considered is, that since the property sought to be reached was the individual property of one of the partners, the plaintiff, as the assignee of the firm, can have no right to the relief sought.

If the allegations of the bill be true, the demurrer is not well taken. The complainant alleges that the property in question was purchased "with money belonging to the firm of Mackoy & Co." If so, then in equity the firm would own it, or have an interest in it, and it would not, as against the firm or their creditors, be the separate or individual property of Mackoy. Assuming these to be the facts, the interest of the firm would pass to the assignee, and he could maintain the bill, although Mackoy has never been individually proceeded against or adjudged a bankrupt. The demurrer is, therefore, overruled.

Whether, on the assumption that the property was the individual property of Mackoy, the assignee of the firm could, in any event, reach it, and if so, what ought to be alleged and shown, to entitle him to do so, are points that need not be considered, since the bill seems not to have been framed upon this basis, but on the one above stated. Demurrer overruled.

[For a bill to enforce the lien of the United States for taxes upon the distillery property which belonged to Mackoy & Co., see Case No. 15,696.]

(As to rights of individual and firm creditors, see Downing's Case [Case No. 4,044]).

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

Case No. 10,804.

PATRICK et ux. v. SHERWOOD.

[4 Blatchf. 112.][1]

Circuit Court, N. D. New York. Oct., 1857.

TAXATION—TAX TITLE—PURCHASE BY TENANT FOR LIFE—REVERSIONER—EJECTMENT—WASTE—FORFEITURE.

1. A tenant for life of real estate, is bound, as between himself and the owner of the reversion, to pay the taxes on the real estate.

[Cited in Peirce v. Burroughs, 58 N. H. 304; Smith v. Blindbury, 66 Mich. 323, 33 N. W. 391.]

2. If the tenant for life neglects to pay them, and, upon the sale of the real estate for their non-payment, obtains a conveyance of it to himself, he will not, after the determination of his life estate, be allowed to claim thereby a title in fee against the reversioner, and thus take advantage of his own wrong.

3. An owner of the reversion to real estate cannot, by ejectment, recover possession of it, upon the ground that the owner of a life estate in it has forfeited that estate by the commission of waste; although he could, in an action of waste, at common law and under the English statutes, have recovered the place or thing wasted.

4. By the law of New York (1 Rev. St. p. 739, § 145), a tenant for life does not, by conveying in fee, forfeit his life estate.

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

5. The vested estates, interests and rights saved by 1 Rev. St. p. 750, § 11, are such as vested by a forfeiture incurred before the statute took effect; and a conveyance in fee made by a tenant for life after the statute took effect does not work a forfeiture of his life estate.

This was an action of ejectment [by Matthew Patrick and wife against Elijah W. Sherwood]. The case was tried before the court, without a jury, under a stipulation that the finding of the court on the evidence should be put into the form of a special verdict. The facts are sufficiently stated in the opinion of the court.

HALL, District Judge. The defendant claims title under John De Mott, and he claimed the premises in controversy, at least in the first instance, as the purchaser thereof under a judgment and execution against Matthew Patrick, one of the plaintiffs. Matthew Patrick had title to the premises only as tenant by the curtesy initiate, the title in fee to the premises sold being vested in his wife Deborah, the other plaintiff.

The defendant also claims title under a tax sale and a conveyance to De Mott, his immediate grantor; but, as De Mott had an estate for life in the premises in controversy at the time the tax was levied, and was bound, as between himself and the owner of the reversion, to pay the tax, this part of the case may be summarily disposed of. His neglect to pay the tax, and his acts in bargaining for and obtaining a conveyance of the premises upon their sale for its non-payment, could not, under any circumstances, vest in him a title in fee as against the reversioner, after the determination of such life estate by forfeiture or otherwise. It would be a reproach to the law and its administration if he could thus take advantage of his own wrong.

But it is insisted, on the part of the plaintiffs, that the life estate or interest of De Mott was forfeited prior to the commencement of this suit for the following reasons: 1. By his having committed waste by the cutting down and sale of large numbers of pine and other valuable trees; 2. By his having conveyed in fee to the defendant, when he had only an estate for the life of Matthew Patrick; 3. By the committing of waste by the present defendant, in cutting down and selling large numbers of valuable timber trees. Assuming, for the purposes of the legal question, what I think might well be assumed for all the purposes of the present case, that the proof clearly establishes the fact, that the defendant, and De Mott, his immediate grantor, have committed waste upon the premises claimed, the question arises, whether this commission of waste works a forfeiture of the life estate, in such manner as to entitle the plaintiffs to recover in this action.

It is clear that, in an action of waste, the plaintiff may recover the "place wasted," as well as treble damages; and the judgment for the recovery of the place or thing wasted was part of the judgment, in a writ of waste at common law and under the English statutes. But it is insisted, and I think with reason, that the owner of the reversion or remainder cannot recover possession by ejectment, upon the ground that the owner of the life estate has forfeited that estate by the commission of waste. The authorities cited by the plaintiffs' counsel do not show that the action of ejectment can be maintained on the ground of forfeiture for waste. In the cases of Jackson v. Brownson, 7 Johns. 227, and Jackson v. Andrew, 18 Johns. 431, which were most relied on, ejectment was brought against a lessee under a lease which contained a covenant against waste and a clause of re-entry, for a breach of the covenants of the lease, so that the term granted by the lease was determined, and the right of re-entry given, by the very terms of the lease under which the defendant claimed the possession. The practice of inserting covenants against waste, with a clause of re-entry upon a breach of such covenant, is at least some evidence that, without such clause of re-entry, the lessor cannot bring ejectment on the ground that the lessee's estate has become forfeited by the commission of waste; and my impressions are so strong against the plaintiffs, upon this question, that I must, in the absence of any authority to the contrary, hold that the plaintiffs are not entitled to recover in this action on the ground of forfeiture caused by the commission of waste. The case of Robinson v. Miller, 2 B. Mon. 284, appears, from the note in the Digest, to be an authority in point against the plaintiffs upon this question.

It must be conceded that the conveyance in fee made by John De Mott to the defendant would have produced a forfeiture of the life estate, if such conveyance had been made before the change of the law in that respect made by the Revised Statutes of New York. The conveyance was not made before but after those statutes took effect, and it is expressly declared by them (1 Rev. St. p. 739, § 145), that a conveyance made by a tenant for life or years, of a greater estate than he possesses, or can lawfully convey, shall not work a forfeiture of his estate, but shall pass to the grantee all the title, estate or interest which such tenant can lawfully convey. It is, however, insisted by the counsel for the plaintiffs, that this provision does not apply to this case, because the 11th section of the 5th title of the same chapter (1 Rev. St. p. 750) declares that none of the provisions of that chapter, except those converting formal trusts into legal estates, shall be construed as altering or impairing any vested estate, interest or right, or as altering or affecting the construction of any deed or other instrument which took effect at any time before the chapter came into force as a law; and he insists, that the estate of Mrs. Patrick vested before the passage of that act, that her right to the immediate possession of the lands in controversy, upon the making of a conveyance in

fee by the tenant for life, had also vested prior to that time, and that, therefore, her right to take possession upon the making of such conveyance was not taken away by the statute referred to. I am not able to adopt the construction thus contended for. I think the rights saved were such as had vested by a forfeiture incurred before the act took effect as a law; and that a conveyance made after the provision referred to took effect, did not work a forfeiture of the life estate. See Burghardt v. Turner, 12 Pick. 534, 539.

These views dispose of the case and require that there should be a judgment for the defendant.

PATRICK (UNITED STATES v.). See Case No. 16,006.

Case No. 10,805.

The PATRICK HENRY.

[1 Ben. 292.] [1]

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

SHIPPING—BILL OF LADING—SOVEREIGNS AS FREIGHT—DAMAGES—INTEREST.

1. Where British sovereigns were shipped on board a vessel in Melbourne, under a bill of lading by which the ship agreed to carry them to New York, and there deliver them, on payment of £2 freight, and the ship failed to deliver them, and the indorsee of the bill of lading libelled the ship to recover his damages, the only question being as to the rule of damages, *held* that the agreement in the bill of lading was not a promise to pay money, but to transport articles on freight.

2. The value of the sovereigns in the port of delivery might be recovered by the holder of the bill.

3. That value was to be estimated in the currency of the country in which the port of delivery was situated and where the suit was brought, it not having been otherwise stipulated in the contract itself.

[Cited in The Mary J. Vaughan, Case No. 9,217.]

4. The legal tender act (12 Stat. 532) and the decisions under it had no application.

5. Though no freight was strictly earned, as the contract was not fulfilled, yet admiralty courts have power to do substantial justice, which in this case is to make the libellant good for his loss, charging him with the freight.

6. The stipulation for freight was a promise to pay money, and the freight must be reckoned in currency according to our laws, which fix the legal value of the pound sterling in commercial transactions at $4.44.

[Cited in Reiser v. Parker, Case No. 11,685.]

7. The libellant was entitled to recover interest on his damages at seven per cent.

This was a suit brought by Reuben Ross, Jr., against the ship Patrick Henry, in rem, to recover damages for the breach of the following bill of lading: "Shipped, in good order and well conditioned, by James Patrick, in and upon the good ship or vessel called the Patrick Henry, whereof is master for the present voyage Wm. Page, and now riding at anchor in Hudson Bay, and bound for New York, one bag containing ninety sovereigns British sterling, being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid port of New York (the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, excepted), unto order, or its assigns, he or they paying freight for the said goods, £2 sterling in full, with primage and average accustomed. In witness whereof, the master or purser of said ship or vessel hath affirmed to four bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void. (Signed) Wm. C. Page. Dated in Melbourne, Sept. 19th, 1865." The ship upon which this coin had been placed on freight proceeded to New York, and arrived there from Australia in December, 1865. The libellant was the indorsee of the bill of lading, and as the ship failed to deliver the coin according to the terms of the contract, he brought this suit to recover damages for the breach. The only question was as to the true rule of damages, the breach being admitted.

James K. Hill, for libellant.
Hawkins & Cothren, for claimants.

SHIPMAN, District Judge. The libellant in this case claims that he is entitled to recover the market value of the coin at this port at the time it should have been delivered. The claimant, on the other hand, insists that in estimating the damages, the value of the sovereign should be taken at the rate fixed by law for computation in ordinary commercial transactions, the same as if this were a suit to recover the amount of a bill of exchange or other promise to pay. I do not accede to this view. The agreement in this bill of lading is not a promise to pay money, but to transport certain articles on freight. Whether those articles were gold coins, gold bars, gold dust, or gold in any other form of use or ornament, can make no difference. Like every other article placed on freight and covered by a bill of lading, unless delivered according to the terms of the contract of affreightment, their value may be recovered by the holder of the bill. That value is to be estimated in the currency of the country in which the port of delivery is situated and where the suit is brought, unless otherwise provided for in the contract itself. The proof is that these sovereigns were worth in this market, at the time they should have been delivered, $7.05 apiece in our money. Our recent legal tender act and the decisions under it cited at bar have no application to this part of the case

There is another question of trifling importance so far as the amount depending upon

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

it is concerned, which requires to be disposed of; and that is whether any deduction should be made on account of freight. No freight was strictly earned, as the contract was not fulfilled. But admiralty courts have power to do substantial justice between parties, and substantial justice in this case is to make the libellant good for the loss sustained. He is, under this breach of the contract, entitled to the value of ninety sovereigns at the market rate, less two pounds sterling freight money. As the stipulation to pay these two pounds was a promise to pay money at this port, they should be reckoned in the currency of this country, according to our laws. The legal value of the pound sterling in commercial transactions in this country is fixed by act of congress at $4.44. The value of ninety sovereigns at the time of the breach was $634.50. From this deduct two pounds sterling, computed in our money ($8.88), and it will leave $625.62—the principal sum, which the libellant is entitled to recover. To this should be added interest at the rate of seven per cent. from December 28, 1865, to the date of the decree. The clerk of this court is hereby directed to compute the interest, and add to it the principal sum. Then let a decree be entered for the amount of principal and interest in favor of the libellant, with costs.

PATRIE (MURRAY v.). See Case No. 9,967.
PATRIOT, The. See Case No. 13,985.

Case No. 10,806.

PATRIOTIC BANK v. BANK OF WASHINGTON.

[5 Cranch, C. C. 602.][1]

Circuit Court, District of Columbia. Nov. Term, 1839.

PLEADING IN EQUITY—EXCEPTIONS TO ANSWER—FOR IMPERTINENCE—TIME FOR FILING.

Exceptions to an answer for insufficiency may be filed after exceptions for impertinence.

Bill in equity.

Mr. Bradley, for plaintiff, excepted to a part of the defendant's answer, for impertinence.

THE COURT (THRUSTON, Circuit Judge, not sitting,) sustained the exception.

Mr. Bradley then filed exceptions to the answer for insufficiency; and moved the court for leave to amend his bill. Coop. Eq. Pl. 321.

Mr. Hellen, contra, objected that the exceptions should all be filed at once; and that after the court has decided upon exceptions, new exception cannot be permitted. 1 Har. Ch. Prac. 228, 235.

Mr. Bradley, in reply. By the English practice, exceptions for impertinence must be filed and decided before exceptions for insufficiency will be allowed. Harrison refers only to exceptions for insufficiency. Chit. Eq. Dig. 872; Newl. Ch. Prac. 184, 185, 190; Story, Eq. Pl. 665, p. 867.

THE COURT, having sustained the exception for impertinence, ordered the impertinent part to be cancelled, and permitted the plaintiff to file exceptions for insufficiency.

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

Case No. 10,807.

PATRIOTIC BANK v. COOTE et al.

[3 Cranch, C. C. 169.][1]

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

WITNESS — DEFENDANT IN ACTION — RELEASED FROM OBLIGATION — IMPEACHMENT — GENERAL REPUTATION FOR VERACITY — PARTNERSHIP — CHECK.

1. One of the defendants, if released by the plaintiff, may, if willing, be sworn and examined as a witness for the plaintiff.

2. The defendants were not permitted to give secondary evidence of the contents of a check, without first showing that the original check was not in their power.

3. When a witness is produced to testify as to the credibility of another witness, the proper questions, to be put to the witness, are, "Do you know the common reputation of the witness for veracity, among the generality of his acquaintance? From your knowledge of his general reputation for veracity, would you believe him on his oath?"

4. The witness is not to be asked who were the persons he had heard say that the general reputation of the witness for veracity was not good.

5. The fact to be ascertained is the common repute as to truth.

[Cited in Fletcher v. State, 49 Ind. 133.]

6. If a check upon a bank be drawn in the name of one of a firm only, it cannot be charged to the firm, unless drawn by authority of the firm, although used and applied in the business of the firm, and the promise of one partner, individually, to make good an overdraft, does not bind the firm.

7. The burden of proof is on the creditor to show that the individual partner had authority to bind the firm by acts in his own name.

Assumpsit, for overdraft by defendants, $150.

The plaintiffs having released Mr. Coote, one of the defendants, from all actions and demands, except jointly with the other defendant, Mr. Jones offered him as a witness.

Mr. Wallach, for plaintiffs, cited Consequa v. Willing, 1 Pet. [26 U. S.] 305; Wise v. Bowen [Case No. 17,905], in replevin in this court, in 1821, where Bowen, the defendant, was examined as a witness; Gaither v. Farmers' & Mechanics' Bank of Georgetown, in this court, in December, 1824 (not reported), where Nicholls, a stockholder in the bank, was examined as a witness.

Mr. Jones, for defendant Jones, referred to the case of Warner v. McCloud, in this court,

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

at Alexandria (of which case there is no report); Piles v. Plum [Case No. 11,165]; and Johnson v. Chapman [Id. 7,378], in this court, at Alexandria; Nicholson v. Patton [Id. 10,250], in Alexandria; and Forrest v. Van Ness & Crossfield, in Washington (not reported); 1 Phil. Ev. 60; Norden v. Williamson, 1 Taunt. 378; Starkie, Ev. pt. 4, 706, 1063, &c.; Dixon v. Waters [Case No. 3,936], in this court, at Washington, December, 1824.

Mr. Wallach and Mr. Key, in reply, cited 1 Phil. Ev. 63, and Patton v. Janney [Case No. 10,836], at Alexandria.

THE COURT (nem. con.) permitted Mr. Coote to be sworn, he being willing. The plaintiffs gave in evidence an account, which had been admitted by Mr. Coote to be correct, and proved that the checks and vouchers of the account had been delivered to the defendant Jones, and having called upon him to produce them in court, at the trial, rested their case upon that evidence.

The defendant's counsel, in cross-examining one of the plaintiffs' witnesses, Mr. Carr, who was an officer in the bank, asked him whether a certain check, constituting one of the items of that account, was drawn by Mr. Coote in the name of the firm. The plaintiffs' counsel objected that the defendant could not give secondary evidence of the contents of that check, without first showing that the original check was not in his power.

THE COURT (MORSELL, Circuit Judge, contra,) was of that opinion; and that the plaintiffs' evidence was not to be considered as secondary.

Mr. Shanks was called as a witness to the reputation of Mr. Coote for veracity.

THE COURT said that the proper questions to be put to the witness were:—"Do you know the common reputation of Mr. Coote for veracity, among the generality of his acquaintance?" "From your knowledge of his general reputation for veracity, would you believe him upon his oath?" Starkie, Ev. pt. 2, p. 146, and note 1.

A witness having testified that he had heard several persons of Mr. Coote's acquaintance say that his reputation for veracity was not good, Mr. Key, for the plaintiffs, asked him who those persons were; but the witness declined answering, unless ordered by the court.

THE COURT (MORSELL, Circuit Judge, contra,) thought he was not bound to answer; and said that the fact to be ascertained was, the common repute of Mr. Coote, among his acquaintance, as to veracity; and that if the witness is bound to state the names of those who had impeached the credit of Mr. Coote, it might lead to an almost endless inquiry; and to the same evils which would result from permitting evidence to be given of particular acts of turpitude, to impeach the character of a witness.

THE COURT (nem. con.) at the prayer of the defendant's counsel, instructed the jury, "that if they should find, from the evidence, that the overdraft claimed by the plaintiffs in this cause was produced by charging, in the account of C. T. Coote & Co. in the said bank, a check or checks drawn in the sole and individual name of C. T. Coote, the plaintiffs are not entitled to recover for such overdraft in this action, unless it appears that such checks were drawn upon the credit, and by the authority of the firm; notwithstanding it may appear to the jury that some of the moneys, credited in the said account to the firm, were originally noted in the rough memorandum-book, called 'the scratch,' as deposited by C. T. Coote, without naming the firm, and were afterwards carried to the credit of the firm in the said account; and notwithstanding the jury should believe the evidence offered on the part of the plaintiffs, that the money paid on such checks was used and applied by the said C. T. Coote in the business and concerns of the said firm; and that, under such circumstances, the promise of the said C. T. Coote, to make good such overdraft, does not bind the said firm of C. T. Coote & Co. That the said checks are prima facie evidence that the same were drawn on the individual account and credit of Coote alone; and that the burden of proof is on the plaintiffs, to show that he was authorized by the firm to draw the said checks."

And THE COURT also (nem. con.) instructed the jury, at the prayer of the plaintiffs' counsel, as follows:—"But if the jury should believe, from the evidence, that the said $300 were drawn by the check of C. T. Coote, by him, from the partnership funds in the Patriotic Bank, with the view of transferring so much of the partnership funds from that bank to the United States Bank, and that he did thereby so transfer the same, and deposit the same, to the credit of the firm, in the said United States Bank, then the defendants are chargeable with the amount of said check."

Verdict for plaintiffs, $150 and interest.

Case No. 10,808.

PATRIOTIC BANK v. FRYE.

[2 Cranch, C. C. 684.][1]

Circuit Court, District of Columbia. May Term, 1826.

WITNESS—BOOKKEEPER OF PLAINTIFF—INTEREST—MISTAKE.

1. A bookkeeper, who has given a credit to A. instead of B., by mistake, is a competent witness to prove the mistake, without a release.

2. Only what a witness recollects is competent evidence.

A sum of $100 had been entered to the credit of the defendant [Nathaniel Frye], in his bank-book by Mr. Bradley, the plaintiffs' bookkeeper, and he was called to be sworn and examined as a witness for the plaintiffs to prove the mistake and that the credit ought to have been given to the

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

Franklin Insurance Company, who had, in fact, deposited the money.

Mr. Coxe and Mr. Key, for defendant, objected that the witness was interested, because he is chargeable for the loss if the plaintiffs should not recover it of this defendant.

But THE COURT (CRANCH, Chief Judge, doubting) permitted him to be examined, without a release from the plaintiffs.

The witness, when examined, had no distinct recollection that the deposit, on the 14th of December, 1822, was made by the Franklin Company, although the original entry of that deposit, to the credit of that company, was in his handwriting.

Mr. Key, for defendant, contended, and THE COURT decided, that the testimony of the witness, as to that fact, is not evidence unless the witness has a recollection of the fact, his memory being refreshed by his own memorandum.

Case No. 10,809.

PATRIOTIC BANK v. LITTLE.

[2 Cranch, C. C. 627.] [1]

Circuit Court, District of Columbia. Dec. Term, 1825.

EVIDENCE—SECONDARY—LOST NOTE.

If a promissory note, with a blank indorsement, be put into the hands of an attorney for collection, and he die, and the note cannot be found after diligent search among his papers, secondary evidence may be given of the contents of the note.

Assumpsit against [Israel Little] the maker of a promissory note.

The plaintiff proved that the note, with a blank indorsement, was, after it was payable, put into the hands of Mr. Law, the plaintiff's attorney, for collection; that Mr. Law died, and the note, after diligent search among his papers, could not be found.

Mr. Morfit and Mr. Key, for defendant, objected to the admission of secondary evidence of the contents of the note, and cited Poole v. Smith, Holt, N. P. 144; Miller v. Race, 1 Burrows, 452; Lawson v. Weston, 4 Esp. 56; Pierson v. Hutchinson, 2 Camp. 211; Ex parte Greenway, 6 Ves. 812; Hart v. King, 12 Mod. 310; Davis v. Dodd, 4 Taunt. 602; Wright v. Hencock, 3 Munf. 521; and Esp. Ev.

Mr. Wallach, contra, cited 1 Holt, N. P. 144; 3 Camp. 324; Williamson v. Clements, 1 Taunt. 523; Dangerfield v. Wilby, 4 Esp. 159; Brown v. Messiter, 3 Maule & S. 281; Anderson v. Robson, 2 Bay, 495; Meyer v. Barker, 6 Bin. 228, 234, 237, 238; Renner v. Bank of Columbia, 9 Wheat. [22 U. S.] 581.

THE COURT (CRANCH, Chief Judge, hesitating) permitted the secondary evidence to be given.

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

Case No. 10,810.

PATRIOTIC BANK v. WILSON.

[4 Cranch, C. C. 253.] [1]

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

NOTES—ASSIGNMENT—PAYMENT BY STRANGER.

A person not a party to a note, who takes it up while lying in a bank under protest, and takes a receipt as in payment of the balance due upon the note, cannot, in an action in the name of the bank for his use, recover of the indorser; but if it was a sale or an assignment of the note to him, he may.

Lewis Johnson was indorser of a note of H. Langley, discounted by the Patriotic Bank, which he could not get renewed because another note of Langley, upon which $57 were due, was lying under protest in the same bank, indorsed by the defendant, [John A.] Wilson, in blank; he therefore paid the balance due upon that note, took it up, and took the following receipt, indorsed thereon: "Balance, $56.27. Received the above amount of fifty-six 27/100 dollars of Lewis Johnson, October 19, 1829. H. T. Weightman, Cashier." For which amount the present suit is brought in the name of the bank for his use.

THE COURT (nem. con.) instructed the jury that if they should be satisfied by the evidence, that the money was received by Mr. Weightman as payment of the note, this suit could not be maintained upon it in the name of the bank; but if they should be of opinion that it was a sale or an assignment of the note, for a valuable consideration, bona fide, then this suit might be maintained in the name of the bank for the use of Mr. Johnson.

Case No. 10,811.

PATRIOTIC BANK OF WASHINGTON v. FARMERS' BANK OF ALEXANDRIA.

[2 Cranch, C. C. 560.] [1]

Circuit Court, District of Columbia. April Term, 1825.

NOTES — DUE ON SUNDAY—WHEN DEMAND TO BE MADE—CUSTOM.

If a bank receives a note to be collected according to the known and established mode of transacting business at that bank, it is not liable for damages by omitting to demand payment on Saturday, when the third day of grace was Sunday; it being the known and established mode of transacting business in that bank, in such a case, not to demand payment until Monday.

Action on the case for negligence, in omitting to demand payment on Saturday, when the third day of grace was Sunday. The draft was dated on the 26th of June, 1818, at ninety days; and became payable on the 24th–27th of September. The declaration averred that "the defendants received the bill to be collected according to the known

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

and established mode of transacting business in the said Farmers' Bank," whereby they became bound to use due and reasonable diligence in collecting the money, and being so liable, undertook so to do; but did not, in this that they did not present the bill for payment on the 27th of September, 1818, but kept it up a long time after it became due, whereby the drawer and indorsers were exonerated, and the acceptor became insolvent, and the plaintiffs sustained damage, &c. There was a verdict for the plaintiffs, subject to the opinion of the court upon a case stated; the material facts of which are that the 27th of September, 1818, was Sunday; that payment was not demanded until Monday the 28th; that it was the known and established mode of transacting business in the said Farmers' Bank, not to demand payment in such cases, until Monday; and that the plaintiffs only required the defendants to make the demand of payment according to the usage of their bank.

PER CURIAM. It appears to the court that upon the case stated the plaintiffs cannot charge the defendants with negligence, and that judgment must be rendered for the defendants.

Judgment for the defendants.

Case No. 10,811a.

PATRIOTIC BANK OF WASHINGTON v. WEBSTER.

[2 Hayw. & H. 47.] [1]

Circuit Court, District of Columbia. May 15, 1851.

LIMITATION OF ACTIONS — DEFENDANT BEYOND SEAS—FOUR DAYS WITHIN JURISDICTION.

In a suit against the endorsers on a promissory note, the defendant, answering, interposed the plea of the statute of limitations, to which the plaintiff replied that the defendant was beyond seas during the time covered by the defendant's plea, and the defendant rejoined, that he was within the jurisdiction of the court for four days during the time, to the knowledge of the plaintiff. The plaintiff's demurrer to the defendant's rejoinder was *held* bad.

At law.

Jos. H. Bradley, for the bank.

D. G. Hall, for defendant.

The note on which this suit was brought was made by Henry L. Kenny, who promised to pay to the defendant [Daniel Webster] sixty days after its date, viz: 13th of September, 1837. The defendant endorsed the note over to D. A. Hall, who in turn endorsed it over to the plaintiffs. The usual counts were inserted in the declaration.

The pleas of the defendant were in substance as follows: First, that he did not undertake and promise in manner and form, as the said plaintiffs have above complained against him. Second, that the plaintiffs ought not to have or maintain their action aforesaid against him, because he saith that he, the said defendant, did not at any time within three years next before the commencement of this suit, undertake or promise in manner and form as the said plaintiffs have above thereof complained against him. Third, that the plaintiffs ought not to have or maintain their action aforesaid against him, because he saith that the several supposed causes of action in the said declaration mentioned did not, nor did any or either of them accrue to the said plaintiffs at any time within three years before the commencement of this suit, in manner and form as the said plaintiffs have above thereof complained against him.

Replication to the defendant's pleas. That the defendant was beyond seas at the time the debt came due and was payable, and continually thereafter to the bringing of the suit.

Rejoinder to the plaintiffs' replication. That on the 3d day of October, 1840, the defendant returned to the city and was here four days, and his being here was well known to the plaintiffs.

The plaintiffs demurred to the defendant's rejoinder. Judgment for the defendant on the demurrer.

[1] [Reported by John A. Hayward, Esq., and George C. Hazelton, Esq.]

PATTEN (ALEXANDER v.). See Case No. 171.

PATTEN (ALEXANDRIA v.). See Case No. 186.

PATTEN (BLUNT v.). See Cases Nos. 1,579 and 1,580.

Case No. 10,812.

PATTEN et al. v. DARLING et al.

[1 Cliff. 254.] [1]

Circuit Court, D. Massachusetts. May Term, 1859.

SHIPPING—GENERAL AVERAGE—WITNESS—COMPETENCY—MASTER—DEPOSITION.

1. In a suit by the owners of a ship against the owners of the cargo, for contribution for the loss of masts sacrificed for the common benefit of ship, cargo, and freight, the master, except in cases where he would be exonerated from some certain liability, if the owners should prevail, is a competent witness for the owners.

[Cited in The Star of Hope, 9 Wall. (76 U. S.) 230.]

2. A deposition was taken after publication had passed, and upon interrogatories filed by leave of court, and application was made to the court to suspend the commission, but counsel consenting to strike out certain interrogatories, the motion was not pressed, and this motion to suppress was made at the final hearing. *Held*, under the circumstances of the case, and inasmuch as the commission issued by special leave of court after due notice, that the deposition ought not to be suppressed.

3. Where masts and spars are cut away in a storm, and, in falling, injure the deck of a ves-

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

sel, or destroy rails and bulwarks, the repairs of such damage belong to general average; and it is well settled by the supreme court, that the voluntary stranding of a vessel, when required and designed for the common safety of the associated interests, constitutes a case for general contribution, even though it be followed by her total loss, provided the cargo is thereby saved.

[Cited in The Star of Hope, 9 Wall. (76 U. S.) 231.]

This was a bill in equity brought by the complainants [George F. Patten and others] owners of the ship Delaware, wherein they claimed from the owners of the cargo a contribution by way of general average, for the loss of the masts, sails, spars, and rigging of the ship, which it was alleged were sacrificed for the common benefit of the ship, cargo, and freight. On the 17th of February, 1857, the ship, then lying in the port of Savannah, took on board to be transported to Boston certain goods and merchandise consigned to the respondents. On the 2d of March following, while the ship was in Massachusetts Bay, she encountered a severe gale and snow-storm from the northward, and at half past three on the following morning it was deemed expedient to attempt to run into Nantasket Roads, for the safety of the vessel, as she was drifting westward, and at four and a half o'clock she came to anchor in nine fathoms of water, Boston Light bearing northeast. The reason for anchoring was that a strong ebb tide set the ship to leeward, insomuch that it was impossible to get up farther. While thus anchored, and at about half past nine in the morning, the tide being at about flood, the wind blowing very heavily and the sea running high, the ship swung with the tide and began to strike on the bottom. When this occurred the wind was blowing toward the shore, and it was deemed expedient by the master to cut away the masts in the hope that the ship might be prevented from drifting on shore, or if she did, she might be saved from going to pieces and being totally lost. Accordingly the master ordered the lanyards cut away, leaving the masts without any support; one of the masts then went overboard, and soon after, the wind increasing, the ship dragged her anchors and went on shore on a stony beach in Hull, near the Toddy Rocks, where the other masts also fell. By this sacrifice, alleged the complainants, the ship, cargo, and lives of the crew were saved from impending destruction, and that the ship, after the storm subsided, lay in safety on the beach, with her cargo on board, and this was afterwards taken out and delivered to the owners, who received it. Such were the substantial allegations of the bill, which also set up an agreement by the respondents [Francis Darling and others] to pay to complainants such sums of money as might be due as their share of any contribution which might be found due for sacrifices made and losses sustained for the benefit of all concerned. None of the acts of the master after the storm commenced were admitted in the answer to be as alleged in the bill. That there was necessity for cutting away the masts; that the same conduced to the safety of the ship or cargo; that the wind was heavy; that she was expected to go to pieces if not relieved of her masts, and that she lay more easily when thus relieved, were denied. The respondents averred that the vessel lay on the beach, with her cargo after the storm, but that she was a wreck, and that the cargo was taken out in a damaged condition; that they paid all expenses in discharging the cargo, which was left in the ship at a distance from her port of destination. The cargo was received by them, as they said, with the agreement that such sums of money should be paid by them to complainants as should be fairly due for losses and expenses properly incurred, for the benefit of all interested, but they alleged those on board the ship were guilty of neglect and carelessness; that the cutting away the masts was not instrumental in saving the vessel or cargo, and that she could not have been got off from the beach and repaired; that the hull was sold for four thousand dollars, which was all it was worth.

F. C. Loring, for complainants.

The only question is, whether the value of the masts, &c., should be included in the adjustment of the general average. With reference to this there are three issues: (1) The intention with which the masts were cut away; (2) whether it tended to preserve the vessel, cargo, and freight; (3) whether they were saved thereby. In the United States courts it is held, if a ship is voluntarily stranded for the common benefit, and is thereby wrecked, the cargo is to contribute to indemnify the owners. Columbian Ins. Co. v. Ashby, 13 Pet. [38 U. S.] 331; Barnard v. Adams, 10 How. [51 U. S.] 270; Sturgess v. Cary [Case No. 13,572]. As to who is to decide when there is a peril, in order to constitute a case of general average. Lawrence v. Minturn, 17 How. [58 U. S.] 109–111. The greater and more imminent the peril, the more merit to be attributed to the sacrifice. In this case there were the three requisites to a general average,—a peril, a sacrifice, success.

B. R. Curtis and H. Durant, for respondents.

It is incumbent on the ship-owner to allege and prove: (1) That the vessel, cargo, and freight were subject to a common peril. (2) That the peril was not occasioned by want of due skill on the part of master and officers. Insurance Co. v. Sherwood, 14 How. [55 U. S.] 365; Lawrence v. Minturn, 17 How. [58 U. S.] 110. (3) That the sacrifice was voluntary, and actually and intentionally made. (4) That the sacrifice was a

reasonable and skilful act. (5) That the sacrifice was the means of relieving the interests not sacrificed from the particular peril it was designed to avert. Columbian Ins. Co. v. Ashby, 13 Pet. [38 U. S.] 338, 339; Williams v. Suffolk Ins. Co. [Case No. 17,-739]; Caze v. Reilly [Id. 2,538]; Scudder v. Bradford, 14 Pick. 13; Nickerson v. Tyson, 8 Mass. 467; Marsh. Ins. 462, 463; Stev. Av. 8; 3 Kent, Comm. 234, 235. The particular peril was the danger of dragging the anchors and going ashore. Complainants have not shown that the peril was not occasioned by the want of skill of their servants. The sacrifice of the masts was not voluntary. If a jettison of masts be made to avoid stranding, and stranding is not thereby avoided, no contribution follows. Cases above. The stranding in the case was not voluntary. Those on board no more elected any of the incidents of the stranding than the stranding itself.

CLIFFORD, Circuit Justice. Most of the circumstances attending the disaster are satisfactorily proved, and there is much less conflict in the testimony than is usual in cases of this description. As alleged in the bill of complaint, and admitted in the answer, the ship sailed from Savannah on the 17th of February, 1857, bound on a voyage to Boston. At the time of her departure she was a sea-worthy vessel, properly laden with cotton and hides, and was in every respect fit for her intended voyage. All of the sails except two were made of hemp, and they were all nearly new, and she was copper fastened. She was well manned and equipped, her whole company consisting of nineteen men, including the master, two mates, the cook, and steward. According to the testimony of the master, she was in every way in good condition when she sailed, and there is no sufficient reason from the testimony to call in question the truth of his statement. Her hull, planking-timbers, and fastenings were in good order, exhibiting no appearance of weakness or decay, and she did not leak throughout the voyage. Prior to her arrival in Massachusetts Bay she had met with no difficulty, and, for aught that appears to the contrary, was in the same condition as when she sailed from the port of departure. At six o'clock in the afternoon of the 2d of March, 1857, she was about twenty miles east of Boston Light, as estimated by the master. That evening the weather became thick and stormy, the wind varying from east to northeast, and there was a heavy sea, and during the night it snowed and the gale increased. About midnight they made Boston Light bearing west-southwest, and soon after found that the ship would go ashore unless they ran into the harbor. At that time, the master says, the ship was on a lee shore, and as he could not get a pilot he concluded to run her in without one, finding that it was impossible to work her off against the wind and storm. Accordingly he sailed for Boston Light, which he passed in safety, and came to anchor in nine fathoms of water, that light bearing northeast. During the ebb-tide the ship rode well and safely, but when the tide turned, the gale increased, and, the wind shifting more northerly, the ship, in swinging with the tide, commenced thumping on the bottom. In this emergency the master ordered the lanyards to be cut, in order, as he says in his first deposition, to prevent the ship from starting her anchors and going on shore. That order was nearly executed when the vessel started adrift, and the masts went over the side of the vessel soon after she struck on the beach. Considerable damage was done to the vessel by the falling of the masts. On the starboard side the mainmast, in going over, broke the rail, bulwarks, and three stanchions, and chafed and split the planksheer. Some damage was also done by the falling of the mizzen-mast. In going overboard it broke a hole through the top of the house, injuring the chains, channels, and guards, and the foremast in falling broke the rails, bulwarks, and two stanchions on the same side of the vessel. It was after the tide turned that the ship went ashore; and as the tide rose the hull was driven by the gale and the force of the sea farther up on to the beach. When the vessel struck, the wind was blowing a hurricane from the north-northeast, pressing the vessel directly on to the shore, and the sea continued to make breach over her till the tide ebbed. She went on shore between nine and ten o'clock in the morning of the 3d of March, 1857, and all the crew remained on board till ten o'clock in the evening of that day, when they were taken off in a life-boat. At that time the tide had ebbed, and there was less sea, and on the following day the storm so far moderated, that they commenced to discharge the cargo from the ship. After the discharge it appeared that she had two holes in her bottom, caused by striking against the rocks, one under her fore-chains and one under her mizzen, and several of the knees were started, and some of her beams were broken. In his second deposition, the master testifies that he consulted with his officers before cutting away the masts, and that they came to the conclusion that the vessel, in the situation in which she then was, must soon start her anchors and go ashore, in which event they expected she would go to pieces, especially if the masts were left standing. He also says, that the masts were cut away for the reason mentioned in his first deposition, but more particularly to prevent the vessel from going to pieces, in case the anchors did not hold, and she went ashore. Just as they had concluded to cut away the masts, he says all the crew came aft and wanted to get out the boats and leave the ship; but he told

them he would first cut away the masts, which might possibly keep the vessel from going ashore, and if not, would no doubt prevent her from going to pieces, and that the work of cutting the masts away was then immediately commenced.

Certain preliminary objections are taken to the testimony of the master in this case, which will now be briefly considered. In the first place, it is insisted that he is not a competent witness, and several decided cases are referred to in support of the proposition. Masters of vessels are generally competent witnesses in suits brought by the owner, except in cases where they would be exonerated from some certain liability, provided the owner should prevail. Mere bias arising from the motive to vindicate their own conduct, unaccompanied by any interest in the event of the suit, only affects their credit as witnesses, and is not in general sufficient to exclude their testimony. Where the suit is against the owner, and the master is liable to indemnify him in case the suit is maintained, or where he would be exonerated from a certain and determinate liability in case the owner prevails, in general he is not a competent witness. All of the cases referred to by the counsel for the respondent are of this latter class. One is the case of The Hope [Case No. 6,678], and another is that of The Nymph [Id. 10,389]. Those cases affirm the rule, that in a libel against a vessel for a forfeiture occasioned by the alleged misconduct of the master, he is not a competent witness, for the reason that if his acts should be adjudged illegal, and draw after them the condemnation of the vessel, he would be responsible to the owners for the consequences. They also affirm the doctrine, that the decree in the admiralty would be evidence against him in a suit by the owners for the damages. Some doubt is entertained on this last point, but it is unnecessary to determine the question at the present time. Johnson v. Huckins [Id. 7,390]; Fland. Shipp. 153. Reference is also made to the case of The William Harris [Case No. 17,-695]. That was a libel against the vessel for seamen's wages, in which the owners claimed that certain deductions ought to be made in the nature of set-off, on account of certain expenses incurred abroad, in the imprisonment of the libellant by the procurement of the master. Such expenses it seems in certain cases are paid by the master, and charged to the owners, and if the imprisonment was unnecessary, and his own conduct unjustifiable, then the charge was an improper one, and he would be liable to refund the amount so charged. He was offered as a witness in that case to justify his own conduct, and throw the expenses of the imprisonment upon the seamen, but was excluded by the court on the ground that he was interested in the event of the suit. Considerable conflict exists in the decided cases on the question, whether the master is a competent witness in a suit against the vessel or owners for seamen's wages; and authorities may be found on both sides. Unless he is called to justify an act for which, if not justified, he would himself be liable, it is generally held in England that he is a competent witness, and such appears to be the tendency of the modern authorities upon the subject. The Lady Ann, 1 Edw. Adm. 235; The Midlothian, 5 Eng. Law & Eq. 556; The Trial [Case No. 10,170]; The Hudson [Id. 6,831]; The Exeter, 2 C. Rob. Adm. 261. When not interested as part owners, masters are constantly admitted as witnesses in cases of collision, and no reason is perceived why they are not equally competent in suits for contribution. They have no immediate interest in the event of the suit, and it is certain that the decree in a case like the present would not be admissible to affect the interests of the master, in any subsequent suit which might be brought against him by the owners of the vessel. In such cases the acts of the master are only collaterally drawn in question, and, in contemplation of law, his liability for negligence at the suit of the owner is too remote and contingent to exclude him as a witness. Whatever effect it may be supposed to have upon the truth of his statements goes to his credit, and not to his competency. For these reasons I am of the opinion that the master is a competent witness. Barnard v. Adams, 10 How. [51 U. S.] 301.

Objection is made, in the next place, that the second deposition of the master was irregularly taken, and it is insisted that it ought to be suppressed. It was taken after publication had passed, but the motion to suppress was not made until the cause came on for final hearing. As stated at the argument, and not denied, it was taken on written interrogatories filed by leave of court. After leave was granted, application was made to the court to suspend the commission. On this last occasion the counsel on both sides were present, and the counsel for the complainants consenting to strike out certain interrogatories, the motion to suspend the commission was not pressed to a decision. Under these circumstances, I am of opinion that the objection was waived, and, inasmuch as the commission issued by the special leave of the court after due notice, I think the deposition ought not to be suppressed.

Twelve other witnesses were examined by the complainants, five of whom saw the ship on the morning of the disaster. None of them, however, were on board the vessel before she went ashore, and as their statements respecting the circumstances of the disaster, so far as they are within their knowledge, substantially confirm the statement of the master, it would be useless to repeat them. Some twenty witnesses were also examined by the respondents, and eleven or more of

that number also saw the vessel, but were not on board before the ship was stranded on the beach. Five of them were in a pilot-boat, and at one time approached very near the vessel while she lay at anchor, but as their testimony has respect chiefly to the questions whether the master exercised proper skill and diligence to prevent or avert the disaster, or whether the sacrifice made was necessary to avoid the peril, or was attended with success, it will be considered in connection with the several propositions assumed by the counsel for the respondents. In respect to the immediate circumstances of the disaster, the witnesses of the respondents do not differ materially from the statements made by the master. A claim for contribution by way of general average rests upon certain elementary principles of law which have long since been well settled. Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit and safety of the associated interests shall be made good by all. That principle, says Grier, J., in Barnard v. Adams, 10 How. [51 U. S.] 303, is recommended not only by its equity but by its policy, because it encourages the owner to throw away his property without hesitation in time of need. In order to constitute a case for general average, the same learned judge remarks that three things must concur—First, there must be a common danger in which the ship, cargo, and crew all participate, and that danger must be imminent and apparently inevitable, except by incurring a loss of a portion of the associated interests to save the remainder; in the second place, there must be a voluntary jettison, or casting away of some portion of the associated interests, for the purpose of avoiding the common peril, or, in other words, a voluntary transfer of the peril from the whole to a particular portion of those interests; thirdly, the attempt so made to avoid the common peril must be successful. Every such sacrifice must be made deliberately and with the object of saving or protecting the remainder of the property at stake. Whenever the peril of a common destruction is apparently so great as to compel the master, in the exercise of proper skill and judgment, to choose between the loss of the ship, cargo, and the lives of those on board, and the jettison or casting away of a part of the associated interests, the master is justified, and indeed it is his duty, to make the sacrifice for the benefit of all concerned. But the right to contribution is not made to depend on any presumed or real intention to destroy the thing cast away, but on the fact that it was selected, under the circumstances before mentioned, to suffer the common peril in the place of the whole of the associated interests, that the remainder might be saved. Much is deferred in such an emergency to the judgment and decision of the master, in whose custody, and under whose control, all those interests are necessarily placed. Owners of vessels are under the obligation to employ masters who are competent, and who have reasonable skill, judgment, and courage in the performance of their duties, and they are liable if, through their failure to possess or exert these qualities in the control and management of the vessels under their command, the goods or merchandise of the shipper are damaged or destroyed. They do not, however, contract that they shall possess such qualities in an extraordinary degree, nor that they shall do in any given emergency precisely what, after the event, others may think would have been best. It was so held in Lawrence v. Minturn, 17 How. [58 U. S.] 110, and the conclusion of the court in that case appears to be just and reasonable. From the necessity of the case, the law imposes upon the master the duty and clothes him with the power to judge and determine whether the circumstances of danger which surround the vessel, cargo, and crew are or are not so great and pressing as to render a jettison of a portion of the associated interests expedient and necessary for the common safety of the remainder. Standing upon the deck of the vessel, with a full knowledge of her strength and condition, and of the state of the elements which threaten a common destruction in judgment of law, he can best decide, in the emergency, what the necessities of the moment require to save the property intrusted to his care, and the lives of those on board. In contemplation of law he derives this authority from the implied consent of all concerned, and, in the absence of any proof to the contrary, it must be presumed that his decision was wisely and properly made.

Accordingly, it was held in Lawrence v. Minturn [supra], and the principle was subsequently affirmed in Dupont v. Vance, 19 How. [60 U. S.] 166, that, if he was a competent master, if an emergency actually existed, calling for a decision whether or not to make a jettison of a part of the cargo, if he appears to have arrived at his decision with due deliberation by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful. In all such cases the sacrifice made will be deemed to have been necessary for the common safety, because the person to whom the law has intrusted the power to decide upon and make it has duly exercised that authority. It is not denied by the counsel of the respondents, that the ship, cargo, and crew in this case were subject to a common danger, but it is contended that the particular peril impending at the time the masts were cut away was the danger that the ship would drag her anchors and go ashore, and it is insisted that she was not saved from that particular peril. Notwithstanding the masts were cut away, the vessel went ashore, but the goods and crew were saved. Some stress is laid upon the fact, that the master, in his first deposition,

stated that his intent in cutting away the masts was to prevent the ship from starting her anchors and going ashore, but it should not be overlooked that he also stated, in the same deposition, that they were afraid the vessel would go to pieces from the effect of the sea or by striking against the rocks to which she was driving. His second deposition explains more fully his precise intent, or rather the hopes and fears he entertained at the time the masts and spars were cut away, and every one of those explanations is perfectly consistent with his statements in the first deposition. By cutting away the masts and spars, he hoped that the anchors would hold, and that the ship might ride out the storm. But if not, and she should go ashore, that she would thereby be prevented from going to pieces upon the rocks, and that the crew and cargo might be saved. That twofold purpose is so obvious from all the attending circumstances, that one would scarcely fail to see and understand it, even if it were less clearly indicated than it is in his first deposition. Common experience teaches that a vessel, in going ashore in a storm on a rocky beach, is less likely to go to pieces with her masts down than while they are standing, and testimony to the contrary is entitled to very little weight. After a careful comparison of the two depositions given by the master, I am of the opinion that they do not conflict in any material respect, and that there is nothing in either to impair the credit of the deponent. All the associated interests were in peril, not only from the liability of the vessel's going ashore, but of a total destruction from the elements, and from this latter peril they were all saved. Common prudence required that the master should look beyond the mere hazard that the anchors were liable to drag, to the danger that the vessel might be dashed against the contiguous rocks; and if he had been less candid in his statements, and had denied that his intent in cutting away the masts and spars was to avoid the peril of a common destruction in case the vessel went ashore, he would not, under the circumstances proved, have been entitled to credit. When masts and spars which have been cut away injure the deck of the vessel in falling, or destroy rails and bulwarks, or do other damage, the repairs of such damage belong to general average; and it is well settled by the supreme court that the voluntary stranding of a vessel, when required and designed for the common safety of the associated interests, constitutes a case for general contribution, even though it be followed by her total loss, provided the cargo is thereby saved. Columbian Ins. Co. v. Ashby, 13 Pet. [38 U. S.] 343; Barnard v. Adams, 10 How. [51 U. S.] 302. That doctrine is denied in some jurisdictions, but it is settled law in this court, and it is believed to rest upon the solid foundations of reason and justice. Caze v. Reilly [Case No. 2,538]; Sims v. Gurney, 4 Bin. 513; Gray v. Waln, 2 Serg. & R. 229.

In the next place it is insisted by the counsel for the respondents that the complainants have not shown that the peril in question was not occasioned by want of due skill, exertions, and vigilance on the part of the master, officers, and crew of the ship. To support this proposition, they assume, in the outset, that whatever dangers the ship encountered arose from her being at anchor in the place where she lay at the time the order to cut away the masts and spars was given, and they insist that the causes which rendered it necessary to anchor there at four o'clock in the morning of the 2d of March, 1857, did not continue to operate at the time the order was executed, and that it was not necessary to remain there after daylight on the day of the disaster. Impliedly, the proposition admits that it was necessary to anchor there on the morning before the disaster, and the bill alleges in effect that the storm continued, and the wind increased till after the vessel went ashore. In his second deposition, the master says, that he was not at all acquainted with the anchorage where the ship lay, and judged that there was no chance of removing the vessel to a place of greater safety. He consulted with his subordinate officers before he decided to cut away the masts, and there is much reason to conclude that, if he had not so decided, the crew would have left the ship in the boats. On the point whether the master ought not to have made an effort to remove the vessel to some other place, a great number of witnesses were examined by the respondents. Many express the opinion that he ought to have done so, while others speak with less confidence or with some hesitation; and another class say, with more reason, that, if he had been acquainted with the anchorage, he ought not to have remained where he was, but admit that it would be different with a stranger, or one not acquainted with his situation, and some of them say that if he did not know the ground, it was not imprudent to remain where he was. He was wholly unacquainted with his situation; and, in the midst of the difficulties and uncertainties which surrounded him, I am of the opinion that he was not wanting in the exercise of reasonable skill and diligence. Those who encounter danger cannot always suit mere lookers-on in the choice of the means they employ to avert it, for the reason that it is easier to find fault than to do in any such emergency. In this case the master had every motive to employ the best means in his power to save the vessel, cargo, and crew, and there is no sufficient evidence in the case to show that he did not perform his duty with coolness, and with the best lights of his judgment. All on board were participants in a common danger, and there is no proof in the case that they did not all concur in the propriety of the master's acts. When the crew came aft with the view to take the boats and abandon the ship, they did not complain that anything had been omit-

ted which ought to have been done, nor did they suggest any other means of avoiding the peril than that proposed by the master.

It is also insisted by the respondents that the master was guilty of negligence, in not adopting reasonable and proper means to secure the assistance of a pilot on the morning of the disaster. On this branch of the case there is some conflict in the testimony. Four or five pilots belonging to the pilot-boat Phantom were examined by the respondents. One of them testifies that the pilot-boat was lying in the sand-cove, near the narrows, and that, seeing a light about five o'clock that morning, they slipped their chain and ran down in that direction. Others testify to the effect that they saw the light of the vessel before daylight, between five and six o'clock in the morning. She was then lying at anchor, and, according to their testimony, they sailed within three or four hundred feet of her, but admit that they were afraid to round her stern, because she was so near the beach they thought their boat might hit the bottom, and, seeing no one on the deck of the vessel, they immediately withdrew, but shortly afterwards repeated the experiment with a like result. Subsequently they were about to approach her for a third time, but seeing a British steamer coming in, they stood away to put a pilot on board the steamer. After having boarded the steamer, and while they were running up the channel, they, for the first time, saw a signal for a pilot in the fore rigging of the ship, but they admit it was of no use at that time to try to get her away, as the wind had shifted more to the northward. Every one of these witnesses saw the vessel before daylight, and in effect admit that they knew she was in need of a pilot. Their excuse for not going on board is, that there was no signal set, or hail made from the vessel. On the other hand, the master testifies that some one was on deck all the time, and that he himself was not below after anchoring, for more than ten minutes at any one time until the vessel went ashore. He saw the pilot-boat get under way and work out to the windward of the ship, but says she did not come within hailing distance; and he further says, that when she proceeded to the steamer he set the signal for a pilot in the fore rigging of the ship, lest the pilot should think he was supplied. At that time all the sails of the ship were furled, and the master says that the signal could be seen from the fore rigging as easily as from the foremast-head. All the circumstances tend to show that the signal was set as soon as the master considered that the vessel was in danger. Unacquainted as he was with the anchorage, it would be unreasonable to suppose that he could have anticipated, in the midst of a northeast storm, at that hour of the morning, that the wind would change with the tide at half past nine. As soon as he saw the pilot-boat, and found that she was standing away from his vessel, he set the signal. That signal was seen by the pilots, and answered every purpose that it would have done if it had been set at the mast-head. But it communicated to the pilots no information which they did not already possess. They knew the vessel was in danger, and had acted upon that knowledge from the time they first approached her to the period when they went to the relief of the steamer. Two or more of them admit that the vessel was so near the beach that they did not deem it prudent to round her stern; and I am satisfied from the evidence that the leeward position of the vessel had more influence in deterring the pilots from boarding her, than the absence of the signal, or the omission to hail by the officers and crew. They were acquainted with the anchorage, and knew the dangers which surrounded the vessel; and if they had been disposed to go to her relief, or had thought it prudent so to do, it is incredible to suppose that they would have been deterred from so praiseworthy an act by the absence of a signal, or the failure of the crew to hail. Had they been ignorant of the peculiarities of the place, or if they had had any sufficient reason to suppose that the master was well acquainted with his situation, there might be some merit in this excuse. Neither of those reasons, however, has any foundation in the fact, and, in view of all the circumstances, this ground of defence must be overruled. For these reasons I am of the opinion that the relief prayed for in the bill of complaint ought to be granted, and when the amount to be recovered is ascertained, the complainants will be entitled to a decree in their favor. Should any dispute arise in ascertaining the amount, the cause must be referred to a master for that purpose.

PATTEN (GILL v.). See Cases Nos. 5,427 and 5,428.

PATTEN (LADD v.). See Case No. 7,973.

PATTEN (UNITED STATES v.). See Case No. 16,007.

Case No. 10,813.

PATTEN v. WASHINGTON.

[3 Cranch, C. C. 654.] [1]

Circuit Court, District of Columbia. Dec., 1829.

JUSTICE OF PEACE — AUTHORITY TO TAKE BOND FOR GOOD BEHAVIOR—COMMON PROSTITUTE.

A justice of the peace in the city of Washington has authority, under the charter of May 4, 1812, and the by-law of the 16th of December, 1812, section 7, to require a common prostitute to give security for her good behavior; and has jurisdiction of a suit upon the bond given therefor; the penalty not exceeding $20.

Appeal from the judgment of Mr. Justice Wharton, for $20, the penalty of a bond here-

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

tofore taken by him from Dolly Ann Patten, a notorious common prostitute, and keeper of a brothel, under the seventh section of the by-law of the corporation of Washington, of December 16, 1812.

Judgment affirmed with costs.

PATTEN, The MARY. See Case No. 9,223.

Case No. 10,814.

In re PATTERSON.

[1 Ben. 448;[1] 1 N. B. R. 100; Bankr. Reg. Supp. 22; 6 Int. Rev. Rec. 127; 7 Am. Law Reg. (N. S.) 26.]

District Court, S. D. New York. Oct. 2, 1867.

BANKRUPTCY—ISSUE OF LAW — WAIVER — FILING PROOF OF DEBT BEFORE FIRST MEETING— EXAMINATION OF BANKRUPT.

1. Where creditors, before the first meeting of creditors, filed proof of their debt, and applied for an order for the examination of the bankrupt, and the bankrupt objected to the granting of the order, on the ground that it could not be made before the first meeting, and, after argument, the register granted the motion, whereupon the bankrupt moved that the question be adjourned into court for the decision of the judge, under section 4 of the bankruptcy act [of 1867 (14 Stat. 519)], and the register declined to adjourn the question, but, on the bankrupt's request, certified the matter to the court; *held*, that the objection of the bankrupt to the granting of the order for the examination, raised an issue of law which it was the duty of the register to adjourn into court.

[Cited in Re Blaisdell, Case No. 1,488; Re Heller, Id. 6,339; Re Pease, 29 Fed. 595.]

2. As the bankrupt argued the question before the register, he waived his right to have the question adjourned into court, and, after the decision of the question by the register, there was no issue of law to be adjourned, and the register was right in not adjourning the question under section four.

3. Creditors may prove their claims before the first meeting of creditors.

4. A creditor who has proved his claim, may apply for an examination of the bankrupt before the first meeting of creditors.

5. It is not the duty of the register to notify the bankrupt, or his attorney, of the filing of proof of any claim before the first meeting of creditors.

[In the matter of Charles G. Patterson, a bankrupt.]

BLATCHFORD, District Judge. In this case, an adjudication of bankruptcy was made September 12th, 1867, and a warrant was issued to the marshal, returnable October 23d. On the 23d of September, Tupper & Beattie, creditors on the debtor's schedules, filed a proof of debt. On the 25th of September, Tupper & Beattie made a motion before the register for an order for the examination of the bankrupt, under section 26 of the act, and according to form No. 45. The bankrupt objected to the granting of the order, on the ground that the order could not be made before the first meeting of creditors. After argument the register granted the motion. Thereupon, the bankrupt moved that the question be adjourned into court for the decision of the judge, under the provisions of section 4 of the act, and tendered his questions and issue to the creditors, in order that they should state their points, and that, issue of law being thus joined, the same might be adjourned into court by the register, for decision by the judge, as provided for in the fourth section of the act. To this tender the creditors objected, and they declined to receive the questions or to join in the issue, on the grounds that their motion had been granted and that there was no question or issue of law raised, inasmuch as section 26 of the act provided distinctly that the court might, on the application of any creditor, at all times require the bankrupt to attend and submit to examination, and that, if the bankrupt wished to raise the question of the register's power to make the order before the return of the warrant, he could take the opinion of the judge by a certificate of the register under the provisions of section 6 of the act. The register declined to grant the motion of the bankrupt to adjourn the question into court, inasmuch as there was no issue joined, and decided that the proper course under the law, if the bankrupt questioned the right to make the order for examination before the warrant was returned, and desired to take the opinion of the judge thereon, was to do so by a certificate of the register under the provisions of section 6 of the act. The order requires the examination to take place on the 9th of October. The bankrupt objected to the action of the register, and requested four questions to be certified to the judge, which has accordingly been done by the register.

1. Whether the matter of granting the motion for an order for examination should not have been adjourned into court for the decision of the judge; and whether, after the bankrupt had tendered his points at issue, the register did not err in granting said motion, and in refusing to adjourn the same into court for the decision of the judge?

As regards this question, the register states that he thinks that it was not necessary to adjourn the matter into court—Firstly, because issue was not joined between the parties; secondly, because section 6 provides a sufficient, and the most usual way, to take the opinion of the judge on the point, without suspending proceedings in the matter. The question of granting the motion for an order for examination ought to have been adjourned into court for the decision of the judge. The fourth section of the act requires that, "in all matters where an issue of fact or of law is raised and contested by any party to the proceedings" before the register, "it shall be his duty to cause the question or issue to be stat-

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

ed by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge." Now, the objection made by the bankrupt, before the register, to the granting of the order for examination, on the ground that the order could not be made before the first meeting of creditors, raised an issue of law, which was contested. That issue it was the duty of the register to adjourn into court for decision by the judge. Instead of doing so, he granted the motion, and thus decided the issue of law himself. But the bankrupt, after raising the issue of law, appears to have argued it and submitted it for decision to the register, without requesting the register to adjourn it into court, and without objecting to its decision by the register. The granting by the register of the motion of the creditor disposed of the question, and, after that, there was no issue or question to be adjourned. It is the duty of the register to adjourn an issue of law into court without any request to that effect by a contesting party. But still such adjournment is a proceeding which a contesting party may waive, and, where he does waive it, by submitting the decision of the issue to the register, he cannot, after finding that the question is decided against him by the register, then ask to have it adjourned into court. If, instead of virtually requesting the register to decide the issue, by arguing the question and awaiting the register's decision, the bankrupt had, on raising the issue, requested the register to adjourn it into court, the case would have presented a different aspect. But as it was, the tendering by the bankrupt of his points after the decision, imposed upon the register no obligation to adjourn them into court.

2. Whether, under the bankrupt law, Tupper & Beattie are creditors who have proved their claim, so as to entitle them to make the motion?

In regard to this question the register states, that he considers Tupper & Beattie to be creditors who have proved their claim, they having fulfilled all the requirements of the law, and there being no restriction as to the time when the claim may be proved, after proceedings are commenced; that the first meeting of creditors is for the choice of an assignee by those who have proved their claims; that he can see no reason why creditors should wait until the return day of the warrant to make their proofs; that the debt which exists is the basis of the right to appear as creditor; and that creditors should be allowed to judge for themselves as to when they will take advantage of the law and appear. I concur with the register in these views. The creditors in this case, having proved their claim, had a right to make the motion.

3. Whether, before the day appointed for the first meeting of the creditors, a creditor can, under the act, prove his claim and so become a party to the proceedings in bankruptcy, as to be entitled to an order for the examination of the bankrupt under the twenty-sixth section of the act?

In regard to this question the register states that he thinks that, when once a creditor has proved his claim, he has, unless the same be questioned, full right under the law, and may at any time call for an examination of the bankrupt. The register is correct in this conclusion.

4. Whether, if, in the interval between the issuing of the warrant in bankruptcy and the day appointed for the first meeting of the creditors, and for proof of claims and choice of assignee, a deposition in proof of a claim against the bankrupt is filed, it is not the duty of the register to notify the bankrupt or his attorney before allowing the same, and entering it upon the list (form No. 13), so that objection to the proof thereof may be made, if any exist, under section 23 of the act?

In regard to this question the register states, that he does not think that the bankrupt need be notified of the filing of claims prior to the first meeting of creditors; that it is a matter of no consequence to him whether creditors file them before or after; and that the bankrupt, having surrendered all his property for the benefit of all his creditors, could, with perfect propriety and honesty, leave all questions connected with his estate to them, without regard to what disposition is made of it.

It is not the duty of the register to notify the bankrupt or his attorney, before the first meeting of the creditors, of the filing of such depositions in proof of claims as may be filed before such first meeting. Notwithstanding the filing of such a deposition before such first meeting, and the entering of the claim on a list (form No. 13), the register may still, at such first meeting, under section 23, postpone the proof of the claim and exclude the creditor from voting in the choice of an assignee. The court has, under section 22, full control, at all times, of all debts and all proofs of debts, even after the depositions in proof have been filed; and the bankrupt can, at the first meeting of creditors, object, under section 23, to the validity of and the right to prove any debt, no matter whether the deposition in proof thereof is filed at such first meeting or was filed previously.

[NOTE. The bankruptcy of Charles G. Patterson was again before the court upon certificate from the register in several cases. Upon the question of the power of the register to decide upon validity of objections to questions put to the bankrupt on examination (Case No. 10,818); upon the ruling of the register in declining to adjourn certain questions into court, and as to the admissibility of the questions, also upon the right of bankrupt during his examination to consult counsel (Id. 10,815); as to the right of the bankrupt to refuse to answer certain questions the answer to which might subject him to criminal prosecution (Id. 10,816); as to his right to refuse to answer the same questions put in a changed form (Id. 10,820). The case is last reported as heard upon the right of the bankrupt to claim exemption from arrest by state authorities upon an execution issued upon a judgment obtained by default upon a com-

plaint charging fraud in the contracting of the debt on account of which suit was brought. Id. 10,817.]

Case No. 10,815.

In re PATTERSON.

[1 Ben. 508;[1] 1 N. B. R. 125, 150; Bankr. Reg. Supp. 27, 33; 6 Int. Rev. Rec. 157.]

District Court, S. D. New York. Oct. 30, 1867.

BANKRUPTCY—COMMENCEMENT OF PROCEEDINGS—TIME TO WHICH THE ASSIGNMENT RELATES—ADJUDICATION — AMENDMENT OF PETITION OR SCHEDULES — RIGHT TO CONSULT COUNSEL ON EXAMINATION.

1. When a petition in bankruptcy is filed, which is followed by an adjudication of bankruptcy, the time of the filing of the petition is the commencement of proceedings in bankruptcy, and the assignment, when made, relates to that date.

[Cited in Re Levy, Case No. 8,296; Re Rosenfield, Id. 12,059; Re Crawford, Id. 3,363; Re Hennocksburgh, Id. 6,367; Re Litchfield, Id. 8,385.]

2. The fact that amendments to the petition or the schedules attached are afterwards, by order of the register, filed before the adjudication, does not affect the date to which the assignment relates.

3. If no adjudication in bankruptcy is made upon a petition, no proceedings are commenced, so as to affect the title to the debtor's property, or to give a creditor any right against the debtor as a bankrupt, or against his property, except such as are provided by section forty.

4. The words "may be issued," in section thirty-eight of the bankruptcy act [of 1867; 14 Stat. 535], are to be read, "shall be issued."

5. The adjudication of bankruptcy in a voluntary case ought not to be postponed until the register has, in accordance with general order No. 7 and rule 4 of this court, certified the petition and schedules to be correct.

6. The words "adjudication of bankruptcy," in sections fourteen and nineteen of the act, mean the commencement of the proceedings, according to section thirty-eight.

7. The register is the proper judge of the propriety of allowing a bankrupt, who is under examination, the privilege of consulting with his counsel, provided that such consultation does not cause delay in the proceedings; and the court will not interfere with the exercise of such discretion, in ordinary cases.

[Cited in Re Judson, Case No. 7,562; Re Collins, Id. 3,008.]

[In the matter of Charles G. Patterson, a bankrupt.]

B. Sanford, for bankrupt.

Benedict & Benedict, for creditors.

BLATCHFORD, District Judge. This is a special case stated for the opinion of the court in this matter under section six of the act. It is signed by the attorneys for the bankrupt, and the attorneys for Tupper & Beattie, creditors, who have proved their debt; and it is certified by the register, under general order No. 11, to contain questions raised before him in the proceedings in this matter.

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

The examination of the bankrupt was proceeding before the register, and the bankrupt testified that he received a sum of $5,000 about the 25th of August, 1867, which he then borrowed from one Charles Kirby, and which he had not repaid. Thereupon the creditors asked him this question: "Where is it?" The question was objected to by the bankrupt, and the register overruled the objection. The bankrupt answered: "It has been mostly spent—used." He was then asked: "How much of it has been spent?" To this question the bankrupt objected, on the ground that, as matter of law, the examining creditors had no right to inquire of the bankrupt as to any property in his possession, which was acquired after the commencement of the proceedings in bankruptcy under which his examination was had, and that, if they had that right, it was exhausted by previous interrogatories put and answered. The bankrupt then requested the register to adjourn the question into court, as an issue of law, to be decided by the judge, under section four of the act. The register declined to adjourn the question into court, and decided that the question should be answered. It is agreed that the records and files in the case are a part of the special case. It is also agreed that the following questions are presented to the court: (1.) Was the register correct in declining to adjourn the question into court, as an issue of law? (2.) Were the questions above set forth admissible?

For the reasons set forth in my decision made herewith, in the matter of Samuel M. Levy and Mark Levy, I hold that the register was correct in declining to adjourn the question into court as an issue of law.

A decision on the second question presented by the special case involves a decision as to the time when the line is to be drawn, between property which does, and property which does not, pass to the assignee in bankruptcy.

In the present case, the chronology of the case is as follows: On the 25th of June, 1867, a petition, with schedules, was filed. On the 27th of June the register examined the same and found them deficient. Proceedings were adjourned from time to time until the 8th of August, on which day the register, on the application of the petitioner, duly verified, made an order that he have leave to file amended schedules, A and B, to his petition, by filing and substituting new and complete schedules. On the 19th of August, new and complete schedules, A and B, comprising the whole eleven of the sheets composing schedules A and B in form No. 1, were filed, accompanied by oaths to the new schedules; but no new petition was filed, nor any amendment to the petition. On the 6th of September the register examined the substituted schedules, and certified the same to be incorrect in form and deficient. On the 10th of September, the register made an

order giving leave to the petitioner to file amendments to his substituted schedules. On the 11th of September, the petitioner filed an amendment to schedule A, No. 2, and one to schedule A, No. 3, duly verified. On the 12th of September, the register examined the petition and schedules, and certified the same, as amended, to be correct, and made adjudication of bankruptcy, and granted a certificate of protection. On the 13th of September, the register issued a warrant to the marshal, returnable October 23d. On the 23d of September, the proof of debt by Tupper & Beattie for $7,952.66 was received and filed by the register. On the 25th of September the register, on the application of Tupper & Beattie, made an order, returnable October 9th, for the examination of the bankrupt. This order fell through for want of service, and another order was made, returnable October 15th, under which the bankrupt attended before the register on that day, and his examination has proceeded.

It thus appears that the petition was filed on the 25th of June, the money inquired about was borrowed and received by the bankrupt on the 25th of August, and the adjudication of bankruptcy was made on the 12th of September. An assignee was elected by the creditors on the 23d of October, at their first meeting, and his choice has been approved by the register and the judge, and he has accepted the trust.

It is insisted by the creditors that everything which was the property of the bankrupt on the 12th of September, at the time the adjudication of bankruptcy was made, passed to the assignee when he was appointed; and it is contended by the bankrupt that nothing passed to the assignee which became the property of the bankrupt after the 25th of June, when his petition was filed. If the latter view is the correct one, the questions in regard to the $5,000 were improper. If the former view is the correct one, the questions were proper. The whole subject has been orally argued before me by the counsel for the respective parties.

The fourteenth section of the act provides, that the assignment to be executed to the assignee shall "assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee." The intent and purport of this provision is, that the property which was the property of the bankrupt at the time of the commencement of the proceedings in bankruptcy, and no other property, shall vest in the assignee, and shall vest in him as of the time of the commencement of such proceedings, no matter when the assignment to the assignee is actually executed. It does not mean that the property which is the property of the bankrupt at the time the assignment is executed, and also the property which was his property at the time of the commencement of the proceedings, shall pass to the assignee. The whole clause must be read together, and, so read, the words "all the estate, real and personal, of the bankrupt" do not mean all that which is his estate at the time the assignment is executed, but they only mean all that which was his estate at the time of the commencement of the proceedings in bankruptcy. So, also, form No. 18, the form of the assignment, construed in connection with the statute, and purporting on its face, as it does, to be made by virtue of the authority conferred by the fourteenth section of the act, conveys to the assignee only the property which was the property of the bankrupt at the time of the commencement of the proceedings in bankruptcy, and the blanks in it for a date are to be filled with the date of the day of the commencement of such proceedings. The word "is," in that form, before the word "possessed," is probably a misprint. The form is evidently copied almost verbatim from the form of assignment used under the Massachusetts insolvent law, and in that form the word "was" is used, and not "is," before the word "possessed."

This brings up the question, What is the time of the commencement of proceedings in bankruptcy? The thirty-eighth section of the act undertakes to determine this. It provides, "that the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, upon which an order may be issued by the court or by a register in the manner provided in section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act." The order referred to in this provision must be one which can be issued by the court, and which can be also issued by a register, provided power is given to the register by section four to issue it; and it evidently must be the earliest order which can be so issued, and it must be an order which is common to voluntary and involuntary cases. It cannot mean the order of reference to a register, form No. 4, for that is confined to voluntary cases, and can never be made by the register, and there is no corresponding order in involuntary cases. It must mean the order adjudicating the debtor to be a bankrupt. This order, in voluntary cases, is form No. 5, and it is called an order, in a note to that form. It may be made by the court, and it may also be made by the register under section four. In involuntary cases this order is form No. 58, and is called an order on the face of it. It is called, in section forty-two, an "order of adjudication of bankruptcy." It can be made by the court, but it cannot be made by a register, because section four of the act, as interpreted by general order No. 5, does not authorize a register to make it. The order of adjudication is the earliest order which answers the requirements

of the statute. Besides, the good sense of the provision harmonizes with this view. Striking out the words "either by a debtor in his own behalf, or by any creditor against a debtor," the provision reads, that "the filing of a petition for adjudication in bankruptcy, upon which an order may be issued by the court or by a register, &c." The words "for adjudication in bankruptcy" are to be understood after the word "order," in like manner as they are found after the word "petition." The petition is filed for an adjudication. The order for an adjudication follows the filing of such a petition.

The next question is, as to what is the meaning of the words, "may be issued." The word "may" must here be interpreted to mean "shall." The filing of a petition, upon which an order of adjudication shall be issued, whether in a voluntary case or in an involuntary case, is the commencement of proceedings in bankruptcy. Unless the order of adjudication is made, the filing of the petition is not the commencement of proceedings. In a voluntary case, the petition may be filed, and, before the adjudication is made, the debtor may, for good reasons, have the proceedings stayed by the court, and they may never be resumed. In such case, no title of the debtor to any property can be affected, nor can any creditor acquire any rights, under the proceedings, for no proceedings will, in a legal sense, have been commenced. So, in an involuntary case, if, under section forty-one, on the return of the order to show cause, the allegations of the petition are not proved, no order of adjudication is made, and no proceedings have, in a legal sense, been commenced, so as to affect the title to the debtor's property, or to give any creditor any rights against the debtor as a bankrupt, or against his property, except the purely provisional rights and remedies provided by section forty. It requires, therefore, an order of adjudication to make the filing of a petition of any avail as a commencement of proceedings. But, when the order of adjudication is made, then the filing of the petition is the commencement of proceedings. By virtue of the making of the order of adjudication, the filing of the petition becomes the commencement of proceedings. The making of the order of adjudication relates back and gives an effect to the filing of the petition which it could not previously have, and that effect is, that the proceedings are to be considered as having been commenced when the petition was filed.

What is the petition, and what is its filing? By section eleven, the petition, in a voluntary case, is to contain certain averments, and is to have annexed to it a sworn schedule of debts and a sworn inventory of property; and it is declared that, if the debtor applies by such a petition, with such a schedule and such an inventory annexed, "the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt." In an involuntary case, by section thirty-nine, a petition by a creditor is provided for, and, by section forty, it is provided that, on the filing of the petition, an order shall be made for the debtor to show cause why the prayer of the petition should not be granted. No provision is made by the act for the filing of more than one petition by the same debtor or the same creditor, in the same matter, or for more than one filing of such petition. The forty-second section provides that the order of adjudication of bankruptcy, in an involuntary case, shall require the bankrupt to give to the marshal a schedule of his creditors, and an inventory of his estate, in the form, and verified in the manner, required of a petitioning debtor. The twenty-sixth section provides, that the bankrupt shall "be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts." General order No. 7 provides, that "the court may allow amendments to be made in the petition and schedules upon the application of the petitioner, upon proper cause shown, at any time prior to the discharge of the bankrupt," and general order No. 33 provides specially for the mode of making amendments to the schedules, annexed to the debtor's petition. All these provisions serve to show that the petition is filed once for all in any case; that, if it is amended, such amendment does not alter the date of its filing, or postpone the effective vigor of such filing to the time the amendment to it is filed; that the amending of the schedules does not affect or postpone the time of the filing of the petition; and that any petition or schedule that is amended is merely amended, leaving the original that is amended still to stand, so far as the question of jurisdiction or commencement of proceedings is concerned, in regard to the time when it was filed, as if it were not amended.

This being so, section eleven declares, that the filing of the petition "shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt." When such a voluntary petitioner as the eleventh section specifies declares, by petition to the proper court, his inability to pay his debts in full, and his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain the benefit of the act, and annexes to his petition what purports to be the verified schedule and inventory required by the eleventh section, the filing of his petition is an act of bankruptcy, and he has a right to be adjudged a bankrupt immediately upon the filing of the petition, even though his petition and schedules may require amendment, and may afterwards be allowed to be amended. The adjudication of bankruptcy, in a voluntary case, ought not to be postponed until, under general order No. 7 and rule 4 of this court, the register has examined the petition and schedules, and certified them to be correct in form. In the present case, that practice seems to have been pursued, for the petition was filed on the 25th of June, and the

adjudication of bankruptcy was postponed until the 12th of September, in order to allow the schedules to be made correct in form. No amendment was made to the petition.

The forms for orders of adjudication support this view. Form No. 5, for a voluntary case, states that the register finds that the debtor "has become a bankrupt." and that the register thereby declares and adjudges him a bankrupt accordingly. He does not become a bankrupt by the adjudication, but he becomes one by the filing of the petition, provided the adjudication is afterwards made. The adjudication is merely a certificate or order, made by an authorized officer, to the effect that the petitioner became a bankrupt by the filing of his petition. Hence, in the title of the matter, in form No. 5, the date of the filing of the petition is set forth, and the adjudication is, in effect, a finding or order by the register that the petitioner became a bankrupt when his petition was filed, and that he is declared and adjudged to be such bankrupt. So, in an involuntary case, the adjudication, form No. 58, adjudges that the debtor became bankrupt before the filing of the petition, and, therefore, declares and adjudges him a bankrupt accordingly. In a voluntary case, he becomes a bankrupt when he files his petition. In an involuntary case, he becomes a bankrupt before the petition is filed against him. In the former case, the filing of the petition is the act of bankruptcy. In the latter case, some act committed before the filing of the creditor's petition was the act of bankruptcy. But, in both cases, the adjudication is nothing but a judicial finding of the fact, that the act of bankruptcy was committed at some period prior to the time the adjudication is made. When this finding is made, then it is legally adjudged, in the voluntary case, that the proceedings were commenced when the debtor's petition was filed, which filing was itself the act of bankruptcy; and, in the involuntary case, that the proceedings were commenced when the creditor's petition was filed, and not before, although the act of bankruptcy was committed before the filing of such petition.

There is nothing in general order No. 7, or in rule 4 of this court, that requires the register to certify the correctness of the petition and schedules before he makes adjudication of bankruptcy. Rule 4 of this court only requires the register to certify such correctness before he issues a warrant to the marshal.

The construction I have given to the act makes all its provisions harmonious. The expression "adjudication of bankruptcy," where it occurs in section fourteen, means a judicial finding that the party became a bankrupt either by the filing of a debtor's petition or before the filing of a creditor's petition. Thus, the provision, in section fourteen, that all the property, rights, &c., of the bankrupt "shall, in virtue of the adjudication of bankruptcy and the appointment of the assignee, be at once vested in such assignee," means, that such property, rights, &c., shall, in virtue of the finding that the bankrupt had previously become a bankrupt and the appointment of the assignee, be at once vested in the assignee; but they vest as of the time of the filing of the petition. The expression, "time of the adjudication of bankruptcy," in sections fourteen and nineteen, means the time when, by the adjudication, the proceedings in bankruptcy were commenced according to section thirty-eight. Thus, under section fourteen, the assignee is to be substituted for the bankrupt, in suits "pending at the time of the adjudication of bankruptcy," that is, pending at the time the proceedings were commenced, according to section thirty-eight. Section sixteen provides, that if, "at the time of the commencement of the proceedings in bankruptcy," an action is pending by the debtor for anything which ought to pass to the assignee, the latter may be admitted to prosecute it in his own name. Section nineteen, in saying that "all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day," "may be proved against the estate of the bankrupt," means, that all debts due and payable at the time of the commencement of the proceedings, as above defined, may be proved. The same section afterwards provides, that any person liable as bail, &c., for the bankrupt, who shall have paid the debt, shall be entitled to prove such debt, "although such payments shall have been made after the proceedings in bankruptcy were commenced." This implies clearly that, but for this provision, inasmuch as the payments were not made till after the proceedings were commenced, the claim, not being a debt when the proceedings were commenced, could not be proved, and shows that, under the previous part of the section, a debt to be provable must be due, or must exist as a debt, and not as a mere suretyship, at the time the proceedings are commenced; for, if the payments were made after the commencement of the proceedings and before the making of the adjudication, they could, under the previous part of the section, be proved as a debt, if that previous part means that debts which come into existence as such as late as the making of the adjudication can be proved.

We then come to the discharge. Section thirty-two gives the form of the discharge in hæc verba. It discharges the bankrupt from all provable debts which existed on the day (naming it) on which the petition for adjudication was filed by or against him, excepting such debts, if any, as are excepted by the act from the operation of a discharge. The language of the discharge is

too plain for comment. There is but one petition, in judgment of law, in a given case, and but one filing of it.

This makes a harmonious system. When an adjudication of bankruptcy is made, following the filing of a petition, then it is judicially established that the proceedings in the case commenced when the petition was filed. The date of such filing then becomes the date from which the assignee takes all the property of the bankrupt which was his property at that date; but the assignee does not take anything which became the property of the bankrupt after that date. Such date also becomes the date at which a debt must be due or exist, in order to be provable, subject to the special provisions of section nineteen in regard to contingent liabilities. Such date also becomes the date at which provable debts must have existed, in order to be discharged by the discharge. In other words, the date of the filing of the petition by or against a debtor is the date at which, if an adjudication of bankruptcy follows, the old order of things passes away and a new leaf is turned over. Any other construction would work injustice either to the bankrupt or to his creditors. As he can be discharged only from debts which existed on the day the petition was filed, it would be wrong to give to the creditors holding those debts property acquired by him after that day, and thus take it away from the bankrupt, or from creditors whose debts, because not in existence on that day, cannot be proved against him under his bankruptcy.

It follows, therefore, that, in the present case, nothing passed to the assignee which became the property of the bankrupt after the 25th of June, and that the questions in regard to the $5,000 were improper if that money was not the property of the bankrupt when his petition was filed.

On the further examination of the bankrupt, he requested of the register the privilege of consulting his counsel as to his answers to interrogatories.

[By JAMES F. DWIGHT, Register:

[Facts: The bankrupt being under examination by virtue of an order duly issued, and being present with his counsel, Mr. B. Sanford, before the register, comes now and files the following question: "In the Matter of C. G. Patterson, a bankrupt. Before Mr. Register Dwight, before whom said matter is pending, and upon examination had under an order for examination under the 26th section of the law [of 1867 (14 Stat. 529)]. And now comes the above named bankrupt, and being under an examination under an order duly issued and served therefor, and said examination being had by written interrogatories and answers taken down by the register sitting in the case, and respectfully requests that he may be permitted to consult his counsel, Mr. B. Sanford, in relation to his answers to such interrogatories as may be proposed to him, before answering the same, and to avail of the assistance of his said counsel in drawing his answers to such questions or interrogatories as may be proposed to him in the course of his said examination. C. G. Patterson, by His Attorney, B. Sanford."

[And the register allows the request, to which Mr. Benedict, on behalf of Tupper & Beattie, objects, and requests that the question may be certified to the judge for his decision thereon.

[In my opinion the bankrupt should have the privilege of consulting with his counsel, while under examination, provided that such consultation does not cause delay in the proceedings; which above facts and questions raised are respectfully submitted to his honor the judge, for his decision.] [2]

(Oct. 31, 1867.)

BLATCHFORD, District Judge. Within the limits stated by the register, that is, to the extent of allowing to the bankrupt the privilege of consulting with his counsel while under examination, provided that such consultation does not cause delay in the proceedings, the register is the proper judge of the propriety of allowing to the bankrupt such privilege, and the court will not interfere with the exercise of such discretion, in ordinary cases.

Case No. 10,816.

In re PATTERSON.

[1 Ben. 544; [1] 1 N. B. R. 152; Bankr. Reg. Supp. 33; 6 Int. Rev. Rec. 166.]

District Court, S. D. New York. Nov. 2, 1867.

BANKRUPTCY—EXAMINATION OF BANKRUPT—GAMING.

A bankrupt under examination, in October, 1867, in proceedings commenced in June, 1867, having stated what amount of property he had a year before that time, was asked "Have you lost any part of it in gaming?" *Held*, that the question, being broad enough to cover the time subsequent to the commencement of his proceedings in bankruptcy, was improper, as calling on him for an answer which might subject him to punishment for a criminal offence, under section 44 of the bankruptcy act [of 1867 (14 Stat. 539)].

[In this case the register certifies the following question: Under an order of examination had in the case, the bankrupt [Charles G. Patterson] was present before the register on the 30th day of October, and was being examined by Mr. Robert D. Benedict, attorney for Tupper & Beattie, creditors. The following questions were asked and answered as follows by the bankrupt: "Question 126. How much property had you a year ago? Answer. I probably had what cost me $100,000, in real and personal prop-

2 [From 1 N. B. R. 150.]

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

erty, subject, perhaps, to liens of various kinds, to half that amount. Question 127. Have you lost any part of that in gaming? (Objected to by the bankrupt as incompetent and irrelevant.)" The register overruled the objection and allowed the question, and thereupon the bankrupt, under instruction of counsel, refuses to answer until ordered so to do by the court; and the question and matter is referred to his honor the judge, under the provisions of section 7 of the bankrupt act. The register further certifies that proceedings in this matter were commenced on the 25th of June, 1867, and that adjudication of bankruptcy was made after the schedules were amended by the petitioner on the 12th day of September following.] [2]

By JAMES F. DWIGHT, Register:

[I think that the bankrupt is compellable to answer the question which he has refused,—No. 127. The law, in section 26, gives to creditors the fullest rights in the examination of bankrupts, using the words "upon all matters relating to the disposal or condition of his property," and "to all other matters concerning his property and estate and the due settlement thereof according to law." Section 29 says that "no discharge shall be granted, or if granted shall be valid, if the bankrupt * * * has made any fraudulent gift * * * of any part of his property, or has lost any part thereof in gaming." Section 44, in addition, provides for the punishment of the bankrupt, who after the commencement of proceedings shall spend any part of his property in gaming.

[It seems to me that these creditors have a double interest in this question, and a double right. Firstly, the interest and right to know if any of the bankrupt's property, which otherwise might go towards the liquidation of their claims, has been wasted or squandered by him, perhaps in some manner which would give the assignee the right to recover it back, thereby swelling the assets; and, secondly, of opposing the discharge of the bankrupt, and of punishing him if he has rendered himself liable under the 44th section. I do not see how the "due settlement according to law" of the bankrupt's estate can be made unless all the facts concerning it are made patent.

[Which statement of facts and opinions are respectfully certified and submitted to his honor the judge, for his decision and action.] [2]

BLATCHFORD, District Judge. The question, so far as it called on the bankrupt to answer as to whether he had, since the commencement of the proceedings in bankruptcy, lost in gaming any portion of his estate, was objectionable, as calling on him for an answer which might subject him to punishment for a criminal offence, under section 44 of the bankruptcy act. The question was broad enough to cover the time subsequent to the commencement of the proceedings in bankruptcy, and was, therefore, improper.

[NOTE. After the rendering of this decision the question was asked the bankrupt so as to exclude any gambling done since the commencement of the bankruptcy proceedings. See Case No. 10,820.]

[For collateral proceedings in this litigation, see note to Case No. 10,814.]

Case No. 10,817.

In re PATTERSON.

[2 Ben. 155; [1] 1 N. B. R. 307 (Quarto, 58); 15 Pittsb. Leg. J. 241.]

District Court, S. D. New York. Feb. 17, 1868.

BANKRUPTCY—FRAUDULENT DEBT—JUDGMENT—ARREST.

1. Where a judgment by default was rendered against a bankrupt in a state court, on a complaint which showed that the debt, which the suit was brought to recover, was contracted by fraud, *held*, that the question, whether the debt represented by the judgment was created by the fraud of the bankrupt, was concluded by the judgment.

[Cited in Hazleton v. Valentine, Case No. 6,287; Re Sidle, Id. 12,844; Re Wright, Id. 18,065.]

2. Under the thirty-third section of the bankruptcy act [of 1867 (14 Stat. 533)], the judgment would not be affected by the discharge, any more than the debt which it represented.

[Cited in Warner v. Cronkhite, Case No. 17,180.]

[Cited in Donald v. Kell, 111 Ind. 3, 11 N. E. 783; Carit v. Williams, 74 Cal. 186, 15 Pac. 752; Wade v. Clark, 52 Iowa, 159, 2 N. W. 1040.]

3. The bankrupt, therefore, was not exempt from arrest on an execution issued on the judgment in question.

On the 8th of November, 1866, one Shepard recovered a judgment against [Charles G. Patterson] the bankrupt, in the superior court of the city of New York, for $515.99, on his default for want of an answer, the summons and complaint in the action having been served on him personally, on the 8th of May, 1866, in the city of New York. The complaint set forth that, on the 9th of April, 1858, Shepard advanced to the bankrupt $500, for the express purpose of buying and paying for some goods, to be shipped to another person, and the bankrupt received that sum from Shepard in a fiduciary capacity, as the agent of Shepard, to buy, pay for, and ship the goods, and agreed to collect the bill for the goods and refund the money to Shepard; and that the bankrupt did not use the money for that purpose, but fraudulently misapplied it, and had never refunded it. On the 25th of June, 1867, the bankrupt filed his petition in bankruptcy, and was adjudicated a bankrupt on the 12th of September, 1867. He now represented to the court that, on the 29th of January, 1868, Shepard issued to the sheriff of the city and

[2] [From Bankr. Reg. Supp. 33.]

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

county of New York an execution on said judgment, commanding him to arrest the bankrupt and commit him to jail until he should pay the judgment or be discharged according to law, and that the execution was in the hands of the sheriff, and he was about to arrest the bankrupt on it. On these facts, the bankrupt asked this court to enjoin the sheriff from arresting the bankrupt on the execution during the pendency of the proceedings in bankruptcy.

Sandford, Le Baron & Porter, for bankrupt.

E. F. Shepard, for creditor.

BLATCHFORD, District Judge. It is claimed, on the part of the bankrupt, that the judgment in question is a debt which will be discharged by a discharge under the act; that the original cause of action was merged in the judgment; that the judgment is now the only debt; that it cannot be said, under section 33 of the act, that the debt was created by fraud, because the original claim, though created by fraud, was extinguished by the judgment, and the fraud disappeared when the judgment was obtained; that the judgment alone, and not the claim created by fraud, is provable under the act; that, as the judgment is provable, a discharge will discharge it; that, therefore, the bankrupt is, by the last clause of section 26, exempt from arrest on the judgment during the pendency of the proceedings in bankruptcy; and that, under section 21, the court can enjoin an execution on the judgment.

I cannot assent to these views. The question as to whether the debt which is represented by the judgment was created by the fraud of the bankrupt, I regard as concluded by the judgment. It was recovered in a court of competent jurisdiction, on the personal service of a complaint setting forth all the facts making up the fraud. The question is, therefore, res adjudicata, as between the parties to the judgment, who are the same parties now before this court.

The only other question is, whether the debt is one excepted by section 33 of the act, from the operation of a discharge. That section provides, that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act." It is claimed by the bankrupt that, the debt in this case being in the shape of a judgment, this court cannot, in applying the thirty-third section, go behind the judgment, to see whether the claim on which the judgment was recovered was created by fraud; that the judgment, which is now the only debt, was created by the claim, and not by the fraud, and that, although the judgment was created by the claim and the claim by the fraud, yet the judgment was not created by the fraud. This view is unsound. Wherever the debt, no matter whether it be in the shape of a judgment or in any other form, was created by fraud, had its root and origin in fraud, there it is not to be discharged. To hold that the recovery of a judgment in an action where the gravamen of the complaint is fraud, condones that very fraud, by so merging the original claim, that the judgment cannot be said to be a debt created by the fraud set out in the complaint as the ground for recovering the judgment, would fritter away entirely the good sense and plain intention of the thirty-third section. The case of Bangs v. Watson, 9 Gray, 211, cited to sustain this view, does not, in my judgment, support it, and I have been referred to no case which leads to any such conclusion.

The debt, in this case, not being one to be affected by a discharge, the bankrupt is not exempt from arrest upon it, and the application is denied.

[For collateral proceedings in this litigation, see note to Case No. 10,814.]

Case No. 10,818.

In re PATTERSON.

[1 N. B. R. 147; [1] Bankr. Reg. Supp. 32.]

District Court, S. D. New York. Oct. 30, 1867.

BANKRUPTCY — EXAMINATION OF BANKRUPT — OBJECTIONS TO QUESTIONS—WHO MAY OVERRULE.

Where questions were put to bankrupt on his examination touching the acquirement of certain moneys, to which bankrupt objected, and the register overruled his objection: *Held*, That the register had no power to decide on the validity of objections or on the admissibility of the questions.

[Cited in Re Graves, 24 Fed. 552.]

By JAMES F. DWIGHT, Register:

Facts: An order had been made for the examination of the bankrupt under oath, and he had attended before Mr. Register Ketchum, acting in the absence of, and at the request of Mr. Register Dwight, on the 15th, 16th, and 19th of October, and had been examined under oath. On the 19th of October the 48th interrogatory was (referring to a certain sum of money of $5,000 which the bankrupt had previously answered concerning): 48th Interrogatory. "Where is it?" Objected to by Mr. Sanford; allowed by the register, and Mr. Sanford excepted. Answer. "It has been mostly spent, used." 49th Interrogatory. "How much of it was spent?" Objected to as before, and because it is an inquiry about property which the bankrupt has acquired since the commencement of these proceedings. Pending decision by the register, by agreement the hearing was adjourned to October 24th, at 10 o'clock. On the 24th, as by adjournment, appeared Mr. Sanford, attorney for the bankrupt, and Mr.

[1] [Reprinted from 1 N. B. R. 147, by permission.]

Robert Benedict, attorney for the creditors, Tupper & Beattie; and Mr. Sanford, for the bankrupt, who does not appear, presents and files the following written objection to interrogatories proposed on the 19th nunc pro tunc: "In the Matter of Charles G. Patterson, a Bankrupt. Upon examination of bankrupt before Mr. Register Dwight, upon motion made under 26th section of the act [of 1867 (14 Stat. 529)]. To the 48th and 49th questions proposed to the bankrupt, he objects, through B. Sanford, one of his attorneys, for that in matter of law the examining creditors had no right to inquire of the bankrupt as to any property in his possession and acquired after the commencement of the proceedings in bankruptcy under which the examination is had, or if they have any right, the same has been exhausted under the preceding interrogatories answered by the bankrupt. B. Sanford, Attorney for Bankrupt,"—and requested the register to adjourn the question into court as an issue of law to be decided by the judge under section 4 of the act. And the register declined to adjourn the question into court, inasmuch as the court has directed in the Case of Levy, Bankrupt, that the examination of bankrupts shall proceed without delay till the same be finished. And the register overrules the objection raised, without argument, and allows the questions.

And Mr. Benedict requests the register to certify to the judge for his opinion, under the 6th section of the act, the following question: "I request the register to certify to the judge the question whether the objection raised by the counsel for the bankrupt to 48th and 49th questions are valid, or whether the register was correct in admitting those questions. R. L. Benedict, of Counsel for Creditors. October 24, 1867,"—which request is hereby granted, and the above facts and questions are submitted to the decision of his honor the judge.

In my opinion the creditor has the right to ask, and the bankrupt must answer the 48th and 49th questions, for the 26th section of the act, by its general terms, clearly means, I think, to allow the fullest examination of the bankrupt. And furthermore, it is my opinion that the direction of the court in the Case of Levy, covers all such examinations as this; and that objections to questions do not raise such points or issues of law as to entitle the register to adjourn the case into court under the 4th section. If any objection raised to a question should be considered an issue of law, justifying an adjournment under the 4th section, examinations might be prolonged interminably and the real object of the same defeated.

BLATCHFORD, District Judge. It is impossible in the foregoing statement to determine whether the objections raised by the counsel for the bankrupt to the 48th and 49th questions are valid, or whether the register was correct in admitting those questions, for the reason that it does not appear whether the $5,000 inquired about was in fact property acquired by the bankrupt after the commencement of the proceedings. The register, however, would not in any event have power to decide on the validity of the objections or on the admissibility of the questions. See decisions of this date in Case of Levy [Case No. 8,296], and in Case of Charles G. Patterson [Id. 10,815].

The clerk will certify this decision to the register, James F. Dwight, Esq.

[For collateral proceedings in this litigation, see note to Case No. 10,814.]

Case No. 10,819.

In re PATTERSON.

[See Case No. 10,815.]

Case No. 10,820.

In re PATTERSON.

[1 N. B. R. 161; [1] Bankr. Reg. Supp. 35.]

District Court, S. D. New York. Nov. 11, 1867.

BANKRUPTCY — EXAMINATION OF BANKRUPT — REFUSAL OF BANKRUPT TO ANSWER—CERTIFICATE.

Where a question was put to the bankrupt under examination which he refused to answer, *held*, no decision could be given as to the question raised, because the certificate did not disclose what interrogatories preceded the one which witness refused to answer.

By JAMES F. DWIGHT, Register:

Facts: The bankrupt [Charles G. Patterson] being duly under examination, was asked this question by Mr. Benedict, counsel for the creditors, Tupper & Beattie: "Q. 128. Have you since that time, a year ago, and before the commencement of these proceedings in bankruptcy, lost any part of your property in gaming? Answer. Under advice of my counsel I decline answering the question, for the reason that so far as the question relates to time antecedent to the passage of the act [of 1867 (14 Stat. 517)], the question is incompetent, immaterial, and irrelevant, and not within the scope of the examination warranted under the twenty-sixth section of the act." And the register overruled the objection, and directed the question to be answered. And the bankrupt, under advice of his counsel, declined so to do until so ordered by the judge. Whereupon Mr. Benedict prayed that the question might be certified to the judge for his decision thereon.

For the same reason set forth at length in the question certified to his honor the judge, on the 30th of October, I think the question a proper one, and that the bankrupt should be directed to answer it. [Case No. 10,816.] The decision of the judge on the question

[1] [Reprinted from 1 N. B. R. 161, by permission.]

referred to, was to the effect that the former question covered time subsequent to proceedings commenced by the bankrupt, and was therefore improper. I think that with the limitation of the question as put now, it should be answered as not controlled by that decision. Which facts and opinion are respectfully submitted to his honor for his decision, with the remark that I think there is much in this case done by the bankrupt (shielding himself behind the advice of his counsel), that it is intended for delay only.

BLATCHFORD, District Judge. It is impossible for the court to decide as to the question raised, for the reason that the certificate does not show what interrogatories preceded the one which the witness refused to answer.

The clerk will certify this decision to the register, James F. Dwight, Esq.

[For collateral proceedings in this litigation, see note to Case No. 10,814.]

Case No. 10,821.

The PATTERSON.

[See Case No. 10,795.]

Case No. 10,822.

PATTERSON v. ATHERTON.

[3 McLean, 147.] [1]

Circuit Court, D. Indiana. May Term, 1843.

NOTES—ASSIGNMENT—PLEA OF PAYMENT TO ASSIGNOR—PLEADING AT LAW.

1. A plea that the defendant paid the note to the assignor, before he had notice of the assignment, cannot be sustained against the assignee.

2. The plea should aver that the payment was made before the note was assigned, or before it was due. And so where the defendant alleges he paid $500 to the assignor, before he had notice of the assignment. And the averment, that the balance was paid to the plaintiff is defective, as it does not appear that the plaintiff received it as such, in discharge of the note.

At law.

OPINION OF THE COURT. This action is brought on a promissory note, given to Buckminster & Barally, at Philadelphia, for $1,073, on the 4th of March, 1836, payable in six months. The declaration alleges the note to have been assigned to the plaintiff before it became due.

The defendant pleaded, that after the execution of the note, and before he had notice of the assignment, and before the commencement of the suit, the defendant paid to the assignor the amount of the note. He also pleaded that before he had notice of the assignment, he paid to the assignor $500, and after the assignment, and before the commencement of the suit, he paid the residue to the plaintiff.

To these pleas the plaintiff demurred.

The demurrer must be sustained to both pleas. In the first place, it does not appear that the payment was made to the assignor, before the note was due, or before it was assigned; and the second plea is defective, because it does not appear that the sum of $500 alleged to have been paid to the assignor, before notice of the assignment, was in fact made before the assignment, or before the note was payable; and it does not appear that the balance due was accepted by the plaintiff, as such, in discharge of the note.

There are other issues which require a jury.

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

Case No. 10,823.

PATTERSON v. BALL et al.

[1 Cranch, C. C. 571.] [1]

Circuit Court, District of Columbia. Nov. Term, 1809.

COSTS—TAXATION OF LAWYER'S FEE—BILL DISMISSED.

If the plaintiffs dismiss their bill because they are not competent to sue as executors in the District of Columbia, a lawyer's fee may be taxed against them.

[Cited in Goodyear v. Sawyer, 17 Fed. 13.]

Attachment in chancery. The defendants had by answer denied that the plaintiffs were executors in the District of Columbia. The plaintiffs thereupon dismissed their bill.

[See Case No. 10825.]

Mr. Swann, for plaintiffs.

Mr. Youngs, for defendants.

THE COURT was of opinion that a lawyer's fee should be taxed against the complainants, although they styled themselves executors. The defendants having denied that they were executors, have thrown the burden of proof on the plaintiffs. And by dismissing their bill they have tacitly admitted that they were not competent to sue here as executors. See Law Va. November 19, 1792, p. 98, § 14.

PATTERSON (BALL v.). See Cases Nos. 813 and 814.

Case No. 10,824.

PATTERSON et al. v. The BELLE IDA.

[Cited in Rogers v. The Reliance, Case No. 12,019. Nowhere reported; opinion not now accessible.]

PATTERSON (BISPHAM v.). See Case No. 1,441.

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

Case No. 10,825.

PATTERSON v. BOWIE et al.

[1 Cranch, C. C. 425.] [1]

Circuit Court, District of Columbia. July Term, 1807.

NE EXEAT—VIRGINIA STATUTE—TO RESTRAIN GARNISHEE.

A ne exeat will not lie, under the laws of Virginia, to restrain a garnishee from going out of the District of Columbia.

Motion to discharge a ne exeat issued against Bowie, as garnishee of Ball.

Mr. W. Herbert, Jr., for garnishee, Bowie, contended that the act of Virginia of 26th of December, 1792, p. 115, provides for the case of restraining the garnishee from paying away the money, &c., by authorizing the court to require security, or by ordering the property to be given up to the plaintiff. A ne exeat does not lie against any but the principal debtor himself. 2 Har. Ch. Prac. 202–210. The affidavit is by Mr. Swann, who only swears that he believes the allegations of the bill to be true.

Mr. Swann, contrà, in support of the ne exeat. The original bill expressly charges that Bowie was indebted to Ball in three hundred and fifty dollars. Originally the ne exeat was a high prerogative writ, and supposed to issue only by order of the crown. But afterwards it issued in favor of a creditor. Wherever there would otherwise be a failure of justice the court of chancery will award it. It is not merely confined to a debtor, but may be issued against a person who may become liable by reason of his having property in possession which the plaintiff can subject to the payment of his debt. Jerningham v. Glass, 3 Atk. 409; 2 Har. Ch. Prac. 207. If the court has a right to order the property to be delivered over to the plaintiff, upon the return of the process, the court has a right and power to prevent its removal before return of process. By Act Va. Nov. 29, 1792, p. 67, § 50, a judge out of court may grant a ne exeat, and by Act Jan. 23, 1798, p. 375, § 4, he may discharge it. If the judge has not such a power, the attachment will be a mere notice to the garnishee to go out of the district with the effects. The affidavit is sufficiently certain; but if not, the answer of Bowie, supplies the defect, by not denying the allegation that he is indebted to the principal debtor, and by acknowledging that he had a vessel of Ball's in his possession at the time of the service of the subpœna. This court decided, in Patterson v. M'Laughlin [Case No. 10,828], in December, 1806, that the ne exeat would lie against an administrator.

Mr. Youngs, in reply. 1. It will not lie against any but a debtor of the plaintiff. There is a difference between executors and garnishees. An executor is the only person against whom the plaintiff can recover. He is debtor to the amount of assets. The form of the writ shows that it must be a debt due from the defendant to the plaintiff. 2. The affidavit does not state positively a debt due from the principal debtor to the plaintiff nor from the garnishee to the debtor. 3. It is a personal writ; the garnishee cannot discharge the ne exeat by delivering up the property. There is no sum to guide as to the amount of security required, but the amount of the principal debt; the garnishee may not have any effects, or a very small sum. The garnishee is in no fault; but a debtor is in fault, and therefore it is right his person should be secured. So an executor who is going away with the goods. The statute for attachments provides for the case, and must be pursued. No other mode can be taken. The court can only require security to restrain the garnishees from paying away, &c. A judge out of court cannot make the order. The judge cannot give the marshal an alternative to take the ne exeat bond or receive the goods. The mode of restraint prescribed by the act is an exclusion of all other modes. The affidavit of Mr. Swann goes only to his belief of three facts, namely, that another bill has been filed to attach, &c., that Bowie is indebted to Ball, and that Bowie is going out of the District of Columbia. Executors and administrators only are entitled to swear to their belief.

THE COURT (nem. con.) quashed the ne exeat with costs of the motion, and ordered the bond to be cancelled. 1st. Because the affidavit was insufficient; and 2d. Because a ne exeat ought not to issue against a garnishee.

FITZHUGH, Circuit Judge, contrà, as to the 2d ground, thinking there might be cases in which there would be a defect of justice if a ne exeat could not issue.

[Subsequently the plaintiffs dismissed a chancery attachment, and the case was heard upon question of costs. Case No. 10,823.]

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

Case No. 10,826.

PATTERSON v. CAMPBELL.

[This is a state case, cited in Scott v. Hore, Case No. 12,535. Nowhere reported.]

PATTERSON (CENTENNIAL BOARD OF FINANCE v.). See Case No. 2,545.

PATTERSON (COMMERCIAL & FARMERS' BANK v.). See Case No. 3,056.

PATTERSON (ELLIS v.). See Case No. 4,-405.

PATTERSON (JOHNSON v.). See Case No. 7,403.

Case No. 10,827.

PATTERSON v. KINGSLAND.

[8 Blatchf. 278.] [1]

Circuit Court, E. D. New York. March 15, 1871.

WASTE—REMOVAL OF BUILDING FROM MORTGAGED PREMISES—INJUNCTION—DESTRUCTION BY WIND—DAMAGES.

1. P., a mortgagee of real estate, sued K., to recover damages for the removal by K. from the mortgaged premises of a building which K. had erected thereon, by agreement with the owner of the premises, and had removed therefrom after the execution of the mortgage. When K. had removed the building to some distance, P. obtained an injunction restraining the further removal. The building was subsequently blown down by the wind: *Held*, that P. did not, by obtaining such injunction, take control of the building, so as to charge him with its value, as it then stood, or impose upon him the obligation to assume possession of it and replace it on the land.

2. The building being one of such peculiar construction, and so located, as to have no market value, evidence as to its cost was relevant, not as evidence of its value, but to enable the jury to test the worth of the opinions of witnesses as to such value.

[Cited in Kerngood v. Gusdorf, 5 D. C. 162.]

This case came before the court on a motion for a new trial, on the ground of misdirection by the court, and the admission of improper evidence. The action was in the nature of an action of waste, brought by [Henry C. Patterson] the owner of a mortgage on certain premises in Brooklyn, to recover the damages by him sustained by reason of the removal from the mortgaged premises of a certain building which had been erected thereon. It appeared in evidence, that the defendant [George A. Kingsland], who was a carpenter, had constructed the building in question under an agreement with the owner of the land, and that, after the execution of the mortgage to the plaintiff, the defendant, without authority, took possession of the building and moved it off the land. He had moved it as far as into the middle of Jackson avenue, when he was restrained by an injunction obtained by the plaintiff, in a suit commenced by him for the purpose in the state court. Subsequently, the building was removed from the avenue to adjacent land, by some one, and there it was blown down by the wind.

Upon the trial, the plaintiff offered in evidence the specifications under which the building was constructed, and, also, the defendant's own bill of the cost of its construction, amounting to $9,463, which evidence was objected to by the defendant. At the close of the evidence, the following requests to charge, among others, were made: (1.) That the plaintiff had failed to show that the mortgagor was insolvent; (2.) That, on the evidence, the plaintiff was entitled to recover nominal damages only, and that no damages were recoverable for any act of the defendant after the building was removed and placed upon Jackson avenue, when the defendant was stopped by an injunction in favor of the plaintiff, taking the control of the building from the defendant; (3.) That, in estimating the damages, the jury could consider only the evidence of the witnesses called to show the actual value of the building at the time of its removal. These requests were severally denied, and the court charged the jury, that on the evidence, the plaintiff was entitled to recover any loss he had sustained by reason of the removal of the building from the land; that the evidence as to the foreclosure of the mortgage and the amount of the deficiency in the proceeds of the foreclosure sale, did not prove the amount of damage sustained by the plaintiff, but was only important to fix the limit of the amount which the plaintiff could claim; that, without going beyond that limit, the jury should give, as damages, the amount which the premises were shown by the evidence to have been depreciated in value by the removal of the building; that the plaintiff was entitled to recover all the damages to the premises by the removal of the building, within the limit of the deficiency, notwithstanding the fact that the defendant was stopped by an injunction when the building was in Jackson avenue; that the cost of the building did not show its value, and was not the proper measure of damages, but that, in the case of such an erection, the cost was a circumstance which, in connection with the description of the erection, the locality, and the testimony as to value, might be considered by the jury in determining the amount of the loss occasioned by the act of the defendant; and that the measure of damages, within the limit mentioned, was the difference between the value of the property with the building upon it, and its value without the building, at the time of the removal. Objections were taken to these several propositions of the charge.

Theodore F. Jackson and George G. Reynolds, for plaintiff.

Elias J. Beach and Charles Jones, for defendant.

BENEDICT, District Judge. In respect to the first request to charge, it is sufficient to say, that the defendant's complaint, in his suit against the mortgagor, which was in evidence, contains the defendant's declaration of the insolvency and irresponsibility of the mortgagor. That fact was, moreover, conceded, on the trial, and so stated to the jury, without objection.

In respect to the second request to charge, I see no reason for believing that it was improperly refused. The request assumed, as a fact in the case, that the plaintiff had taken control of the building after it was placed on Jackson avenue, whereas, there was no evidence of such a fact. All that

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

was shown was, that, in some action commenced by the plaintiff, the defendant had been restrained from further removing the building, after it had been taken from the land in question and placed in Jackson avenue. Such an injunction did not give to the plaintiff the control of the building. There was no evidence tending to show that the plaintiff had ever regained the possession of the building. On the contrary, it was destroyed by the wind; and the fact that the plaintiff procured the issuing of such an injunction as described, did not, in law, charge him with the value of the building as it then stood, nor impose upon him the obligation to assume the possession of the building and replace it upon the land.

The remaining question arises on the third request to charge, and the objection to that portion of the charge given which related to the evidence respecting the cost of the building. Upon this question, I remark, that the evidence as to the description of the building removed was clearly material. This evidence showed it was an irregular structure, intended for a sort of barn, with expensive stalls, and stained wood, and painted glass, erected without much regard to expense, and, in many of its features, peculiar. It was erected on a plot of land upon the edge of salt meadows, in a place remote from business. Few buildings were near it, and those of poor character. The tide at times ebbed and flowed under it. Upon the evidence, the building was dissimilar, in its mode of construction, to most buildings constructed for the same use, and was not a building likely to be desired by any one, or that could be put to use by any considerable number of persons, perhaps not by any person, within a reasonable distance from the place of its erection. Such an erection has no market value. There is no market which can fix its value. The method, then, whereby the jury were to be informed as to the amount of damages which its removal caused, was to give them the opinions of men who were acquainted with the property and its surroundings, and the value of property there. Such evidence was given by the defendant. Now, it seems to me, that, in the case of such an erection, the jury are entitled, also to know the cost of the thing, not as evidence of its value, but to enable them the better to test the worth of the opinions of the witnesses. The jury would be sure to use, for that purpose, their own notions of the cost, derived from its description. It would be impossible to exclude the idea of the cost from the deliberations of the jury. Why, then, should they be prevented from having, not an opinion as to its cost, but the fact of its actual cost, coupled, as it was, with the distinct charge, that its cost did not show its value, and that they were not to take the cost as the measure of damages? So the jury understood the charge given, and they used the evidence of cost for that purpose alone, as their verdict shows, for they did not give the cost, which was over $9,000. I am satisfied that the objection to the charge upon this point cannot be sustained. It seems to me to be correct in principle, and it is sustained by the authorities, even by those cited by the defence.

The motion for a new trial must, therefore, be denied.

PATTERSON (LANHAM v.). See Case No. 8,069.

PATTERSON (LEE v.). See Case No. 8,198.

Case No. 10,828.

PATTERSON v. McLAUGHLIN et al.

[1 Cranch, C. C. 352.] [1]

Circuit Court, District of Columbia. Dec. 17, 1806.

NE EXEAT—ADMINISTRATRIX ABOUT TO REMOVE—FOREIGN SURETY—GOODS OF INTESTATE—RESIDENT DEBTOR.

1. A ne exeat will be granted to restrain an administratrix from removing from this district with the effects of the deceased, before final settlement of her administration account, if her sureties reside out of the district;—but it will not be granted against her surety, a citizen of Maryland, who happens to be found here.

2. The goods of an intestate cannot be attached by his creditors, nor will a chancery attachment lie against the effects of a resident debtor.

[Cited in brief in Loewenstein v. Biernbaum, Case No. 8,461a.]

In chancery. This was a motion [by Benjamin Patterson] to discharge the ne exeat and certain chancery attachments, and for restoration of certain goods delivered by Holliday & Allen, to the marshal, under the condition of the order for a ne exeat. The bill states that Charles McLaughlin, late of Georgetown, deceased, was indebted to the plaintiff in nine hundred and ninety-two dollars and upwards, which sum yet remains due and unpaid. That the defendant Peggy McLaughlin, obtained letters of administration on his estate, from the orphans' court, in the county of Washington, in this district. That Joshua Barney and Joseph Young, both of Baltimore, in the state of Maryland, are her sureties for the faithful administration of the estate; and that she has given no security whatever, within the District of Columbia. That she is about to remove herself from the said district and to settle in the state of Maryland. That the complainant has reason to believe she has fraudulently concealed and embezzled a great quantity of goods and chattels of the decedent to a great value;—and that to defraud the creditors, she and the defendant, Barney, without suffering those goods to be inventoried and appraised, but concealing them from the view of the apprais-

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

ers, employed a vessel, owned by one Robert Holliday, of Maryland, and of which William Allen is master, to convey the concealed and embezzled goods out of this dictrict, into Maryland. That the goods are now on board the vessel, on the river Potomac, sailing on the voyage to Havre de Grace, or Baltimore, and transporting thither for the private gain of the administratrix and of the defendant, Barney. That so secret have been their proceedings, that it is impossible for any of the creditors to know certainly, or to bring proof in a court of law as to the quantity and value of the said goods, nor of what particular articles they consist, without the interposition of this court for a discovery thereof. That unless the said goods can be subjected to examination and detention, under the orders of this court, for the purpose of being applied to the satisfaction of the complainant and other creditors of the deceased, they will lose their demands. It seeks a discovery as to what goods of the deceased have come to the hands of the administratrix or of the defendant Barney, other than those which have been inventoried: What goods of the deceased, or of others, and to whom belonging, were shipped on board of the vessel. It prays that the defendants, Peggy and Joshua, may be restrained by ne exeat from departing from the district until a full, fair, and final adminstration shall be made: That all the defendants may be enjoined and restrained from carrying away the goods shipped on board the vessel, and that Holliday and Allen may be restrained from departing until the said goods shall be surrendered and subjected to due examination and appropriation, under the jurisdiction and orders of this court. This bill being sworn to, the following order was indorsed by one of the judges of this court: "The clerk will issue a writ of ne exeat as prayed, restraining the defendants from removing out of the District of Columbia, with the effects within mentioned, unless they give bond with security in the usual form, in the penalty of one thousand nine hundred dollars; or shall deliver up to the marshal the said effects, to be subject to the future order of the court."

The answer of Peggy McLaughlin denies that she or the defendant Barney, is personally indebted to the plaintiff, and denies his claim to be just against the estate of her husband. It admits that the defendant Barney, and one Joseph Young, both of Baltimore, in Maryland, are her sureties in the administration-bond, and avers them both to be men of sufficient property;—that they were accepted by the judge of orphans' court, who has the sole jurisdiction as to their sufficiency, and denies the power of this court to judge thereon, or to require other sureties. It denies that she is about to change her residence, but avers that she only intended to pay a visit to her friends. It denies that she intended to remove out of the jurisdiction of the court, which has the power to settle the deceased's estate. It denies that she has fraudulently concealed, or embezzled any of the estate,—but avers that she has fairly inventoried the estate according to the best of her knowledge. It avers that the goods on board the vessel were the property of herself, and other persons whom she names. That she has no inventory of those effects. It states that she purchased part of those goods, to the amount of eight hundred and thirty-eight dollars, from Mr. Crawford, who bought them at the sale of the deceased's estate. It again denies the power of this court to compel further security for the administration of the estate; and avers that if any waste, fraud, or embezzlement has taken place, there is a clear remedy on her bond already given. It alleges that several creditors, of whom the complainant is one, have filed a libel against her in the orphans' court, at Washington, on the ground of the fraud, concealment, and embezzlement, which is the subject of the present bill, and that that court has complete jurisdiction over the subject; and refers to the proceedings in that court. It further states, that the same creditors have filed a bill on the same grounds in the circuit court, in Washington county, a copy of which is referred to. It alleges that although she has sold property of the deceased to a Mr. Crawford, and given him possession, yet she is enjoined from taking his notes with surety, whereby the estate is put to hazard. It avers a design to oppress her by a multiplicity of suits, and by drawing her into different tribunals for the same cause of action.

In the answer to the libel in the orphans' court, which is made part of her answer to the present bill, she admits, that in order to be near her relations, she did intend to remove to Baltimore, but not to avoid the settlement of her husband's estate, nor to avoid the process of this court; but from the persecutions of her creditors she has changed her mind, and does not now intend to leave the District of Columbia, but means therein to reside, and settle the estate of the intestate.

E. J. Lee, C. Lee, and Jones & Hiort, for plaintiff.

Mr. Swann and P. B. Key, for defendants.

CRANCH, Chief Judge (DUCKETT, Circuit Judge, absent). The facts which give jurisdiction to this court in the present case are: That the complainant is a creditor of the deceased, residing in the District of Columbia. That letters of administration have been granted to the defendant, Peggy McLaughlin, by the orphans' court of Washington. That the only sureties for her faithful administration of the estate reside in Baltimore, in Maryland, and out of the

reach of the civil authority of this district. That the administratrix, Peggy McLaughlin, was about to remove with the effects of her deceased intestate, out of the District of Columbia, and beyond the reach of its process. That the orphans' court of Washington county, although it has exclusive original cognizance of the sufficiency of the sureties upon adminstration-bonds taken by that court, yet has no power to issue a writ of ne exeat, nor any other original process to restrain the administratrix from departing with the goods of the deceased, out of its jurisdiction. These facts being admitted by the answer, the court cannot dissolve or discharge the ne exeat as to the defendant, Mrs. McLaughlin. The court sees no ground for a ne exeat against Mr. Barney; if there was any stated in the bill it is removed by his answer. There may be some doubt also as to the power of issuing a ne exeat against a citizen of another state; the writ of ne exeat being considered as originally founded upon the right of the sovereign or of the state to demand the services of all its subjects. It is the opinion of the court, therefore, that the ne exeat should be discharged as to him, and as to Holliday and Allen, who, although they were charged by the bill with being concerned in the transportation of the goods so clandestinely attempted to be carried away, yet having voluntarily relinquished the business and delivered up the goods, ought not to be further charged. It is also the opinion of the court that the order of the judge did not require the marshal to detain the goods, if proper security had been tendered by Mrs. McLaughlin upon the process of ne exeat, the effect of the order being to give an option to the defendants to deposit the goods in lieu of other security.

It is therefore ordered by the court that the said goods, now in the custody of the marshal, be delivered up to the defendant, Peggy McLaughlin, upon her giving a ne exeat bond in the usual form, in the penalty of one thousand nine hundred dollars. Those goods are considered as having been voluntarily delivered to the marshal, and being thus in his hands, by virtue of a condition intended for the benefit of the defendants, the court does not think it right that they should take them back without giving that security for which they were intended as a substitute.

Upon the question respecting the attachments, the court is of opinion, that the defendant, Mrs. McLaughlin, has a right to appear without security. To require security, would be to evade the rule of law that an administrator is not required to give bail for a debt due from the intestate. To allow the goods of the deceased to be attached, would interfere with another rule of law, which requires the marshalling of assets, and the priority or equality of payment to the creditors of the intestate.

The court is also of opinion, that the process of chancery attachment will not lie in this court against the effects of a debtor, resident within the District of Columbia.

Upon the first hearing of the answer of Mrs. McLaughlin, the court noticed several expressions in it, which at that time, seemed indecorous and disrespectful towards this court and its process. It was endeavored, by her counsel, to explain them in such a manner as to show that they ought not to be considered as offensive. But upon a careful perusal of the answer, the court finds that its first understanding of those expressions was correct; and not to have noticed them, would have implied a carelessness of that self-respect, which it is the duty of every court of justice to maintain. The first expression alluded to, is that which charges, that the complainant's bill "contains a libel upon the orphans' court." Mrs. McLaughlin, or the solicitor who drew her answer, must have known, that the bill had been perused by one of the judges of this court, before the order for a ne exeat was made, and that the judge would not have made such an order, if the bill had been considered as a libel upon that court. Nor has the court found any thing in the bill which can justify that allegation in the answer. After the bill had been thus sanctioned by a judge's order, the court cannot but consider the expressions of the answer in that respect as disrespectful. The other expression alluded to, is that which declares, that the defendant's goods "have been shamefully and wantonly seized by the process of this court, at the instance and false suggestions of the complainant."

The court, therefore, directs the clerk to strike out those expressions in the answer of Mrs. McLaughlin. From the respectability of the counsel who has signed that answer, the court cannot believe that any thing disrespectful to the court was intended to be sanctioned by him, but is willing to believe that those expressions must either have escaped his notice, or have been understood by him in a manner different from the impression which they have made upon the court.

Case No. 10,829.

PATTERSON v. MISSISSIPPI & R. R. BOOM CO.

[3 Dill. 465.][1]

Circuit Court, D. Minnesota. 1875.

BOOM—EMINENT DOMAIN—REMOVAL OF SUITS TO THE FEDERAL COURT.

1. A suit pending in a state court, between a land owner and an incorporated company, seeking to appropriate his private property under the right of eminent domain, where the question to be tried is the value of such land, is a suit of such a nature as may be removed to the federal

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

court, although the proceeding in its inception was an appraisement by commissioners appointed under the charter of the company.

[Cited in Webber v. Humphreys, Case No. 17,326; Cragie v. McArthur, Id. 3,341. Cited in Washington Imp. Co. v. Kansas Pac. Ry. Co., Id. 17,242.]

2. The legislature may constitutionally authorize the fee of private property to be taken for a boom, to be built and operated by an incorporated company over which, and its charges, legislative control is reserved.

[Cited in brief in Sholl v. German Coal Co., 118 Ill. 429, 10 N. E. 200.]

3. Measure of damages where property is appropriated for boom purposes—see note.

[Cited in Russell v. St. Paul, M. & M. Ry. Co., 33 Minn. 213, 22 N. W. 380.]

[This was an action by William C. Patterson against the Mississippi & Rum River Boom Company.]

A statute of the state of Minnesota incorporated a boom company and authorized it to exercise the right of eminent domain for the appropriation of land necessary for its business. Sp. Laws 1867, p. 355, § 13. The act provided for the appointment of three commissioners by the district court or judge, who, upon notice, were to make the assessment of damages and file the award in the office of the clerk of said court. The act gives either party the right to appeal from the award to the district court. Upon such appeal being taken the statute directs the clerk to "enter the appeal as a case upon the docket of said court, the land owners being set down as plaintiffs and the boom company as defendant; and the court shall proceed to hear and determine such case in such manner as other cases are heard and determined; all issues of fact to be tried by a jury, unless a jury be waived by both parties," the jury, or court, if a jury is waived, shall assess the land at the time the same is entered upon and taken by the company. The statute directs how judgments shall be entered and gives either party the right to a change of venue and provides that "the judgment of the said court may be reviewed on writ of error, as other cases at law."

After an award of damages had been made under the statute and an appeal taken to the state district court and the case duly docketed, the land owner, who was a citizen of another state, made due application for the removal of the case to the circuit court of the United States, and the removal was ordered. In the circuit court the boom company made a motion to remand the case, on the ground that such a case was not removable.

Lochren, McNair & Gilfillan, for the motion.
Bigelow, Flandrau & Clark, opposed.

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

MILLER, Circuit Justice. 1. Under the charter of the boom company, the mode of appropriation of lands is particularly prescribed. At the time when the removal was applied for, the controversy between the boom company and the land owner had assumed the shape of a suit docketed and pending as an action at law in the state court, and, in our judgment, it was such a suit as might be removed under the act of congress in that regard [18 Stat. 470].

2. In view of the large logging and lumber interests of the state on the Mississippi river and of the necessity for booms, and of the special provisions of the charter of the boom company reserving legislative control over the said company and its tolls and charges, this court cannot hold that it was beyond the legislative competency to authorize the boom company compulsorily to acquire, on making compensation therefor, "such lands as may be necessary for properly conducting the business as herein authorized and required."

3. Conceding that the charter of the boom company authorizes the apropriation in fee of the lands of others to its own use, it is not for that reason unconstitutional. Dill. Mun. Corp. § 456, and cases cited.

NOTE. Subsequently, on the trial before a jury, the circuit judge (NELSON, District Judge, concurring) charged as follows:

1. The only question for you to determine is, what is the just and fair value of the land of Patterson which the boom company is seeking to appropriate for its use? The case is peculiar in some of its features, and makes the determination of the value of the lands somewhat difficult. The lands in question, 34 46/100 acres, comprise all of one island and part of two other islands in the Mississippi river. The main channel of the river is on the east of these islands and the space on the left of the islands (about one-eighth of a mile wide), is what is known as a slough and is conceded to be well adapted to the making of a boom for logs coming down the river.

(The charge of the court, after referring to the chartered franchises of the boom company, proceeded as follows:)

2. The boom company in this case propose to appropriate all the land of the plaintiff on these three islands, and hence there is no embarrassment arising from the effect of the taking of only part of the land upon the value of the part remaining in the owner. Where all of the land of a private owner is taken for public purposes, as in this case, the owner is entitled to the fair and full pecuniary value of the property at the time it is taken, no matter what may have caused that value. The owner is entitled not simply to such sum as the property would bring at forced sale, but such sum as the property is worth in the market, that is to persons generally, if those desiring to purchase were found who were willing to pay its just and full value, and he is entitled to no more. Dill. Mun. Corp. § 487, and cases cited. Neither the plaintiff nor any other person, without legislative authority, has the right to sink piles or make a boom in the Mississippi river, which would obstruct any part of its navigable surface. Aside from that, the charter of the boom company, above referred, gives it the right to establish a boom within the limits fixed in its charter, within which limits lie the lands of the plaintiff. There cannot be two concurrent rights in different persons to make a boom at one and the same place in the river. It therefore follows that the plaintiff could not himself use his islands for boom purposes; and hence he is not to be allowed, as an element of damages, that he is deprived of the right to use them in this manner. The right of the boom company to use the islands when acquired, in connection with their other property, for boom purposes, is a franchise con-

ferred upon the company, and upon no one else, by the legislature, and therefore it is not proper for the jury to allow what the islands when acquired by the company will be made worth to the company by reason of the legislative franchise above mentioned. While this is so, it is yet true that if these islands are particularly adapted for boom purposes, and if this adaptability is an element which creates an additional demand for these islands and confers upon them an additional value, this may and should be considered by you in ascertaining the value of the plaintiff's lands.

3. This question of value is one for the jury to determine upon the whole evidence and all the circumstances of the particular case, guided by the rules of law above stated. It is the universal experience of courts that where any fact depends upon the opinions of witnesses, these opinions are generally found to be variant and conflicting. This case affords a striking illustration of this observation. Witnesses professing to be conversant with the value of such property vary in their estimates of the value of the plaintiff's islands all the way between $300 and $20,000 or $30,000. Some of these opinions must be wrong and of little value, and all of them may be mistaken opinions. You must form your own judgment upon all the facts before you (including, of course, for what they are worth, the opinions as to value of the various witnesses). It is your judgment that must govern. You may fix upon or adopt, if you think it just, the value heretofore fixed by the commissioners, or a greater or less value. If there have been sales of these islands or of other islands similarly situated and adapted to the same uses, or contracts with land owners, by the boom company, for the use of other lands in the vicinity for boom purposes, these may be resorted to by you looking at all the circumstances of these sales and contracts, in the determination of the ultimate question of value, and, ordinarily, actual sales or transactions are better evidence of value than the mere opinions of witnesses on the subject, especially where the value concerns property for which there is not a market demand, or a known or easily ascertainable general value.

(The jury returned a verdict for over $9,000, which was reduced, as a condition of denying a motion for a new trial, to $5,500, but the boom company, nevertheless, sued out a writ of error.)

[The supreme court affirmed this judgment. 98 U. S. 403.]

Case No. 10,829a.

PATTERSON v. PHILLIPS.

[Hempst. 69.][1]

Superior Court, D. Arkansas. April, 1829.

EXECUTORS AND ADMINISTRATORS—DUTY TO BOARD AND CLOTHE INFANT HEIRS—ALLOWANCE—LIMITATIONS—JUDGMENT AGAINST ESTATE—WRIT OF ERROR BY HEIR.

1. An heir is entitled to prosecute a writ of error to reverse a judgment rendered by the circuit court against an estate, in favor of the executor.

2. It is no part of the duty of an executor or administrator to board and clothe infant heirs, and he can have no allowance for it in his administration accounts.

3. Notice must be given to heirs where their interests are to be affected by a proceeding.

4. Where the statute of limitations does not apply, lapse of time affords a presumption against the justice of a claim, entitled to weight by a court or jury.

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

Error to the Phillips circuit court; determined before Benjamin Johnson and Thomas P. Eskridge, Judges.

In equity.

OPINION OF THE COURT. Sylvanus Phillips, executor of William Patterson, deceased, and defendant in error, presented an account against the estate of William Patterson, at the December term, 1825, of the circuit court of Phillips county, and obtained a judgment for seven hundred and fifty dollars. John Patterson, one of the heirs, and plaintiff in error, appeared and opposed the allowance of the account, and having failed in the court below, has brought this case up on a writ of error. A preliminary question has been made and argued, which it is first necessary to notice. The defendant, by his counsel, insists that a writ of error will not lie in the present case. In ordinary cases it is admitted that a writ of error lies from the circuit courts to this court, but it is contended that the proceeding was had under the thirtieth section of the administration law of 1825; and that by the provisions of that section an appeal is the only mode of bringing the case to this court. It is a sufficient answer to this objection, that the present case does not come under the provisions of that section. The provision is, "that if any person having any claim or demand against the estate of any deceased person, shall apply to the circuit court where administration was granted, to have the same allowed, first giving the executor or administrator ten days previous notice in writing."

The mode of proceeding is then pointed out, and a further provision made, that if either party feels aggrieved by the decision, he may appeal to the superior court, where the trial is to be had de novo upon the merits.

It is very obvious that the present case does not come within the provisions of this section. It provides a remedy for the creditor of the estate, other than the executor himself, who, as the representative of the estate, is to defend the claim. The creditor is to be one party and the executor the other. If Phillips is permitted to exhibit the claim, who is to oppose or defend it? Is he permitted to present it in his individual character, and to defend it in his fiduciary capacity? Allen v. Gray, 1 T. B. Mon. 98. If this could be tolerated he has not done so; for he has presented the account as executor, and not in his personal character, or as guardian of the infant heirs. 3 Litt. 8. It is needless to attempt to illustrate that which is so obvious. If the preceding observations be correct, it follows that the plaintiff is entitled to a writ of error in this, as in ordinary cases.

The first error assigned questions the propriety of allowing any part of the account against the estate of William Patterson. The claim presented by Phillips did not, in our judgment, constitute a proper subject of allowance against Patterson's estate. It was

not a debt created by Patterson, nor was it due from or owing by him; it was, in truth, a claim, not against the estate, but against the heirs of Patterson in their individual character. It was no part of the duty of Phillips, as executor, to board and clothe the infant heirs, and he could have no allowance therefor in his administration accounts. Toller, Ex'rs, 134; Brewster v. Brewster, 8 Mass. 131; Hart v. Hart, 2 Bibb, 609; Washburn v. Phillips, 5 Smedes & M. 600. It is contended that Phillips was constituted guardian by the will, and maintained and educated the infant heirs of Patterson. He is undoubtedly entitled to remuneration; but in presenting his accounts against those heirs, the defendant, as guardian, should have made it out against them severally and not jointly. It would be manifestly unjust to charge one heir with necessaries furnished to another, and by presenting a joint account this would be the inevitable consequence.

In the present case the heirs had attained to full age, and they were entitled to notice of any thing by which their interest was to be affected. No such notice appears to have been given, and one only of the heirs appeared and opposed the proceedings. We do not think the statute of limitations applicable to this case as a positive bar, as the defendant stands in the attitude of a trustee; but the great lapse of time affords a presumption against the justice of the claim, which is entitled to due weight in the consideration of a court or jury.

Judgment reversed.

Case No. 10,830.

PATTERSON v. TATUM.

[3 Sawy. 164.] [1]

Circuit Court, D. California. Sept. 28, 1874.

FIVE HUNDRED THOUSAND ACRES GRANT TO STATE —COMMISSIONER OF LAND OFFICE, DUTIES—REPEALS BY REVISING ACTS — PRESUMPTION AS TO LAND TITLES IN CALIFORNIA — PATENT A GOVERNMENT CONVEYANCE.

1. The grant to the state by the act of congress of September 4, 1841 [5 Stat. 453], of 500,000 acres, is not of any specific land, but of a specific quantity to be selected under the direction of her legislature, in parcels conformably to the lines of the public surveys, out of any public land, excepting such as was then reserved, or might thereafter at the date of the selection be reserved from sale by any act of congress or proclamation of the president. When the selection and location are once made pursuant to the state's directions, of lands not reserved, but subject to location, the general gift of the quantity becomes a particular gift of the specific lands located, vesting in her a perfect and absolute title to the same; and that title passes by her patent. The patent takes effect by relation as of the date of the selection.

[Cited in Ison v. Nelson Min. Co., 47 Fed. 200; Los Angeles Farming & Milling Co. v. Hoff, 48 Fed. 344.]

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

2. The commissioner of the general land office is attached to the department of the interior, and acts under the direction and supervision of the head of that department in all matters respecting the public lands of the United States. The legislation of congress respecting his office stated.

[Cited in Snyder v. Sickles, 98 U. S. 210.]

3. The doctrine that a statute is impliedly repealed by a subsequent act revising the whole matter of the first, does not apply when the revisory statute itself prescribes its operation upon the previous act; when that is done no other effect can be given to the revisory act.

[Cited in Barden v. Wells, 14 Mont. 462, 36 Pac. 1077. Cited in brief in Bush v. District of Columbia, 1 D. C. App. 4. Cited in Gaston v. Merriam, 33 Minn. 284, 22 N. W. 614.]

4. All titles to land in California, except where the land is covered by tide-waters, or is acquired by accretion from the sea, come either from the United States or the government which preceded them. In the absence of proof that the title is obtained directly from the government, the legal presumption is that the title is in the United States. This presumption is not only one which would arise independent of any legislation, but it has been expressly declared by statute in that state.

5. A patent is the instrument by which the government, whether state or national, passes its title; it is the government conveyance. But if the government possesses at the time no title, that fact may be shown in an action of ejectment. The patent is evidence of title, only because government, being the original source of title, the presumption of law is that the title remained with the government until some other disposition of it is shown. A court of law is as competent to pass upon the question whether a title existed at the time in the government, as it is whether the title existed in an individual, where the grantor is a private party. The cases where a party must resort to a court of equity for relief against the operation of a patent stated.

[Quoted in Hayner v. Stanly, 13 Fed. 223.]

[Cited in Deno v. Griffin, 20 Nev. 249, 20 Pac. 309; Rose v. Richmond M. Co., 17 Nev. 70, 27 Pac. 1115.]

This was an action [by John D. Patterson against Thomas J. Tatum] to recover the possession of a parcel of land situated in the county of Stanislaus, and was tried by the court, before Mr. Justice FIELD, without the intervention of a jury, by stipulation of the parties. The court found for the defendant.

George A. Nourse, for plaintiff.

C. T. Botts and D. S. Terry, for defendant.

FIELD, Circuit Justice. This is an action for the possession of certain real property situated in Stanislaus county in this state. The plaintiff claims title to the demanded premises under a patent of the state of California, bearing date February 14, 1871, issued upon a selection of the premises as part of the five hundred thousand acres donated by the act of congress of September 4, 1841.

The selection was made by the locating agent of the state for the Stockton district, with that of other lands, on the first of May, 1868. A list of the selections was on that

day filed by the agent in the United States land office at Stockton. This list was approved by the commissioner of the general land office on the sixteenth of October, 1871, and by the secretary of the interior on the eighteenth of the same month. The title of the plaintiff rests upon the validity of this selection.

The selection covered nine hundred and sixty acres, and objection was taken to the validity of the patent, on the ground that the statute of the state at the time prohibited the purchase of more than three hundred and twenty acres by one person. From the views we take of this case, it is unnecessary to pass upon this objection. We, therefore, refrain from expressing any opinion upon it.

The grant to the state by the act of congress of September 4, 1841, is not of any specific land, but of a specific quantity to be selected under the direction of her legislature, in parcels conformably to the lines of the public surveys, out of any public land, excepting such as was then reserved, or might thereafter at the date of the selection be reserved from sale by any act of congress or proclamation of the president. When the selection and location, as is said in Doll v. Meador, 16 Cal. 320, "are once made pursuant to her (the state's) directions, of lands not reserved, but subject to location, the general gift of the quantity becomes a particular gift of the specific lands located, vesting in her a perfect and absolute title to the same; and that title passes by her patent." But whilst affirming the correctness of this adjudication, we add to it what is equally obvious, that when the selection and location are of lands which are reserved from sale and are not subject to location, no title vests in the state, and, of course, none passes by her patent.

The state patent takes effect, by relation, as of the date of the selection, May 1, 1868. The defendant contends, that on that day the lands selected were reserved from sale by acts of congress passed in 1862 and 1864, and proceedings taken under them. And he produces directions of the land department, to show that the premises had been withdrawn from sale under those acts. Two questions are thus presented, one of fact, whether the lands were thus reserved; the other of law, whether, such being the case, the defendant can set up the fact in this action to defeat the plaintiff's recovery.

First, as to the question of fact. By Act July 1, 1862, § 3 (12 Stat. 493), congress granted to the Central Pacific Railroad Company, for the purpose of aiding in the construction of a railway and telegraph line across the continent, alternate sections, designated by odd numbers, of public land on each side of the road to the extent of ten miles, subject to certain exceptions; and provided that within two years after the passage of the act, the company should designate the general route of its road, as near as might be, and file a map of the same in the department of the interior, and that thereupon the secretary of the interior should cause the odd sections within fifteen miles of the designated route to be withdrawn from pre-emption, private entry and sale.

Act Cong. July 2, 1864, §§ 4, 5 (13 Stat. 358), amending the first act, increased the grant, so as to include the alternate odd sections to the distance of twenty miles on each side of the road, and extended the time for designating the general route of the road, and filing a map of the same one year beyond the original period, and increased the distance within which the lands should be withdrawn from pre-emption, private entry and sale, when such route was designated and map filed, to twenty-five miles.

The act of 1862 authorized the construction by the Central Pacific Railroad Company of a road and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento, to the eastern boundary of California, on the same terms and conditions upon which the construction of a road and telegraph line was authorized beyond that boundary. The right to construct the road and telegraph line from the city of San José to the city of Sacramento, and all the privileges and benefits which the company had acquired under the acts of congress were, previous to March 3, 1865, assigned by the company to the Western Pacific Railroad Company, a corporation also created under the laws of California, and on that day the assignment was ratified and confirmed by act of congress. 13 Stat. 504.

On the twenty-third of November, 1864, the commissioner of the general land office at Washington sent a communication, purporting by its heading to issue from the department of the interior, directed to the register and receiver of the land office at Stockton, informing those officers that he inclosed a diagram showing that part of their district embraced within the twenty-five-mile limit of the Central Pacific Railroad, and directing them "to reserve from sale, location, or claims of any kind, the vacant odd sections and parts of sections" within those limits, as shown by that map.

On the twenty-third of December following, the commissioner sent a second communication, also purporting to issue from the department of the interior, to the same officers, referring to the previous one of November 23d as transmitting a diagram of the route of the Central Pacific Railroad, east from Sacramento city, which passed through their district, and added that he then transmitted a diagram of that part of the western division of the road, which was within their district, and that the line of the road and the twenty-five mile limit were indicated by

red lines, and informing the officers that the previous instructions sent on the twenty-third of November, as to withholding the public lands from sale within the twenty-five-mile limit of the road eastward, were applied to the western division of the road, and that they would be governed accordingly.

This diagram was received by the register of the land office at Stockton, on the thirty-first of January, 1865. A certified copy is in evidence, and it is admitted that the premises in controversy are odd sections within the twenty-five-mile limit, as designated thereon. The indorsements show that it was made from a map dated October 6, 1854. That map must, of course, have been in the department of the interior, as the diagram came from that quarter. It shows on its face the general route of the Pacific Railroad in the western district. Examined in connection with the communication of the commissioner of the general land office, the conclusion is irresistible that a map of the general route of the railroad company was filed in the department of the interior by the Pacific Railroad Company, as required by the act of congress, and that it was accepted and acted upon by the secretary of the interior in the communication to the register and receiver of the Stockton district.

The position that the communication of the commissioner of the general land office must be treated as the separate act of the commissioner, and not as the act of the secretary, is not tenable. The statute provides that the secretary of the interior, when a map of the route of the road is filed, "shall cause" the lands within the prescribed limits to be withdrawn. It does not require the act of withdrawal to be personally made by the secretary; the law is complied with if the withdrawal be made by his department; that is, through the officers acting under his general supervision and control. The commissioner of the general land office is attached to the department of the interior, and acts under the direction and supervision of the head of that department in all matters respecting the public lands of the United States. The act of April 25, 1812 (2 Stat. 716), establishing the general land office, put the office in the department of the treasury, and placed the commissioner under the direction of the head of that department. The act of July 4, 1846 (5 Stat. 107), reorganizing the office, provided that the executive duties prescribed by law respecting the public lands should be subject to the supervision and control of the commissioner, under the direction of the president. But the office still continued a part of the department of the treasury; and as the president acts in matters belonging to the departments through their respective heads, the immediate supervision over and direction of the commissioner remained with the secretary after, as previous to, the reorganization.

The proposition of counsel that a statute is impliedly repealed by a subsequent act revising the whole matter of the first, is, undoubtedly, correct. The authorities are numerous to that effect. Two cases recently decided by the supreme court of the United States, in addition to those cited by counsel, establish this position; that of U. S. v. Tynen, 11 Wall. [78 U. S. 88], and that of Henderson's Tobacco, Id. 652. But the implication cannot arise when the revisory statute itself prescribes its operation upon the previous act; when that is done, no other effect can be given to the revisory act. And such was the case in the revisory act of 1846. It repeals such provisions of the original act as were inconsistent with the new act—none other. The continued direction of the commissioner and supervision over him by the secretary of the treasury, acting as in all other cases under the president, as prescribed by the original act, was not inconsistent with anything in the new act. And such was the understanding and practice of the treasury department, until the department of the interior was established in 1849, when the land office was transferred to that department, and its secretary was required to "perform all the duties of supervision and appeal" in relation to that office, which had been previously discharged by the secretary of the treasury.

The position of counsel that there is no evidence that the odd sections covered by the patent of the defendant were vacant at the time of the reservation in 1865, and therefore they cannot be so regarded in this action, is not entitled to any consideration. If the selections were not then vacant, they were not vacant in 1868, when selected by the locating agent of the state. All titles to land in California, except where the land is covered by tide-waters, or is acquired by accretion from the sea, come either from the United States or the government which preceded them. In the absence of proof that the title is obtained directly from the government, the legal presumption is that the title is in the United States. This presumption is not only one which would arise independent of any legislation, but it has been expressly declared by statute in that state.

Our conclusion from the evidence is, that the land embraced by the patent to the plaintiff was reserved from sale when selected by the locating agent, as part of the five hundred thousand acres granted to the state, and that such selection was inoperative and void. The approval of the commissioner of the land office and of the secretary of the interior, of the list of selections, so far as the list embraced the premises in controversy, was equally inoperative. No interest by either proceeding was vested in the state. This result would follow without any legislation to that effect, from the condition annexed to the grant, that the selection must be made from lands not reserved from sale by any law of congress or proclamation of

the president; but, as if to preclude any possible discussion upon the question, the act of congress of August 3, 1854, providing for vesting the title in the states, of lands certified to them, declares that in all cases where lands are granted by any law of congress to any state or territory, and the law "does not convey the fee simple title of such lands, or require patents to be issued therefor," the lists of such lands certified by the commissioner of the general land office, where the lands are not of the character embraced by the acts of congress, and are not intended to be granted thereby, shall, so far as such lands are concerned, "be perfectly null and void, and no right, title, claim, or interest, shall be conveyed thereby." 10 Stat. 346.

The donating act of 1841 does not convey the fee simple title to any specific lands, or require patents to be issued therefor; it only vests an immediate right to a specific quantity to be afterwards selected under direction of the state. And should the selection be postponed until after the land is reserved or otherwise appropriated, the interest of the state would lapse and fail. The lands donated to the state are precisely those to which the act of congress refers when it declares the effect of the list certified by the commissioner.

Second. The lands selected by the agent of the state having been at the time of the selection thus reserved from sale, and the selection being therefore void, the second question arises, whether the defendant can set up this fact to defeat the plaintiff's recovery on the state patent. The defendant claims title to the demanded premises under patents of the United States, bearing date in March, August, and September, 1873, issued to different parties upon pre-emption settlements made by the patentees on the fifth of July, 1870. On that day the reservation from sale by the proceedings already detailed, was withdrawn, and the lands were opened to pre-emption and homestead entries. The defendant claiming under the patents thus issued, has a standing in a court of law, and occupies a position with respect to the property which enables him to assail the title of the plaintiff. The case of Doll v. Meador, to which the counsel refers, and upon which he relies to show that the title of the plaintiff cannot be questioned in this action, is a very different case from the one at bar. There the controversy was between the holder of a patent of the state, and a trespasser without title; and it was held that the latter, not being in privity with a common or paramount source of title, was in no position to question the validity of the patent, or the action of the officers of the state by whom the lands were selected. We adhere to every position asserted in that case respecting the efficacy of patents and the conditions upon which they may be assailed. We have had frequent occasions during a somewhat extended judicial experience, to reconsider the doctrines there stated, and upon every reconsideration we have felt renewed confidence in their soundness. But they cannot be applied to a case entirely dissimilar in its facts, where the assailant of the plaintiff's patent comes clothed with a patent of the United States, of equal dignity, and equally entitled to every presumption in favor of its validity.

A patent is the instrument by which the government, whether state or national, passes its title; it is the government conveyance. But, if the government possess at the time no title, none passes by its execution. It is of itself evidence of title, only because government being the original source of title, the presumption of law is that the title remained with the government until some other disposition of it is shown. But, if an earlier patent is produced, the subsequent one ceases to have any operation. The title passing by the first conveyance is not affected by the second until the first is got out of the way. If the first was issued from improper motives, corrupt actions, erroneous views of duty, or mistaken considerations, as to matter of fact or law by the officers of the government to whom the execution and issue of patents are intrusted, a court of law can afford no remedy to the second patentee; he must resort to a court of equity for relief. So, also, if particular facts respecting the condition or location of the property must be previously ascertained and determined by a special tribunal appointed for that purpose, and that tribunal has come to erroneous conclusions upon which the patent has issued, such conclusions cannot be questioned collaterally, and the patent be thereby invalidated in the action of ejectment. Relief in such cases can only be afforded by a direct proceeding by bill, information, or scire facias, either to revoke the first patent, or restrain its operation, or to subject, where equitable grounds exist, the land to certain trusts in the first patentee's hands. A court of law in an action of ejectment cannot listen to any objections founded upon such considerations. But where the action of the officers in the execution and issue of the patent, or the correctness of the conclusions of the special tribunal is not assailed, but the objection to the patent reaches beyond such action and conclusions, and goes to the existence of a subject upon which such officers or tribunal could act, that is, to the title in the grantor, no such difficulty exists in its consideration in a court of law. That tribunal is as fully competent to pass upon the question whether a title existed at the time in the government, as it would be whether the title existed in an individual where the grantor is a private party.

In Polk's Lessee v. Wendall, 9 Cranch [13 U. S.] 87, the question was considered as to how far in a court of law inquiries tending to impeach a patent could be considered, and it was observed that the laws for the sale of public lands were intended to secure the regularity of grants, and to protect the incipient

rights of individuals and the state from imposition; that officers were appointed to superintend the business, and rules had been framed prescribing their duty, and that when all the proceedings were completed by a patent, a compliance with the rules was presupposed. It would, therefore, be extremely unreasonable, said the court, to avoid a grant for any irregularity in the conduct of officers appointed by government to supervise the progressive course of a title, from its commencement to its consummation in a patent; but that the great principles of justice and law would be violated, did there not exist some tribunal to which an injured party might appeal in which the means by which an elder title was acquired, might be examined, and that in general a court of equity was a tribunal better adapted for the purpose than a court of law. "But," adds the court, "there are cases in which a grant is absolutely void, as where the state has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law." In Patterson v. Winn, 11 Wheat. [24 U. S.] 381, the supreme court refers to this case, and after giving a brief summary of the positions we have stated, says: "We may therefore, assume, as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the state had no title, it may be impeached collaterally in a court of law, in an action of ejectment. But, in general, other objections and defects complained of must be put in issue, in a regular course of pleadings, on a direct proceeding to avoid the patent."

This doctrine was recognized in Doll v. Meador. The court, after referring to a previous case, and observing that a patent issued by the government for any land not embraced in the grant to the state, would, undoubtedly, be void, for want of power to convey, said: "We do not question this proposition; we affirm it as sound. The point here is, as to the status of the party who can raise any question as to its validity, when it is regular on its face. Nor do we question the further proposition, that the defendant might have disproved the evidence of title furnished by the patent, by showing that the land in question was not included in the act of congress, or was within the exceptions contained in the act of this state. We only annex to the proposition the qualification, that to do this, he must first have brought himself in some privity with the common source of title. If he was a mere intruder, not possessing any claim of title, either from the general or state government, he would not be in a position to question the regularity and correctness of the action of the officers of the state, in the selection of the lands or the issuance of the patent."

Nor is there anything in the language of the court, in Leese v. Clark, 18 Cal. 535, which militates against these decisions. There a patent issued upon a confirmation of a Mexican grant, was under consideration. The United States had stipulated, in the treaty by which California was acquired, to protect its inhabitants in their property, and, in the execution of the obligation thus created, had established a special tribunal to examine all claims to property which parties asserted they possessed upon the transfer of jurisdiction from the former government. Numerous proceedings were required to be taken before this tribunal and in execution of its decrees, and where its adjudication was favorable to the claimant, a patent was directed to be issued to him. A patent thus resting upon the judgment of a special tribunal was something more than an ordinary conveyance of the government. It was an official declaration that the grant to the claimant was of such a character at the date of the cession of the country, that it was entitled to recognition and confirmation by the United States. And so the court very justly used the language which counsel cites, that upon all matters of fact and law, essential to authorize its issue, the patent imported absolute verity. And what were those matters of fact and law? These only; that the claimant had a valid grant at the date of the cession, that is, a genuine grant issued by the former government, which was entitled to confirmation under the treaty and the laws made to carry its stipulations into effect, and that by subsequent proceedings the claim of the grantee had been definitely located by an official survey. The whole proceeding resulting in the patent was one between the government and the claimant; it bound them until vacated by direct proceedings instituted for that purpose, and, of course, all parties in privity with either by title subsequent. But, if before the grant thus confirmed had issued, the title had passed from the Mexican government, the patent notwithstanding all the formality of the various steps preceding its issue, would have created no interest in the patentee. Such previous transfer of title, supposing always that the transfer had been judicially recognized and confirmed, could be set up in an action at law against the patent, without assailing the regularity of the proceedings of the land commissioner, or of the officers of the United States, in the survey and location of the land. Such previous transfer being established, would not make the patent void, but, like a prior conveyance of the same property, would render it inoperative.

We do not think the judgment in the previous action between the same parties can be deemed an adjudication estopping the defendant from setting up his title and questioning the validity of the plaintiff's patent. When the first action was tried the defendant had not acquired the title of the government by his patent, and was therefore in no posi-

tion to assail the plaintiff's patent. Such, at least, was the ruling of the court, which must be regarded, whether correct or otherwise, as the law of that case.

It follows, from the views we have expressed, that the law is with the defendant, and judgment must therefore pass in his favor; and it is so ordered.

PATTERSON (UNITED STATES v.). See Cases Nos. 16,008–16,011.

PATTISON (LANAHAN v.). See Case No. 8,-036.

PATTON (ATKINSON v.). See Case No. 614.

Case No. 10,831.

PATTON et al. v. BLACKWELL.

[1 Brunner, Col. Cas. 125;[1] 2 Overt. 114.]

Circuit Court, D. Tennessee. June, 1809.

COSTS OF CONTINUANCE.

In a federal court the party obtaining a continuance must pay the costs of the term.

This case was continued on the affidavit of the defendant. The question was as to the costs of the term.

Mr. Overton, for plaintiffs.
Mr. Grundy, for defendant.

PER CURIAM. This court sits but once a year. The rule of practice in the superior courts of the state does not apply. There, we are informed, the party obtaining the continuance is not taxed with the costs of the term upon the first application. There is certainly much equity in the English practice, which obliges the party praying the continuance to pay the costs of the term. This court has the power to establish such rules of practice as may be necessary to expedite and attain justice. The party who is ready for trial is in no default; and let the cause go which way it may, he ought not to pay the costs, which he might have avoided had the defendant been ready. If this cause is continued it must be for a year; and hence it follows that an application of this kind is in the same predicament as a similar one in the superior court at the second term, when it is usual to make the party pay the costs of the term. In all cases where continuances have been obtained during the present term, the costs of the term must be paid; and this will be considered the rule of practice hereafter. [It is also the practice of the federal court where a witness is subpœnæd in several causes, to permit him to prove his attendance in but one of the causes.][2]

[For other actions by the same plaintiffs against different defendants, see Cases Nos. 10,-832–10,835, and 10,838.]

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

[2] [From 2 Overt. 114.]

Case No. 10,832.

PATTON et al. v. BROWN.

[Brunner, Col. Cas. 185;[1] Cooke, 126.]

Circuit Court, D. Tennessee. 1812.

CONVEYANCE—REGISTRATION NECESSARY TO PASS LEGAL ESTATE—DEED—EXECUTION—HOW PROVED.

1. Registration of a deed of conveyance is necessary to pass the legal estate to the grantee.

2. The execution of a deed can only be proved by the subscribing witnesses. To prove the execution by authentication before a judge, his certificate must show where and in what capacity he acted.

In this cause the same questions arose precisely which did in the preceding case [of Patton & Erwin's Lessee against Reiley, Case No. 10,838]. The court was full, which was the reason why the counsel for the plaintiffs stirred them again.

All the points were very fully spoken to by Dickinson and Cooke, for defendant; and by Whiteside and Beck, for plaintiffs.

Before TODD, Circuit Justice, and M'NAIRY, District Judge.

TODD, Circuit Justice. I at first thought that the deed might be read in evidence without registration. I formed that opinion from a view of the Virginia statute on the same subject and the decisions upon it. Upon an investigation, however, I discover that there is no provision similar to the fourth section in the statute of Virginia in relation to the validity of the deed between the parties, and as to creditors and subsequent purchasers incorporated in the statute of North Carolina, passed in 1715. By this statute registration is made expressly necessary preparatory to the passing of the legal estate to the grantee. Every deed, therefore, should be registered, because without this previous act the legal estate does not pass by the deed. The words of the act are plain upon this subject, and the necessity of a conformity to them cannot be dispensed with.

The certificate of Judge Haywood is insufficient. It does not show the capacity or state in which he acted. Perhaps if it had appeared from the certificate that it was done in North Carolina the probate might be viewed as legally taken and authenticated. But upon this point I give no opinion, as such a case is not now before the court. It is sufficient now to say that it does not show where it was done.

As registration is necessary to vest the legal title in the grantee, much need not be said as to the other probate. It is barely the oath of a person who proves the handwriting of the subscribing witnesses and of the grantors, the witnesses and one of the grantors being dead. The act of assembly under which this

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deed could have been proved recognized no other mode of proof but the subscribing witnesses. These requisitions cannot be dispensed with.

M'NAIRY, District Judge, concurred, and the deed was rejected.

The plaintiffs were nonsuited.

[For other actions by same plaintiffs against different defendants, see Cases Nos. 10,831, 10,833–10,835, and 10,838.]

Case No. 10,833.

PATTON et al. v. CAROTHERS.

[Brunner, Col. Cas. 207;[1] Cooke, 148.]

Circuit Court, D. Tennessee. 1812.

OLDEST GRANT—CONCLUSIVENESS.

The oldest grant is evidence of title at law, and can only be defeated by producing an older entry coupled with a grant.

After the lessors of the plaintiff had gone through with their evidence, the defendant produced an entry made in the name of Jean Donaldson, covering the land in dispute. It appeared from the entry books, that this entry had been transferred to John Donaldson. The defendant then produced a grant, in the name of John Donaldson, covering the land in controversy. The grant did not upon its face show what entry it was founded on, and no plat and certificate of survey was attached to it or produced. The plat and certificate of survey always show the date and number of the entry, and the name of the enterer. The plaintiff's counsel objected to this grant being read as evidence to the jury, because it did not appear that it issued upon the entry made in the name of Jean Donaldson.

Mr. Whiteside, for plaintiff.

Grundy, Haywood & Cooke, for defendant.

BY THE COURT (absent, TODD, Circuit Justice). The grant cannot be read as evidence. The grant to the lessors of the plaintiffs is older in date than this grant; their claim can only be defeated by producing an entry, older than their grant, coupled with a grant. An older entry is produced; but it does not appear that this entry ever has been carried into a grant. The entry will not do without the grant, nor the grant without the entry; and nothing appears to show that they ought to be attached to each other. The plat and certificate of survey ought to have been produced, from which it would have appeared, upon what entry the grant issued. As it stands, it cannot be read.

[For other actions by the same plaintiffs against different defendants, see Cases Nos. 10,831, 10,832, 10,834, 10,835, and 10,838.]

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

Case No. 10,834.

PATTON et al. v. COOPER.

[Brunner, Col. Cas. 193;[1] Cooke, 133.]

Circuit Court, D. Tennessee. 1812.

RECOVERY IN ACTION OF EJECTMENT—DEED—EFFECT OF REGISTRATION.

1. In an action of ejectment plaintiff may recover less than he declares for, but he cannot recover more than prayed for.

2. The registration of a deed vests the legal estate in the grantee, as of the date of the deed, and relates back to that time.

The plaintiffs produced in evidence in support of their title a deed from John G. Blount and Thomas Blount to David Allison, which had been proved and registered as to John G. Blount, but not proved as to Thomas Blount. The proof and registration were after the commencement of the suit, and the demises laid in the declaration.

It was objected by Dickinson & Cooke, for defendant, that this deed could not be viewed as the deed of both the grantors when only proved as to one; and that therefore as the plaintiffs had brought suit for the whole of the land they ought not to recover; as, if they did recover, it could only be an undivided moiety.

It was also objected that the suit had been brought and the demises laid in the declaration long previous to the registration of the deed; and that inasmuch as no interest passed to the grantee until registration, the plaintiffs had commenced their suit before they had any legal title.

Mr. Whiteside, for plaintiffs.

BY THE COURT. It is true this deed can only be read as the deed of John G. Blount, and that in consequence thereof the whole cannot be recovered in this action; but it is equally true that an undivided moiety may. If the plaintiff declares in ejectment for the whole he may recover a part; or if he declares for a part he may recover less. The rule is that he may recover less though he cannot recover more than he declares for. 2 Hayw. (N. C.) 150, 222; 1 Burrows, 326; Runn. Ej. 104; 1 Johns. Cas. 101.

But it is further objected that the deed has been registered since the demises laid in the declaration. To this we will reply, that although a deed does not pass the estate to the grantee until registration, yet, when it is registered, it relates back to the time of the execution; and the grantee in such a case is considered as having been seized from the beginning. 2 Hayw. (N. C.) 287, 288; 1 Bac. Abr. 277, 278; Cro. Car. 217; Cro. Jac. 52; 2 Com. Dig: 65, 66. The case in 2 Show. 207, is perhaps founded upon the particular bankrupt laws of England; but be that as it may, it is a single case, and is

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not supported by any other decision. It is directly in opposition to the whole current of principles upon this subject. We are therefore of the opinion that the deed may be read as the deed of one of the grantors, and that the plaintiff can recover an undivided moiety.

[For other actions by same plaintiffs against different defendants, see Cases Nos. 10,831–10,833, 10,835, and 10,838.]

PATTON (GILL v.). See Cases Nos. 5,429 and 5,430.

Case No. 10,835.

PATTON v. HYNES.

[Brunner, Col. Cas. 231;[1] Cooke, 356.]

Circuit Court, D. Tennessee. 1813.

STATUTE OF LIMITATIONS—TITLE OF ADVERSE POSSESSION.

To obtain the benefit of the statute of limitations under a plea of seven years' possession in Tennessee, the claimant must have color of title.

This was an ejectment brought [by Patton's lessee] to recover possession of lot No. 23, in the town of Nashville. The plaintiff gave in evidence a deed from the commissioners to Abednigo Llewallen, dated the 8th day of July, 1785, for the lot in question. It was then proved that Abednigo was dead; and that Shadrach Llewallen was his heir at law. A deed was exhibited from Shadrach to Francis May, dated the 30th day of August, 1810; and also a conveyance from May to the lessor of the plaintiff, dated the 31st of October, 1810. The defendant also claimed title under Abednigo Llewallen, and exhibited in proof a deed from William T. Lewis, dated in 1805; a deed from Joel Lewis to William T. Lewis, dated, in 1802; a deed from Josiah Love to Joel Lewis, dated in 1793; and a deed from John Montgomery to Josiah Love, dated in September, 1789. The defendant, and those under whom he claims, have been in possession of the lot ever since the month of February, 1793. Testimony was introduced in behalf of the defendant for the purpose of showing that Abednigo Llewallen had sold the lot to Montgomery; but it was admitted that no deed of conveyance could be produced. Testimony was also introduced, with a view of proving the deed purporting to be from Montgomery to Love a forgery.

Mr. Whiteside, for plaintiff.

Dickinson & Haywood, for defendant.

TODD, Circuit Justice (absent, McNAIRY, District Judge). There are two questions arising in this case: First. Whether the jury have a right, from length of possession and other circumstances, to presume a deed from Llewallen to Montgomery. This is a proposition so entirely depending on matters of fact that it is difficult to give any clear and satisfactory opinion upon it. At present, however, I have no hesitation in saying that where a person has been in possession for the length of time mentioned in this case, and can also introduce circumstances to prove a sale by the original owner, it may be left to a jury to presume that there was a conveyance, and that it has been registered. But even then the chain of title in the present case would be defective, if the jury should be of opinion that the paper purporting to be a deed from Montgomery to Love is a forgery. Second. The second question arises upon the statutes of limitation. The act of 1715 [1 Scott's Laws, 14] declares that "no person or persons, nor their heirs, which hereafter shall have any right or title to any lands, tenements, or hereditaments, shall thereunto enter and make claim, but within seven years next after his, her, or their right or title shall descend or accrue; and in default thereof, such person or persons so not entering or making default shall be utterly excluded and disabled from any entry or claim thereafter to be made." The act of 1797 [1 Scott's Laws, 612] upon which the plaintiff's counsel relies as a repeal of that of 1715, provides that in all cases where any person or persons shall have had seven years' peaceable possession of any land by virtue of a grant, or deed of conveyance founded upon a grant, and no legal claim, by suit in law, shall be set up to the said land within the above time, then and in that case the person so holding possession as aforesaid shall be entitled, etc.

I do not consider that the act of 1797 repeals that of 1715; but when they are both taken together the result will be that a naked possession, by a mere trespasser for the term of seven years, will be no bar to a recovery sought by the original legal owner. At the same time I wish it understood as the opinion of the court that a regular chain of conveyances in due form, from the original grantee, is not required to authorize the statute to be a bar. The land must first be appropriated, and then, to protect the possession of a defendant, he must have had that possession seven years, peaceably, under a color of title. To constitute a color of title there need not be a regular chain of conveyances. If the possession has been taken in such a way as to authorize a belief that the possessor imagined he was occupying his own property, that will be color of title. What will amount to this must depend upon the particular circumstances of the case; but it has always been understood that possession under a deed will be sufficient. Upon this principle the case of Sawyer v. Shannon [Case No. 12,405], in this court, was decided; and I have no disposition to disturb it. It is of the utmost consequence that our decisions in regard to real property should be uniform.

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

Under this view of the case it will not be at all material whether the deed from Montgomery was forged or not, as there has been possession under a deed admitted to be genuine for twenty years.

[For other actions by the same plaintiff against different defendants, see Cases Nos. 10,-831–10,834, and 10,838.]

Case No. 10,836.

PATTON v. JANNEY.

SAME v. TAYLOR et al.

[2 Cranch, C. C. 71.] [1]

Circuit Court, District of Columbia. April Term, 1813.

PRINCIPAL AND AGENT — EFFECT OF KNOWLEDGE OF ONE AGENT UPON ACTS OF ANOTHER AGENT OF SAME PRINCIPAL—INSURANCE AFTER LOSS OF PROPERTY—WITNESS.

1. Witnesses may be removed while others are examined.

2. One joint defendant, in an action of assumpsit, cannot confess judgment so as to enable him to testify in behalf of the other defendants.

3. Information, received by an agent of the insured, of the loss of the property, before insurance effected, will not vacate the policy, unless the agent is the agent who obtains the insurance, or gives the information to the person who obtains it.

4. If several actions against several underwriters upon the same policy are submitted to the same jury at the same time, and the jury find verdicts against some of them, but wish to reconsider as to the others, those underwriters against whom the verdicts are found cannot be examined as witnesses for the others.

These were actions of assumpsit against several underwriters upon the same policy of insurance on the schooner Dorchester, from Antigua to Alexandria.

The counsel for the defendants requested that Captain Roberts (who it was supposed was a witness for the plaintiffs, and would give different testimony from that contained in a deposition of Mr. Dykes, as upon a former trial he had differed in some particulars,) might be removed out of hearing at the time of reading that deposition, which was allowed by the court, it not being opposed by the counsel for the plaintiff. (THRUSTON, Circuit Judge, absent, and CRANCH, Chief Judge, doubting, as to the correctness of the practice.)

E. J. Lee and Mr. Taylor, for defendants, offered to examine John Young as a witness. He was a joint defendant with Mr. Marsteller in a suit on some policy then depending, and the judgment in which was, by agreement, to depend on the verdict in this case. Mr. Young offered to confess judgment in that suit, waiving the joint plea of non assumpsit as far as it was pleaded on his part.

But THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that as the suit against Marsteller and Young was joint, and they had pleaded jointly, judgment could not be entered separately against one; and refused to order the judgment to be entered; but permitted an entry to be made on the record that Mr. Young came and offered to confess judgment; but they rejected Young as a witness for the defendant; for as judgment cannot be rendered against Young until it is rendered against Marsteller; and as the judgment against Marsteller is, by agreement, to depend on the event of the present suit, and as the verdict in the present case may be affected by the testimony of Young, if he should be permitted to testify, he is directly interested.

E. J. Lee, for defendants, then contended that if Dykes was the general agent of the plaintiff, and had information of the loss soon enough to have communicated it to the plaintiff, so as to prevent the insurance, and failed to do so, the plaintiff was bound by the knowledge and negligence of his said agent, and the policy is void.

Mr. Swann, contra. The knowledge of the agent which can affect the policy, must be the knowledge of an agent concerned in obtaining the insurance or in giving the information upon which it is obtained; but the mere neglect of the agent at Norfolk to give the information by the next mail, did not vitiate the policy.

And of that opinion was THE COURT (THRUSTON, Circuit Judge, absent).

The jury found verdicts against the defendants in two of the cases, but wished to reconsider as to the other cases. Mr. Lee, for the defendants, proposed to examine the defendants, against whom the verdicts were found, as witnesses for the other defendants; but the court said it was not consistent with the practice of the court: all the causes having been submitted to the jury at the same time.

Bills of exception were taken by the defendants' counsel, but no writ of error was prosecuted.

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

PATTON (NICHOLSON v.). See Case No. 10,250.

PATTON (PIERCE v.). See Case No. 11,145.

Case No. 10,837.

PATTON et al. v. The RANDOLPH.

[Gilp. 457.] [1]

District Court, E. D. Pennsylvania. July 23, 1834.

BOTTOMRY — WHEN AUTHORIZED — NECESSITY — PRESENCE OF OWNER — FUNDS — LIEN ON CO-OWNER'S SHARE IN FAVOR OF ANOTHER CO-OWNER.

1. A case of necessity alone authorizes a master to pledge his vessel by giving a bottomry bond.

[Cited in Gibbs v. The Texas, Case No. 5,385; Greely v. Smith, Id. 5,750.]

[1] [Reported by Henry D. Gilpin, Esq.]

2. The master cannot pledge a vessel by giving a bottomry bond for money borrowed for repairs, when the owners of the vessel are present at the place where the repairs are made, or when he has funds of the owners, which he has not used, for the purpose.

[Cited in Gibbs v. The Texas, Case No. 5,385; Joy v. Allen, Id. 7,552; The Panama, Id. 10,703.]

3. One part owner cannot take from the master a bottomry bond on the share of another part owner, for repairs done to the vessel.

4. It seems to be the better opinion, that one part owner of a vessel has not a lien on the share of another part owner, for a balance which may be due to him.

[Cited in Macy v. De Wolf, Case No. 8,933; The Larch, Id. 8,085; The Jennie B. Gilkey, 20 Fed. 161; The Daniel Kaine, 35 Fed. 787.]

[This was a libel by William Patton and Samuel D. Dickson against the schooner Randolph, to enforce a bottomry bond.

J. R. Ingersoll, for libellants.

C. Gilpin, for respondents.

HOPKINSON, District Judge. There seems to be no question about the material facts of this case. The vessel sailed from Philadelphia, bound to Charleston; the respondents, Sloan and Morris, being the owners of one-fourth part of her. At Charleston certain repairs were required, and were made and paid for by moneys advanced by the libellants, Patton and Dickson, to whom the captain gave a bottomry bond, on the one-fourth part of the schooner belonging to Sloan and Morris, to secure the repayment of their advances. The libellants were then in Charleston, and part owners of the vessel, the captain himself being the other part owner. Various grounds of defence against this bond have been taken and insisted upon on the part of the respondents. In the first place, it appears that, prior to the execution of the bond, Sloan and Morris had made an assignment of their share and interest in this schooner to assignees for the benefit of their general creditors, and that this assignment was known to captain Doyle, as well as to the libellants, the obligees in the bond, before the execution of the bond; but the assignment was subsequent to the making of the repairs for which the money was advanced. I pass by the question, whether the assignment or the bond should be preferred in such a case.

A second question has been raised. Can a part owner take a bottomry bond on the share of another owner, for repairs done to the vessel? It is to be recollected that the bond and pledge or hypothecation of the vessel are given by the captain, to raise money, by borrowing, for the outfit of the vessel, in order that she may prosecute her voyage. It is an extraordinary power over the property of another, and strictly confined to the cases of necessity which authorize it. But of whom, in this case, did the captain borrow the money he wanted? Of the very persons who were themselves personally responsible for the whole debt. He borrowed money from Patton and Dickson to pay the debts of Patton and Dickson. This is, at least, a novelty. It is difficult to reject the suggestion, that it was a device got up by the captain and the libellants, after they heard of the failure and assignment of their co-partners, Sloan and Morris, to appropriate to themselves their share of the schooner, in order to indemnify them for the share of Sloan and Morris, in the advances made for the repairs at Charleston. They, therefore, became lenders to the captain to pay their own debts, contracted for the repairs of their own vessel.

Two objections to the bond, as an hypothecation of the schooner, remain; either of which, in my opinion, is sufficient to destroy its validity.

The first objection is, that, at the time the money was borrowed, if it can be so considered, and the bond given, two of the owners, besides the captain himself, were actually in Charleston, where the repairs were made and the debts contracted; in fact, the owners of three-fourths of the schooner were present. Can the captain of a vessel pledge her for money borrowed for her repairs in such a case? If the captain, instead of getting this money from his owners, or of applying to them for funds, had borrowed it from strangers, in their presence, and pledged their vessel for its repayment, would they have deemed it a valid act; would they have submitted to such an exercise of power over their property? His power is not altered or enlarged because he resorted to them for the money, pledging to them the interest of an absent owner. In the presence of the owner of a vessel, on whose personal credit it is presumed the money necessary for the prosecution of a voyage may be obtained, the case of necessity does not exist which alone authorizes a captain to assume a power, not belonging to his ordinary duties or authority, to pledge his vessel. I consider, then, the residence or presence of some of the owners of this schooner, at the place where the repairs were made, and the money taken up, as sufficient to destroy the validity of this bond, as an instrument without authority.

The other objection is equally fatal to it, and on the same general ground, that is, the absence of that necessity, which alone confers the power on the captain to execute such a bond. Sloan and Morris, whose share in the schooner is hypothecated, sent out in her, as their own separate property, seventy-nine barrels of flour, which was sold at Charleston by the captain for five dollars and seventy-five cents per barrel. He got a note from the purchaser, which he had discounted on the 12th February, and received thereon four hundred and twelve dollars;

more than the share of Sloan and Morris of the advances made for repairs; more than the sum for which their part of the schooner was hypothecated. The bond is dated on the 15th of March, 1834, a little more than a month after these funds came into the captain's hands, and after the repairs had been made; so that after these debts for repairs were contracted, the captain actually had in his hands money enough to pay for them, or at least for the portion chargeable to the respondents. Why did he not so apply it? He says he disposed of these funds in the purchase of their paper, which was then good, but admits that he had no instructions from Sloan and Morris to apply them in this way. Can the master of a vessel dispose of his owner's funds, at his own pleasure, and thus create a necessity which is to give him an authority to hypothecate their vessel? I apprehend not. We are here again compelled to see that the execution of this bond did not arise out of any necessity to procure money to pay for the repairs of the vessel, and get her out of the hands of those who had furnished the materials and done the work of her repairs; but it was an expedient to secure to the owners at Charleston, who had paid for the whole, a reimbursement of the one-fourth part chargeable to Sloan and Morris, and to get it from their general creditors, to whom an assignment had been made of their interest in this schooner. I do not say there was any thing unfair in making the experiment, but I think the law will not sanction it.

It has been suggested by the counsel of the libellants, that a joint owner has a lien on the share of his co-owner of a vessel for a balance which may be due to him. Opinions on this point have differed, and it appears to me that the better opinion is against this doctrine. I should be disposed to follow the opinion of Lord Eldon in the case of Ex parte Young, 2 Ves. & B. 242, as Chancellor Kent did on this question in the case of Mumford v. Nicoll, 4 Johns. Ch. 522, although a majority of the judges in the New York court of appeals seemed inclined to support the opinion of Lord Hardwicke, in the case of Doddington v. Hallet, 1 Ves. Sr. 497, which was in favour of the lien. If, however, such a lien were admitted to exist, can it be enforced by a libel in the admiralty? Or when a libel has been filed, setting forth a claim founded on a bottomry bond, and on that only, can the libellants, finding themselves unable to sustain that claim, withdraw it, or have it dismissed, and then substitute, in its place, another claim altogether different, and of which the court, originally, could have taken no cognizance? It is wholly unlike the case in which chancery, having jurisdiction of the principal matter, will take it over collateral subjects, although they would not, by themselves, have been liable to it.

Decree: That the libel be dismissed, with costs.

Case No. 10,838.

PATTON et al. v. REILY.

[1 Brunner, Col. Cas. 180;[1] 4 Cooke, 119.]

Circuit Court, D. Tennessee. 1812.

CONVEYANCE—REGISTRATION NECESSARY TO PASS LEGAL NOTICE.

The legal estate will not pass to the grantee by a deed of conveyance, unless such deed be registered, registration having been substituted by the legislature for livery of seizin.

[Cited in Olcott v. Bynum, 17 Wall. (84 U. S.) 58.]

The plaintiffs, in support of their title, produced in evidence a grant from the state of North Carolina to John G. Blount and Thomas Blount, for five thousand acres of land, as mentioned in the declaration; and they offered in evidence a deed from the grantees to David Allison, under whom they claim. This deed had upon the back of it the following indorsements: "This deed of bargain and sale from J. G. Blount and Thomas Blount to David Allison was this day proved to be the act and deed of the grantors by John Blackledge, a subscribing witness thereto. J. Haywood, J. S. C. L. E." "Let it be registered. J. Haywood, J. S. C. L. E." Upon the back of the deed also appeared a probate of the oaths of several witnesses, stating that the two subscribing witnesses were dead; that the persons called upon also were well acquainted with the handwriting of the subscribing witnesses, and the handwriting of John G. Blount and Thomas Blount; and that the attestation was in the handwriting of the witnesses. They also proved the handwriting of the grantors in the same way. Upon these probates respectively the deed had been registered. The plaintiffs also offered, and produced witnesses in open court who proved the handwriting of the subscribing witnesses, and that they were dead; and also the handwriting of the grantors, and that one of them, viz., Thomas Blount, was dead, and the other lived in North Carolina.

Dickinson and Cooke, for defendant, objected to reading the deed in evidence. As to the probate before J. Haywood, there can be no pretense for its legality. A law passed in 1794, authorizing deeds to be registered in this country, if proved before a judge of a superior court in another state. It is not pretended but that the person who took this probate is not, nor ever was, a judicial officer of this state; and if he were, the probate would still be illegal, because no law ever authorized proof of the execution of a deed in that manner. To make this probate and the consequent registration good it must in some way appear that the person receiving it really acted in the capacity which the law requires. To the end of the name J. Haywood is added the hieroglyphics J. S. C.

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

L. E., which the gentlemen will say mean justice of the superior court of law and equity. It does happen that these characters will correspond with the initials of that title; but they as well stand for almost anything else. It may be the cipher used in North Carolina, designating the title of their judges; but this court cannot officially take notice of it. Besides, if we can give a legal interpretation of these letters, and thereby be enabled to explain them so as to suit the ideas of the plaintiff's counsel, still there is an essential wanting, because it does not from the certificate appear of what state Mr. Haywood was a judge. There is not even an initial which stands for North Carolina. Although, then, he may be a judge of a superior court of law and equity for anything that appears to the court, it may be in some one of the territories, or even out of the United States. In short, it does not appear that he really occupied the station which the act of assembly required as a prerequisite to his receiving the probate.

Now, as to the second objection viz., the proof by parity of hands. It will not be contended on the other side that the deed now produced in evidence would pass any legal estate at common law. By the common law livery of seizin was necessary to be made upon every grant of an estate, whether of inheritance or for life only. 2 Bl. Comm. 318. To remedy the inconvenience which might result from this ceremony in England was passed the statute of Henry VIII., recognizing deeds of bargain and sale; and in this country the act of the North Carolina legislature, making, in substance, a similar provision, passed in 1715. It is entitled "an act to appoint public registers, and to direct the method that shall be observed in conveying lands," etc., and provides "that no conveyance, or bill of sale for lands (other than mortgage), in what manner of form soever drawn, shall be good and available in law, unless the same shall be acknowledged by the vendor, or proved by one or more evidences upon oath, either before the chief justice for the time being, or in the court of the precinct where the land lieth, and registered by the public register of the precinct where the land lieth, within twelve months from the execution thereof; and that all deeds so done and executed shall be valid, and pass estates in land, or right to other estate, without livery of seizin, attournment, or other ceremony whatsoever."

It will be argued by Mr. Whiteside, that as the legislature, in the act of 1715, required the deed previous to registration to be proved by evidence, it is not necessary to resort to the subscribing witnesses in those cases where proof of handwriting would be sufficient at common law. What would have been the construction of that act upon a deed offered to be proved in one year after the execution (which is not the case here), and before any other statute had passed on the subject, it will not now be necessary to inquire, as we expect to show that from a uniform train of legislative declarations it has been always required that the deed should either be acknowledged by the grantor, his agent or attorney, or proved by the subscribing witnesses. The next law which passed upon this subject was enacted in 1760, and expressly provides that before the deed can be admitted to registration it shall be acknowledged by the grantor, his agent or attorney, or proved by the oath of the subscribing witnesses, and gives two years time for registration. In the act of 1776 will be found a provision in the same words; so also in the acts of 1773, 1777, 1782, and 1784, and in every other law which has passed on the subject, except the law of 1811, which can be of no service to the plaintiffs, as the probate now objected to was made several years before. As a further evidence of the legislative meaning upon this point, if anything is required more than an express declaration, we will refer the court to an act passed in 1787, providing that the deeds from the office of Lord Grenville might be proved by parity of hands. Now, if this was understood to be the law before in relation to all deeds, it was, to say the least of it, extremely absurd to say it should apply to a particular kind of deeds; for it would have applied to them without any such law. It is, therefore, a fair mode of argument to say that, when the legislature recognized proof of a certain description as being sufficient to establish the execution of a particular kind of deeds, they meant thereby to exclude the idea of that proof being sufficient to prove the execution of other deeds. As a further illustration of the uniform view which the legislature have taken of this point we will refer the court to two statutes,—the one enacted by North Carolina in 1756 (chapter 6, § 4, Hayw. Rev. 66), and the other by the legislature of Tennessee, in the year 1806 (chapter 49, § 1, Hayw. Rev. 413). Each of these statutes was intended to remedy a particular inconvenience. The grantee had no summary method of compelling the attendance of witnesses to a deed, for the purpose of proving the execution preparatory to registration. This was an evil which the legislature felt anxious to cure, and therefore they passed these statutes, respectively, authorizing the grantee to apply to the court of the county where land might lie, and procure a summons for the subscribing witnesses, compelling them to attend, and testify what they knew about the execution of the deed. The evil was that the grantee had no summary way of compelling the proof of the execution of his deed. (Perhaps the only previous mode was by a bill to perpetuate testimony.) The legislature, to remedy this inconvenience, passed the laws in question, authorizing a process to compel the attendance of the subscribing witnesses. If it had been the law that the execution of

the deed could be proved by witnesses other than those who were subscribed as such, this remedy would be but half complete. In truth, it was never believed by the legislature that the deed could be proved by any but the subscribing witnesses, and therefore, when they make a remedial provision on that subject, they only speak of witnesses of that legal character.

The only statute which we shall notice was passed in 1811, subsequent to the respective probates. It provides that where the witnesses are dead, or live out of the state, and the grantor is also dead, that the deed may be registered by proving the handwriting of the witnesses and grantor; and then when it is so proved and registered it shall be read in evidence. The plaintiffs do not pretend that they come within the provision of this act, nor can they do so, because their probate and registration is long prior to the passage of the law, and because the law is only prospective, and is to continue in force for two years thereafter. It seems most manifest that no such privilege existed previous to the enactment of this statute, and that the object of the legislature was to provide a new remedy, which was to be tried for a limited time. But admitting that a deed for land may be proved as an instrument at common law, so as to pass the legal estate to the grantee, and still we must prevail. The evidence offered is ex parte. In those cases at common law where proof of the execution was admitted by persons other than the subscribing witness, it was in open court, and not by an ex parte examination.

As to the third objection, viz., proof of execution upon trial, we will briefly state what we conceive to be the law. When this testimony is offered it is upon the principle that there has been no registration. We contend that until registration no estate passes. The act of 1715 is the only law of this country which authorizes lands to pass by deed. It is in substance a copy of the statute (27 Hen. VIII.) in relation to deeds of bargain and sale. The English statute requires that the deed shall be enrolled; and our statute requires that it should be registered; and these things must be respectively done before any estate passes. It may be that when registered it relates back to the time of execution; but still until it is registered the legal estate is not in the grantee. It has constantly been determined in England that no estate passes until after enrollment. 1 Bac. Abr. 277, 278; Cro. Jac. 52; Hynde's Case, 4 Coke, 70a; 2 Com. Dig. 65, 66. Upon this point we know of no determination in this country. A case occurred in North Carolina in which the court said that when the deed was enrolled, it passed the estate ab initio, and would so operate as to consider the grantee as legally seized from the execution. 2 Hayw. N. C. 287, 288. Such a determination could alone be founded upon the idea that no estate passed without registration. Indeed, the act of assembly expressly requires it preparatory to the passing a legal estate; and it is not for the court to say it may be passed in any other way. In truth, it will not do for the gentleman to say that the act is to be disregarded, for it is the very foundation of his claim; it has no effect whatever without it. In those cases where an instrument has been supported by discarding a statute made upon the subject, the courts have done so upon the ground that the instrument is good at common law. There is no pretense for such a thing in this case. There never was a case where a right accrued under a statute that such right was adjudged valid if the express requisitions of the statute had not been complied with. Those requisitions have not been complied with in this case; the deed has not been registered; and therefore we humbly hope that it will be rejected.

M'NAIRY, District Judge. The objections which apply to the first two modes of proof offered by the plaintiffs have been decided as valid by this court upon a former occasion. At that time I was of opinion that the execution of the deed might be proved upon the trial, and given in evidence before it had been registered. After a very full investigation I am constrained to alter that part of my former decision. Registration was intended by the legislature to stand in the place of livery of seizin. By the common law no estate could pass without livery of seizin; and the same may be said as to its substitute. Lands as conveyed by this deed, would not pass the estate at common law; and if it will pass, it must be by act of assembly. The act of 1715 requires the deed to be registered before a legal estate is vested in the grantee. To create a title under this act of assembly the party claiming the benefit of it must have complied with its requisitions, one of which is that the deed shall be registered. The deed cannot be read in evidence.

And the plaintiffs were nonsuited.

NOTE. Unregistered deed cannot be read in evidence of conveyance. See Olcott v. Bynum, 17 Wall. [84 U. S.] 58, citing above case.

[For other actions by same plaintiffs against different defendants, see Cases Nos. 10,831–10,835.]

PATTON (SLOAT v.). See Case No. 12,947.

PATTON (SMITH v.). See Case No. 13,088.

PATTON (STRODES v.). See Case No. 13,538.

PATTON v. TAYLOR. See Case No. 10,836.

Case No. 10,839.

PATTON v. VIOLETT.

[1 Cranch, C. C. 463.][1]

Circuit Court, District of Columbia. Nov. Term, 1807.

BILLS AND NOTES — INSOLVENCY OF MAKER—SUIT AGAINST INDORSER — INDORSEMENT OF BLANK NOTE—SOLVENCY OF MAKER AT MATURITY—REQUEST TO SUE.

1. In Virginia the insolvency of the maker of a promissory note excuses the holder for not suing him and obtaining judgment, &c., before suing the indorser.

2. An indorsement of a blank paper, with intent to give credit to the maker of a promissory note which should afterwards be written thereon, is obligatory, although no other consideration passed from the indorsee to the indorser; and authorizes the maker to make the note in the manner intended at the time of the indorsement.

3. It is no bar to the plaintiff's recovery in this action that the maker had, at the time the note became payable, property enough to pay this debt, and that he and the plaintiff both resided in the same town, and that the plaintiff brought no suit against the maker.

4. The insolvency which will excuse the plaintiff for not bringing suit against the maker, must be such as, in the opinion of the jury, would render a suit fruitless.

5. If the maker was solvent at the time the note became payable, and during such solvency the defendant requested the plaintiff (but not in writing) to sue the maker, and he did not, the defendant is discharged from liability, under the equity of the statute of Virginia 23d December, 1794, "concerning debtors and their securities." [Laws 1794, p. 7.]

The declaration was upon a promissory note, made by Brooke, payable to Violett or order, and by him assigned, by indorsement, to the plaintiff; and averred demand of payment from Brooke, his refusal and insolvency at the time of demand, and notice thereof to Violett.

Upon the trial of the general issue, THE COURT (DUCKETT, Circuit Judge, absent), at the prayer of the plaintiff, instructed the jury, in effect, that if the defendant indorsed the note, with intent to give credit to the maker with the plaintiff, for the amount of the note, and the plaintiff did thereupon give such credit, the circumstance that the indorsement was made before the note was filled up, was no bar to the plaintiff's recovery in this action, although the defendant received no other consideration for his indorsement than the credit thus given by the plaintiff to Brooke upon the faith of the note; and that such indorsement authorized Brooke to fill up, and make the note in the form in which it appears to have been made; and that the circumstance, that the body of the note was in the plaintiff's handwriting, was wholly immaterial to this issue.

And THE COURT refused to instruct the jury, as prayed by the defendant, that if they should be satisfied by the evidence, that Brooke had property enough to pay this debt at any time after the note became payable, and that the plaintiff had remained in the same county with him, and had not brought suit against him, he could not recover in this action.

THE COURT also said that the insolvency, to excuse the not bringing a suit, must be such as would, in the opinion of the jury, have rendered a suit fruitless.

THE COURT also, at the suggestion of the defendant's counsel, expressed an opinion, that under the equity of the Virginia statute of 23d December, 1794, "concerning debtors and their securities," the defendant is discharged from his liability upon the note, if, after the note became payable, and while the maker was solvent, the defendant requested the plaintiff to sue the maker, and he did not; although such request was not in writing, as required by the letter of the statute. See Vowell v. Lyles (at July term, 1807). [Case No. 17,021].

[The judgment of this court, which was for the plaintiff, was affirmed by the supreme court, where it was carried on writ of error. 5 Cranch (9 U. S.) 142.]

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

PATTON (VIOLETT v.). See Case No. 16,952.

Case No. 10,840.

PATTY v EDELIN.

[1 Cranch, C. C. 60.][1]

Circuit Court, District of Columbia. Jan. Term, 1802.

DEMURRER TO EVIDENCE.

The plaintiff is not obliged to join in demurrer to the evidence unless the demurrer expressly admits every fact which the jury might reasonably infer from the testimony. But if demurrer be joined, the court will infer what the jury might infer.

Mr. Swann, for defendant, offered a demurrer to the evidence, stating the testimony only as delivered by the witnesses for the plaintiff.

Mr. Jones, for plaintiff, objected to join in demurrer, because it did not state the facts which might be inferred from the testimony. Cocksedge v. Fanshaw, 1 Doug. 131; Hoyle v. Young, 1 Wash. [Va.] 151; Bull. N. P. 313; Thweat v. Finch, 1 Wash. [Va.] 220.

THE COURT was of opinion that the plaintiff [Negro Patty] was not obliged to join in demurrer, unless the defendant [Edward Edelin], would admit those facts which the jury might reasonably infer from the testimony. But that if such a demurrer, stating the testimony of facts, and not the facts themselves, be joined, then the court are bound to infer, against the party demurring, every fact which a jury might reasonably have inferred from the testimony so stated.

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

THE COURT refused to compel the plaintiff to join in demurrer, unless the defendant would admit that he hired the plaintiff to Henry Lyles; a fact which they thought the jury might reasonably infer from the testimony.

PAUL, In re. See Case No. 12,148.

Case No. 10,841.

PAUL v. HULBERT et al.

[5 Reporter, 738;[1] 1 N. W. Rep. (O. S.) 149; 24 Int. Rev. Rec. 53.]

Circuit Court, D. Minnesota. Jan. 18, 1878.

ACTION—DEFENSE — PENDING ACTION IN EQUITY BROUGHT BY DEFENDANT.

A defendant in an action in the United States courts cannot defeat the action by pleading the pendency of a suit in equity, previously commenced by himself, and involving the same questions.

[Cited in Seymour v. Malcolm McDonald Lumber Co., 7 C. C. A. 593, 58 Fed. 961.]

On May 9, 1876, the defendants [Lester F. Hulbert and Charles C. Paige] entered into a contract to build and erect for the plaintiff [Benjamin F. Paul] a flouring mill, and furnish and provide materials and machinery complete for the same. This suit was commenced September 27, 1877, to recover damages for breach of warranty under the contract. The defendants answer that before the commencement of this suit, on March 27, 1877, they filed a bill in equity against the plaintiff to recover a balance due under the contract, and to have the amount declared a specific lien on the mill and the land on which it is situated, and that on June 5, 1877, the plaintiff appeared as defendant in that suit, and duly filed his answer to the bill of complaint, and pleaded, all and singular, the matters alleged in his complaint in this action by way of set-off and recoupment against the claim of these defendants, which action is still pending and undetermined, and they demand a judgment of dismissal in this suit.

Davis, O'Brien & Wilson, for plaintiff.

Gilman, Clough & Lane, for defendants.

NELSON, Circuit Justice. [The pendency of an equity suit in this court, wherein the defendants in this action as complainants there seek to recover a balance due them, and to enforce a lien upon the mill and land upon which it is erected, is urged as a defense to an undoubted cause of action at law, and to defeat a trial by jury of an important issue of fact.][2] Had the plaintiff made no defense in the equity suit, and commenced this action, it is admitted he could have prosecuted it to a final determination. If so, I can see no reason why he should be deprived of the right now. No decree would be granted until the allegations in the bill of complaint were proved, and this plaintiff, without answer, could have met the proof by counter evidence. The statutes of Minnesota are invoked to sustain the answer as a plea in abatement. It is provided by section 77, and the third subdivision of section 74, p. 460, Rev. St. Minn., that an objection to the complaint of a plaintiff, "that there is another action pending between the same parties for the same cause," may be taken by answer where it does not appear upon the face of the complaint; and it is declared by act of congress, June 1, 1872 [17 Stat. 196], "that the practice, pleadings, and forms and modes of proceeding in civil causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held." I shall admit, for the purposes of this case only, that the question presented is one of practice and pleading; still the defendants are not aided thereby. The state statutes did not enlarge a defense but merely directed the mode in which defenses and objections available by law at the time it was enacted may be taken advantage of, the nature of these defenses and objections being left unaltered. Such was the early construction of this section of the New York Code, from which the Minnesota statute was transcribed. See 5 How. Prac. 52.

The act of congress recognizes the constitutional distinction between proceedings in equity and at common law, and no case has been presented where a defendant has been permitted to defeat an action at law against him by pleading the pendency of a suit brought by himself against his adversary. Previous to the Code enactments the plea of a former action pending, in abatement, was allowed only in case the same party instituted double actions for the same subject matter in the same court. In some cases in equity after a decree to account was made where trust funds would be affected, and the rights of all persons interested therein could be settled and adjusted, the rule was that suits at law would be enjoined to prevent the prosecution of suits against the persons in charge of the fund, and protect it from being squandered by litigation, but no case is cited and no principle laid down which excludes a defendant from the benefit of a cross action, or restricts him to a defense to the suit instituted against him before a decree, except, perhaps, where executors have been sued in chancery and afterwards cited before the probate judge to account.

Judgment for plaintiff, unless answer is served in twenty days.

[1] [Reprinted from 5 Reporter, 738, by permission.]

[2] [From 1 N. W. Rep. (O. S.) 149.]

Case No. 10,842.

PAUL v. The ILEX.

[2 Woods, 229.][1]

Circuit Court, D. Louisiana. April Term, 1876.

MARITIME LIENS—SERVICES OF STEVEDORE.

A stevedore has no maritime lien upon a ship, for his services in loading and stowing her cargo.

[Cited, but not followed, in The Canada, 7 Fed. 124; The Wivanhoe, 26 Fed. 928. Followed in The Esteban De Antunano, 31 Fed. 924. Cited, but not followed, in The Gilbert Knapp, 37 Fed. 211. Cited in Danace v. The Magnolia, Id. 369; The Augustine Kobbe, Id. 699. Overruled in The Main, 51 Fed. 955, 2 C. C. A. 569.]

[See The Amstel, Case No. 339.]

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

[This was a libel by James Paul against the bark Ilex to enforce a maritime lien for services as a stevedore. The libel was dismissed in the court below.] Case unreported.

B. C. Elliott, for libellant.

C. B. Singleton and R. H. Browne, for claimant.

BRADLEY, Circuit Justice. This is a libel in rem against a foreign ship, bound on a foreign voyage, for services as stevedore in loading timber on the ship. A stevedore has never been held to have a claim against the ship itself for his services; on the contrary, the claim has been uniformly rejected. Judge Betts, in Cox v. Murray [Case No. 3,304], undertakes to explain why the loading of a ship with cargo preparatory to a voyage, is not a maritime service, whilst the furnishing of repairs and supplies preparatory to such voyage is a maritime service. He seems to think that the maritime quality arises only when the matters performed or entered upon pertain to the fitment of the vessel for navigation, aid and relief supplied her in preparing for and conducting a voyage, or the freighting or employment of her as the instrument of a voyage; but that services only incidentally benefiting a voyage have not this quality. Judge Lowell thinks this not a very satisfactory explanation, because a ship cannot be used to advantage without a cargo any more than without repairs and supplies. As, however, the precedents are all one way, I do not feel at liberty in this court to disregard them, and the views expressed by Mr. Justice Grier, in McDermott v. The Owens [Id. 8,748] are so clear and forcible, that I am not certain that I should come to a different conclusion if the question were a new one. He says: "The stevedores are usually employed by the owner, consignee, or master, on their personal credit; the service performed is in no sense maritime, being completed before the voyage is begun, or after it is ended, and they are no more entitled to a lien on the vessel than the draymen and other laborers who perform services in loading and discharging vessels."

The decree of the district court is affirmed.

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

Case No. 10,843.

PAUL v. KANE.

[5 Cranch, C. C. 549.][1]

Circuit Court, District of Columbia. Jan. Term, 1840.[2]

LETTERS OF ADMINISTRATION CUM TESTAMENTO ANNEXO—EXECUTOR ACTING UNDER PRIOR APPOINTMENT.

Letters of administration, with the will annexed, granted in the District of Columbia while there was an executor acting under letters testamentary granted in Maryland, are void.

Assumpsit for money had and received by the defendant [Elias Kane] for the use of the plaintiff [Gabriel Paul], as executor of Edward Coursault, to recover from the defendant the sum of $7,864.32 principal, and $304.72 interest, received by the defendant from the treasury of the United States, for indemnity for French spoliation of the testator's brig Good Friends and cargo, confiscated by the French government in 1810. This money was received by the defendant under letters of administration with the will annexed of the said Edward Coursault, granted by the orphans' court of the county of Washington in the District of Columbia, on the 28th of March, 1837. Edward Coursault died in August, 1814. His will was proved, and letters testamentary were granted to the plaintiff by the orphans' court of Baltimore county, in Maryland, on the 27th of August, 1814. The memorial to the commissioners under the French treaty was presented by Madame Aglae Coursault in her own name, as executrix of the testator, stating that letters testamentary had been granted to her and to Gabriel Paul (the plaintiff), who were named executors in the will, and that whatever might be awarded would belong solely and exclusively to her, as executor of the testator. Upon affidavit that she died in 1835, the orphans' court of Washington county granted the letters of administration to the defendant; the executor, Gabriel Paul, being still alive, and under the act of congress of the 24th of June, 1812, § 11 (2 Stat. 755), competent to sue for and recover any claim in the District of Columbia, in the same manner as if the letters testamentary had been granted by the proper authority of the district.

Mr. Coxe, for plaintiff, cited Griffith v. Frazier, 8 Cranch [12 U. S.] 9, and Childres v. Emory, 8 Wheat. [21 U. S.] 671.

Mr. Key, for defendant, cited 1 Petersd. Abr. 250; 1 Saund. 274, note 3; 1 Chit. Pl.

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

[2] [Affirmed in 14 Pet. (39 U. S.) 33.]

484; 2 Starkie, Ev. 548, 549, pt. 4; Marsfield v. Marsh, 2 Ld. Raym. 824; Jones v. Jones, 1 Bing. 249; Hunt v. Stevens, 3 Taunt. 113; Story, Confl. Law, 421, 430; 3 Bac. Abr. 38; Stevens v. Gaylord, 11 Mass. 256; Langdon v. Potter, Id. 313; 1 Wheel. 236, 243; Hughes v. M'Kinsey, 5 T. B. Mon. 40; Henderson v. Clarke, 4 Litt. (Ky.) 277.

THE COURT was of opinion that, as there was an executor qualified and competent to sue, when the orphans' court of the county of Washington granted the letters of administration to the defendant, the latter were void.

Verdict for plaintiff. Judgment affirmed by the supreme court of the United States, at January term, 1840 [14 Pet. (39 U. S.) 33.]

Case No. 10,844.

PAUL v. LOWRY.

[2 Cranch, C. C. 628.] [1]

Circuit Court, District of Columbia. Dec. Term, 1825.

DEPOSITION—BEFORE MAYOR—OFFICIAL SEAL—AUTHORITY SHOWN BY PAROL.

A deposition taken before the mayor of a city, who usually certifies his acts under his official seal, must be so certified; or his authority otherwise proved; which, it seems, may be done by parol.

R. P. Dunlop, for plaintiff, offered in evidence a deposition, taken under the act of congress [1 Stat. 73], before a person who certifies himself to be mayor of Petersburg, but who did not affix his official seal to his certificate, nor was there any other evidence of his being mayor. Mr. Dunlop cited the cases of Dunlop v. Munroe [Case No. 4,167], in this court, at June term, 1809, and Lindsay v. Riggs [Id. 8,366], at December term, 1811, (not reported as to this point,) when a deposition purporting to be taken before the superintendent of the city of Charleston, certified under the seal of the corporation, and taken in due form under the act of congress, was permitted by the court to be read in evidence, without other proof of the fact that he was the chief magistrate of the city, than his own certificate and his official seal; but before Mr. Key, the plaintiff's counsel, read the deposition, he proved, by the testimony of Mr. Cheves, that ———————, before whom the deposition was taken, was the intendant and chief magistrate of the city of Charleston, at the date of the certificate, and that he believed it was the seal of the corporation, but did not know his handwriting.

THE COURT (nem. con.) having looked into all the cases respecting the admission of depositions taken under the act of congress, of which any note had been taken in this court, rejected the deposition, stating that where the officer taking the deposition has an official seal, and usually certifies his acts under that seal, his certificate, (not accompanied by his official seal,) that he is such officer is not sufficient; but intimated that the fact, that he is such officer, may be proved by parol testimony, as any other matter in pais.

PAUL v. PACIFIC R. CO. See Cases Nos. 10,767 and 10,768.

Case No. 10,845.

PAUL v. PACIFIC R. CO. et al. PARMELY v. IRON MOUNTAIN R. CO. BAILEY v. ATLANTIC & P. R. CO.

[4 Dill. 35; [1] 3 Cent. Law J. 306.]

Circuit Court, E. D. Missouri. April, 1876.

POWERS OF MISSOURI STATE BOARD OF EQUALIZATION—EFFECT OF ACTING ULTRA VIRES—OVER-VALUATION OF PROPERTY—INJUNCTION AGAINST COLLECTION OF ILLEGAL TAXES.

1. A statute of Missouri [Laws 1852–53, p. 13], provided that the state board of equalization "shall proceed to adjust and equalize the aggregate valuation of the property of each one of the railroad companies liable to taxation under the provisions of this act:" *Held*, that this only authorized the board to equalize the aggregate valuation of the county boards, and did not give them power to act as an original assessing body, and make an assessment de novo.

[Cited in brief in City of Kansas v. Hannibal & St. J. R. Co., 81 Mo. 287.]

2. Although to make an assessment de novo would be an act beyond the power of the board, and void, this would not vitiate the entire tax, but would leave the final valuation as fixed by the county boards.

3. The companies were required to pay taxes on the valuation fixed by the county boards, and the collecting officers were enjoined only in respect of the excess over such valuation.

4. A mere error of judgment on the part of the assessing officers, as to the valuation of property, is not, in the absence of fraud, subject to judicial revision. The charge of fraud made against the state board of equalization not sustained by the proofs.

[Bills by Amos Paul against Pacific Railroad Company, Duncan S. Parmely against St. Louis, Iron Mountain & Southern Railroad Company, and Ozias Bailey against Atlantic & Pacific Railroad Company.] These bills in equity were filed for an injunction and relief against taxes assessed for the year 1873, upon the property of the Pacific and certain other railroads in the state of Missouri. Temporary injunctions were allowed on certain conditions, for reasons which were stated at the time, and which will be seen by Parmely v. St. Louis, I. M. & S. R. Co. [Cases Nos. 10,767 and 10,768. See, also, Case No. 732.] The issues having been made up, and the proofs taken, the causes were submitted for final decrees.

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

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

Mr. Baker, Mr. Lowe, Mr. Dryden, and Mr. Sears, and others, for plaintiffs.

Mr. Bowman and others, for the counties.

DILLON, Circuit Judge, in disposing of the cases, delivered an oral opinion, substantially as follows:

These cases concerning railroad taxes, which we have had before us for some time, were, at the outset, and perhaps are still, very important.

Bills were originally presented to me for the granting of temporary injunctions. After hearing the parties, I allowed temporary injunctions until the term when the supreme court justice allotted to this circuit—Mr. Justice MILLER—was to be here, at which time we had a very full argument before all three of us, Judge TREAT sitting at our request. It is not necessary to go into all that was said and done at that time. The result of it was this: That, after hearing the counsel fully for two or three days on each side, we made our order, requiring these companies to pay what amounted to about sixty per cent of the taxes which were claimed against them, meanwhile continuing the temporary injunctions, but with a provision that if this amount was not paid the injunctions should stand dissolved, leaving the state and the various counties and municipalities free to use the ordinary remedies for the collection of their taxes. Parmley v. St. Louis, I. M. & S. R. Co. [Cases Nos. 10,767 and 10,768]. In respect of the Atlantic & Pacific and the Missouri Pacific Railroads, there were special grounds of exemption from taxation claimed, on which the court ruled against them, leaving the cases against those companies and the other companies to stand on ground common to all, as far as they could stand at all. The views which the court took of those special exemptions have, since that time, been settled by the United States supreme court, in conformity with our judgment against the companies, to the effect that they have no special legislative contract for exemption from the particular taxes here in controversy.

The main ground-work of the bills was the alleged fraudulent conduct of the state board of equalization, and also the alleged attempt of that board to exercise powers not conferred upon it by the statute. The companies also complained loudly of the excessive nature of these assessments.

In this state each railroad company is required to make a list of its property, and to affix a value to it. These lists are transmitted to the counties, and there is a county board established, whose duty it is "to examine the statement furnished them by the officers of the company, and determine the correctness thereof, as to the amount of property and the valuation thereof." The companies complied with this provision, and transmitted their descriptive lists and their valuation to the various counties. In some instances the valuations were accepted by the counties, but in most cases they were raised, as, for example, in the case of Pettis county. The value of the railroad property in that county, as returned by the officers of the company, amounted to $300,260; as increased by the county court, it amounted to $533,000—nearly double; and, in general, the counties went over those lists returned by the companies, and very largely increased the specific valuations, and the aggregate amounts returned. Another provision of the law is that this valuation, as fixed by the county court, shall be transmitted to the central authority, at Jefferson City, that is, to the state board of equalization; and that board, for the year the taxes of which are in dispute here, was constituted of the state senate. Now, the result of the action of that body was very largely to increase the valuations fixed by the county courts; and the printed record of their proceedings shows that they conceived it to be their duty to investigate this matter very fully, and to examine witnesses. The result was that they increased largely the valuations. In the case of the Missouri, Kansas & Texas Railroad, the valuation was increased from $8,000 or $9,000 a mile to $26,000 a mile. The bill alleged that this valuation was largely over what it had ever been before; that although the condition of the property was nearly the same, the assessment was double, in round numbers, what it was the preceding year; and a supplemental showing has been made to the effect that it was double what it was the next year; and that altogether this is a very extraordinary and most exceptional valuation, without anything like it before or since. The railroad companies imputed this in their bills to a disposition, intention, and purpose, on the part of the senate, acting as a state board of equalization, to discriminate against property of this class, and to make it bear, in violation of the constitution of the state, more than its proportionate share of the public burdens. A great deal of evidence has been produced here for the purpose of showing that, in general, other property throughout the state is valued at from fifty to sixty or sixty-six per cent of its actual value, whereas the valuation placed by the state board of equalization on this railroad property is not only equal to, but in excess of, its full value, and the distinct charge is made in the bill that this was done from a premeditated design to make this property contribute more than its share of the public burdens.

A large amount of evidence has been taken on that point. We have gone over that evidence, and while we cannot say that the result is, in our minds, quite clear that these valuations, relatively considered, are not excessive, yet we are of opinion that a mere error in judgment, on the part of any body of this kind, in fixing the valuation of property, is not subject to judicial revision or con-

trol; and if the bill could rest on no other ground it would have to be dismissed. In other words, the charge of fraud, which is made against this body, is not sustained.

That leaves simply a question whether this body was acting in excess of the rightful jurisdiction conferred upon it by the statute. The claim on the part of the complainant is that the statute then in force—for in this regard it has since been amended, and the same question cannot again arise—created the state board of equalization, with only the power to equalize taxes, that is, to equalize the aggregate valuation. It is acknowledged that they have the power to do that, but it is denied that the statute gave them the power to act as an original assessing body, to go over all the railroads of the state and ascertain their property, and make an original assessment, de novo, based on the value of the specific articles which compose the property of these companies.

Now, it is a question of law as to what powers were conferred on that body by the statute of 1873. The question of fact is whether, if that body had only the powers of a board of equalization, they undertook to exercise the powers of an assessing body. The statute is this: "The said board shall proceed to adjust and equalize the aggregate valuation of the property of each one of the railroad companies, liable to taxation, under the provisions of this act,"—"shall proceed to adjust and equalize the aggregate valuation." "The board shall have power to summon witnesses, by process issued to any officer authorized to serve subpœnas, and shall have the power of a circuit court to compel the attendance of such witnesses, and compel them to testify; they shall have power to increase or reduce the aggregate valuation of the property of any railroad company included in the statements or returns made by the railroad companies and clerks of the county courts, and any other property belonging to said railroad companies which may be otherwise known to them, as they may deem just and right."

Since that time a statute has been passed by the legislature of Missouri inserting, in addition to these words, the power to "assess," but that statute has no relation to this controversy. This question was very elaborately argued before the full bench when Mr. Justice MILLER was here, and although, I believe, nothing very positive was stated about it in the remarks which were made, and no definite conclusion was announced, we reached quite a satisfactory one, which was that the law limited the functions and powers of this body to the work of equalizing, and that they had not the functions and powers of an original assessing body; and upon further reflection, that is still our judgment. This makes it necessary to consider whether what the state board of equalization did was an adjustment and equalization of values, or whether it was an original assessment. Judge TREAT and myself have gone through the evidence in this respect and have not reached a conclusion exactly in accord. Judge TREAT is of opinion that what they did can be reconciled with a fair view of simply adjusting and equalizing the aggregate valuations. I am of opinion, taking the whole of that evidence together, that this body undertook to make, and did make, a specific assessment of this property—undertook to inquire originally, and did inquire originally, into the value of each locomotive, sleeping car and freight car, the value of lands and of all specific property, just as fully and completely as they could have done had they been undertaking to assess it originally; and, indeed, while this is charged in the bill, the answer hardly denies it, but, on the contrary, asserts in terms, whether meant to do so or not, that they did assess it, and that their assessment was just. So, taking the pleadings and the proofs together, I am of opinion that they did undertake to make, and did make, an original assessment.

Now, this being so, what is the result of it? The result is that they were acting ultra vires. It was contended on the argument before us, by the companies, that this would have the effect of vitiating the entire assessment, and that no tax at all could be collected, and it has since been pressed upon us that that is the true view of the matter; but that was settled at the other argument. We held then, under the circumstances of the case, that this did not have the effect to vitiate the whole proceeding, but that, if they undertook to do what they had no authority to do, it would be just the same as if they had not done it at all; that the valuations as fixed by the county courts would be the true valuations in the premises, and that these companies must pay taxes on the valuations for this year as fixed, not by themselves, but by the county courts of the respective counties. And that will be the decision now. If it becomes necessary to refer this to a master in order to ascertain what those valuations are, we will make that reference, and, perhaps, it would be better to have a master, if the case is going to remain so that the amounts due, on this basis, can be ascertained and required to be paid or collected. There will be no injunction, except for the excess over the amounts fixed by the county courts.

I am the more reconciled to this view, because, in my judgment, it affects an equitable result. It cannot be said that the state is not getting its full share of revenue, if these companies are required to pay, in the absence of any valid action on the part of the state board of equalization, on the value as fixed by the several counties in which this property is situated. That makes it about the same amount the companies paid the year before, and a showing supplemental has been made, that the taxes for the year afterward were assessed and paid on just

about the same valuation. There is no reason to suppose that these roads were worth twice as much in 1873 as they were the following year; and, from the evidence, the extent of this assessment is shown by a comparison of the percentage of taxation imposed by this action with that imposed on other railroads elsewhere, which may be presumed to be not far from the same value. Of course this is only a comparison of the taxes with the net earnings. The assessment on the Chicago & Northwestern Railroad is 8 65-100 per cent; on the Chicago, Rock Island & Pacific, 4 91-100, or about five per cent; on the Chicago, Burlington & Quincy, 5 76-100, or about six per cent; on the Lake Shore & Michigan Southern, 10 80-100 per cent; on the Illinois Central, 4 60-100 per cent; and on the Missouri, Kansas & Texas for 1873, the year here in question, it was 38 73-100 per cent.

The judgment of the court is that the injunctions may remain to restrain the collection of taxes in excess of the amount fixed in the aggregate, by the various county courts, through which the roads run.

Ordered accordingly.

NOTE. Upon the announcement of the foregoing opinion, Mr. Bowman, counsel for the state and counties, said that they acquiesced in the decision of the court, and, upon his motion, the cases were referred to a master to carry into effect the order of the court; and the court ordered those roads in the hands of its receivers at once to pay the taxes due from them on the above basis.

We append a report of the rulings of Treat, J., in Ketchum v. Pacific R. Co. [Case No. 7,738], in the circuit court for the Eastern district of Missouri, September, 1876.

[The case reported as a note to this case in 4 Dill. 41, is here published as Case No. 7,738.]

Case No. 10,846.

The PAUL BOGGS.

[1 Spr. 369.][1]

District Court, D. Massachusetts. Aug., 1857.

MARITIME LIENS—DELAY IN BRINGING SUIT—EFFECT OF SUIT IN PERSONAM IN STATE COURT.

1. The lien of a material-man is not lost by commencing a suit in personam, in the state court, and attaching the vessel therein.

[Cited in The Highlander, Case No. 6,476; The Custer, 10 Wall. (77 U. S.) 218; The Augustine Kobbe, 37 Fed. 701.]

2. Nor by delay in commencing a suit in rem, if the ownership of the vessel remains unchanged, or if there be only a colorable transfer.

[Cited in The Helen M. Pierce, Case No. 6,332.]

3. But as against bona fide purchasers, for a valuable consideration, there must be reasonable diligence in enforcing the lien.

This was a libel in rem, promoted by James W. Elwell et als., ship-brokers, in New York, to recover money paid for supplies furnished by them in 1855, to the bark Paul Boggs [J. H. Rivers and others claimants], belonging to Maine. At the time of the commencement of the suit, which was on the 13th of July, 1857, the original owner of the bark was dead, and the present claimants came in as purchasers, by a bill of sale, made in June, 1857, from the administratrix. The libellants commenced a suit, in the state court, against the administratrix, and attached the vessel, which was discontinued before the filing of this libel.

Benjamin Dean, for libellants.

H. W. Paine and Levi Gray, for claimants.

SPRAGUE, District Judge. There can be no doubt that the debt, on which this libel was brought, constituted a lien on the vessel, which would have adhered to it, as against the original owners. But it is urged by the claimant, that the creditors, by commencing an action on the same claim, against the administratrix, in the state court, and attaching the vessel by mesne process therein, waived the lien. This is the first question to be decided.

Judge Story, in the case of The Chusan [Case No. 2,717], states the law to be, that on a claim like the present, there are three distinct remedies, which may be pursued, viz., against the owner, against the master, and against the vessel. And the general rule is, that the pursuing of any one of the remedies by a creditor, does not impair his right to resort to the others, until his claim be satisfied. If any property, other than this vessel, had been attached, in the suit in personam, there would have been no pretense for saying that it had dissolved this lien. It is evident, there was no intention of waiver on the part of these creditors. On the contrary, their intention was to avail themselves of all their remedies, if it should become necessary. They endeavored to obtain satisfaction by suit in the state court; but finding that remedy fruitless, they have very properly promoted this libel to enforce their lien.

The counsel for the claimants cited the case of Legg v. Willard, 17 Pick. 140, where it was held that the common law lien of a mechanic was discharged, by his procuring an attachment of the property on mesne process. But that lien depended upon possession. When the creditor caused the property to be attached, he delivered it to the officer, and thereby relinquished his possession, and all the rights depending thereon. It went into the custody of the sheriff, and he held it, not as an agent of the creditor, but as an officer of the law, equally responsible to all parties. But admiralty liens do not depend on possession, and the case cited has no application to them.

But it is insisted, as a second ground of defence, that although a lien may have continued as against the original owner, yet it cannot be enforced against the claimants;

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

because they are bonâ fide purchasers, for a valuable consideration. There is no doubt, that as against such purchasers, the lien must be enforced with reasonable diligence. The supplies in the present case were furnished at New York, in December, 1855, and these claimants became purchasers in June, 1857. This vessel was, during that time, pursuing the coasting trade, and was within the knowledge and reach of the libellants, who might have instituted proceedings against her, at various times and places, if they had seen fit. Having neglected so to do, they could not maintain this suit, if the claimants were in reality what they pretend to be, bonâ fide purchasers, for a valuable consideration. But the evidence shows satisfactorily, that their purchase was colorable merely, and designed to defeat the libellants' claim; that they paid no consideration, and will lose nothing by the vessel's being taken from them and appropriated to the payment of this claim.

Decree for the libellants.

See The Harriet [Case No. 6,098]; The Monsoon [Id. 9,716]; The Chusan [Id. 2,716]; The Eliza Jane [Id. 4,363]; The Antarctic [Id. 479]; The Highlander [Id. 6,476].

PAULIN (HEDGES v.). See Case No. 6,319.

Case No. 10,847.

The PAULINA.

[See Case No. 9,224.]

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END OF CASES IN BOOK 18.

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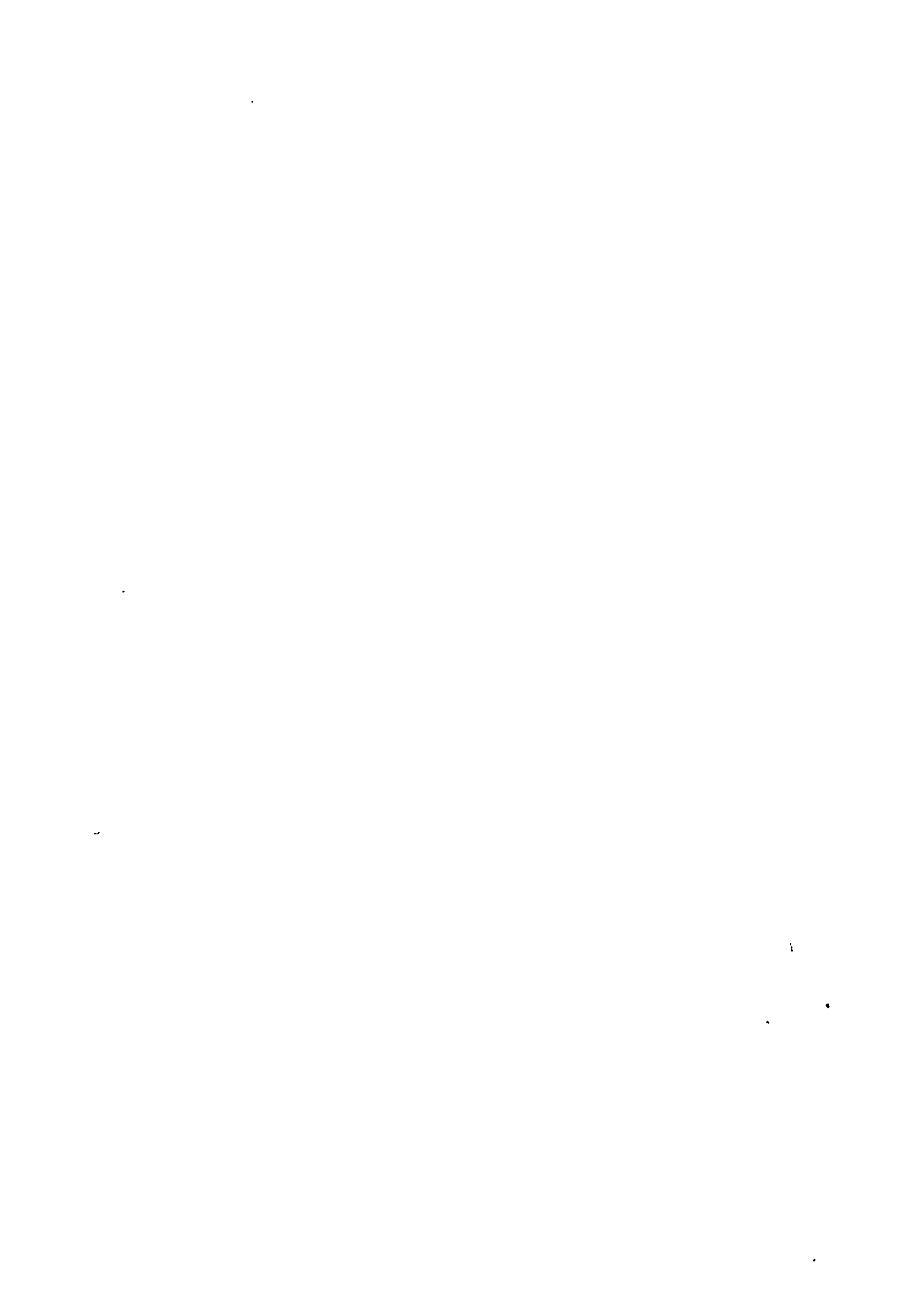

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